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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
SIXTH APPELLATE DISTRICT

In re J.W., a Person Coming Under the  
Juvenile Court Law.

H038869  
(Santa Cruz County  
Super. Ct. No. J22720)

THE PEOPLE,

Plaintiff and Respondent,

v.

J.W.,

Defendant and Appellant.

Minor J.W. appeals from a juvenile adjudication for assault with a deadly weapon. Minor contends that the juvenile court prejudicially erred in admitting, at the contested jurisdictional hearing, the victim's hearsay statement to a police officer. Minor additionally argues that the juvenile court erred in failing to declare the assault with a deadly weapon to be a misdemeanor or a felony. We conclude that the hearsay statement was properly admitted under Evidence Code section 1240, and that the admission of the hearsay statement did not violate minor's right to confrontation. We also conclude that the trial court erred in failing to declare the assault with a deadly weapon to be a misdemeanor or a felony, as required by Welfare and Institutions Code section 702. We

accordingly will remand to the juvenile court for compliance with Welfare and Institutions Code section 702, and we will affirm the judgment in all other respects.

#### **STATEMENT OF THE FACTS AND THE CASE**

On August 1, 2012, 13-year-old minor and his friend, I.L., were “hanging out” at Grant Street Park in Santa Cruz. Minor broke a glass, and an elderly homeless man, Seth Fieldman, yelled, “Pick it up. Pick it up.” Fieldman grabbed minor’s shoulders and shook minor. Minor said, “Get off of me, get off of me.” Fieldman told minor to pick up the pieces of glass, and he continued to shake minor. Minor hit Fieldman three times, and Fieldman let go of minor. I.L. noticed that minor appeared to be “mad” or “freaked out” when Fieldman shook him.

On the evening of August 2, 2012, I.L. and his friend, J.M., were at I.L.’s house, which was located across the street from Grant Street Park. At approximately 8:45 p.m., I.L. and J.M. heard yelling emanating from the park. I.L. heard minor yell, “Get off of me.” I.L. also heard minor yell, “You remember me?” I.L. and J.M. ran across the street to the park.

I.L. saw minor and Fieldman “circling each other.” Minor picked up a hammer from the ground. Minor swung the hammer over his head, and he brought the hammer down on Fieldman’s upper head. Fieldman fell to the ground. While Fieldman was on the ground, minor threw the hammer. I.L. testified that he was unsure whether the hammer hit Fieldman when minor threw it. After the incident, however, I.L. told police that when minor threw the hammer, the hammer hit Fieldman’s head.

J.M. approached Fieldman, who was attempting to stand up, and he noticed that Fieldman was “delirious.” J.M. grabbed minor, and he saw that minor appeared to be “a little” angry and “a little” scared. Minor told J.M. to let him go, and J.M. complied. J.M. did not see any injuries on minor’s body.

Santa Cruz Police Officer Sal Rodriguez received a dispatch call around 8:45 p.m. The dispatcher informed Officer Rodriguez that there had been an assault with a hammer

at Grant Street Park. Officer Rodriguez arrived at the park “within a minute or . . . a few minutes” of receiving the dispatch call. He approached Fieldman, who was bleeding. He noticed that Fieldman “looked very upset, obviously injured, concerned over his well-being and his injuries.” Officer Rodriguez asked Fieldman what had happened. Fieldman responded that he was attacked with a hammer “by someone that he was familiar [with] from seeing him in the park in prior days,” and that “the attack was unprovoked.” Officer Rodriguez saw a claw hammer and a large metal dustpan within five feet of Fieldman.

Medical personnel arrived at the park. Officer Rodriguez noticed that Fieldman “was sort of refusing medical attention” and was “hesitant” to receive first aid. Fieldman appeared to not “like the attention he was getting[,] especially from law enforcement.” Fieldman kept walking around, and he looked upset and agitated. He refused to be transported to the hospital.

Minor was later arrested, and Santa Cruz Police Officer Mark Bailey noticed a small scratch on minor’s arm. Minor told Officer Bailey that he sustained the scratch during the altercation with Fieldman.

A juvenile wardship petition alleged that minor committed felony assault with a deadly weapon (Pen. Code, § 245, subd. (a)(1); count 1) and misdemeanor vandalism (Pen. Code, § 594, subd. (a); counts 2 & 3). The petition specified that minor had previously been declared a ward of the court. Minor denied the allegations in the petition.

The juvenile court held a contested jurisdictional hearing. At the conclusion of the hearing, the court found true the allegation of assault with a deadly weapon. The court granted the prosecutor’s motion to dismiss the vandalism allegations.

The court ordered minor to be continued as a ward of the court. The court granted probation and ordered that minor be placed in a 24-hour placement. The court set the maximum term of confinement at four years two months.

Minor filed this timely appeal.

### DISCUSSION

Minor argues the judgment must be reversed because the juvenile court prejudicially erred in admitting Fieldman's hearsay statement regarding the unprovoked nature of the hammer attack. Minor's argument is twofold: first, he contends that Fieldman's statement was the product of deliberation, and that the statement was therefore improperly admitted under Evidence Code section 1240,<sup>1</sup> the spontaneous utterance exception to the hearsay rule; second, he contends that Fieldman's statement was testimonial, and that the introduction of the testimonial statement violated his constitutional right to confrontation, as described by *Crawford v. Washington* (2004) 541 U.S. 36 (*Crawford*). Minor additionally argues remand is required because the juvenile court failed to declare the assault with a deadly weapon to be a misdemeanor or a felony, as required by Welfare and Institutions Code section 702.

We conclude that Fieldman's statement was not the product of deliberation or reflection, and that the statement was properly admitted pursuant to section 1240. We also conclude that Fieldman's statement was nontestimonial, and that the introduction of the statement therefore did not violate minor's right to confrontation. We agree that the juvenile court erred in failing to declare the assault with a deadly weapon to be a misdemeanor or a felony. Accordingly, we remand to the juvenile court for compliance with Welfare and Institutions Code section 702, and we affirm the judgment in all other respects.

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<sup>1</sup> Subsequent unspecified statutory references are to the Evidence Code

## **I. THE JUVENILE COURT DID NOT ERR IN ADMITTING THE VICTIM'S HEARSAY STATEMENT**

### **A. Background**

At the end of the direct examination of Officer Rodriguez at the contested jurisdictional hearing, the prosecutor sought to admit Fieldman's statement to Officer Rodriguez regarding the unprovoked nature of the hammer attack. Minor's counsel objected to the introduction of Fieldman's statement. Minor's counsel argued that the statement was hearsay, and that introduction of the statement would violate minor's "*Crawford* right to confront and cross-examine witnesses."

The prosecutor argued that Fieldman's statement was admissible under the spontaneous utterance exception to the hearsay rule. The prosecutor asserted that Officer Rodriguez's testimony that Fieldman was upset, combined with Officer Rodriguez's testimony that Fieldman made the statement within minutes of the attack, established that Fieldman's statement was sufficiently spontaneous. The prosecutor further argued that, because Fieldman was injured and his statement was made immediately after the attack, the statement was not testimonial and did not implicate minor's right to confrontation.

The juvenile court admitted Fieldman's hearsay statement pursuant to section 1240. In admitting the statement, the court noted that the evidence established that the statement was not testimonial, and that the introduction of the statement therefore did not violate minor's right to confrontation.

### **B. Standard of Review**

The admission of hearsay pursuant to section 1240 is reviewed for abuse of discretion. (*People v. Raley* (1992) 2 Cal.4th 870, 894.) When conducting such an abuse of discretion analysis, the reviewing court must be guided by the following principles: " 'The discretion of a trial judge is not a whimsical, uncontrolled power, but a legal discretion, which is subject to the limitations of legal principles governing the subject of its action, and to reversal on appeal where no reasonable basis for the action is shown.' "

(9 Witkin, Cal. Procedure (5th ed. 2008) Appeal, § 364, p. 420; see *Westside Community for Independent Living, Inc. v. Obledo* (1983) 33 Cal.3d 348, 355 [quoting this language].) ‘The scope of discretion always resides in the particular law being applied, i.e., in the “legal principles governing the subject of [the] action . . . .” Action that transgresses the confines of the applicable principles of law is outside the scope of discretion and we call such action an “abuse” of discretion. [Citation.] . . . [¶] The legal principles that govern the subject of discretionary action vary greatly with context. [Citation.] They are derived from the common law or statutes under which discretion is conferred.’ (*City of Sacramento v. Drew* (1989) 207 Cal. App. 3d 1287, 1297-1298.) To determine if a court abused its discretion, we must thus consider ‘the legal principles and policies that should have guided the court’s actions.’ (*People v. Carmony* [(2004)] 33 Cal.4th [367,] 377.)” (*Sargon Enterprises, Inc. v. University of Southern California* (2012) 55 Cal.4th 747, 773.)

In contrast, when reviewing a claimed violation of the constitutional right to confrontation, the reviewing court applies the de novo standard of review. (*People v. Sweeney* (2009) 175 Cal.App.4th 210, 221.)

### **C. Section 1240**

Minor argues that Fieldman’s statement was the product of reflection and deliberation, and that the statement was therefore insufficiently spontaneous to be admitted under section 1240. As explained below, minor’s argument is unpersuasive.

Section 1240 states: “Evidence of a statement is not made inadmissible by the hearsay rule if the statement: [¶] (a) Purports to narrate, describe, or explain an act, condition, or event perceived by the declarant; and [¶] (b) Was made spontaneously while the declarant was under the stress of excitement caused by such perception.” This section is known as the “spontaneous utterance exception to the hearsay rule.” (*People v. Brown* (2003) 31 Cal.4th 518, 540.)

The word “spontaneous,” as used in section 1240, describes “actions undertaken without deliberation or reflection.” (*People v. Farmer* (1989) 47 Cal.3d 888, 903, overruled on another point in *People v. Waidla* (2000) 22 Cal.4th 690, 724, fn. 6.) Statements are spontaneous within the meaning of section 1240 if “ ‘they were made under the stress of excitement and while the reflective powers were still in abeyance.’ ” (*People v. Poggi* (1988) 45 Cal.3d 306, 319 (*Poggi*), italics omitted.)

Whether a statement is sufficiently spontaneous for admission under section 1240 “is informed by a number of factors, including the passage of time between the startling occurrence and the statement, whether the statement [is] a response to questioning, and the declarant’s emotional state and physical condition.” (*People v. Clark* (2011) 52 Cal.4th 856, 925.) When a court considers these factors, the ultimate focus is on the declarant’s mental state: “The crucial element in determining whether a declaration is . . . admissible under this exception to the hearsay rule is thus not the nature of the statement but the mental state of the speaker. The nature of the utterance—how long it was made after the startling incident and whether the speaker blurted it out, for example—may be important, but solely as an indicator of the mental state of the declarant. The fact that a statement is made in response to questioning is one factor suggesting the answer may be the product of deliberation, but it does not ipso facto deprive the statement of spontaneity. Thus, an answer to a simple inquiry has been held to be spontaneous. [Citations.]” (*Farmer, supra*, 47 Cal.3d at pp. 903-904.)

The California Supreme Court’s holding in *People v. Poggi, supra*, 45 Cal.3d 306 is instructive. In *Poggi*, the victim was stabbed several times. (*Id.* at p. 315.) A police officer responded to the scene 30 minutes after the stabbing, and he “found [the victim] in a very excited state.” (*Ibid.*) The victim’s chest and mouth were bleeding profusely. (*Id.* at pp. 315-316.) The officer asked the victim what had happened, and he proceeded to question the victim for 15 to 20 minutes. (*Id.* at p. 316.) In response to the questioning, the victim made the following statements: the perpetrator was a stranger, he had a knife,

he stole approximately \$90, he beat her, he raped her in her son's bedroom, he forced her to fill the bathtub with water, he unsuccessfully attempted to drown her, and he stabbed her. (*Ibid.*) *Poggi* held that the victim's statements were properly admitted under section 1240. (*Id.* at p. 320.) *Poggi* reasoned: "Here the record supports the finding of spontaneity. First, although [the victim] made the statements at issue about 30 minutes after the attack, it is undisputed that she was still under its influence. Second, it is also undisputed that she remained excited as she made the statements, even though she had become calm enough to speak coherently. Finally, the fact that the statements were delivered in response to questioning does not render them nonspontaneous. [The officer's] questions appear to have been simple and nonsuggestive—in substance, 'What happened?', 'What happened then?', and so on." (*Id.* at pp. 319-320.)

If the statements at issue in *Poggi* were properly admitted pursuant to section 1240, we must conclude that Fieldman's statement regarding the unprovoked nature of the hammer attack was also properly admitted. Like the victim in *Poggi*, Fieldman was bleeding and injured as a result of a recent attack. Fieldman was agitated and very upset when he made the statement regarding the attack, so he was in an excited state like the victim in *Poggi*. Also like *Poggi*, Fieldman's statement was made in response to the nonsuggestive question, "What happened?" Thus, like *Poggi*, the statement in the instant case must be deemed spontaneous and unreflecting. Indeed, given the circumstance that Fieldman's statement was made mere minutes after the attack—not half an hour after the attack like the statements in *Poggi*—and the circumstance that Fieldman's statement was the product of a single question—not the product of 15-20 minutes of questioning like *Poggi*—Fieldman's statement appears to have been even less deliberative than the statements in *Poggi*. (See *Brown, supra*, 31 Cal.4th at p. 541 [the timing of the statement is an important factor for the issue of spontaneity]; *Farmer, supra*, 47 Cal.3d at p. 904 ["an answer to a simple inquiry has been held to be spontaneous," and "detailed questioning, in contrast, is likely to deprive the

response of the requisite spontaneity”].) Accordingly, we conclude that Fieldman’s statement was sufficiently spontaneous, and that the juvenile court therefore did not abuse its discretion in admitting the statement pursuant to section 1240.

Minor contends that Fieldman’s statement that the attack was unprovoked was self-serving, and that the self-serving nature of the statement established that the statement was the product of deliberation. Minor’s argument is unpersuasive. Minor cites no authority specifying that the self-serving nature of a statement, by itself, renders the statement nonspontaneous. Moreover, the circumstances surrounding Fieldman’s statement belie defendant’s claim that Fieldman deliberated before making the statement. Shortly before Fieldman made the statement, J.M. noticed that Fieldman was “delirious.” A delirious person is not able to deliberate before making a statement. (See generally *People v. Ramirez* (2006) 143 Cal.App.4th 1512, 1525 [statement was not spontaneous where the evidence established that the declarant was able to deliberate and did in fact deliberate].) We therefore cannot accept minor’s argument that Fieldman deliberated before making the statement. (See generally *People v. Stanphill* (2009) 170 Cal.App.4th 61, 77 [self-serving statement was properly admitted under section 1240].)

For the foregoing reasons, we conclude that Fieldman’s statement was spontaneous within the meaning of section 1240. We accordingly find no abuse of discretion in the juvenile court’s admission of the statement.

#### **D. The Right to Confrontation**

Minor argues that, even if Fieldman’s statement was properly admitted under section 1240, the statement was nonetheless “inadmissible under the confrontation clause.” Specifically, minor contends that Fieldman’s statement was testimonial because it was made during a non-emergency situation, and that the introduction of the testimonial statement violated his right to confrontation as described in *Crawford, supra*, 541 U.S. 36. As explained below, we conclude that the introduction of Fieldman’s statement did not violate minor’s right to confrontation.

In *Crawford*, the United States Supreme Court held that the confrontation clause of the Sixth Amendment permits admission of “testimonial” hearsay only where the declarant is unavailable and there has been a prior opportunity to cross-examine the declarant. (*Crawford, supra*, 541 U.S. p. 68.) *Crawford* further held that “nontestimonial” hearsay is properly exempted from the foregoing Sixth Amendment protections. (*Ibid.*)

“Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.” (*Davis v. Washington* (2006) 547 U.S. 813, 822, fn. omitted.) “It is the ‘primary purpose of creating an out-of-court substitute for trial testimony’ that implicates the confrontation clause.” (*People v. Blacksher* (2011) 52 Cal.4th 769, 813 (*Blacksher*).

When determining the primary purpose of an interrogation, a court “must *objectively* evaluate the circumstances of the encounter along with the statements and actions of the parties.” (*Blacksher, supra*, 52 Cal.4th at p. 813, italics added.) The inquiry is on the “*primary* purpose of both officer and declarant” at the time the statement was made. (*Id.* at p. 814, italics in original.) Considerations relevant to the inquiry include the “medical condition of the declarant,” the “disarming or capture of a perpetrator,” and the “informality of the statement and the circumstances of its acquisition.” (*Id.* at pp. 814-815.) The subjective intentions of the parties do not factor into a court’s determination of the primary purpose: “ ‘the relevant inquiry is not the subjective or actual purpose of the individuals involved in a particular encounter, but rather the purpose that reasonable participants would have had.’ ” (*Id.* at p. 813.)

In the instant case, the circumstances present at the time Fieldman made his statement objectively indicated that the primary purpose of the interrogation was to deal with an ongoing emergency, not to create an out-of-court substitute for trial testimony. Officer Rodriguez arrived at the park within minutes of the hammer attack. Upon arriving at the park, he saw that Fieldman, an elderly man, was bleeding and “obviously injured.” Officer Rodriguez immediately asked Fieldman what had happened, and Fieldman responded that he was the victim of an unprovoked hammer attack. Fieldman did not provide a motive for the attack, nor did he specify the whereabouts of the perpetrator. Given the circumstance that Fieldman was elderly, injured, and bleeding and the circumstance that a perpetrator with unknown motives was still at large, the primary purpose of reasonable parties in Officer Rodriguez’s position and Fieldman’s position would have been to deal with an ongoing emergency—namely, tending to Fieldman’s injuries and locating the perpetrator in order to thwart a potential further attack. Another important circumstance was the informality of the interrogation, as shown by the following evidence: Officer Rodriguez asked a single question immediately upon his arrival at the scene of the hammer attack, Fieldman provided a succinct answer to the question, the question and response occurred in an exposed public area before the arrival of emergency medical personnel, and Fieldman was agitated and bleeding when he made the statement. The informal, slightly chaotic nature of the interrogation suggested that reasonable parties would not have intended to create an out-of-court-substitute for trial testimony. (See *Michigan v. Bryant* (2011) 131 S.Ct. 1143, 1160 (*Bryant*) [statements were held to be nontestimonial, in part, because “the questioning . . . occurred in an exposed, public area, prior to the arrival of emergency medical services, and in a disorganized fashion”]; *Blacksher, supra*, 52 Cal.4th at p. 815 [inquiries conducted in a “disorganized way and in turbulent circumstances” are more likely to be nontestimonial than a jailhouse interview].) Accordingly, because the circumstances objectively indicated that the primary purpose of the interrogation was to deal with an ongoing

emergency and not to produce an out-of-court substitute for trial testimony, we conclude that Fieldman's statement was nontestimonial. (See generally *Bryant, supra*, 131 S.Ct. at p. 1158 [whether an ongoing emergency exists is a "highly context-dependent inquiry"].)

Minor contends that no emergency existed, and Fieldman's statement was therefore testimonial, because Fieldman refused medical treatment. Minor's argument is unavailing because Fieldman refused medical treatment *after* he made the statement. The testimonial or nontestimonial nature of a statement is determined by examining the circumstances present at the time the statement was made. (*Blacksher, supra*, 52 Cal.4th at p. 814.) "Even if hindsight reveals that an emergency did not, in fact, exist, if it reasonably appeared to exist based on the information known when the statement was made the emergency test is satisfied." (*Ibid.*) Here, the circumstance that Fieldman was bleeding and injured at the time of making the statement demonstrated that an emergency existed and the statement was nontestimonial. The circumstance that Fieldman later refused medical treatment did not render the statement testimonial.

Minor also contends that no emergency existed because the weapon employed in the attack, the hammer, had been located by the time Fieldman made his statement. Again, minor's contention is unpersuasive. Although Officer Rodriguez found the hammer that was presumably used in the attack, this circumstance did not objectively indicate that the emergency had ended. Rather, because Fieldman did not provide a motive for the attack and did not specify whether the hammer was the only weapon possessed by the perpetrator, it would not have been unreasonable for Officer Rodriguez to conclude that the perpetrator posed a potential danger to the public at large. (See *Bryant, supra*, 131 S.Ct. at pp. 1163-1164 [where the interrogation reveals no information regarding the perpetrator's motive, the perpetrator may present a danger to the public at large].) Moreover, minor's argument ignores the circumstance that Fieldman, an elderly man, was injured and bleeding at the time he made the statement; Fieldman's physical condition, by itself, constituted an ongoing medical emergency.

(See *People v. Cage* (2007) 40 Cal.4th 965, 986 [statement was nontestimonial where the objective circumstances established that the question and the statement were made to “deal with the immediate medical situation”].) Accordingly, the circumstance that the hammer had been located did not negate the existence of an ongoing emergency.

Minor finally argues that, because Officer Rodriguez testified that one of his goals in speaking with Fieldman was the identification of suspects, the primary purpose of the interrogation was necessarily testimonial in nature. Minor’s argument fails because the relevant inquiry is not the subjective purpose of the individuals involved in the interrogation, but rather the purpose that reasonable participants would have had. (*Blacksher, supra*, 52 Cal.4th at p. 813.) Moreover, even if we did consider Officer Rodriguez’s subjective intent in determining the primary purpose of the interrogation, we would still conclude that the primary purpose of the interrogation was to deal with an ongoing emergency. Officer Rodriguez testified that he spoke with Fieldman for the following reasons: to “see if [Fieldman] was in need of any type of medical help,” to “limit any further attacks,” and to “identify any potential suspects.” Officer Rodriguez’s testimony, as a whole, demonstrated that he was subjectively concerned with dealing with an emergency situation, not securing out-of-court statements for use at trial. Minor’s argument regarding Officer Rodriguez’s subjective intent therefore does not compel us to conclude that Fieldman’s statement was testimonial.

In summary, we conclude that the circumstances present at the time Fieldman made his statement objectively indicated that the primary purpose of the interrogation was to deal with an ongoing emergency. We accordingly conclude that Fieldman’s statement was nontestimonial, and that the introduction of Fieldman’s statement did not violate minor’s right to confrontation.

## II. THE JUVENILE COURT ERRED IN FAILING TO DECLARE THE OFFENSE TO BE A MISDEMEANOR OR A FELONY

Minor argues remand is necessary because the juvenile court failed to declare the assault with a deadly weapon to be a misdemeanor or a felony, as required by Welfare and Institutions Code section 702. The People agree that remand for the required declaration is appropriate.

Welfare and Institutions Code section 702 states, in pertinent part: “If the minor is found to have committed an offense which would in the case of an adult be punishable alternatively as a felony or a misdemeanor, the court shall declare the offense to be a misdemeanor or felony.” An “explicit declaration” is required. (*In re Manzy W.* (1997) 14 Cal.4th 1199, 1204 (*Manzy W.*.) Such a declaration “determines the maximum period of physical confinement” to which the minor is subject. (*In re Kenneth H.* (1983) 33 Cal.3d 616, 619, fn. 3.) The express-declaration requirement “also serves the purpose of ensuring that the juvenile court is aware of, and actually exercises, its discretion under Welfare and Institutions Code section 702.” (*Manzy W.*, *supra*, 14 Cal.4th at p. 1207.)

A juvenile court’s failure to make the necessary declaration “requires remand . . . for strict compliance with Welfare and Institutions Code section 702.” (*Manzy W.*, *supra*, 14 Cal.4th at p. 1204.) On remand, the maximum period of physical confinement may need to be recalculated based on the juvenile court’s express declaration. (See *id.* at p. 1211.)

In the instant case, minor’s assault with a deadly weapon was an offense punishable alternatively as a felony or a misdemeanor in adult court. (See *People v. Statum* (2002) 28 Cal.4th 682, 698 [assault with a deadly weapon is a “wobbler” offense].) The juvenile court failed, however, to declare minor’s offense to be a misdemeanor or a felony. We accordingly remand to the juvenile court for an express declaration pursuant to Welfare and Institutions Code section 702 and possible

recalculation of the maximum period of physical confinement based on the express declaration.

**DISPOSITION**

The matter is remanded to the juvenile court for compliance with Welfare and Institutions Code section 702 and possible recalculation of minor's maximum period of physical confinement. In all other respects, the judgment is affirmed.

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RUSHING, P.J.

WE CONCUR:

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PREMO, J.

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ELIA, J.