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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. JOAQUIN MENA, Defendant and [redacted].	No. S _____ Court of Appeal No. D052091 San Diego County Superior Court No. SCD205930

SUPREME COURT
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PETITION FOR REVIEW

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

Honorable Bernard Revak, Judge

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By appointment of the Court of Appeal
under the Appellate Defenders, Inc.
independent case system

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PETITION FOR REVIEW

TO THE HONORABLE RONALD GEORGE, CHIEF JUSTICE OF THE STATE OF CALIFORNIA, AND TO THE HONORABLE ASSOCIATE JUSTICES OF THE SUPREME COURT: Pursuant to Rule 8.500 of the California Rules of Court, petitioner Joaquin Mena petitions for review of the published decision of the Court of Appeal, Fourth Appellate District, Division One, filed on May 19, 2009, a copy of which is attached as Exhibit A.

ISSUES PRESENTED

Petitioner's convictions for assault rested entirely on a highly suggestive showup. To demonstrate at trial the unreliability of that showup, petitioner timely requested a lineup. The trial court denied the motion, and petitioner was convicted. The Court of Appeal held that petitioner forfeited the right to seek appellate review of the trial court's ruling because he did not seek writ review of the trial court's ruling. The court also held in the alternative that the error was harmless beyond a reasonable doubt because the results of the lineup would have been cumulative of other evidence that the victim/eyewitness could no longer identify petitioner. The first holding conflicts with this court's precedents,

and the second is based on an incomplete assessment of the record.

Petitioner thus raises two issues:

1. Whether the Court of Appeal correctly held, in conflict with Supreme Court precedent in analogous cases, that petitioner forfeited his right to seek appellate court review of the trial court's denial of his lineup motion because he did not seek writ review.

2. Whether the Court of Appeal correctly held that even if the trial court erred in denying the lineup motion, the error was harmless beyond a reasonable doubt because the victim/eyewitness was unable to identify petitioner at the preliminary hearing and trial, where the Court of Appeal ignored (1) the prosecution's argument that the non-identification was due to the victim/eyewitness' fear of confronting petitioner in the courtroom; (2) that argument would not have been available if petitioner had been afforded a formal lineup and (as everyone expected) the victim/eyewitness would not have been able to identify petitioner; and (3) there was no significant evidence, other than the identification at the highly suggestive showup, of petitioner's guilt.

NECESSITY FOR REVIEW

Petitioner was charged with being a part of a gang assault on two young men. Because there was no forensic evidence or incriminating statements establishing petitioner's guilt, the case against petitioner turned entirely on the victim/witness' identification of petitioner at a highly suggestive showup. Following his arraignment, petitioner timely moved for a line up. (See *Evans v. Superior Court* (1974) 11 Cal.3d 617, 625 [establishing a due process right to a lineup if certain criteria are met].) The trial court denied the motion, and petitioner was convicted of two counts of assault. Following his sentencing, petitioner challenged the denial of the lineup motion.

1. Departing from established Supreme Court precedent, the Court of Appeal created new criteria to decide when a defendant's failure to seek writ review of a pretrial ruling bars a post-judgment direct appeal challenging the ruling. This conflict between the decision below and this court's opinions merits review. (Cal Rules of Court, rule 8.500(b)(1).)

In *People v. Memro* (1985) 38 Cal.3d 658, a case involving an adverse ruling on a discovery matter, this court held that the failure to seek writ review did not preclude a direct appeal after considering (1) there is no statutory authority for such a requirement and several courts have reviewed discovery violations on direct appeal; (2) a writ requirement would impose unnecessary delay and expense; (3) a writ requirement would undercut this court's appellate jurisdiction in death penalty cases by resolving issues through the writ procedure in the Court of Appeal rather than by direct appeal to the Supreme Court; and (4) a requirement of writ review has been rejected in other contexts, such as violations of a defendant's right to a speedy trial and to proceed pro se. (*Id.* at pp. 675-676.) Nearly 30 years later, in *People v. Batts* (2003) 30 Cal.4th 660, a case involving a double jeopardy violation, this court reaffirmed the reasoning in *Memro* and held that the failure to seek writ review does not preclude appellate review following final judgment. (*Id.* at p. 678.)

Here, there is no dispute that each of *Memro/Batts* criteria favors permitting a direct appeal. Rather, the Court of Appeal disregarded the holdings in those cases and held instead that because it would be impractical to remand the case for a lineup following a direct appeal, the failure to seek writ review precludes a post-judgment appeal raising that issue. The Court of Appeal's reasoning not only conflicts with *Memro* and *Batts*, it is based on the faulty assumption that a remand for lineup is the only possible remedy. In fact, as illustrated in other Supreme Court cases in which a defendant was denied potentially exculpatory evidence that is

not available at a new trial, the proper remedy is a remand for a new trial with a jury instruction allowing the jury to infer that if a formal lineup had been held, the witness would have been unable to identify petitioner. (See *People v. Zamora* (1980) 28 Cal.3d 88, 102-103 *People v. Conrad* (2006) 145 Cal.App.4th 1175, 1186.)

2. The Court of Appeal held in the alternative that any error in denying the lineup motion was harmless beyond a reasonable doubt because the victim/eyewitness was unable to identify petitioner at either the preliminary hearing or the trial. The Court of Appeal did not rule that the evidence of petitioner's guilt was overwhelming, but instead held there was no additional evidentiary value in a lineup because the evidence already showed the eyewitness could no longer identify petitioner.

In its *Chapman* analysis, the Court of Appeal ignored the prosecution's argument that the in-court non-identifications reflected not a genuine inability to identify petitioner, but rather the victim/eyewitness' fear of confronting petitioner in the courtroom. However, that argument would not have been available if the trial court had ordered the requested lineup, at which the witness would have been able to view petitioner, along with other similar-looking young men, behind one-way glass, and thus without fear of confronting petitioner. Because – as no one disputes – the eyewitness would not have been able to identify petitioner in the course of a fair lineup, and the only evidence supporting guilt was a highly suggestive showup, his failure to identify petitioner at a fair lineup would have fatally undermined the case against petitioner. In these circumstances, respondent cannot meet the stringent *Chapman* standard.

STATEMENT OF THE CASE

Petitioner was arrested on April 13, 2007, and arraigned on April 18.

(1 CT 89.01.)[1] On May 21, 2007, before the preliminary hearing, he moved for a pretrial lineup, which the trial court denied. (1 SCT 1; 1 CT 89.06; 1 RT 8-9.)[2]

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

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

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

On May 19, 2009, the Court of Appeal affirmed the judgment, with a modification, in a published opinion.

COURT OF APPEAL OPINION

Petitioner raised two issues below: (1) that the trial court erroneously denied petitioner's timely motion for a pre-trial lineup; and (2) that two of the conditions of probation were unconstitutionally vague and overbroad. The court rejected the first argument, but agreed with the second.

First, the Court of Appeal rejected petitioner's lineup argument. Without deciding whether the trial court decision denying the motion

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

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

violated petitioner's due process right to a lineup (see *Evans v. Superior Court* (1974) 11 Cal.3d 617), the court held that petitioner forfeited his right to seek appellate review because he did not seek immediate review of the decision via a petition for writ of mandate. (Opn. 6-8.) The Court of Appeal held in the alternative that any error was harmless beyond a reasonable doubt because the victim was unable to identify petitioner at either the preliminary hearing or the trial. (Opn. at 8.)

Second, the Court of Appeal agreed with petitioner that two conditions of probation – barring his association with gang members and with persons possessing weapons – were unconstitutionally vague and overbroad because they did not include a knowledge element. That is, the conditions of probation contained no requirement that petitioner have knowledge that the persons to be avoided were gang members or were in possession of weapons. The Court of Appeal ordered the trial court to correct the order of probation to include a knowledge element. (Opn. at 9-10.)

STATEMENT OF FACTS

At about 5 p.m. on April 13, 2007, 17-year old Jonathan F. and 16-year-old Jesus C. were walking west on Polk Street in San Diego after getting some food at a nearby Jack-in-the-Box. (2 RT 26-28, 126, 129-130.) As they were crossing the intersection at Van Dyke, a red Ford and a white Cadillac stopped without warning in the intersection, with one occupant yelling, "How's the East Side life treating you?" to Jonathan and Jesus. (2 RT 29-30, 72-75, 130-131.)

Although Jesus and Jonathan responded that they were not involved in gangs (2 RT 31, 133), a dozen or so young Hispanic men immediately piled out of the cars and several of them started running after Jesus and Jonathan. (2 RT 31-33, 58, 78, 83, 133, 135, 149, 164.) One swung at Jesus, who began to run up Van Dyke being chased by at least two people,

including Pasillas, who was trying to stab Jesus. (2 RT 32, 35-39, 59-60, 79.) After he ran about half a block, Jesus realized he was no longer being chased. (2 RT 81.)

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

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

Following the assaults, police patrolled the neighborhood looking for the cars involved in the incident. About four blocks from the scene, two gang officers spotted a red car that roughly matched one of the cars involved in the incident (it later turned out to be the wrong car). (2 RT 170-171, 211, 251, 264.) They also noticed four young Hispanic men in the front yard of a nearby house – petitioner, co-defendants Lopez and Pasillas, and Robert Ferguson. (2 RT 171-172, 175-176, 207-209.) Petitioner was sitting in a chair onto which East San Diego gang graffiti

[3] Gangs and gang members were rife in the area. An officer in a gang suppression unit testified that the East San Diego gang alone has 200 members and another 400 associates. (2 RT 202-203, 212.)

had been scratched. Police searched petitioner and found a steak knife in his pocket (this is the factual basis for count 3). (2 RT 204, 213, 230, 260.) They also found a spray paint can and two recently painted baseball bats in the side yard. (2 RT 179-182, 233-234, 253, 263.)

The police arranged for a showup with petitioner, Lopez, Pasillas, Ferguson and another young man found in the house, co-defendant Ricardo Sanchez. (2 RT 184.)[4] About 7 p.m., while it was still daylight, Jesus arrived in the back of a patrol car. The police presented the suspects one-by-one; each suspect was turned so that Jesus could view the front, side, and back for a couple of seconds. (2 RT 184-185; 3 RT 288.) From a distance of 35-40 feet (which he described as "far away"), Jesus said that petitioner, Lopez, Pasillas, and Sanchez were involved in the assault.[5] Specifically, in response to the question whether petitioner was involved, he said only "yes." (3 RT 290-294, 299, 305.) Jesus said that Ferguson was not involved because all the assailants were Hispanic and Ferguson was Anglo. (2 RT 45-46, 49, 51, 67, 88; 3 RT 294.) At trial, Jesus testified that the four he identified at the showup had been chasing him during the attack. (2 RT 50, 54.) Jesus could not make an in-court identification of any of the defendants at either trial or the preliminary hearing. (2 RT 46-48.)

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

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

[5] Jesus identified Pasillas as the person who tried to stab him. (3 RT 292.)

identification of any of the defendants at either trial or the preliminary hearing. (2 RT 146.)

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

ARGUMENT

I. The Court Of Appeal Erred In Holding That Petitioner Forfeited His Right To Appellate Review Of The Trial Court's Denial Of His Lineup Motion Because He Did Not Seek Review Via A Petition For A Writ Of Mandate.

In *Evans v. Superior Court*, *supra*, this court held that a defendant has a federal due process right to a pretrial lineup if he timely files a lineup motion and if "eyewitness identification is shown to be a material issue and there exists a reasonable likelihood of a mistaken identification which a lineup would tend to resolve." (11 Cal.3d at p. 625.)

In the trial court (and the Court of Appeal), there was no dispute that petitioner's lineup motion was timely. Nor was there any dispute that eyewitness identification was a material issue.[6] The only disputed issue vis-à-vis the motion was whether there was a material likelihood of mistaken identification. The Court of Appeal, however, did not reach that issue because it held that petitioner forfeited his right to challenge the trial

[6] Neither the prosecution nor the trial court claimed that the motion was untimely or that the eyewitness identification was not material. (See 1 RT 6-9.) Respondent did not contend otherwise on appeal.

court ruling because he did not file a petition for writ of mandate.[7] The court's holding conflicts with decisions of this court addressing the same issue in the context of other constitutional right violations.

In *People v. Memro* (1985) 38 Cal.3d 658, this court considered whether the failure to file a writ petition in the context of a discovery violation forfeited the issue on appeal following a final judgment. This court rejected the writ requirement for four reasons: (1) there is no statutory authority for such a requirement and several courts have reviewed discovery violations on direct appeal; (2) a writ requirement would impose unnecessary delay and expense; (3) a writ requirement would undercut the Supreme Court's appellate jurisdiction in death penalty cases by resolving issues through the writ procedure in the Court of Appeal rather than by

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[7] The court requested supplemental briefing on whether the right in *Evans* was supplanted by the 1990 enactment of the discovery law (Proposition 115). (See § 1054 et seq.) In that briefing, petitioner explained that (1) under the plain language of the discovery law and several cases, the law applies only to discovery *between the parties* (compare *Verdin v. Superior Court* (2008) 43 Cal.4th 1096, 1105 [holding that obtaining information from the defendant – namely, a party – was subject to the procedures in the discovery law]; (2) since enactment of the discovery law, this court has twice affirmed *Evans* (see *People v. Williams* (1997) 16 Cal.4th 153, 235; *People v. Farnam* (2002) 28 Cal.4th 107, 183); (3) the discovery law expressly exempts discovery mandated by the federal constitution (see § 1054, subd. (e); *Garcia v. Superior Court* (1991) 1 Cal.App.4th 979, 986-987); (4) a statute cannot trump a constitutional due process right (U.S. Const., art. VI, cl. 2 [supremacy clause]; *Jacob B. v. County of Shasta* (2007) 40 Cal.4th 948, 963 [statutes must conform to the California Constitution], conc. opn of Kennard, J.; *People v. Navarro* (1972) 7 Cal.3d 248, 260 ["Wherever statutes conflict with constitutional provisions, the latter must prevail."]); and (5) holding that a request for a lineup is a request for "discovery" would disrupt law enforcement investigations because there is no mechanism in the discovery statute to hold a lineup; yet there is no basis in the legislative history of Proposition 115 to conclude the voters intended this result.

Notably, respondent agreed that *Evans* remains good law.

direct appeal to the Supreme Court; and (4) the requirement has been rejected in other contexts, such as violations of a defendant's right to a speedy trial and to proceed pro se. (*Id.* at pp. 675-676.) Nearly 30 years later, in *People v. Batts* (2003) 30 Cal.4th 660, this court revisited *Memro*, explicitly adopted its reasoning, and reached the same conclusion in the context of double jeopardy violation. That is, although a defendant may seek pre-trial writ review, the failure to do so does not preclude appellate review following final judgment. (*Id.* at p. 678.)

All the reasons cited in *Memro* and *Batts* are equally applicable to an erroneous denial of a defendant's request for a pre-trial lineup. There is no statutory or case law authority for the proposition that a defendant must seek pre-trial writ review of the denial of a motion for a lineup, and there are several cases in which the matter was considered for the first time on direct appeal following a final judgment. (See, e.g., *People v. Sullivan* (2007) 151 Cal.App.4th 524, 560-561; *People v. Farnam* (2002) 28 Cal.4th 107, 183; *People v. Williams* (1997) 16 Cal.4th 153, 235.) In addition, establishing such a requirement would impose a burdensome expense on defendants and divert scarce time and resources from their trial preparation as well as from the appellate court. Moreover, given the practical constraints of trial practice, the issue is not likely to be briefed as thoroughly in a petition for peremptory writ as it would be on direct appeal. And, as *Memro* pointed out, requiring writ review could limit the Supreme Court's jurisdiction, especially (but not only) in capital cases. As a result, absent clear legislative indication that a defendant must file a writ petition to seek review, such a requirement should not be established by judicial decision.

Of course, waiting until after final judgment to challenge the court's ruling may come at some cost to a defendant. A defendant need not show prejudice if he petitions pre-trial for review, but must demonstrate prejudice

if he waits until after final judgment to seek appellate review. (*People v. Wilson* (1963) 60 Cal.2d 139, 149-154; *People v. Martinez* (2000) 22 Cal.4th 750, 769; *In re Chuong D.* (2006) 135 Cal.App.4th 1303, 1311; Cal. Const., art. VI, § 13.)

Below, petitioner argued that if he met the *Evans* criteria for a lineup and demonstrated prejudice, the proper appellate remedy was a new trial with jury instruction that (1) shortly after the incident and his arrest, petitioner requested a standard lineup in a neutral setting at which the victim/eyewitness would have been able to view petitioner and five similar looking young men in an effort to identify the assailants; (2) a lineup was not permitted even though petitioner had a constitutional right to a lineup; and (3) the jury may infer from these circumstances that the victim/eyewitness would not have been able to identify petitioner in the lineup as one of the assailants. (See *People v. Zamora* (1980) 28 Cal.3d 88, 102-103 [holding that where the defendant's defense to a charge of battery on a police officer was that the officers used excessive force, and where the city attorney's office in good faith ordered the destruction of past citizen complaints against the officers, thereby preventing the defendant from locating witnesses who could testify that the officers had used excessive force in other cases, the jury should be instructed that the officers used excessive force in the other cases and that they jury may infer that the officers were prone to use excessive force]; *People v. Conrad* (2006) 145 Cal.App.4th 1175, 1186 [holding that where the defendant was denied his constitutional right to a speedy trial, and where a potentially exculpatory witness died during the delay, the proper remedy was to instruct the jury that the witness would have testified as the defendant claimed he would; "This is not a perfect solution to the problem of lost evidence; however, it adequately addresses the loss of relevant evidence in a manner that affords

defendant due process and a fair trial while allowing the prosecution to go forward."].)

The Court of Appeal, however, rejected the holdings and reasoning in *Memro* and *Batts* on the ground that it would be impractical to remand the case for a lineup. Given the passage of time following a trial and the normal appeal process, such a lineup would have no evidentiary value – i.e., as evidence of whether, near the time of the crime, the eyewitness/victim could identify petitioner. (Opn. at 7.) The decision, however, rests on a faulty assumption and logic – namely, that a remand for lineup is the only possible remedy and that because waiting for an appeal would render that remedy worthless, a defendant should be compelled to seek writ review.

Batts, which addressed this issue in the context of a violation of a defendant's double jeopardy right, illustrates the error in the Court of Appeal decision. The double jeopardy clause not only bars a conviction following an earlier conviction (or acquittal), it also bars a second trial. (See *Witte v. United States* (1995) 515 U.S. 389, 415 fn.4 ["The Double Jeopardy Clause protects against the burdens incident to a second trial, and not just against the imposition of a second punishment"].) Yet, if a defendant waits until direct appeal to raise the issue, he will have lost forever his right not to be tried a second time. Such a defendant is not entirely without a remedy, however. If the defendant successfully raises the issue on direct appeal, his conviction following the second trial will be reversed. Here, also, a defendant who elects to vindicate his due process right to a lineup on direct appeal rather than by peremptory writ loses part of the benefit of the right – he will not get a lineup at which the victim/witness fails to identify the defendant. He also faces a greater burden on direct appeal – namely, to demonstrate prejudice. But if he

demonstrates prejudice, he still gets the benefit of a new trial with an appropriate jury instruction.

II. The Court Of Appeal Erred In Holding In The Alternative That Any Error Was Harmless Beyond A Reasonable Doubt.

The Court of Appeal held in the alternative that if the trial court violated petitioner's federal due process right, the error was harmless beyond a reasonable doubt. (Opn. at 8; see also *Chapman v. California* (1967) 386 U.S. 18, 24; *People v. Goodwillie* (2007) 147 Cal.App.4th 695, 736 [federal due process error subject to *Chapman* standard].) The Court of Appeal did not claim that the evidence of petitioner's culpability was overwhelming. Nor could it. (See pp. 15-17, *post.*) Instead, the court reasoned that because Jesus could not identify petitioner at either the preliminary hearing or the trial, there was no prejudice in denying a lineup at which Jesus would have failed to identify petitioner. That is, according to the Court of Appeal, a lineup would not have changed the evidentiary balance. This holding was based on an incomplete assessment of the record.

The prosecution faced a serious proof problem – Jesus and Jonathan could not identify the assailants at trial. It solved that problem by arguing that they would not make in-court identifications because they were afraid to do so in front of the defendants.

> It is a lot different sitting in that chair up there just a few feet away from some people that did some very violent things and being asked to look at those people and identify them as guilty parties as people who participated, then [*sic*] it is to sit in the back of a patrol car with armed officers in the front seat where those people can't see you.
>
> . . .
>
> I would submit to you he was scared stiff when he was in here when I asked him to look around the courtroom. . . . He could barely look over to the left side of the courtroom. His eyes flashed over there for a second and he said, "No, I do not

> recognize anybody." He is scared stiff. He doesn't live in this courtroom. They don't have an armed bailiff like I told you. He's got to go back and walk those streets. That is something you can consider in deciding whether or not he was giving truthful, accurate testimony or not.
>
> It doesn't change the fact that he didn't ID them. What I'm saying is a failure to identify in court doesn't mean that these defendant[s] are not guilty.
>
> This is the neighborhood that he lives in. These are the streets that he has to walk through. He is going to want to go to Jack-in-the-Box again. He is going to want to walk wherever he wants to in that neighborhood. This is the filter that he is looking through.

(5 RT 632-633; see also 6 RT 724.)

That argument, however, would have been unavailable if there had been a formal lineup at which the victim had an opportunity to view petitioner along with other similar-looking young men behind one-way glass. If, as petitioner believes, the victim would have been unable to pick out petitioner from a fair lineup shortly after the crimes, the prosecutor could not claim that their inability to do so at the preliminary hearing and trial was simply a product of their fear of confronting their assailants. On the contrary, their inability to identify petitioner at a lineup would have grossly undermined the prosecution's case. In reaching its decision using the stringent *Chapman* standard, however, the Court of Appeal took no account of the substantial role the prosecutor's argument played in securing the convictions.

It bears emphasizing that the evidence of petitioner's guilt was underwhelming. The assault was chaotic and brief, thereby making it difficult for either Jesus or Jonathan to have a good look at their assailants. According to the two victims – the only eyewitnesses to the offenses – two cars stopped suddenly and one occupant called out a gang challenge. Several young men chased Jesus and Jonathan, who fled. Jesus had run

only half a block when he realized the incident was over. (2 RT 81.) Both Jesus and Jonathan gave only general descriptions of the assailants – young, Hispanic men with shaved heads (2 RT 42, 58, 135, 148) – which, according to investigating officers and Jonathan himself, fit many people, including non-gang members, in the area. (2 RT 159, 224; 3 RT 257.) The presence of numerous other people in the "same area fitting the same physical description" – young, Hispanic male with shaved heads – "was bound to 'substantially reduce[] or destroy[]' the 'value' of the eyewitness testimony." (*United States v. Jernigan* (9th Cir. 2007) 492 F.3d 1050, 1054, quoting *Kyles v. Whitley* (1995) 514 U.S. 419, 441.)

The "curbside lineup" was suggestive. Although a showup – where suspects are shown to the victim one person at a time – is not per se unconstitutional, the risk of misidentification from this procedure has been well known for decades. (See *Stovall v. Denno* (1967) 388 U.S. 293, 302, overruled on another ground in *Griffith v. Kentucky* (1987) 479 U.S. 314, 326.) Here, the suspects were shown one at a time at a distance that Jesus described as "far away." (2 RT 49, 66, 68; 3 RT 299.) Petitioner and the others were handcuffed. (6 RT 718.) Jesus was emotionally upset and frightened (2 RT 102-104; see also 2 RT 85-86 [Jesus stated that he was not sure of his identification at the showup because the event was traumatic and he was running as fast as he could to get away]), which exacerbated the well known dangers of uncorroborated eyewitness testimony. (*United States v. Wade* (1967) 388 U.S. 218, 228 [describing "the vagaries of eyewitness identification" as "well-known" and acknowledging numerous "instances of mistaken identification"]; *People v. McDonald* (1984) 37 Cal.3d 351, 363 [noting "the unreliability of eyewitness identification in the prosecution of criminal cases and the 'high incidence of miscarriage of justice' caused by . . . mistaken identifications"], overruled on other grounds, *People v. Mendoza* (2000) 23 Cal.4th 896, 914; *United States v.*

Jernigan, *supra*, 492 F.3d at p. 1054 [describing eyewitness identification as "highly suspect" and the "least reliable" form of evidence].)

The error in denying the lineup motion certainly was not rendered harmless by Jonathan's testimony. His identification of petitioner in the photo lineup had little probative value. Shown a six-pack of photographs, he said petitioner "looked like" one of the persons in the car, but told the DA investigator that he was "not sure." (2 RT 145-146, 156; 3 RT 349.) His identification was so weak that the experienced DA investigator wrote in his report that Jonathan could not make an identification from the photo array. (3 RT 355, 359.) Jonathan's inability to identify anyone is not surprising; not only was he struck in the head, as he testified at trial, the incident "happened fast." (2 RT 157.)

Further, when detained, petitioner did not confess or make an incriminating statement, and he was cooperative with police and did not attempt to flee. (2 RT 188, 200; 3 RT 257-258.) The prosecution did not present evidence that his fingerprints were on the baseball bats or the spray can founds near the bats. (3 RT 370, 377.) There was no evidence that the bats belonged to petitioner, that the bats were connected to the offenses, or that petitioner lived at the address where he was arrested. (2 RT 222, 257, 272.) In fact, the record showed that petitioner lived elsewhere. (4 RT 452-453.) There was no evidence that the knife found in his pocket at the time of his arrest was connected to the assaults.

Finally, the jury requested a readback of Jesus' testimony. (1 SCT 14; 1 CT 116, 118.) Although not dispostive, a request for a readback is indication that the jury found the case close. (*People v. Pearch* (1991) 229 Cal.App.3d 1282, 1295 ["Juror questions and requests to have testimony reread are indications the deliberations were close."]; but see *People v. Houston* (2005) 130 Cal.App.4th 279, 301 [a request for a readback does not necessarily indicate a close case].) Requesting a readback may be

interpreted as evidence of the jury's conscientiousness, but that interpretation does not undermine the fact that the jury needed to review Jesus' testimony before returning its verdict.

The case against petitioner rested on a single, suggestive identification. The circumstances of the assault prevented the victims from having a good look at their assailants. Most importantly, the prosecutor's argument that Jesus did not identify petitioner at the preliminary hearing or at trial because he feared confronting them in the courtroom *supports* petitioner's prejudice argument. Had the trial court granted petitioner's lineup motion – thereby providing a police lineup at which petitioner would have been able to view petitioner and other similar looking young men behind one-way glass – the prosecution would have been unable to argue that Jesus' failure to make an in court identification resulted from his fear in confronting his assailant. In these circumstances, respondent cannot show, beyond a reasonable doubt, that the verdict "was surely unattributable to the error." (*Sullivan v. Louisiana* (1993) 508 U.S. 273, 279; *People v. Quartermain* (1997) 16 Cal.4th 600, 621 [same].)

CONCLUSION

For the reasons discussed, this court should grant review.

DATED: June 19, 2009

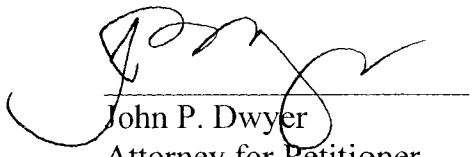
Respectfully submitted,

John P. Dwyer
Attorney for Petitioner
JOAQUIN MENA

CERTIFICATE PURSUANT TO CRC RULE 8.504(d)(1)

I, John P. Dwyer, counsel for petitioner Joaquin Mena, certify pursuant to the California Rules of Court that the word count for this document is 5,764 words, excluding the tables, this certificate, and any attachment permitted under rule 8.504(d)(3). This document was prepared in Microsoft Word, and this is the word count generated by the program for this document.

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



John P. Dwyer
Attorney for Petitioner
Joaquin Mena

Exhibit A

Filed 5/19/09

CERTIFIED FOR PUBLICATION

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. JOAQUIN MENA, Defendant and Appellant.	D052091 (Super. Ct. No. SCD205930)

APPEAL from a judgment of the Superior Court of San Diego County, Bernard E. Revak, Judge. Affirmed as modified.

John P. Dwyer, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, Barry Carlton and Susan Miller, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted defendant Joaquin Mena of two counts of assault with a deadly weapon (Pen. Code, § 245, subd. (a)(1),[1] counts 1 & 2), and one count of carrying a concealed dirk or dagger (§ 12020, subd. (a)(4), count 3), and found true the special allegations that Mena committed counts 1 and 2 for the benefit of a criminal street gang (§ 186.22, subd. (b)(1)). The court placed Mena on probation. On appeal, Mena asserts the court abused its discretion by denying his motion for a pretrial lineup, and the terms of his probation are vague and overbroad.

FACTS

The Attack

On April 13, 2007, 15-year-old Jesus C. and 17-year-old Jonathan F. were walking home. As they crossed an intersection, two cars (each carrying several men) stopped in the intersection. An occupant from one car got out, asked the boys, "How's the East Side treating you?" and walked toward them. Jesus knew they were in an area claimed by the East Side gang as their territory, and thought the man was an East Side member. Jesus replied "I don't bang," signifying he was not involved in any gangs.

The man responded by swinging his fist at Jesus; the other occupants of the cars got out and approached Jesus. One of the men had a baseball bat and another was holding a knife. Jesus and Jonathan began running and the men chased them. The man carrying the knife, two feet behind Jesus, swung the knife in Jesus's direction, trying to

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1 All further statutory references are to the Penal Code unless otherwise specified.

stab him. The man yelled, "stop running or I'm going to shank you." Jesus ran about a block before his pursuers gave up the chase.

A man carrying a bat and another man with a knife chased Jonathan. One man hit Jonathan in the head with the bat, knocking him to the ground; however, he was able to get back up and continue running.

When Jesus realized the men had stopped chasing him, he stopped and looked back. He watched the men return to their cars and drive away.

The Investigation

Jonathan went to the hospital. An officer questioned Jesus at the scene to obtain a description of the assailants. Jesus stated they were Hispanic males in their teens to early 20's, some of whom had shaved heads, but did not provide a more detailed description. These descriptions fit numerous persons living in the area.

After the assaults, police patrolled the area, looking for the cars involved in the attack. Police observed a car, roughly matching the description of one of the cars carrying the attackers, parked in front of a house just a few blocks from the site of the attack. Four males with shaved heads or short hair--later identified as Mena and codefendants Lopez and Pasillas and a Mr. Ferguson--were sitting in the front yard. When officers got out of their car, Pasillas and Ferguson ran inside. Mena and Lopez remained outside, sitting in chairs decorated with East Side gang graffiti. Police searched Mena and found a steak knife in his pocket. They also found a spray paint can and two freshly painted baseball bats in the front yard.

Inside the house, officers found Pasillas hiding under the covers in bed, pretending to be asleep. Pasillas was sweating profusely and his shirt was damp with sweat. He also had lacerations on his face and dried blood on his face, neck and shirt.

The Curbside Lineup

A few hours after the attack, police brought Jesus to the house for a curbside lineup. It was still light outside. Jesus remained in the back seat of the police car as police brought each suspect, separately, to stand in front of the police car. There was some discrepancy as to the distance between Jesus and the suspects. One officer stated the suspects stood between 15 to 20 feet from the front of the car, and another officer estimated the distance from Jesus to each suspect was 35 to 40 feet. The officers had each suspect turn to allow Jesus to view the front, sides and backs of each of them. Jesus identified Mena, Lopez, Pasillas and another man found inside the house (Mr. Valle) as being involved in the attack, but stated Ferguson had not been involved.

Approximately one month later, police showed Jonathan four "six pack" photograph arrays, one for each suspect. The only picture Jonathan was able to identify was Mena, but Jonathan stated only that he looked like one of the men involved in the attack, but he was not sure.

ANALYSIS

A. The Pretrial Lineup Motion

Mena asserts the judgment of conviction must be reversed because the court erroneously denied his motion for a pretrial lineup, and this error was prejudicial under *Chapman v. California* (1967) 386 U.S. 18, 24.

The Motion

One week before the scheduled preliminary hearing, a codefendant, Lopez, moved for an order compelling the police to conduct a live physical lineup attended by Jesus, as provided under *Evans v. Superior Court* (1974) 11 Cal.3d 617 (*Evans*). The motion, in which Mena joined, argued there were sufficient grounds to order a lineup because there was a reasonable likelihood of misidentification by Jesus. The motion argued Jesus had minimal opportunity to observe the attackers before he started running away, his description of the attackers was minimal and he was equivocal whether he could identify the attackers before the requested lineup occurred, the curbside lineup was conducted under problematic conditions, and the fact there were numerous attackers of similar appearances raised concerns about Jesus's ability to distinguish individual identities. The court denied the motion because it found there was no reasonable likelihood there was a mistaken identification that would be addressed by a lineup.

Applicable Standards

In *Evans*, the Supreme Court concluded "due process requires in an appropriate case that an accused, upon timely request therefor, be afforded a pretrial lineup in which witnesses to the alleged criminal conduct can participate. The right to a lineup arises, however, only when eyewitness identification is shown to be a material issue and there exists a reasonable likelihood of a mistaken identification which a lineup would tend to resolve." (*Evans, supra,* 11 Cal.3d at p. 625, fn. omitted.) The prerequisites for obtaining an *Evans* lineup are (1) a timely request for the lineup, (2) a showing eyewitness identification was a material issue, and (3) a showing a reasonable likelihood

of a mistaken identification existed that a lineup would tend to resolve. (*People v. Farnam* (2002) 28 Cal.4th 107, 184.)

Analysis

We have some reservations whether a defendant's right to seek an *Evans* lineup survived the enactment of Proposition 115. After the passage of Proposition 115, no discovery may occur in criminal cases "except as provided by [Penal Code sections 1054 through 1054.10], other express statutory provisions, or as mandated by the [federal] Constitution . . . ." (§ 1054.) A lineup under *Evans* is not provided by either the provisions of sections 1054 through 1054.10 or any other express statutory provisions, and therefore is only obtainable if expressly mandated by the federal Constitution. Although some passages in *Evans* suggest a defendant's right to seek a lineup is rooted in the due process clause (see, e.g., *Evans, supra,* 11 Cal.3d at p. 625), other passages in *Evans* suggest the right to seek a lineup was necessary to ensure fairness in pretrial discovery. (*Id.* at p. 622.) However, because the parties in this case (responding to our request for supplemental briefing on this issue) agree *Evans* survived the passage of Proposition 115, we proceed on the basis of that assumption.

Mena argues the trial court abused its discretion by denying the motion. We conclude, even assuming the trial court erred by denying the motion, Mena is not entitled to reversal of his conviction. First, we conclude a defendant's right to relief is waived if he does not challenge an adverse ruling by a timely pretrial petition for a peremptory writ. The *Evans* court expressly conditioned the right to seek a lineup on a *timely* request (*Evans, supra,* 11 Cal.3d at p. 626), and enforced the newly minted right in the case

before it by issuing a peremptory writ compelling the trial court to hold a lineup before trial. (*Id.* at p. 627.) The Supreme Court in *People v. Baines* (1981) 30 Cal.3d 143 explicitly recognized the "value of a pretrial lineup is substantially diminished once a preliminary examination has been conducted and a direct confrontation between a defendant and his accusers has occurred." (*Id.* at p. 148.) When a trial court denies a request for a pretrial lineup, and the defendant elects not to challenge the ruling by writ, the delay effectively thwarts the purposes served by the right conferred under *Evans* and prevents a court reviewing the claim on appeal from the conviction from fashioning any appropriate relief even if it finds error. (Cf. *Reid v. Balter* (1993) 14 Cal.App.4th 1186, 1195-1196 [because failure to challenge ruling by writ petition thwarted purposes served by statute, appellant barred from raising issue on appeal from adverse judgment].) If a defendant forgoes writ review of the lineup ruling, and instead undergoes a preliminary hearing and trial, the witness will have ordinarily viewed the defendant at the preliminary hearing and/or at trial. Even if an appellate court reversed and ordered a lineup on remand, the results of that lineup would have no evidentiary value: a positive identification would be tainted by the fact the witness saw the defendant at trial, and a negative identification would be tainted by the lengthy passage of time during which fading memories and changing appearances would operate. Mena concedes here that reversal coupled with an order to conduct a lineup on remand is not appropriate because it would have "no evidentiary value" in a later trial.

We recognize several cases have discussed alleged error in denying an *Evans* lineup on appeal from the judgment of conviction. (See *People v. Sullivan* (2007) 151

Cal.App.4th 524, 560-561; *People v. Farnam, supra,* 28 Cal.4th at pp. 183-184; *People v. Williams* (1997) 16 Cal.4th 153, 235-236.) However, because those cases found the ruling was *not* error, they had no occasion to consider whether a ruling that *was* error would be waived if not raised by writ. Because of the uniquely ephemeral nature of the rights conferred by *Evans*, we conclude the requirement of timely pursuit of a lineup includes timely review of an adverse ruling by writ proceedings, and failure to pursue writ relief waives the claim of error.

Even assuming the claim of error is preserved and the trial court abused its discretion when it denied the motion, we conclude any alleged error was harmless beyond a reasonable doubt. Mena asserts the erroneous ruling deprived him of evidence that Jesus would *not* have identified him in a lineup conducted in June of 2007 (near the time of Mena's *Evans* motion), and we should reverse and instruct the jury on remand to that effect. However, Jesus testified at trial that he did not recognize Mena as one of his attackers, and he had *not been able to identify Mena as one of his attackers in June of 2007* when he saw Mena at the preliminary hearing. Thus, the jury convicted Mena despite having the benefit of testimony substantially identical to the evidence Mena claims he was deprived of by the erroneous ruling on his *Evans* motion. Under these unique circumstances, we conclude any deprivation resulting from denial of Mena's request for a pretrial lineup was harmless beyond a reasonable doubt.

B. The Probation Conditions

Mena argues the court imposed two "nonassociation" conditions of probation[2] that violate due process for vagueness and overbreadth because there is no requirement Mena have knowledge the persons with whom he may not associate are members of the specified gang or have weapons in their possession. Although the People concede one of the conditions (condition 12(f)) must be modified to insert a knowledge provision, they argue condition 12(b) is proper because it requires that Mena "[n]ot associate with any known gang members or persons who are associated with the East San Diego gang," and therefore contains the requisite knowledge limitation.

Mena argues, and the People in effect concede, a probation condition that bars the probationer from associating with persons possessing specified characteristics cannot impose strict liability on the probationer. Instead, the condition must include an "express requirement of knowledge" by "explicitly direct[ing] the probationer not to associate with anyone '*known to* [possess the specified characteristic]." (*In re Sheena K.* (2007) 40 Cal.4th 875, 891-892; accord, *People v Turner* (2007) 155 Cal.App.4th 1432, 1436.)

The People asserts condition 12(b) satisfies *Sheena K.* and obviates any vagueness or overbreadth concerns because it requires that Mena "[n]ot associate with any *known* gang members or persons who are associated with the East San Diego gang" (italics added), thereby supplying the requisite scienter requirement. However, we agree with

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2 Condition 12(b) requires Mena "[n]ot associate with any known gang member or persons who are associated with the East San Diego gang," and condition 12(f) requires Mena "[n]ot associate with any persons who have firearms or weapons in their possession."

Mena that condition 12(b) precludes Mena from associating with two distinct classes of persons: "gang members" and "persons who are associated with the East San Diego gang." The knowledge requirement may apply to the former group, but grammatically does not apply to the latter group. We are "empowered to modify a probation condition to render [it] constitutional" (*People v. Turner, supra,* 155 Cal.App.4th at p. 1436), and we therefore modify condition 12(b) to read: "Not to associate with persons he knows to be gang members or he knows to be associated with the East San Diego gang." As so modified, condition 12(b) does not violate due process.

DISPOSITION

The order of probation is modified as follows: probation condition 12(b) is modified to read: "Not to associate with persons he knows are gang members or he knows are associated with the East San Diego gang"; and, probation condition 12(f) is modified to read: "Not to associate with persons he knows to have firearms or weapons in their possession." The trial court is directed to forward a copy of the corrected order to the probation authorities. As so modified, the judgment is affirmed.

CERTIFIED FOR PUBLICATION

McDONALD, J.

WE CONCUR:

NARES, Acting P. J.

AARON, J.

PROOF OF SERVICE

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

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

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

John P. Dwyer