In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA, **Plaintiff and Respondent,** **v.** **JOAQUIN MENA,** **Defendant-Appellant.**	Case No. S173973

Fourth Appellate District, Division One, Case No. D052091
San Diego County Superior Court, Case No. CD205930
The Honorable Bernard E. Revak, Judge

RESPONDENT'S BRIEF ON THE MERITS

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INTRODUCTION

In a random assault, several men who were wielding knives and baseball bats attacked two teenage boys as they walked down Polk Street in San Diego. Two hours later, police apprehended five suspects just a few blocks from the scene of the crime. One of the victims identified appellant during a field showup. Appellant was charged with two counts of assault with a deadly weapon and illegal possession of a knife. It was also alleged that his crimes were gang related. Before his preliminary hearing, appellant requested a lineup, but the trial court denied his motion. Though neither victim was able to identify appellant at his trial, a jury convicted him as charged. Appellant alleges he was deprived of his federal due process right to a pretrial lineup and that the Court of Appeal incorrectly held the error was not harmless beyond a reasonable doubt.

Appellant has not preserved his claims for review because he failed to seek a writ of mandate prior to trial. The right to a lineup must be asserted in a timely manner, prior to the point where evidence of identification is received. The value of holding a lineup disappears once there has been an in-court confrontation between a complaining witness and the defendant. After that point has been reached, the defendant has no adequate remedy on appeal. Application of such a forfeiture rule would work no unfairness, because a defendant in appellant's circumstances may still challenge the suggestiveness of any intervening identification procedure and the reliability of the identification evidence at trial generally. Even assuming, arguendo, that appellant preserved his claims, he fails to demonstrate that the trial court abused its discretion, or that any error was prejudicial.

STATEMENT OF THE FACTS AND THE CASE

Around 5:00 p.m. on April 13, 2007, Jesus C. ("Jesus") and Jonathan F. ("Jonathan") were returning to the latter's apartment after having shared

a meal at a Jack-in-the-Box restaurant located in the City Heights neighborhood of San Diego. (2 RT 27-28, 55, 168.) As they were walking west on Polk and crossing Van Dyke, a red car that had been traveling eastbound on Polk came to a stop. The front seat passenger emerged, walked up to the boys, and asked, "How's the east side treating you?" (2 RT 29-30, 56-57, 72-74.) Taking this to be a gang-related challenge, both Jesus and Jonathan replied that they did not "bang." (2 RT 30-31, 76, 131-132.) The car's passenger then took a swing at Jesus, who backed up in order to avert the blow. (2 RT 32-33, 79.)

At that moment, a white car pulled up behind the red one. As if on cue, the occupants of both cars stepped out. The men in the cars were Hispanic and most of them had shaved heads. Both boys recalled seeing three or four men advancing upon them from a distance of about 12 feet; they saw one man carrying a knife and at least one other man carrying a bat. Jesus had a specific recollection that the bat was black. At that point, Jesus and Jonathan began to run in a northbound direction. (2 RT 31-35, 57-60, 75, 78-82, 129-130, 134-135, 138, 150-153, 157.) Some members of the group remained behind, while the rest divided up and began pursuing the two boys. The victims estimated that between 10 and 12 men had been riding in the two cars; however, only two men were chasing Jesus and "about three" men were chasing Jonathan. (2 RT 35, 42, 61-62, 83, 100-101, 135, 149-150, 160-161, 164-165.)

As he ran, Jesus heard one of his pursuers say, "Stop running or I'm going to shank you." (2 RT 36.) During the chase, Jesus looked back "a couple of times." (2 RT 61, 80.) He could see one man about two feet behind him, swinging a knife from side to side. (2 RT 36-39.) After running about half a block, Jesus's assailants grew tired and abandoned their efforts. (2 RT 39-40, 81.) Jesus looked back again and could see the men returning to their cars. One of the men was carrying a black bat. Jesus

looked for Jonathan, but he could not see him. (2 RT 35, 40, 62-63, 88-89, 93-94.) Jesus left to retrieve a bat from a nearby apartment, then returned to the scene. In the meantime, a neighbor had summoned police, and his attackers had left. Jesus encountered Jonathan, who was bleeding from his head. (2 RT 41-42, 94-96.)

According to Jonathan, a short time after the chase began, one of the men had struck him from behind in the back of the head with a baseball bat, knocking him to the ground. The force of the blow had opened up a wound above his right ear, which required nine stitches to close. (2 RT 138-142.)

Several police officers who responded to the call saw a red Ford parked in front of a house at 4227 Wightman, near the scene of the attack. (2 RT 168-172, 228.) Four males who appeared to be Hispanic and who had shaved heads or short hair were sitting in the front yard. (2 RT 171.) When the officers got out of their car, two of the men ran into the house. The two men who remained in the yard were sitting on chairs with East San Diego gang graffiti etched on them and were later identified as appellant and co-defendant Jorge Lopez. (2 RT 172, 204-205, 213, 229.) During a search of appellant, police found a steak knife in appellant's right pants pocket. (2 RT 230-231.)

Inside the house, the officers found Adrian Pasillas, one of the men who had been in the front yard, hiding under the covers in bed pretending to be asleep. (2 RT 176-177, 205, 232.) Pasillas was sweating profusely and his shirt was damp with sweat. He also had abrasions on his head and dried blood on his face, neck and shirt. The officers found two bats in the side yard next to a can of black spray paint. The bats had recently been spray-painted black. (2 RT 179-183, 233-234, 255-256.)

Several hours after the attack, police brought Jesus to the house for a curbside lineup. (2 RT 45-46; 3 RT 283.) Appellant and his three co-defendants participated in the lineup along with a Caucasian male who had

been in the house. (2 RT 183-184.) At the time of the lineup, it was still daylight. (2 RT 186; 3 RT 287.) Jesus remained in the back seat of the police car which was parked directly in front of the suspects at a distance of approximately 35 feet. (2 RT 184; 3 RT 288.) Jesus identified appellant and his three co-defendants as his assailants. He said that the Caucasian male had not been involved in the attack. (2 RT 290-294, 304-305.)

A month after the attack, police showed a photographic lineup to Jonathan, which included a picture of appellant. When asked if appellant was one of the attackers, Jonathan stated that he thought appellant might have been one of the men in the red car, but he was not sure. (2 RT 145-146, 156; 3 RT 349.)

Appellant was charged with two counts of assault with a deadly weapon (Pen. Code, § 245, subd. (a)(1)) and one count of carrying a concealed dirk or dagger (Pen. Code, § 12020, subd. (a)(4)). It was also alleged that he committed his crimes for the benefit of a criminal street gang (Pen. Code, § 186.22, subd. (b)(1)).[1] (1 CT 1-4.) Prior to his preliminary hearing, appellant moved to hold a lineup. The trial court denied his motion, upon a finding that the circumstances of his case did not present any reasonable likelihood of a mistaken identification which a lineup would tend to resolve. Appellant did not challenge the denial of his motion by application for extraordinary writ. During both his preliminary hearing and his trial, the complaining witnesses testified they were unable to identify him. The jury convicted him as charged, and the sentencing court granted appellant probation. (1 CT 84, 120-124.)

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[1] Co-defendants Jorge Lopez, Adrian Pasillas, and Ricardo Sanchez were also jointly charged with two counts of assault with a deadly weapon and the attached gang enhancements. (1 CT 1-4.) Sanchez pled guilty to the crimes and the enhancements. A jury found Lopez and Pasillas guilty of the crimes and found true the enhancements. (1 CT 66, 95-96, 118-119.)

Appellant contended on appeal that the trial court erroneously denied his motion for a pretrial lineup, and the error was prejudicial under Chapman.[2] (Slip Opn. at p. 4.) Division One of the Fourth District Court of Appeal affirmed the judgment. The appellate court concluded that "a defendant's right to relief is waived if he does not challenge an adverse ruling by a timely pretrial petition for a preemptory writ." (Slip Opn. at p. 6.) Addressing the issue on the merits, the Court of Appeal held that even if the trial court had abused its discretion, the error was harmless beyond a reasonable doubt. (Slip Opn. at p. 8.) This Court granted appellant's petition for review.

ARGUMENT

I. BECAUSE HE DID NOT SEEK PRETRIAL WRIT RELIEF, APPELLANT'S CLAIMS ARE FORFEITED

In his Opening Brief on the Merits (BOM) appellant asserts the Court of Appeal erred when it held that he forfeited his right to complain that he was denied a pretrial lineup on direct appeal because he failed to challenge the trial court's ruling by seeking a writ of mandate. (BOM at p. 2.) Appellant contends that "there is no statutory authority or case law [supporting] the proposition that defendants who want to obtain appellate review of the denial of a lineup motion must first seek immediate review by filing a petition for a writ of mandate." Appellant believes that imposition of a forfeiture rule in this context would intrude upon the legislatively established scheme for post-judgment review, and conflict with other holdings by this Court. (BOM at p. 9.) Before addressing these questions, it is necessary first to determine the nature of the right to a pretrial lineup that this Court identified in *Evans v. Superior Court* (1974) 11 Cal.3d 617

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[2] *Chapman v. California* (1967) 386 U.S. 18 [87 S.Ct. 824, 17 L.Ed.2d 705] (*Chapman*).

(*Evans*), and whether it has survived the passage of Proposition 115. Based on this review, it is clear that a rule requiring a defendant to timely preserve his right to a pretrial lineup by means of seeking a writ of mandate to challenge an adverse trial court ruling is entirely consistent with both Evans and the policies identified in that decision. Further, it is appropriate to apply this rule to appellant.

A. The Due Process Right To A Pretrial Lineup In *Evans* Is Guaranteed Only By The California Constitution

In *Evans*, the defendant filed a "Notice of Motion for Lineup" following his preliminary hearing but prior to the commencement of trial. (*Evans*, *supra*, 11 Cal.3d at pp. 620-621.) Though the court below concluded the motion was potentially meritorious because "an in-court identification of the defendant seated at a counsel table is inherently suggestive," it believed it lacked the discretion to order the prosecution to hold a lineup and accordingly denied it. The defendant then applied to this Court for a writ of mandate. (*Id.* at p. 621.)

In granting the writ, this Court observed there were no cases "holding as a matter of discovery in criminal matters that a trial court may order the granting of a defendant's request for a pretrial lineup." (*Id.* at p. 621.) Evans sought to fill an existing gap in the discovery process by creating a mechanism whereby "prior to the in-court receipt of evidence of identification the accused can insist that procedures be afforded whereby the weakness of the identification evidence, if it is in fact weak, can be disclosed." (*Id.* at p. 622.)

While the prosecution had the means to arrange a pretrial lineup, a defendant was unable to avail himself of the same procedure. The *Evans* court cited *Wardius v. Oregon* (1973) 412 U.S. 470 [93 S.Ct. 2208, 37 L.Ed.2d 82] (*Wardius*), a case that struck down Oregon's "notice of alibi provision" as a violation of due process of law under the Fourteenth

Amendment because that statute failed to provide reciprocal discovery rights to the defense. (*Evans*, *supra*, 11 Cal.3d at p. 623.) Analogizing to the circumstances presented in Wardius, the Evans court found that the prosecution's superior ability to hold a lineup created an asymmetrical discovery scheme which gave it an evidentiary advantage at trial:

> Because the People are in a position to compel a lineup and utilize what favorable evidence is derived therefrom, fairness requires that the accused be given a reciprocal right to discover and utilize contrary evidence. (Citation). In *Wardius* the United States Supreme Court stated that "although the Due Process Clause has little to say regarding the amount of discovery which the parties must be afforded . . . , it does speak to the balance of forces between the accused and his accuser . . . . We do not suggest that the Due Process Clause of its own force requires Oregon to adopt [discovery proceedings] . . . . But we do hold that in the absence of a strong showing of state interests to the contrary, discovery must be a two-way street. The State may not insist that trials be run as a 'search for truth' so far as defense witnesses are concerned, while maintaining 'poker game' secrecy for its own witnesses."

(*Evans*, *supra*, 11 Cal.3d at p. 623.)

The *Evans* court clarified it was not holding that "in every case where there has not been a pretrial lineup the accused may, on demand, compel the People to arrange for one." (*Id.* at p. 625.) Instead, it specified that the determination whether due process requires that a lineup be held in a particular case "necessarily rests[s] . . . within the broad discretion of the magistrate or trial judge." (*Ibid* [*citing United States v. MacDonald* (9th Cir. 1971) 441 F.2d 259; *United States v. Ravich* (2d Cir. 1970) 421 F.2d 1196, 1202-1203].)[3]

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[3] Indeed, *Ravich* itself held, "We would likewise not be disposed to hold a lineup to be so essential to the presentation of a proper defense concerning identification that refusal to arrange one on a defendant's

(continued...)

The Evans Court concluded that the right to a lineup is nevertheless limited:

> [D]ue process requires in an appropriate case that an accused, upon timely request therefore, 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.

(*Ibid.*) Stressing the importance of making the motion in a timely manner, the *Evans* court added that a motion for a pretrial lineup should "normally be made as soon after arrest or arraignment as possible," and added that "motions which are not made until shortly before trial should, unless good cause is clearly demonstrated, be denied in most instances by reason of such delay." (*Id.* at p. 626.)

While *Evans* invoked "due process" in reaching its holding, it did not specify whether this right was grounded in the federal or state Constitution. Reasonably construed, *Evans* identified a federal due process right only to reciprocal discovery procedures, and not to a pretrial lineup itself. A contrary conclusion that *Evans* recognized a federal right would place *Evans* in conflict with the holdings of courts in many jurisdictions. Though the United States Supreme Court has not spoken to the issue (*Moore v. Illinois* (1977) 434 U.S. 220, 230, fn. 5 [98 S.Ct. 458, 54 L.Ed.2d 424]), all but one federal circuit and the high courts of many states have held there is no federal constitutional right to a pretrial lineup. (*See, e.g., Haskins v. United States* (10th Cir. 1970) 433 F.2d 836, 838; *United States v. Hall* (3d Cir. 1971) 437 F.2d 248, 249; *United States v. Poe* (5th Cir. 1972) 462 F.2d

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(...continued)
request is a denial of due process of law." (*United States v. Ravich*, *supra*, 421 F.2d at p. 1203.)

195, 198; *United States v. Hurt* (D.C. Cir. 1973) 476 F.2d 1164, 1168; *United States v. White* (4th Cir. 1973) 482 F.2d 485, 488; *United States v. Estremera* (2d Cir. 1976) 531 F.2d 1103, 1111; *United States v. Robertson* (9th Cir. 1979) 606 F.2d 853, 857; *United States v. Ostertag* (8th Cir. 1980) 619 F.2d 767, 771; *Code v. Montgomery* (11th Cir. 1984) 725 F.2d 1316, 1320, fn. 4; *United States v. Jackson* (7th Cir. 1987) 835 F.2d 1195, 1198; *United States v. Causey* (6th Cir. 1987) 834 F.2d 1277, 1286; *State v. Rossi* (1985) 146 Ariz. 359, 363, 706 P.2d 371; *State v. Tatum* (1991) 219 Conn. 721, 729, 595 A.2d 322; *Laury v. State* (Del. 1969) 260 A.2d 907, 909; *People v. Brinkley* (1965) 33 Ill.2d 403, 406, 211 N.E.2d 730; *Dunlap v. State* (1973) 212 Kan. 822, 823, 512 P.2d 484; *Wilson v. Commonwealth* (Ky. 1985) 695 S.W.2d 854, 858; *State v. Boettcher* (La. 1976) 338 So.2d 1356, 1361; *Cummings v. State* (1969) 7 Md.App. 687, 690, 256 A.2d 894, 896; *State v. Haselhorst* (Mo. 1972) 476 S.W.2d 543, 546-547; *State v. Campbell* (1985) 219 Mont. 194, 199-200, 711 P.2d 1357; *State v. Vasquez* (1982) 122 N.H. 878, 880, 451 A.2d 1297; *State in Interest of W.C.* (*State v. Walls*) (1981) 85 N.J. 218, 221, 426 A.2d 50; *State v. Roberts* (1968) 249 Or. 139, 143, 437 P.2d 731; *Commonwealth v. Evans* (1975) 460 Pa. 313, 315-316, 333 A.2d 743; *State v. Emerson* (1987) 149 Vt. 171, 176, 541 A.2d 466; *Holmes v. State* (1973) 59 Wis.2d 488, 503, 208 N.W.2d 815; *but see United States v. Key* (8th Cir. 1983) 717 F.2d 1206, 1209 ("Even though there is no constitutional right to compel the government to conduct a line-up . . . many times a court can and should compel the government to do so if the interests of justice and fair play require it"); *Appeal of McGuire* (1st Cir. 1978) 571 F.2d 675, 677 ("The line-up is intended for the protection of the individuals' constitutional rights in order to avoid improper suggestiveness in any confrontation"); *Commonwealth v. Sexton*, (1979) 485 Pa. 17, 23, 400 A.2d 1289 ("While we concede that under the present state of the law it has not been determined that an accused has a

constitutional right to a lineup . . . it does not follow, as the trial court suggests, that a judge can arbitrarily and capriciously deny such a request" [citations omitted]).)

Evans made it clear that a defendant is not entitled to a pretrial lineup on demand. (*Evans*, *supra*, 11 Cal.3d at p. 625.) What is more, " 'There is no general constitutional right to discovery in a criminal case[.]" (*Pennsylvania v. Ritchie* (1987) 480 U.S. 39, 59-60 [*quoting Weatherford v. Bursey* (1977) 429 U.S. 545, 559, 97 S.Ct. 837, 51 L.Ed.2d 30].) Consequently, the right that arises to a lineup when identification is a material issue and there exists a reasonable likelihood of a mistaken identification which a lineup would tend to resolve must be deemed a due process right under the California Constitution only. To the extent that any language in *Evans* suggests a federal due process right is denied under such circumstances, it should be disapproved.

In identifying the right to a pretrial lineup, the *Evans* court cited *Brady v. Maryland* (1963) 373 U.S. 83 [83 S.Ct. 1194, 10 L.Ed.2d 215] ("*Brady*"), and framed the issue as one involving the disclosure of exculpatory or impeachment evidence:

> Here petitioner seeks to compel the People to exercise a duty to discover material evidence which does not now, in effect, exist. Should petitioner be denied his right of discovery the net effect would be the same as if existing evidence were intentionally suppressed. It is settled that the intentional suppression of material evidence denies a defendant a fair trial.

(*Evans v. Superior Court*, *supra*, 11 Cal.3d at p. 625 [*citing Brady*, *supra*, 373 U.S. at p. 87.)

The analogy to *Brady* is inapposite. Under *Brady*, the prosecution must disclose any evidence that is 'favorable to the accused' and is 'material' on the issue of either guilt or punishment." (*City of Los Angeles v. Superior Court* (2002) 29 Cal.4th 1, 7.) Evidence is considered material

when " 'there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.' " (*Ibid* [*quoting United States v. Bagley* (1985) 473 U.S. 667, 682 [105 S.Ct. 3375, 87 L.Ed.2d 481].) "*Brady* and its progeny serve 'to restrict the prosecution's ability to suppress evidence rather than to provide the accused a right to criminal discovery.' " (*People v. Morrison* (2004) 34 Cal.4th 698, 715 [*quoting United States v. Martinez-Mercado* (5th Cir. 1989) 888 F.2d 1484, 1488].)

As a discovery procedure, a pretrial lineup is calculated to produce admissible evidence which may be of assistance to the jury in determining a witness's credibility or the defendant's guilt of the charged offense. However, at the point where a motion for a pretrial lineup is made, there is no evidence to "disclose." What is more, if a pretrial lineup is held and a complaining witness identifies the defendant unequivocally, then the evidence would not be "favorable to the accused" and would not meet the test for materiality under the federal constitutional standard. In that regard, the denial of a motion for a pretrial lineup cannot be said to involve the intentional suppression of material evidence.

Even if *Brady* provided the appropriate framework within which to create a reciprocal *right* to seek discovery in the form of a pretrial lineup, Evans does not stand for the proposition that the denial of such a motion runs afoul of the constitutional standard informing *Brady*. Further, in cases where a pretrial lineup has been denied, neither the prosecution nor the government has committed any misconduct, either by intentionally suppressing or destroying exculpatory evidence or by wrongfully denying a defendant's discovery request. If a violation is committed, it is on the part of the trial court, and is analogous to any other form of trial error.

B. *Evans* Has Not Been Superseded By Proposition 115

Although the Court of Appeal expressed "some reservations" whether a defendant's right to seek a pretrial lineup had "survived the enactment of Proposition 115," it nevertheless proceeded on the "assumption" that *Evans* had not been superseded. (Slip Opn. at p. 6.) The Court of Appeal noted that in the wake of Proposition 115, Penal Code section 1054, subdivision (e) now provides, "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." (Slip Opn. at p. 6; *see also Raven v. Deukmejian* (1990) 52 Cal.3d 336, 343-344.) Since there is no federal constitutional right to a pretrial lineup, the question remains whether such a procedure is authorized by the provisions of Penal Code sections 1054, et. seq.

In *People v. Verdin* (2008) 43 Cal. 4th at page 1096 (*Verdin*), this Court had occasion to examine the effect of Proposition 115 on the prosecution's attempt to obtain the mental examination of a defendant who was accused of attempted murder and who planned to offer a defense of diminished actuality at trial. The *Verdin* court determined that a mental examination is properly deemed a form of pretrial discovery and that several cases, including *People v. McPeters* (1992) 2 Cal.4th 1148 (*McPeters*), *People v. Carpenter* (1997) 15 Cal.4th 312 (*Carpenter*), and *People v. Danis* (1973) 31 Cal.App.3d 782 (*Danis*) had purported to authorize the procedure. However, the *Verdin* court held that those cases had not survived the passage of Proposition 115. (*People v. Verdin*, *supra*, 43 Cal.4th at pp. 1106-1007.)

The *Verdin* court first rejected the Danis court's contention that a judge's inherent power to order discovery permitted the prosecution to obtain a court-ordered mental examination from the defendant even in the absence of an "authorizing statute," noting that "no part of its reasoning can

have survived the enactment of [Penal Code] section 1054, subdivision (e)." (*Verdin v. Superior Court*, *supra*, 43 Cal.4th at p. 1107.) The Verdin Court also criticized both McPeters and Carpenter because those decisions failed to articulate the foundation for their assertion that a right arises in the prosecution "to discovery in the form of a mental examination" whenever a criminal defendant "places his mental state in issue." Accordingly, the *Verdin* court rejected the holdings of those cases, opining that since "neither *McPeters* nor *Carpenter* rests on a statutory or constitutional basis, both are inconsistent with [Penal Code] section 1054, subdivision (e)." (*Ibid.*) The *Verdin* court concluded that any such rule in existence before 1990 had been superseded by Penal Code section 1054, et. seq., and that "nothing in the criminal discovery statutes . . . authorizes a trial court to issue an order granting such access." (*Id.* at p. 1109.)

The prosecution next argued that Penal Code section 1054.4[4] authorized its expert to gain access to the petitioner to perform a mental examination. (*Id.* at p. 1110.) However, the *Verdin* court observed that the exemption created by Penal Code section 1054.4 referred to the prosecution's ability to obtain nontestimonial evidence. Finding that the statements petitioner would make during the course of a mental examination would necessarily be communicative, any evidence derived from such a procedure would also be unquestionably testimonial. (*Id.* at p. 1112.) The *Verdin* court contrasted that type of evidence with traditional

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[4] Penal Code section 1054.4 specifies,

> Nothing in this chapter shall be construed as limiting any law enforcement or prosecuting agency from obtaining nontestimonial evidence to the extent permitted by law on the effective date of this section.

examples of nontestimonial evidence, such as pretrial lineups. (*Id.* at p. 1111.)

Finally, the Verdin court addressed the prosecution's claims that denying it this type of pretrial discovery violated its rights under the federal and the state Constitutions. In the first instance, this Court held that even if such discovery might be permitted by the federal charter, nothing in the United States Constitution mandates such an order. (*Id.* at p. 1115.) The *Verdin* court also brushed aside the prosecution's claim that it would be denied its due process rights under the state Constitution were it unable to obtain a mental examination of petitioner. After respondent argued "the prosecution cannot meaningfully meet petitioner's evidence without an opportunity to examine petitioner prior to trial," this Court responded:

> While it is probable the People could more effectively challenge petitioner's anticipated mental defense if a prosecution expert were granted access to him for purposes of a mental examination, that probability does not establish that denial of such access violates article I, section 29 of the California Constitution. Should petitioner present a mental defense at trial, the People's strong interest in prosecuting criminals can often be vindicated by challenging that defense in other ways.

(*Verdin v. Superior Court*, *supra*, 43 Cal.4th at 1115-1116.)

As examples, this Court noted that the prosecution would have the opportunity during trial to challenge "the defense expert's professional qualifications and reputation, as well as his perceptions and thoroughness of preparation." The *Verdin* court also offered that the prosecution's own experts would be able to review both the report and the interview notes provided by the defense expert, and "comment on petitioner's alleged mental condition." (*Id.* at p. 1116.)

Having found that a mental examination was not authorized either by the criminal discovery statutes or any other statute, and was not mandated by the United States Constitution, the *Verdin* court instructed the Court of

Appeal to issue a writ of mandate directing the trial court to vacate its previous order and issue a new one denying the People's motion. (*Id.* at pp. 1116-1117.) In that vein, the *Verdin* court held that "following Proposition 115 and the enactment of the exclusivity guidelines" in the discovery statute, "we are no longer free to create such a rule of criminal procedure, untethered to a statutory or constitutional base." (*Id.* at p. 1116.) The *Verdin* court also observed that "Our conclusion renders it unnecessary to decide whether the trial court's order violates petitioner's constitutional rights." (*Ibid.*)

Because a pretrial lineup is nontestimonial, and because the right to such a lineup under *Evans* predated Proposition 115, Penal Code section 1054.4 would appear to continue to extend that right. Although the language of Penal Code section 1054.4 confers the exemption for gathering nontestimonial evidence upon law enforcement or prosecuting agencies only, in light of the California Constitution's command that "discovery in criminal cases shall be reciprocal in nature" (Article I, section 30, subdivision (c)), Penal Code section 1054.4 must be read to apply the same exemption to a defendant's attempts to obtain such evidence. (*See Izazaga v. Superior Court* (1991) 54 Cal.3d 356, 377 ["we conclude that the new discovery chapter enacted by Proposition 115 creates a nearly symmetrical scheme of discovery in criminal cases, with any imbalance favoring the defendant as required by reciprocity under the due process clause"] (*citing Wardius v. Oregon*, *supra*, 412 U.S. at p. 475, fn. 9).)

Penal Code section 1054.4 also specifies that nontestimonial evidence may be obtained "to the extent permitted by law on the effective date of this section." *Evans* was decided in 1977, and so it was in effect when the electorate approved Proposition 115 in 1990. It would appear, then, that Evans has not been superseded by that ballot measure. Construing Penal Code section 1054.4 so as to free the prosecution, and not the defense, from

the exclusivity provisions of Penal Code section 1054, subdivision (e), would also run afoul of the federal due process right to reciprocal discovery that was announced in *Wardius*, *supra*, and that served as the basis for this Court's ruling in *Evans*. This Court's case law subsequent to Proposition 115 has also assumed the continuing viability of *Evans*. (*People v. Farnam* (2002) 28 Cal.4th 107, 183; *People v. Williams* (1997) 16 Cal.4th 153, 235; *People v. Hansel* (1992) 1 Cal.4th 1211, 1220-1221.)

C. Because The Value Of A Pretrial Lineup Disappears Following A Live Confrontation Between The Defendant And A Complaining Witness, He Must Pursue A Writ Of Mandate To Preserve His Claim

Of course, *Evans* itself addressed petitioner's application for a writ of mandate, filed after the trial court had denied his motion for a pretrial lineup. This Court has observed that a challenge brought by pretrial writ confers certain advantages, because a defendant who waits to bring his claim until after he has been tried and convicted has the additional burden of demonstrating resultant prejudice on direct appeal from the judgment. (*See, e.g., People v. Pompa-Ortiz* (1980) 27 Cal.3d 519, 529 [where defendant did not pursue pretrial writ relief, he was required to establish prejudice to prevail on claim that preliminary hearing was improperly closed to public]; *see also People v. Wilson* (1963) 60 Cal.2d 139, 152 [same, denial of defendant's right to trial within a prescribed statutory time period]; *People v. Welch* (1972) 8 Cal.3d 106, 113 [same, change of venue]; *People v. Salas* (1972) 7 Cal.3d 812, 818-819 [same]; *Harris v. Superior Court* (1977) 19 Cal.3d 786, 799 [same, appointment of counsel, noting "statement of counsel preference must be 'timely made' "].)

Another line of cases views the writ as a necessary expedient where "initiative is required to protect a defendant's fundamental right to a fair trial." (*Maine v. Superior Court* (1968) 68 Cal.2d 375, 378 [change of venue]; *see also Cash v. Superior Court* (1959) 53 Cal.2d 72, 75

[opportunity to inspect and copy statements made by defendant to law enforcement officers]; *Powell v. Superior Court* (1957) 48 Cal.2d 704, 707 [same]; *Funk v. Superior Court* (1959) 52 Cal.2d 423 [discovery of police officers' notes regarding statements of witnesses]); *Cornell v. Superior Court* (1959) 52 Cal.2d 99 [hypnotic examination of a defendant]); *Harris v. Municipal Court* (1930) 209 Cal. 55 [dismissal of a criminal action not brought to trial within the time required by law]); *Zamloch v. Municipal Court* (1951) 106 Cal.App.2d 260 [dismissal where a defendant has been denied the constitutional right to a speedy trial]); *Gomez v. Superior Court* (1958) 50 Cal.2d 640 [case transfer]; *Smith v. Municipal Court* (1959) 167 Cal.App.2d 534 [same]). This theory rests on the proposition that the "[a]vailability of appeal often falls short of sufficient protection, since 'the burden, expense and delay involved in a trial render an appeal from an eventual judgment an inadequate remedy.' " (*Maine v. Superior Court, supra,* 68 Cal.2d at p. 378.)

Appellant relies extensively on *People v. Memro* (1985) 38 Cal.3d 658, 676, for his assertion that a forfeiture rule should not apply in the context of pretrial discovery. (BOM at 14-17.) That case is inapposite. In Memro, the defendant sought to establish that his confession should be excluded because it had been obtained by means of police coercion. In order to bolster his claim, the defendant sought discovery in the form of investigative reports referencing complaints received against those officers concerning their use of excessive force or violence. (*People v. Memro, supra,* 38 Cal.3d at p. 674.) The prosecution argued that appellate review should be precluded because the defendant had not first sought to overturn the ruling by means of a pretrial writ, but this Court declined to impose such a requirement as a condition to review on appeal. (*Id.* at pp. 675-676.)

In reaching its conclusion, *Memro* cited *People v. Wilson, supra,* 60 Cal.2d 139 (*Wilson*), a case that discussed whether a defendant who had not

challenged an alleged violation of his constitutional right to speedy trial by writ could still assert his claim on direct appeal. In this context, the Wilson court adverted to the paradoxical circumstances of a defendant who challenges the denial of the right post-judgment. Noting that the purpose of Penal Code section 1382 is to protect the accused from having charges pending against him for an undue length of time, the Wilson court observed:

> But in the case at bench *nothing that any court can do now will achieve that end*; the charges are no longer pending against defendant; the delay has ended, and he has been duly tried and convicted. It is, very simply, too late for defendant to seek to be relieved of a delay that no longer exists.

(*Wilson*, *supra*, 60 Cal.2d at p. 151 [emphasis in original].) The *Wilson* court also found, however, that while it was "too late to relieve defendant of the delay in bringing him to trial," he was still in a position to obtain appellate review of the matter, where the Court could weigh "the effect of the delay in bringing defendant to trial or the fairness of the subsequent trial itself." (*Ibid.*)

The situation here is unlike that presented in *Memro*. While the application of a general forfeiture rule to discovery requests may be both unwise from a policy perspective and unsupported by case law, the unusual circumstances surrounding pretrial lineups counsel a holding by this Court that a defendant who seeks to challenge the denial of his motion must do so by writ of mandate because he has no adequate remedy on appeal. By waiting to do so until after his trial's completion, a defendant has ensured that the evidentiary value of any subsequent lineup would be negated and would therefore do nothing to increase the reliability of a second trial, or increase the accuracy of the jury's fact-finding. Appellant acknowledged as much in his supplemental briefing for the Court of Appeal. (SAOB at pp. 6-7.) In short, his failure to seek redress pretrial precludes appellant from

effectively vindicating the right he was assertedly denied. In *Memro*, by contrast, the evidence that the defendant sought was still available to him post-appeal.

The Evans Court limited the right it created to those instances where a "timely request" has been made. (*Evans*, *supra*, 11 Cal.3d at p. 625.) In Evans, this Court also declared that a motion for a pretrial lineup should "normally be made as soon after arrest or arraignment as practicable" (*Id.* at p. 626.) Four years after it decided Evans, this Court observed that "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." (*People v. Baines* (1981) 30 Cal.3d 143, 148.)

As the *Evans* court framed the issue, "The question is whether *prior to* the in-court receipt of evidence of identification the accused can insist that procedures be afforded whereby the weakness of the identification evidence, if it is in fact weak, can be disclosed." (*Evans*, *supra*, 11 Cal.3d at p. 622 [italics in original]. The Court of Appeal in the instant case aptly characterized the nature of the *Evans* right as "ephemeral" (Slip Opn. at p. 8), and appropriately concluded that absent a challenge by writ, the ensuing delay in seeking relief "thwarts the purposes served by the right conferred under *Evans* and prevents a court reviewing the claim . . . from fashioning any appropriate relief even if it finds error." (Slip Opn. at p. 7.) A writ requirement is logically derived from an intrinsic analysis of the emphasis *Evans* itself places on a timely assertion of the right to a pretrial lineup. It exists until an in-court confrontation between the defendant and the witness occurs; it can only be enforced prior to that event.

Accordingly, appellant's case must be distinguished from cases such as Wilson, which held that notwithstanding the lack of a remedy for the violation, a defendant retains the right of review on appeal, where the Court

may weigh " 'the effect of the delay in bringing defendant to trial or the fairness of the subsequent trial itself,' " and relief may still be granted. (*Wilson*, *supra*, 60 Cal.2d at p. 151.) It must also be distinguished from cases such as *Memro*, where a defendant may still obtain the discovery he was denied. Though it is true that a lineup may still be held on remand, due to the fact that the complaining witness has already viewed the defendant at trial, its evidentiary value is irremediably compromised. And since appellant was deprived of the evidence as the result of his own inaction and not because of prosecutorial or governmental misconduct, sanctions including dismissal, suppression of the identification evidence, or an instruction creating an adverse presumption regarding identification are unwarranted.

Given *Evans's* holding that the right to a lineup must be timely asserted, and subsequent holdings by this Court that the evidentiary value of a lineup nears a vanishing point once the preliminary hearing has been held, appellant cannot be heard to complain, as he does, that a forfeiture rule would be "new" and that it should not be applied "retroactively" to his case. (BOM at pp. 20-21.) The forfeiture rule is well settled in this Court's jurisprudence; its application would not present a "clear break" with past precedent. (*Griffith v. Kentucky* (1987) 479 U.S. 314, 324-325 [107 S.Ct. 708, 93 L.Ed.2d 649].) This Court reserved the question of whether appellant's claim was timely asserted in *People v. Farnam*, *supra*, 28 Cal.4th at page 184. Accordingly, a forfeiture rule such as the one contemplated here would neither overrule a past precedent of this Court, nor disapprove a practice this Court has arguably sanctioned in prior cases, nor overturn a longstanding practice that lower appellate courts in this state have uniformly approved. (*Griffith v. Kentucky*, *supra*, 479 U.S. at p. 325.) The fact that this Court has considered claims concerning the denial of a pretrial lineup on direct appeal does not mean that it has sanctioned their

post-judgment review. Until now, this Court has never been squarely presented with that question.

In arguing that a writ requirement is ill-advised, appellant raises the specter that a Court of Appeal may deny relief in a written opinion, and the law of the case doctrine may be applied to circumvent any subsequent review of the issue by this Court. (BOM at 10.) As appellant concedes (BOM at p. 17), following an adverse ruling on his writ application by the Court of Appeal, he would have the opportunity of seeking review of the judgment from this Court. Alternatively, he could seek writ relief from this Court in the first instance, since it has original jurisdiction. (Cal. Constitution, Art. VI, § 10; Rules of Court, rule 8.485(a)).

It is no doubt the unavailability of a remedy on appeal which has led to the paucity of opinions that have addressed the subject. Respondent has only found a single case, *Commonwealth v. Sexton*, *supra,* 485 Pa. at p. 17 (*Sexton*), where a reviewing court found an abuse of discretion on direct appeal and had occasion to fashion an appropriate remedy on remand. *Sexton* only serves to underscore the lack of a remedy under the circumstances presented by the instant case.

In *Sexton*, the defendant robbed a cashier at gunpoint. A store customer observed the defendant for approximately one minute before he approached the cashier, and also pursued the defendant as he fled. The first time that the customer identified the defendant was at his preliminary hearing, and that identification was the only evidence connecting the defendant to the crime. The defendant had moved for a pretrial lineup before his preliminary hearing was held, but the trial court denied his motion. (*Sexton*, *supra*, 485 Pa. at p. 20.) On appeal, the Pennsylvania Supreme Court disagreed with the lower court's resolution of the case, as it had reversed so that further hearings could be held to determine whether the suggestive one-on-one confrontation between the defendant and the

complaining witness at the preliminary hearing had tainted the subsequent in-court identification. (*Ibid.*)

After finding the circumstances surrounding the identification at the preliminary hearing were not "so unreliable as to offend due process," the *Sexton* court turned to what it considered the "difficult aspect" of the case, involving the trial court's denial of the motion for a pretrial lineup. The *Sexton* court declared it could "perceive of no situation where such a request would be more warranted," considering that the sole evidence connecting the defendant to the crime was the identification of the customer, "who had no knowledge of [the defendant] before the incident, observed the culprit briefly before and during the crime, had no contact with the [defendant] between the arrest and the certification hearing, and had not been presented with an opportunity of a photographic identification prior to the hearing confrontation." (*Sexton*, *supra*, 485 Pa. at pp. 22-23.)

Though the *Sexton* court conceded the United States Supreme Court had not determined whether a defendant has a constitutional right to a pretrial lineup, it observed that the high court "recognized the importance that such a procedure may have in ameliorating the suggestiveness of a courtroom confrontation and in insuring the reliability of identification evidence." (*Sexton*, *supra*, 485 Pa. at pp. 23-24 [*citing Moore v. Illinois*, *supra*, 434 U.S. at pp. 230-231, fn. 5.].) The *Sexton* court then noted that, "Where it is shown that [the trial court's] decision is without justification and that the accused has been substantially harmed thereby, it is incumbent upon the reviewing court to provide a remedy commensurate to the harm sustained by the party receiving the adverse ruling." (*Id.* at p. 24.)

The *Sexton* court took issue, however, with the lower court's holding that since no remedy was available, the courtroom identifications should be excluded. In fashioning its proposed remedy, the *Sexton* court opined that the purpose of a pretrial lineup is "to provide a setting which is less

suggestive than the one-on-one confrontation provided by an in-court identification." (*Sexton*, *supra*, 485 Pa. at p. 24.) Under the circumstances presented by *Sexton*, where there had been no intervening identification of the defendant by the complaining witness, the Pennsylvania Supreme Court observed that the defendant had been denied the benefit of having the victim identify him in a setting that was more objective than that offered at his preliminary hearing. (*Id.* at pp. 20, 24.) It reasoned that the defendant had perhaps "lost the possibility that under such circumstances either an identification could not have been made, or that it might have been made with apparent uncertainty or hesitancy." (*Ibid.*)

After first noting that evidentiary sanctions are reserved for instances of governmental misconduct or impropriety, the *Sexton* court determined that excluding the in-court identifications because a pretrial lineup was not held would be "punitive rather than remedial" as well as "unduly harsh and out of proportion to the injury sustained." (*Id.* at pp. 24, 26.) It then concluded that the violation of appellant's right could properly be cured by a charge to the jury on remand, which would instruct jurors that "[the defendant] had been denied the opportunity for a more objective identification and for that reason the subsequent less reliable identification could be viewed with caution." (*Id.* at p. 25.)

Even this remedy is inapplicable to the circumstances of the instant case. The *Sexton* court's finding that an injury had been sustained by that defendant arose from the fact that no intervening identification had been made by the complaining witness between the time that the defendant committed the crime and the time where he was asked to point him out at the preliminary hearing. (*Sexton*, *supra*, 485 Pa. at p. 23.) By contrast, in the instant case Jesus was able to identify appellant at the field show-up, which was conducted only two hours after the attack. At that point appellant had already received the benefit of one reliable intervening

identification procedure. Staging a lineup the day of the preliminary hearing, a full two months after the attack, would not have yielded a more objective identification under the circumstances presented here.

In the case at bar, appellant chose not to exercise his right to challenge the denial of his motion through application for a writ of mandate at a time when a pretrial lineup would have had evidentiary value. Given that appellant's post-judgment assertion of his right to a pretrial lineup is untimely under *Evans's* own terms, and that he has no adequate remedy on appeal, the forfeiture doctrine should apply. Notwithstanding appellant's claims to the contrary (BOM at pp. 10-14), such a holding would no more contravene the legislative scheme governing appellate rights than any other instance where this Court has applied a forfeiture rule. The *Sexton* court did not consider whether a defendant should be limited to challenging the denial of such a motion by pretrial writ in those instances where an intervening identification has been made; however, it illustrates the problematic nature of fashioning a remedy on appeal when that is the case.

Under the rule respondent proposes, a defendant in appellant's circumstances would not find himself without recourse. Though he may not challenge the denial of his motion for a pretrial lineup on direct appeal, he may still challenge any intervening identification on grounds that it was impermissibly suggestive, and that it gave rise to a very substantial likelihood of irreparable misidentification in violation of his federal due process rights. The denial of a motion for a pretrial lineup would at that point be subsumed by the inquiry addressing the overall reliability of the identification evidence that was presented at trial.

Here, appellant contended below that the showup was suggestive (1 RT 3-4), and he continues to make the same assertion on appeal (BOM at pp. 3, 27); however, he never made the appropriate objection or motion to suppress and so he has forfeited that claim as well. (Cf. *People v.*

Lawrence (1971) 4 Cal.3d 273, 275, fn. 1 ["Identification evidence is properly challenged on *Wade-Gilbert* grounds by means of a pretrial motion to suppress or by a timely objection at the time the evidence is offered at trial"].)

Even if he has preserved that claim, it lacks merit. An identification may be so unreliable that it violates a defendant's right to due process under the Fourteenth Amendment. (*Manson v. Brathwaite* (1977) 432 U.S. 98, 104-107 [97 S.Ct. 2243, 53 L.Ed.2d 140]; *Neil v. Biggers* (1972) 409 U.S. 188, 196-199 [93 S.Ct. 375, 34 L.Ed.2d 401].) In order to determine whether the admission of identification evidence violates a defendant's right to due process of law, a reviewing court considers:

> (1) whether the identification procedure was unduly suggestive and unnecessary, and, if so, (2) whether the identification itself was nevertheless reliable under the totality of the circumstances, taking into account such factors as the opportunity of the witness to view the suspect at the time of the offense, the witness's degree of attention at the time of the offense, the accuracy of his or her prior description of the suspect, the level of certainty demonstrated at the time of the identification, and the lapse of time between the offense and the identification.

(*People v. Cunningham* (2001) 25 Cal.4th 926, 989.)

Appellant bears the burden of demonstrating that an extrajudicial identification procedure was unreliable. (*Ibid*; *People v. Carter* (2005) 36 Cal.4th 1114, 1164.) " 'The question is whether anything caused [appellant] to "stand out" from the others in a way that would suggest the witness should select him.' " (*People v. Cunningham, supra*, 25 Cal.4th at p. 990 [*quoting People v. Carpenter* (1997) 15 Cal.4th 312, 367 (superseded by statute on another point as stated in *Verdin v. Superior Court, supra*, 43 Cal.4th at p. 1106.)].) The identification of a single eyewitness is sufficient to establish appellant's guilt even if the witness does not confirm the identification in court. (*People v. Boyer* (2006) 38

Cal.4th 412, 480.) In the context of a witness's pretrial identification of a defendant, even a single person showup is not inherently unfair. (*People v. Ochoa* (1998) 19 Cal.4th 353, 413; *see also Manson v. Brathwaite*, *supra*, 432 U.S. at p. 105 ["The 'admission of evidence of a showup without more does not violate due process' "] (*quoting Neil v. Biggers*, *supra*, 409 U.S. at p. 198).)

Because this rule is intended to avert an unfair trial rather than an unfair identification, an unnecessarily suggestive identification procedure does not, of itself, require exclusion of tainted identification evidence, much less constitute reversible error. (*Manson v. Brathwaite*, *supra*, 432 U.S. at pp. 106, 110-114.) "Reliability is the linchpin in determining the admissibility of identification testimony. . . ." (*Id.* at p. 114.) A conviction based upon eyewitness identification will be set aside only if the identification procedure was so impermissibly suggestive as to give rise to a "very substantial likelihood of irreparable misidentification." (*Simmons v. United States* (1968) 390 U.S. 377, 384 [88 S.Ct. 967, 19 L.Ed.2d 1247].) An appellate court reviews independently a trial court's ruling that a pretrial identification procedure was not unduly suggestive. (*People v. Kennedy* (2005) 36 Cal.4th 595, 609.)

As factors supporting the suggestive nature of the showup identification, appellant adverts to the fact that at least one suspect was handcuffed, and that the prosecutor speculated it was likely that all five suspects were similarly restrained. (BOM at p. 27.) Given the circumstances, where the suspects had been apprehended only two hours after the attack and appellant was in possession of a knife, it was not at all unusual that he and his companions would be handcuffed. Appellant was not the only man standing before the victim, and courts have held that even where a small number of individuals are handcuffed, seated in the back of a patrol car, and surrounded by police officers, a field show-up is not unduly

suggestive. (*See, e.g., Stovall v. Denno* 388 U.S. 293, 295, 302 [87 S.Ct. 1967, 18 L.Ed.2d 1199] (overruled on another ground in *Griffith v. Kentucky*, *supra*, 479 U.S. at p. 314); *In re Richard W.* (1979) 91 Cal.App.3d 960, 969-970; *People v. Craig* (1978) 86 Cal.App.3d 905, 914.)

What is more, all three defense attorneys cross-examined the witnesses extensively concerning their ability to see the perpetrators at the time of the crime, the circumstances surrounding the field showup, and the reliability of that identification procedure generally. (2 RT 53-69, 73-92, 100-107, 113-119, 124-125, 148-162.) They also gave those issues strong emphasis in their closing arguments (5 RT 647-653, 664-675, 679-688.) Where a defendant has had the opportunity to so test doubtful identification evidence during trial, there is no due process violation. "Counsel can both cross-examine the identification witnesses and argue in summation as to factors causing doubts as to the accuracy of the identification – including reference to [ ] any suggestibility in the identification procedure . . . ." *Manson v. Braithwaite*, *supra*, 432 U.S. at pp. 113-114, fn. 14, see also *People v. Rodrigues* (1994) 8 Cal.4th 1060, 1155.

As the right to a pretrial lineup exists only prior to the in-court receipt of identification evidence, that right must be timely asserted, and the value of a pretrial lineup disappears following a confrontation between the complaining witness and the defendant at preliminary hearing or trial, the application of a forfeiture rule in appellant's case would be neither inappropriate nor unforeseen. And because a defendant would still be able to challenge the reliability of the identification evidence on direct appeal or in a writ of habeas corpus, application of the forfeiture rule would work no unfairness.

D. Even If This Court Determines That Appellant Has Preserved His Claims, The Trial Court Did Not Abuse Its Discretion When It Denied His Motion For A Pretrial Lineup

Even if appellant's claims are not forfeited, the trial court did not abuse its discretion when it denied his motion for a pretrial lineup because there was no reasonable likelihood of a mistaken identification. During the attack, Jesus had the opportunity to observe his assailants as they got out of, and returned to, the car. (1 RT 6-7; 2 RT 31-35, 57-60, 75, 78-82.) Jesus testified that as he ran he looked back "a couple of times," and he had the opportunity to see the faces of his assailants. (2 RT 61, 80.) After he stopped running, Jesus could see his attackers returning to their cars from a distance of half a block. At that point, he was able to see that they were carrying at least one black bat. (2 RT 35, 40, 62-63, 88-89, 93-94.)

The show-up occurred while it was still daylight, and the car from which Jesus viewed the suspects was parked directly in front of them. (2 RT 45-46, 184-186; 3 RT 289.) He was no more than 35 away from the 5 men, he indicated that he had a clear view, and he did not wear corrective lenses. (2 RT 82, 122.) Jesus was able to identify Pasillas as the "man with the knife," and Sanchez as the last man to get out of the red car. (2 RT 49; 3 RT 292, 294.) He also offered that one of the suspects had not been at the scene of the attack. (2 RT 51.)

As officers arrived at the house on Wightman, Pasillas and another man ran inside. Pasillas was discovered hiding in his bedroom, sweating profusely, with visible abrasions and dried blood on his head and neck. (1 RT 7; 2 RT 182, 233, 255.) Officers recovered two bats that had recently been spray-painted black from the yard of the house where they detained appellant. (1 RT 7; 2 RT 179-183, 233-234.) Though Jonathan was unsure as to his identification, he picked appellant out of the many photographic arrays he was shown. (3 RT 345-346, 349, 359.)

What is more, and as the trial court observed (1 RT 9-10), an additional lineup would have done nothing to "resolve" the identification issue for the jury in light of the fact that appellant had already been positively identified at the showup. Since it cannot be said the trial court's ruling was arbitrary or irrational, or that it fell outside the bounds of reason, appellant fails to establish the denial of his motion constituted an abuse of discretion.

II. IF THIS COURT FINDS THE TRIAL COURT ABUSED ITS DISCRETION, THE ERROR MUST BE EVALUATED UNDER THE *WATSON*[5] STANDARD OF REVIEW

Appellant argues that any error is properly reviewed under the *Chapman* standard of prejudice, and that the Court of Appeal recognized that proposition. (BOM at p. 21.) Because *Evans* arose in the context of a writ, it had no occasion to review for prejudice.] The Court of Appeal did not hold that *Chapman* was the appropriate standard; it merely assumed it was.[6] As previously discussed, the only federal due process right *Evans* identified was the right to reciprocal discovery as required by *Wardius*. Since appellant was deprived of a discovery right under state law only, if this Court finds the court below did abuse its discretion in denying appellant's motion, the error should be reviewed under *Watson*. This Court should therefore seek to determine whether there is a reasonable probability that appellant would have obtained a different result at trial had a pretrial lineup been conducted.

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[5] *People v. Watson* (1956) 46 Cal.2d 818 (*Watson.*)

[6] Respondent made the same assumption in its supplemental briefing (SRB at p. 2). Upon further consideration, respondent has concluded that *Evans* survived the passage of Proposition 115 because a pretrial lineup is authorized under Penal Code section 1054.4, and not because a defendant has a federal due process right to that procedure.

The evidence against appellant was considerably stronger than he makes it out to be. (BOM at pp. 25-29.) Aside from the evidence already detailed above, the record reveals that appellant was in the front yard of a house located only a few blocks from the scene of the attack when he was apprehended, seated in a chair that was etched with East San Diego gang graffiti, and in possession of a knife. (2 RT 172, 204-205, 213, 226-231.) Jurors also heard extensive evidence regarding appellant's ties to, and history with, the East Side gang generally. (3 RT 406-413, 424-425.)

Appellant's observation that the jurors requested a readback of Jesus's testimony (BOM at pp. 27-28) is irrelevant. Appellant merely speculates that this was a sign of their uncertainty as to the identification evidence concerning him, when it is equally possible that they may have been focused on the identification evidence as it pertained to his codefendants. Even if appellant's jurors actually had concerns regarding the reliability of appellant's identification, they would have gone to the weight of the evidence only, and his jurors ultimately resolved the issue adversely to him. As the high court has said, "We are content to rely upon the good sense and judgment of American juries, for evidence with some element of untrustworthiness is customary grist for the jury mill. Juries are not so susceptible that they cannot measure intelligently the weight of identification testimony that has some questionable feature." (*Manson v. Brathwaite*, *supra*, 432 U.S. at p. 116.)

And even if this Court were to apply the Chapman standard of review, there is no possibility that the error contributed to appellant's verdict, in light of the fact that neither witness identified him at either his preliminary hearing or his trial. Appellant contends that he was nonetheless prejudiced by the lack of a pretrial lineup as the prosecutor was thereby in a position where he could argue that the victims failed to identify the defendants because of their fear, and not because of their inability to do so. (BOM at

pp. 23-25.) Appellant's claim fails. In the first instance, the prosecutor did not draw this argument out of thin air. Both Jesus and Jonathan testified that they feared they would be killed if they were to cooperate as witnesses, and that they had personal knowledge of people in their neighborhood who had been murdered as the result of their testimony. (2 RT 44, 52, 146-147; 3 RT 282, 350.)

Appellant reasons that the jury might have been swayed by the results of a pretrial lineup because it could be conducted in a police station while the victims stood behind a one-way mirror. Appellant believes that the victims' failure to identify him under circumstances where their anonymity was preserved would have successfully refuted the prosecutor's argument and exposed the weaknesses in the identification evidence to the jury. (BOM at p. 25.) Appellant's contentions must be rejected. Even assuming that Jesus and Jonathan would have failed to identify appellant, the prosecutor would still have been able to make the same argument. The victims did not enjoy "anonymity" under the circumstances of this case. They lived in a neighborhood that was controlled by the East Side gang, and a short distance from the house where the defendants were first detained. (2 RT 94, 163, 226-227; 5 RT 544.) Appellant and his confederates had a clear view of Jesus, and they certainly would have known, or at the very least would have learned during trial, that it was he who had identified them during the pretrial lineup.

Appellant fails to persuade, in light of the fact that neither witness identified him at both his preliminary hearing and trial, that the jury's verdict would have been affected by the knowledge that Jesus had also failed to identify him during a pretrial lineup. Jesus successfully identified appellant before he was asked to make an in-court identification, and that procedure involved no substantial likelihood of a mistaken identification. Appellant merely sought the opportunity to avail himself of a second

pretrial procedure as an additional test of his accuser's ability to identify him. The court below was not constrained to grant that request under the showing made by appellant, and its denial cannot have prejudiced him under any standard.

CONCLUSION

For all the foregoing reasons, this Court should affirm the judgment below in its entirety.

Dated: January 15, 2010

Respectfully submitted,

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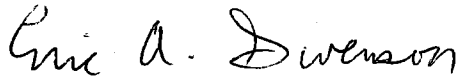

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CERTIFICATE OF COMPLIANCE

I certify that the attached Respondent's Brief on the Merits uses a 13 point Times New Roman font and contains 10,079 words.

Dated: January 15, 2010

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AMENDED DECLARATION OF SERVICE BY U.S. MAIL& ELECTRONIC SERVICE

Case Name: **People v. Mena** No.: **S173973**
COA No. D052091

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service that same day in the ordinary course of business.

On **January 15, 2010**, I served the attached [**Respondent's Brief on the Merits**] by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the internal mail collection system at the Office of the Attorney General at 110 West A Street, Suite 1100, P.O. Box 85266, San Diego, CA 92186-5266, addressed as follows::

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and furthermore declare, I electronically served a copy of the above document from the Office of the Attorney General's electronic notification address (ADIEService@doj.ca.gov) on **January 15, 2010** to Appellate Defender's , Inc's electronic notification address, eservice-criminal@adi-sandiego.com

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on **January 15, 2010**, at San Diego, California.

Cathey Pryor