IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. JOAQUIN MENA, Defendant and Appellant.	No. S173973 Court of Appeal No. D052091 San Diego County Superior Court No. SCD205930

APPELLANT'S REPLY BRIEF ON THE MERITS

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

Honorable Bernard Revak, Judge

John P. Dwyer, SBN 106860
LAW OFFICES OF JOHN P. DWYER
601 Van Ness Ave., Suite E-115
San Francisco, CA 94102
415.885.4451

Attorney for Appellant
JOAQUIN MENA

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ARGUMENT

I. Appellant Did Not Forfeit His Right To Challenge The Denial Of His Lineup Motion By Failing To File A Petition For A Writ Of Mandate.

A. Defendants Who Want To Challenge The Denial Of A Lineup Motion Are Not Required To Seek Writ Relief.

Respondent urges this court to impose a writ requirement on defendants who want appellate review of the denial of a lineup motion. Respondent's analysis is not anchored in statutes or in cases establishing the analytic framework for imposing a writ requirement, but in its belief that allowing a post-judgment appeal would leave defendants without a remedy. (RB at 16-24.) Respondent's argument is meritless and should be rejected.

1. The Detailed Legislative Scheme Governing Appeals And Writs Precludes This Court From Imposing A Writ Requirement.

Without any analysis or discussion, respondent rejects Mena's argument that imposing a writ requirement would contravene the statutory scheme governing appeals. According to respondent, a writ requirement would no more interfere with the statutory scheme than the requirement to

object to preserve an issue for appellate review. (RB at 24.) Respondent, however, fails to consider the statutory scheme outlined in Mena's opening brief.

The right to bring a criminal appeal is governed by statute. (See, e.g., § 1237, 1237.1, 1237.5, 1238; see also *People v. Chi Ko Wong* (1976) 18 Cal.3d 698, 709, disapproved on another ground in *People v. Green* (1980) 27 Cal.3d 1, 34-35; *Powers v. City of Richmond* (2001) 85 Cal.4th 85, 105 [lead opn.].) Even the requirement to make an objection in the trial court – the statutory basis for the forfeiture doctrine – is specifically set forth in section 1259. However, no statutory provision (or rule adopted under section 1247k) imposes a writ requirement. This omission is significant in light of the Legislature's complete authority to determine the contours of the right to appeal. As two Courts of Appeal have held in the civil context, because of the Legislature's control of the right to appeal, absent a statutory requirement for writ review, a court may not create such a requirement. (*Premium Commercial Servs. Corp. v. National Bank of Calif.* (1999) 72 Cal.App.4th 1493, 1498-1499; *In re Joann E.* (2002) 104 Cal.App.4th 347, 353.) (AOB at 9-12.)

Not only would such a requirement burden the right to appeal, it could *deny* the right altogether. Under the doctrines of law of the case and res judicata, a defendant is precluded from bringing an appeal if the Court of Appeal denied relief in a written opinion following issuance of alternative writ. (See AOB at 10-11.)

Moreover, the Legislature has been very active in imposing writ requirements, sometime expressly prohibiting and sometimes expressly permitting a post-judgment appeal. In resolving whether a particular statute makes writ relief the exclusive or non-exclusive appellate remedy, courts have focused on legislative intent, not judicial policies. (See AOB at 12-14.) Respondent, however, simply ignores this extensive legislative

authority and case law precedent.

2. Alternatively, *Memro* And *Batts* Provide The Appropriate Framework To Determine Whether To Impose A Writ Requirement.

Respondent shrugs off the *Memro/Batts*[1] analytic framework on the ground that an appellant would have no viable remedy following a direct appeal. According to respondent, absent a viable remedy, *Memro* and *Batts* are irrelevant. (RB at 17-20.) Respondent posits no other objection to the *Memro/Batts* framework.

Thus, respondent does not dispute that if the *Memro/Batts* criteria are applicable, this court should not impose a writ requirement. (See AOB at 16-17.) Specifically, respondent does not dispute that there is no statutory requirement to seek writ review of the denial of a lineup motion. Respondent does not dispute that a writ requirement would impose a burdensome expense on defendants and divert scarce resources from their trial preparation. Respondent does not dispute that because the vast majority of writ petitions are denied summarily, and because a summary denial does not preclude a post-judgment appeal, a writ requirement would increase the burden on courts.

In passing, respondent rejects as a "specter" *Memro*'s concern that requiring writ review could limit the Supreme Court's jurisdiction, especially in capital cases. (See *People v. Memro*, *supra*, 38 Cal.3d at p. 675 ["This court's constitutional responsibility in [capital] cases should not be so easily circumscribed by procedural barriers" such as a writ requirement].) According to respondent, the concern is a non-issue because a defendant could seek discretionary review in the Supreme Court following an adverse decision in the Court of Appeal. (RB at 21.) But

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[1] See *People v. Memro* (1985) 38 Cal.3d 658, overruled on another ground in *People v. Gaines* (2009) 46 Cal.4th 172, 181, fn. 2; *People v. Batts* (2003) 30 Cal.4th 660.

respondent does not dispute *Memro*'s core points that (1) because review at that stage of the litigation is discretionary, under the doctrines of law of the case and res judicata, the issue may evade Supreme Court review in capital cases, and (2) the possibility of evading Supreme Court review weighs against imposing a writ requirement. (AOB at 17.)

Turning to remedy, one must begin by acknowledging that in any appeal, no remedy is perfect. The passage of time may result in faded memories, lost evidence, or the unavailability of witnesses at a second trial. Parties are never recompensed for the expense of a trial later reversed. And time spent in custody cannot be returned to a defendant if the charges are dropped following a reversal.

Here, an appropriate and serviceable remedy following a reversal for *Evans* error (*Evans v. Superior Court* (1974) 11 Cal.3d 617) is a new trial with a jury instruction allowing (but not requiring) the jury to infer that if a lineup had been held, Jesus C. would not have been able to identify Mena. This remedy is supported by California precedent.

In *People v. Zamora* (1980) 28 Cal.3d 88, Zamora was charged with battery on a police officer. Just before his arrest, the city attorney's office in good faith ordered the destruction of past citizen complaints against police officers (excepting complaints found meritorious). The Supreme Court held that the order violated Zamora's due process rights because it prevented him from locating witnesses who could testify that the officers involved in his case had used excessive force in other cases (albeit, cases that the police department found unmeritorious). (28 Cal.3d at pp. 100-101.) The Supreme Court also recognized that the destroyed records did not contain material evidence, but only names of potential witnesses who *might* have testified that the officers previously had used excessive force, "leading at most to impeachment evidence." (*Id.* at p. 101.)

Acknowledging there was no perfect remedy, the court ordered the

trial court to instruct the jury

> that Officers Soelitz and Schroyer used excessive or unnecessary force on each occasion when complaints were filed against those officers, but that the complaint records later were destroyed. The court should also instruct the jury that they may rely upon that information to infer that the officers were prone to use excessive or unnecessary force and that the officers' testimony regarding incidents of alleged police force may be biased.

(*Id.* at pp. 102-103, citations omitted.)

A similar issue arose in *People v. Conrad* (2006) 145 Cal.App.4th 1175. There, the prosecution violated the defendant's constitutional right to a speedy trial; during the period of delay, a potentially exculpatory witness died. The Court of Appeal observed that the witness' testimony *might* have been helpful (if the witness testified as the defendant claimed he would), but even if helpful it did not conclusively demonstrate the defendant's innocence. In these circumstances, "an intermediate remedy, between dismissal and no remedy, is appropriate." (*Id.* at p. 1186.) Following *Zamora*, the court held that the proper remedy was to instruct the jury that the witness would have testified as the defendant claimed he would, and that the witness was unavailable because he had died during the time the prosecution unjustifiably delayed filing the complaint against the defendant. "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." (*Ibid.*)

These cases demonstrate that – where, like here, the defendant's due process rights were violated by the loss of evidence, but there was no showing of bad faith – an appropriate remedy is a jury instruction allowing the jury to infer that the witness would have testified as the defendant had hoped.

Following *Zamora* and *Conrad*, the appropriate remedy for an erroneous denial of a lineup motion is to remand for a new trial with an order to instruct the jury that (1) shortly after the incident and his arrest, Mena requested a standard lineup in a neutral setting at which Jesus C. would have been able to view Mena and five similar looking young men in an effort to identify the assailants; (2) a lineup was not permitted even though Mena had a constitutional right to a lineup; and (3) the jury may infer from these circumstances that Jesus C. would not have been able to identify Mena in the lineup as one of the assailants. As in *Zamora* and *Conrad*, this remedy would afford Mena due process despite the lost evidence, and also allow the prosecution to go forward.

3. Respondent's Argument Concerning The *Braithwaite/Biggers/Simmons* Line Of Cases Is Irrelevant.

Respondent argues at length that if this court imposed a writ requirement, defendants may continue to challenge police-supervised identifications (e.g., showup or a photo lineup) as being so unreliable as to violate due process. Respondent also asserts that Mena is making such a claim in this appeal, but that he forfeited the issue because he did not make a proper objection in the trial court. Respondent further argues that the facts presented at trial show that the showup procedures did not violate due process. (RB at 24-27.) These arguments completely miss the point.

Mena is not challenging the showup as being so impermissibly suggestive as to violate due process. On the contrary, in his opening brief, Mena argued that although the showup passed constitutional muster, it nevertheless was suggestive – albeit not so unduly suggestive as to create a very substantial likelihood of irreparable misidentification – and that that factor weighed in favor of finding that the trial court's error was not harmless. (AOB at 17.) The *Braithwaite/Biggers/Simmons* analysis is

simply irrelevant to the question whether Mena should be deemed to have forfeited his right to appellate review of the denial of the *Evans* motion because he failed to seek writ review.

4. Whether To Seek Writ Review Should Be Left To Defendants To Weigh The Costs And Benefits.

Whether to seek immediate writ review or wait until after final judgment to bring a direct appeal requires a defendant to make an individualized assessment of the costs and benefits. A petition for writ of mandate diverts scare resources from trial preparation and has extremely little chance of success. On the other hand, if the writ were granted, it would result in tangible evidence that the witness could not identify the defendant. Seeking appellate review has the advantage of not interfering with trial preparation, but also imposes costs. Although a defendant need not show prejudice if he petitions pre-trial for review, he 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.) Moreover, the remedy following a direct appeal – allowing a jury to infer that the witness would not have be able to identify the defendant – is less compelling than evidence that in fact the witness could not make the identification.

The point is that this decision is best left to the defendant and counsel, who can make an individualized weighing of the costs and benefits. There is very little, if any, benefit to the judicial system in imposing a one-size-fits-all rule requiring defendants to seek writ review.

B. If This Court Holds That The Right To Appellate Review Is Forfeited If A Defendant Does Not Seek Writ Review, That Holding Should Not Be Applied Retroactively To Appellant In This Case.

Respondent contends that its proposed writ requirement, if adopted by this court, should be applied to Mena. (RB at 20.) In making this contention, respondent ignores relevant case law dealing with the retroactivity of new forfeiture rules and disregards the inequity that would result from Mena's reasonable reliance on past decisions and practices.

As framed by this court's decisions – none of which respondent cites or discusses – whether to apply a forfeiture rule to cases that are not yet final depends on whether the appellant reasonably relied on the now-rejected rule or practice. (*People v. Scott* (1994) 9 Cal.4th 331, 357-358.) Invoking concerns about fairness, several decisions from this court have held that a new forfeiture rule may not be applied retroactively in a criminal case where the defendant did all that was necessary under the previous rule to preserve the issue. (*People v. Welch* (1993) 5 Cal.4th 228, 238; *People v. Collins* (1986) 42 Cal.3d 378, 388; *Chi Ko Wong*, *supra*, 18 Cal.3d at p. 716.)

The unfairness in applying a new forfeiture rule retroactively in this case is palpable. As set forth in appellant's opening brief, (1) three published cases reviewed the merits of an *Evans* issue on direct appeal, thereby signaling to the defense bar that a timely lineup motion was the sole prerequisite for preserving the issue for appellate review (see *People v. Farnam* (2002) 28 Cal.4th 107, 183; *People v. Williams* (1997) 16 Cal.4th 153, 235; *People v. Sullivan* (2007) 151 Cal.App.4th 524, 560-561); (2) there is no published precedent requiring defendants to seek writ review to preserve an *Evans* claim; (3) the secondary authorities make no mention of an obligation to seek writ review (see CEB, Cal. Criminal Law: Procedure and Procedure (Cont.Ed.Bar 2009) Defense (*Evans*) Lineups §22.17; 2

Erwin, et al., Cal. Criminal Defense Practice (2009) Defendant's Motion for Lineup §31.07); and (4) the *Memro* and *Batts* cases established an analytic framework that would lead a diligent lawyer to conclude that an *Evans* issues was not forfeited by the failure to seek writ review. (AOB at 18-21.) Because the clear weight of case and secondary authority "broadly . . . assumed" that writ review was unnecessary to preserve the issue, a new writ requirement should not be applied retroactively to defendants who relied on the now-repudiated practices. (*People v. Scott*, *supra*, 9 Cal.4th at p. 357.) Respondent addresses none of these arguments or authorities.

Instead, respondent argues that under the authority of *Griffith v. Kentucky* (1987) 479 U.S. 314, a rule of procedure must be applied retroactively unless it represents a "clear break" with precedent. (RB at 20.) *Griffith*, however, does not support respondent's argument. *First*, *Griffith* was not a forfeiture case, and thus did not address the inequity that would result from applying a new forfeiture rule to cases already on appeal. Rather, *Griffith* concerned the retroactivity of *Batson v. Kentucky* (1986) 476 U.S. 79 to cases not yet final on direct appeal. *Second*, the *Griffith* court *rejected* a "clear break" rule and ordered the new *Batson* holding to be applied retroactively in order to avoid inequities among criminal defendants. Thus, the driving consideration in *Griffith* was not whether there was a "clear break" with precedent but whether retroactive application of the new rule would increase or decrease inequities. (479 U.S. at pp. 327-328.) *Third*, this court has held that *Griffith* applies "only to rules based on the federal Constitution, or upon the federal judicial supervisory power." (*People v. Murtishaw* (1989) 48 Cal.3d 1001, 1013.) Because respondent's proposed forfeiture rule is a matter of state law, not federal constitutional law, *Griffiths* is inapplicable.

Respondent also suggests that in *People v. Farnam*, *supra*, this court reserved the question whether writ review is a necessary prerequisite. (RB

at 20.) That is simply wrong. In *Farnam*, the defendant argued that *Evans* should apply to other crimes evidence in the penalty phase of a capital trial. This court held that, assuming the defendant made a timely motion for a lineup, he failed to satisfy the criteria that the identification was a material issue and that there was a reasonable likelihood of misidentification. (28 Cal.4th at p. 184.) The decision did not reserve the question whether a defendant must seek writ review to preserve an *Evans* issue.

For the foregoing reasons, if this court holds that defendants must seek writ review of a ruling denying a lineup motion in order to obtain appellate review, this court should hold the new rule does not apply to cases in which the motion was made before the decision in this case becomes final. (*People v. Scott*, *supra*, 9 Cal.4th at p. 358.)

C. A Defendant Has A Due Process Right To A Lineup.

1. A Defendant Has A State Due Process Right To A Lineup.

Respondent concedes that defendants have a state due process right to a lineup, and that the criminal discovery statute does not govern or limit that right. (RB at 12-16.) Although Mena does not disagree with respondent's conclusion, Mena submits there are more compelling reasons to reach this result.

a. The Plain Language Of The Discovery Law Shows That It Does Not Apply To Lineup Motions.

A lineup motion is an effort to obtain information from a non-party witness. The plain language of the discovery statute, however, shows that it applies only to the disclosure of discovery *between the parties*, and thus does not govern discovery from non-parties. (See § 1054, subd. (b) [a goal of the statute is to require discovery to be conducted informally "between and among the parties" before seeking judicial enforcement]; § 1054.1 [requiring the "prosecuting attorney" to disclose materials and information

"in the possession of the prosecuting attorney" or investigating agencies]; § 1054.3 [requiring the defendant to disclose certain information to the prosecuting attorney].) Nothing in the language or structure of the discovery statute suggests that it applies to the parties' efforts to obtain information from non-parties.

Numerous cases agree that obtaining discovery from third parties is not governed by the discovery statute. (See, e.g., *County of Placer v. Superior Court* (2005) 130 Cal.App.4th 807, 814; *People v. Superior Court (Barrett)* (2000) 80 Cal.App.4th 1305, 1313; *People v. Sanchez* (1994) 24 Cal.App.4th 1012, 1026-1027; *People v. Superior Court (Broderick)* (1991) 231 Cal.App.3d 584, 594.) *Verdin v. Superior Court* (2008) 43 Cal.4th 1096, which held that the discovery statute governs a prosecution's request for a psychiatric examination of a defendant, is consistent with these cases because a defendant is a party.

Finally, holding that a request for a lineup is a request for "discovery," as that term is used in the discovery statute, would bar both the defense and the prosecution from using lineups after the accusatory pleading is filed. The reason is that there is no mechanism in the discovery statute to hold a lineup. Because there is no language in Proposition 115 or its legislative history showing that the voters intended to bar law enforcement from using lineups once the case is filed, the better interpretation of "discovery" is that dictated by the plain language – namely, it does not include information obtained from non-parties.

b. The Enactment Of The Discovery Law Cannot Override A Due Process Right.

The *Evans* line of cases established a due process right to a lineup. (*Evans*, *supra*, 11 Cal.3d at p. 625; *Williams*, *supra*, 16 Cal.4th at p. 235; *Farnam*, *supra*, 28 Cal.4th at p. 183.) Because a statute cannot trump a constitutional right (*Jacob B. v. County of Shasta* (2007) 40 Cal.4th 948,

963 ["The California Constitution is 'the supreme law of the state' to which all statutes must conform."], conc. opn of Kennard, J.; *People v. Navarro* (1972) 7 Cal.3d 248, 260 [in a case involving a conflict between a statutory provision and a state constitutional provision, holding, "Wherever statutes conflict with constitutional provisions, the latter must prevail."]), the discovery statute cannot override the due process right to a lineup.

Nor can the discovery statute be viewed as implementing *Evans*, because it provides no mechanism to obtain a timely pre-trial lineup. Section 1054.1 permits the defense to request information from the prosecutor, but a lineup is not such a request. In addition, under section 1054.7, discovery need not be provided until 30 days before trial. In almost all cases, that provision would prevent a defendant from obtaining a timely lineup that *Evans* guarantees, thus rendering hollow the due process right established in *Evans*.

2. *Evans* Established A Federal Due Process Right To A Lineup.

Respondent contends that *Evans* did not establish a federal due process right to a lineup, and it correctly notes that many courts in other jurisdictions have held there is no federal right. (See RB 8-11.) Notwithstanding these decisions, Mean submits that *Evans* established a federal due process right to a lineup.

As noted above, *Evans* established a due process right to a lineup. (See *Evans*, *supra*, 11 Cal.3d at p. 625.) This court has repeatedly reaffirmed that due process right. (See, e.g., *People v. Farnam*, *supra*, 28 Cal.4th at p. 183; *People v. Williams*, *supra*, 16 Cal.4th at p. 235; see also *People v. Municipal Court (Runyan)* (1978) 20 Cal.3d 523, 537, fn. 4 [stating that while most judicial rules of discovery are not constitutionally compelled, the right to a lineup is a due process right].)

Although *Evans* did not specify whether the right was a state or

federal right, it was based on U.S. Supreme Court cases establishing federal due process rights in analogous circumstances. (See *id.* at pp. 623-625 [basing its analysis on *Wardius v. Oregon* (1973) 412 U.S. 470; *Williams v. Florida* (1970) 399 U.S. 78; and *Brady v. Maryland* (1963) 373 U.S. 83, 87].) Nothing in the subsequent cases applying *Evans* suggests that this Court has backed away from the federal due process underpinnings of the *Evans* holding. And, as respondent acknowledges, the U.S. Supreme Court has not ruled on the issue.

If, as respondent contends, *Evans* recognized a federal due process right to reciprocal discovery procedures (here, "discovery" means something broader than the definition in the discovery statute), then the specific holding in *Evans* is a particular application of that federal due process right. That is, because the prosecution can arrange lineups, the defense has a federal due process right to do so as well. (Cf. *Moore v. Illinois* (1977) 434 U.S. 220, 230, fn. 5 [98 S.Ct. 458, 54 L.Ed.2d 424] [suggesting that the defense could make a reasonable request for a lineup].)

For these reasons, defendants have a federal due process right to a lineup. (U.S. Const., 14th Amend.)

D. The Case Should Be Remanded To The Court Of Appeal To Decide Whether The Trial Court Abused Its Discretion In Finding There Was No Reasonable Likelihood Of Misidentification; Alternatively, This Court Should Find The Trial Court Abused Its Discretion.

Respondent argues that if writ review is not required, this court should rule that the trial court did not abuse its discretion in finding there was no reasonable likelihood of misidentification. (RB at 28-29.) The argument must be rejected both because it was not fairly included in the grant of review and because it is wrong on the merits.

1. The Abuse Of Discretion Issue Is Not "Fairly Included" In The Issues On Which This Court Granted Review.

The parties may raise any issue "fairly included" in the issues on which this court granted review. (Cal. Rules of Court, rule 8.516(a)(1); *People v. Estrada* (1995) 11 Cal.4th 568, 580.) Further, this court "may decide any issues that are raised or fairly included in the petition or answer." (Cal. Rules of Court, rule 8.516(b)(1).) The abuse of discretion issue does not meet these criteria.

First, the Court of Appeal did not reach this issue. Rather, that court held that Mena forfeited the *Evans* issue and, alternatively, that any error was harmless. That is a basis to decline to decide the issue here. (*Title Ins. & Trust Co. v. County of Riverside* (1989) 48 Cal.3d 84, 98-99 [declining to address an issue in part because the Court of Appeal had not reached the issue].) *Second*, Mena did not raise the issue in his petition for review, and respondent did not file an answer. That, too, is a basis to decline to address the abuse of discretion issue. (See *In re Marriage of Cornejo* (1996) 13 Cal.4th 381, 388, fn. 6 [declining to address an issue that was not raised in the petition for review].)

2. Alternatively, The Superior Court Abused Its Discretion In Finding There Was No Reasonable Likelihood Of Misidentification.

Respondent contends that the trial court did not abuse its discretion in denying the lineup motion because there was no reasonable likelihood of mistaken identification. (RB at 28-29.)[2] This contention does not withstand analysis.

In making this argument, respondent incorrectly relies on the trial record. Rather, any assessment of the trial court's ruling must be based

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[2] Respondent does not contend that the lineup motion was untimely or that the eyewitness identification was not material.

solely on the facts known to the trial court at the time it ruled on the motion. (See *People v. Arias* (1996) 13 Cal.4th 92, 127 [an appellate court reviews a pretrial ruling based "on the record then before the court"]; *People v. Davis* (1995) 10 Cal.4th 468, 503 ["On appeal, we examine the ruling on the record in which it was made."].) Evidence presented at trial is relevant only to the harmless error analysis. Thus, to the extent respondent relies on evidence not before the trial court when it made its ruling on the motion for a lineup, its analysis is deficient.

There was no live testimony at hearing on the lineup motion. Appellant submitted a motion, which included excerpts from the police reports. Those excerpts – to which the prosecution did not object – constituted the factual record on which the court relied in making its decision. (See 1 RT 8 [accepting defense counsel's representations regarding the facts and observing that the parties were "largely in agreement . . . as to what the basic facts are"].)

a. Jesus C. Did Not Have A Good Opportunity To View His Assailants.

Citing trial evidence, respondent asserts that Jesus had multiple opportunities to view his assailants. (RB at 28.) In fact, the record at the hearing on the motion does not support this assertion.

Jesus C. had little opportunity to see his assailants during the brief and chaotic assault. The record at the motion hearing shows only that when two cars suddenly pulled up and someone shouted a gang challenge, Jesus C. fled and "didn't look back." (1 SCT 7.) The incident was over quickly after Jesus had run about half a block. (1 SCT 7.) Jesus C. gave only a general description of the assailants as young Hispanic men with shaved heads. (1 SCT 7.) He could not describe their clothing, tattoos, jewelry, or piercings. (1 SCT 11.) Nothing in the record suggests that Jesus C. previously knew Mena or any of his assailants.

The circumstances of the "curbside lineup" magnified the risk of misidentification. The police showed the handcuffed suspects, one at a time, at a distance of 35 feet from the patrol car. Jesus said "yes" when asked if Mena was involved, but did not otherwise say that he was certain of his identification of appellant. (1 SCT 8; cf. *People v. Abdel-Malak* (1986) 186 Cal.App.3d 359, 369 [holding there was no reasonable likelihood of misidentification where the witness testified that she was "certain" the defendant was the robber and that she remembered the defendant independent of the photo lineup].) Although a show-up 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.)[3]

b. Jonathan Did Not Identify Appellant.

Respondent mistakenly relies on evidence – presented at trial, not the motion hearing – of Jonathan's very tentative identification of appellant as proof that there was no reasonable likelihood of mistaken identification. (RB at 28.)

In fact, at the motion hearing appellant asserted without contradiction from the prosecution that according to discovery Jonathan could not identify any of the defendants as one of the assailants. (1 SCT 3 [para. 5].) Thus, Jonathan provided no corroboration of Jesus C.'s identification of Mena. (Cf. *People v. Williams*, *supra*, 16 Cal.4th at pp. 235-236 [upholding a trial court order denying a lineup motion because several other witnesses identified the defendant as the shooter].)

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[3] The only suspect that Jesus said was not involved was a young white male (Robert Ferguson), but Jesus had told police that all the assailants were Hispanic. (1 SCT 8, 11.) Thus, Jesus' statement that the white male was not involved is not an indicium of the reliability of his identification of the Hispanic suspects.

c. There Was No Other Significant Corroboration Of Jesus C.'s Identification.

Uncorroborated eyewitness identifications of strangers are highly problematic, especially when, as here, the circumstances are brief, traumatic, and frenzied. (*United States v. Wade* (1967) 388 U.S. 218, 228; *People v. McDonald* (1984) 37 Cal.3d 351, 363; *United States v. Jernigan* (9th Cir. 2007) 492 F.3d 1050, 1054.)

Here, Jesus C.'s identification was uncorroborated by other eyewitnesses. (Cf. *People v. Williams*, *supra*, 16 Cal.4th at p. 183 [holding that the trial court did not err in denying the lineup motion because several witnesses identified the defendant as the shooter, and they all testified they saw his face].) Moreover, nothing about appellant's conduct corroborated the identification. Appellant (unlike co-defendant Pasillas) did not flee when contacted by police (1 SCT 7), and he did not confess to the assaults or make incriminating admissions. (1 SCT 9; cf. *People v. Farnam*, *supra*, 28 Cal.4th at p. 184 [finding no reasonable likelihood of misidentification because the defendant had given a detailed confession].) There was no evidence – e.g., fingerprints, blood, or hair – linking the baseball bats found in a side yard to the assault, much less to appellant. (1 SCT 8; 1 RT 3, 7.) There was no evidence that appellant lived at the house where police detained him. The fact that appellant was sitting in the front yard in a chair that had gang markings (1 SCT 7; 1 RT 3) corroborates only that someone living at the house may be connected to the gang, but does not significantly corroborate Jesus C.'s identification of Mena as one of the assailants.

II. The Error Was Not Harmless Under Either The *Watson* Or *Chapman* Standard.

Respondent contends that the *Evans* error was harmless under both the "reasonable probability" test in *People v. Watson* (1956) 46 Cal.2d 181

and the "harmless beyond a reasonable doubt" test in *Chapman v. California* (1967) 386 U.S. 18, 24. Respondent is mistaken.

Before reaching the merits of the argument, it bears noting that although the *Watson* standard is less demanding than the *Chapman* standard, it is not toothless. Under *Watson*, a reasonable probability "does not mean more likely than not, but merely a *reasonable chance*, more than an *abstract possibility*. [Citations.]" (*College Hospital, Inc. v. Superior Court* (1994) 8 Cal.4th 704, 715, emphasis in original.) Thus, under *Watson*, prejudice exists whenever the appellant can "'undermine confidence'" in the result achieved at trial. (*Ibid.*)

Respondent does not attempt to defend the harmless error analysis in the Court of Appeal opinion.[4] Rather, respondent makes three other points, none of which is persuasive. *First*, respondent recites evidence that Jesus C. identified Mena at the showup, that police arrested Mena a few blocks away sitting in a chair marked with East San Diego gang graffiti, that Mena had a steak knife in his pocket when he was arrested, and that he had gang connections. (RB at 30.) None of this evidence so compellingly points to guilt that it overcomes the prejudice arising from the trial court's error in denying the lineup motion, namely, excluding evidence that Jesus C. would not have been able to identify Mena in a formal lineup. Notably, the Court of Appeal did not make a finding that the evidence of guilt was overwhelming or even strong.

Respondent begins by asserting that the showup did not involve a "substantial likelihood of misidentification." (RB at 31.) That assertion – which is the standard for whether an out-of-court identification must be

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[4] As set forth in Mena's opening brief, the Court of Appeal fallaciously reasoned that the *Evans* error was harmless because the failure to make an in-court identification was "substantially similar" to the lineup evidence that Mena was denied. (AOB at 23-25.)

suppressed (e.g., *Simmons v. United States* (1968) 390 U.S. 377, 384) – is inapt because Mena does not seek to suppress the showup identification. Rather, Mena's point is that the *Evans* error was prejudicial in part because the showup evidence was weak. As set forth in Mena's opening brief, (1) case law and legal scholarship show that uncorroborated eyewitness identifications of strangers may be unreliable even in the best of circumstances; (2) the chaotic circumstances of the assault made it difficult for Jesus C. to get a good look at the assailants; (3) the victims did not know the assailants; (4) the victims' descriptions of the assailants were highly generalized and, according to the victims and the police, fit numerous young men in the area; and (5) the circumstances of the showup – with the suspects in handcuffs and viewed from a substantial distance – were suggestive and created a well known risk of misidentification. (AOB at 25-27.) Although respondent fails to address or dispute any of these points, the fact remains that suggestive procedures of the showup identification undermined the probative value of the identification.

The other evidence on which respondent relies (RB at 30) added very little to the prosecution's case. Mena was arrested a few blocks away in the front yard of a house sitting in a chair marked with gang graffiti. But that fact carries little weight for two different reasons. First, by police estimates, 200 East San Diego gang members and 400 gang associates operated in the area. (2 RT 202-203, 212.) Also, as the police acknowledged, there were lots of young, shaved-head, Hispanic males (gang and non-gang) in the area. (2 RT 224, 3 RT 257.) Being a young, male Hispanic with a shaved head in that neighborhood, even sitting in a chair with gang graffiti, had little or no evidentiary value. Second, over a dozen assailants were involved in the attack (2 RT 58), but only four suspects were found at the house. Moreover, the reason the police stopped at that house was because they *mistakenly* believed a nearby car was

involved in the assault and they saw four Hispanic men in the yard. (2 RT 171, 191, 211; 3 RT 251.) Thus, the probative value of the fact that Mena was in the front yard is virtually nonexistent. Mena's possession of a steak knife also is not probative of guilt because there is no evidence that the knife had any connection to the assault. Moreover, there was no other corroborating evidence of Mena's involvement in the assault. Indeed, Mena was cooperative with the police, did not attempt to flee, and did not make any incriminating statements. (2 RT 188, 200; 3 RT 257-258.) Although Mena discussed these points in his opening brief (AOB at 28-29), respondent fails to address any of them.

Second, respondent dismisses the jury's request for a readback as irrelevant because the "jurors ultimately resolved the issue against" Mena. (RB at 30.) Thus, according to respondent, indications that the jury struggled with an issue is *always* irrelevant to a prejudice analysis when the jury convicts the defendant. This is contrary to cases finding requests for readbacks relevant to prejudice analysis. (See *People v. Pearch* (1991) 229 Cal.App.3d 1282, 1295; *People v. Williams* (1971) 22 Cal.App.3d 34, 38-40.) In some cases, the meaning of a request for a readback might be ambiguous if, for example, there were multiple issues at trial or the evidence against each the defendant was significantly different. Here, however, there was only one disputed factual issue at trial – identification – and that issue underlies the *Evans* motion and this appeal. Although there were three defendants at trial, the evidence against each was virtually identical (the evidence against Pasillas was slightly stronger because he fled when police approached). Thus, if the jury was struggling with the evidence, it was struggling with the evidence against Mena. Although, as Mena acknowledged in his opening brief, the request for a readback does not conclusively prove the case was close, it tends to show that is was, and therefore weighs in Mena's favor in the prejudice analysis.

Third, respondent contends that the prosecutor would have made the same closing argument even if Jesus C. failed to identify Mena at a formal lineup. Respondent speculates that at a lineup Jesus C. would have refused to identify Mena because he feared later being identified as a witness. (RB at 31.) This speculation ignores the substance and logic of the prosecutor's closing argument.

The prosecutor powerfully argued that Jesus C. did not make an in-court identification because he feared doing so while Mena watched him from only a few feet away. The prosecutor insinuated that Jesus C. would have identified Mena in court had he not been so afraid. (5 RT 632-633; 6 RT 724.) In making this argument, the prosecutor took the time to distinguish the fear Jesus C. would have felt in making a face-to-face identification in court from the relative safety he felt in anonymously making an identification at the showup.

> 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.*

(5 RT 632, emphasis added.)

That contrast exactly describes the difference between an in-court identification and a formal, police-supervised lineup at which Jesus C. would have viewed Mena with other similar-looking young men behind a one-way glass. Mena would not have been able to see Jesus C. during the formal lineup. Respondent thus is wrong when it claims the prosecutor could have argued that Jesus C.'s failure to identify Mena at a formal lineup was the same as his failure to identify Mena at trial. The prosecutor might have tried to argue that Jesus C. was afraid at the lineup, but that argument would be difficult to reconcile with Jesus C.'s willingness to identify Mena

at the showup, and it would have put the defense in a much better position to argue that Jesus C.'s identification at the showup was sufficiently unreliable to create a reasonable doubt.

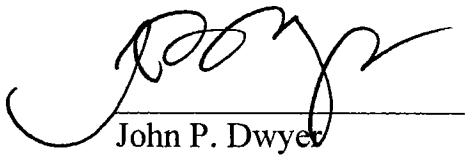
Taken together, these considerations undermine confidence in the verdict. Whether under *Watson* or *Chapman*, the assault convictions must be reversed.

CONCLUSION

For the reasons discussed, this court should remand the case to the Court of Appeal to consider whether the trial court erred in denying Mena's lineup motion. Alternatively, this court should find that the trial court abused its direction in denying the lineup motion and remand for a new trial.

DATED: March 5, 2010

Respectfully submitted,



John P. Dwyer
Attorney for Appellant
JOAQUIN MENA

CERTIFICATE PURSUANT TO CRC RULE 8.520(c)(1)

I, John P. Dwyer, counsel for appellant Joaquin Mena, certify pursuant to the California Rules of Court that the word count for this document is 6,649 words, excluding the tables, this certificate, and any attachment permitted under rule 8.504(c)(3). This document was prepared in Microsoft Word, and this is the word count generated by the program for this document.

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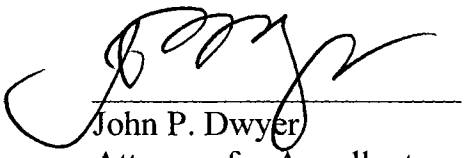

John P. Dwyer
Attorney for Appellant
Joaquin Mena

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 **APPELLANT'S REPLY BRIEF ON THE MERITS** 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:

Clerk, Court of Appeal
Fourth Appellate District, Div. One
750 B Street, Suite 300
San Diego, CA 92101

Attorney General's Office
P.O. Box 85266
San Diego, CA 92186-5266

Joaquin Mena
5312 Oak Park Dr.
San Diego, CA 92105

Howard C. Cohen
Appellate Defenders, Inc.
555 West Beech Street, Suite 300
San Diego, CA 92101

Clerk, San Diego County Superior Court
[for Judge Bernard Revak]
222 West Broadway
San Diego, CA 92101

San Diego County District Attorney's Office
330 West Broadway
San Diego, CA 92101

Keith H. Rutman
402 West Broadway, Suite 2010
San Diego, CA 92101-8516
[Trial counsel]

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

Executed this 5th day of March 2010 at San Francisco, California.

John P. Dwyer