Supreme Court No. _________

In the Supreme Court of the State of California

The People, Plaintiff and Respondent, **v.** **Ryann Lynn Jones**, Defendant and Appellant.	Court of Appeal No. F068996 Tulare County Superior Court No. VCF219203

Appeal From The Superior Court Of Tulare County

Honorable Joseph Kalashian, Judge Presiding

Petition for Review

Stephen Greenberg
Attorney at Law (SBN 88495)
P.O. Box 754
Nevada City, CA 95959-0754
Telephone: (530) 265-3696
Email: sgberg1@mac.com

Appointed by Court of Appeal,
in Conjunction with the Central
California Appellate Program
Independent Case System

Attorney for Appellant
Ryann Lynn Jones

Table of Contents

Table of Authorities 5
Petition for Review 9
Issues Presented for Review 10
Brief in Support of Request for Review 13
Statement of Case and Facts 13
I. Introduction; procedural history 13
II. Factual issues 14
Argument: Necessity for Review 18
I. Review is necessary in order to breathe life into the due process requirement that California must provide "minimum safeguards" in support of an "adequate and effective" direct appeal: What safeguards apply to the appellate opinion? 18
A. For the sake of criminal appellants and California's entire appellate justice system, the issue needs resolution. 19
1. Established due process and related principles are so vague as to provide insufficient guidance. 19
2. Material appellate error is an important, systemic issue. 22
3. Due process concerns aside, this court should exercise its supervisory powers to ensure the integrity of appellate review. 27
4. California provides no meaningful remedy for appellate error. 27
5. Holding appellate courts to meaningful due process or supervisory standards would impose no unreasonable burden on the state. 29
6. This case is an ideal vehicle to address the issue. 29
B. Review would allow this court to identify significant elements of an "adequate and effective" appellate decision. 30
1. Facts: The reviewing court mustn't rely on a material mischaracterization of or material failure to consider facts in the record. 30
a) Relevant principles 30
b) The Court of Appeal opinion 31
2. Facts: The reviewing court mustn't rely on its own factual or credibility determinations, where those are reserved for the trier of fact. 37

a) Relevant principles 37
b) Court of Appeal opinion 39
3. Law: The reviewing court mustn't rely on a material misstatement of or material failure to acknowledge settled law, or on an inapplicable legal principle. 40
a) Relevant principles 40
b) Court of Appeal opinion 41
4. Issues: The reviewing court mustn't materially mischaracterize or fail to consider or resolve a properly briefed issue. 41
a) Relevant principles 41
b) Court of Appeal opinion 43
5. Issues: The reviewing court mustn't materially rely on an unbriefed issue. 43
a) Relevant principles 43
b) Court of Appeal opinion 44
6. Prejudice/harmless error: Where the reviewing court finds or presumes error, the court must conduct relevant "whole-record" review and not simply recite evidence supporting the judgment. 45
a) Relevant principles 45
b) Court of Appeal opinion 48
7. Harmless error under federal Constitution: Where in a criminal case the reviewing court finds or presumes error, the court must hold the state to its burden of proving harmlessness beyond a reasonable doubt. 51
a) Relevant principles 51
b) Court of Appeal opinion 52
C. Review would allow this court to determine remedies for a less than "adequate and effective" appellate decision. 52

II. Review is necessary to determine whether, as to improperly suggestive eyewitness identification, a defendant is somehow entitled to less due process protection where the evidence was introduced as uncharged misconduct. 53
A. In determining whether due process was violated and whether the error was harmless, the evidence's character as uncharged misconduct has no significance. 53
B. The single-photo identifications were unfairly suggestive. 55
C. Under all the circumstances, the identifications weren't independently reliable. 56

D. The error can't be shown harmless beyond a reasonable doubt. 57

III. Review is necessary to determine whether the reviewing court may treat as harmless error, based on generic pattern instructions, an extended guilt-phase argument urging jurors to identify with the decedent and her mournful parent, where the prosecutor ignores sustained objections and the trial court refuses to admonish the jury. 58

A. Trial court proceedings 58

B. Appellate proceedings 59

C. Review is necessary to explore the extent to which a guilt-phase victim-impact argument interferes with the due process right to a fair trial, requires court intervention, and can't be excused as harmless because generic pattern instructions were given. 60

IV. The cumulative impact of the errors denied defendant due process and a fair trial. 62

Conclusion 63

Certificate of Length 63

Appendices in Supreme Court copies (rule 8.504(b)(4)):

A: Court of Appeal Opinion (40 pp),

B: Order Modifying Opinion & Denying Rehearing (2 pp)

C: Exhibit 29 (photograph)

Declaration of Service 64

Table of Authorities

Cases

Amwest Surety Ins. Co. v. Wilson (1995) 11 Cal.4th 1243 22
Anders v. California (1967) 386 U.S. 738 .... 42, 43
Arizona v. Fulminante (1991) 499 U.S. 279 47
Arrendondo v. Neven (9th Cir. 2014) 763 F.3d 1122 28
Bankhead v. ArvinMeritor, Inc. (2012) 205 Cal.App.4th 68 45
Bell v. Cone (2005) 543 U.S. 447 42
Bouie v. Columbia (1964) 378 U.S. 347 20
California School Bds. Assn. v. State Bd. of Education (2010) 186 Cal.App.4th 1298.. 42
California v. Roy (1996) 519 U.S. 2 39
Caperton v. A.T. Massey Coal Co., Inc. (2009) 556 U.S. 868.................... 27
Cavazos v. Smith (2011) 565 U.S. 1 38
Chapman v. California (1967) 386 U.S. 18 .... *passim*
Cooter & Gell v. Hartmarx Corp. (1990) 496 U.S. 384 .... 31, 40
Costco Wholesale Corp. v. Superior Court (2009) 47 Cal.4th 725 40
Dillon v. United States (2010) 560 U.S. 817 38
Donnelly v. DeChristoforo (1974) 416 U.S. 637 61
Elkins v. Superior Court (2007) 41 Cal.4th 1337 .... 27, 28
Evitts v. Lucey (1985) 469 U.S. 387... *passim*
Federal Ins. Co. v. Workers' Comp. Appeals Bd. (2013) 221 Cal.App.4th 1116 42
Fry v. Pliler (2007) 551 U.S. 112 46
Gamache v. California (2010) 562 U.S. 1083 51
Griffin v. Illinois (1956) 351 U.S. 12 19
Haraguchi v. Superior Court (2008) 43 Cal.4th 706................................ 40
Holmes v. South Carolina (2006) 547 U.S. 319 46
In re Cortez (1971) 6 Cal.3d 78 31
In re Jessup (1889) 81 Cal. 408 .... 29, 30
In re Richards (2016) 63 Cal.4th 291.. 14
In re S.C. (2006) 138 Cal.App.4th 396 30
In re Stephanie M. (1994) 7 Cal.4th 295 37
In re Steven B. (1979) 25 Cal.3d 1.. 26
In re Zeth S. (2003) 31 Cal.4th 396 38
Johnson v. California (2005) 543 U.S. 499.. 40
Johnson v. Fankell (1997) 520 U.S. 911 18
LeMons v. Regents of University of California (1978) 21 Cal.3d 869 47
Lewis v. County of Sacramento (2001) 93 Cal.App.4th 107 30
Manson v. Brathwaite (1977) 432 U.S. 98... 54, 56
Neil v. Biggers (1972) 409 U.S. 188.. 49
Payne v. Tennessee (1991) 501 U.S. 808... 58
Penson v. Ohio (1988) 488 U.S. 75 .... 42, 44

People v. Alice (2007) 41 Cal.4th 668 43
People v. Alvarez (1996) 14 Cal.4th 155 20
People v. Anderson (1978) 20 Cal.3d 647 47
People v. Barton (1978) 21 Cal.3d 513 20
People v. Brown (2016) 245 Cal.App.4th 140 47
People v. Cluff (2001) 87 Cal.App.4th 991 31
People v. Cross (2005) 127 Cal.App.4th 63 31
People v. Dominguez (2006) 39 Cal.4th 1141 47
People v. Ewoldt (1994) 7 Cal.4th 380 54
People v. Feggans (1967) 67 Cal.2d 444 20
People v. Fleming (1913) 166 Cal. 357 46
People v. Galland (2008) 45 Cal.4th 354 29
People v. Garcia (2005) 36 Cal.4th 777 46
People v. Giardino (2000) 82 Cal.App.4th 454 45
People v. Guiton (1993) 4 Cal.4th 1116 46
People v. Gutierrez (June 1, 2017, S224724) ___ Cal.5th ___ 22, 26
People v. Harris (1994) 9 Cal.4th 407 49
People v. Hawthorne (1992) 4 Cal.4th 43 19
People v. Hill (1998) 17 Cal.4th 800 .... 23, 62
People v. Howard (1992) 1 Cal.4th 1132 20
People v. Jackson (2014) 58 Cal.4th 724 .... 10, 22, 26, 52
People v. Jones (1990) 51 Cal.3d 294 45
People v. Kennedy (2005) 36 Cal.4th 595 41
People v. Merritt (2017) 2 Cal.5th 819 38
People v. Mil (2012) 53 Cal.4th 400 .... 46, 47, 48
People v. Newson (1951) 37 Cal.2d 34 46
People v. Riccardi (2012) 54 Cal.4th 758 49
People v. Schmitz (2012) 55 Cal.4th 909 44
People v. Scott (1998) 64 Cal.App.4th 550 20
People v. Seumanu (2015) 61 Cal.4th 1293 .... 60, 62
People v. Stanley (1995) 10 Cal.4th 764 42
People v. Taylor (1991) 6 Cal.App.4th 1084 43
People v. Thomas (2013) 218 Cal.App.4th 630 42
People v. Thompkins (1987) 195 Cal.App.3d 244 27
People v. Thompson (1980) 27 Cal.3d 303 .... 50, 57
People v. Vance (2010) 188 Cal.App.4th 1182 .... 60, 61
People v. Watson (1956) 46 Cal.2d 818 .... 45, 46, 52
People v. Wende (1979) 25 Cal.3d 436 44
People v. Wilkins (2013) 56 Cal.4th 333 45
People v. Wright (1988) 45 Cal.3d 1126 57
People v. Young (2005) 34 Cal.4th 1149 .... 37, 38
Perry v. New Hampshire (2012) 565 U.S. 228 .... 56, 57
Powers v. City of Richmond (1995) 10 Cal.4th 85 29
Richardson v. Superior Court (2008) 43 Cal.4th 1040 45
Robins v. Pruneyard Shopping Center (1979) 23 Cal.3d 899 20

Rufo v. Simpson (2001) 86 Cal.App.4th 573 37
Satterwhite v. Texas (1988) 486 U.S. 249 .... 47, 48
Schlup v. Delo (1995) 513 U.S. 29 40
Schriro v. Smith (2005) 546 U.S. 6 28
Sears v. Upton (2010) 561 U.S. 945 48
Shelley v. Kraemer (1948) 334 U.S. 1 22
Simmons v. United States (1968) 390 U.S. 377 .... 11, 35, 57
Smith v. Robbins (2000) 528 U.S. 259 .... 19, 44
Strickland v. Washington (1984) 466 U.S. 668 .... 45, 48
Sullivan v. Louisiana (1993) 508 U.S. 275 .... 38, 57
Taylor v. Kentucky (1978) 436 U.S. 478 62
Taylor v. Maddox (9th Cir. 2004) 366 F.3d 992 .... 31, 40
United States v. Hasting (1983) 461 U.S. 499 47
Uriarte v. United States Pipe & Foundry Co. (1996) 51 Cal.App.4th 780 30
Wade v. Terhune (9th Cir.2000) 202 F.3d 1190 40
Weiler v. United States (1945) 323 U.S. 606 38
Zapata v. Vasquez (9th Cir. 2015) 788 F.3d 1106 .... 60, 61

Statutes

Code Civ. Proc., § 902 23
Code Civ. Proc., § 904 23
Code Civ. Proc., § 909 38
Evid. Code, § 1101 .... 11, 49, 54
Gov. Code, § 68081 .... 25, 28, 43, 44
Pen. Code, § 1237 18
Pen. Code, § 1252 41

Jury Instructions

CALCRIM No. 200 61
CALCRIM No. 220 61
CALCRIM No. 222 61
CALCRIM No. 302 39
CALCRIM No. 315 57
CALCRIM No. 375 49

Rules

Cal. Rules of Court, rule 8.252 38
Cal. Rules of Court, rule 8.260 21
Cal. Rules of Court, rule 8.264 21
Cal. Rules of Court, rule 8.268 27
Cal. Rules of Court, rule 8.366 .... 21, 27
Cal. Rules of Court, rule 8.500 .... passim
Cal. Rules of Court, rule 8.504 63
U.S. Supreme Court Rule 10 27

Constitutional Provisions

Cal. Const., art, I, § 16 11
Cal. Const., art. I, § 14 21
Cal. Const., art. I, § 15 .... 11, 18, 19
Cal. Const., art. VI, § 13 45
U.S. Const., 6th Amend. 11, 38, 45
U.S. Const., 14th Amend. 12, 18

Other Authorities

1 Appeals & Writs in Criminal Cases (3d ed. Cal CEB), § 5.8 41
CalAppErrors, <http://www.calapperrors.com> 24
Google Scholar, <https://scholar.google.com> 23
How Cases Come to the Supreme Court 9
Mathieson & Gross, Review for error, *Law, Probability and Risk* (2003) 2 24
Reinhardt, The Demise of Habeas Corpus and the Rise of Qualified Immunity (2015) 113 Mich. L.Rev. 1219 28
Reynoso & Greenberg, *A New Ground for Review and Transfer*, S.F. Daily Journal (Aug. 2, 2016) 24, 28
Roussos, *How to Maximize Your Chances of Showing an Abuse of Discretion on Appeal*, The Daily Recorder (Apr. 20, 2009) 40

In the Supreme Court of the State of California

The People,

Plaintiff and Respondent,

v.

Ryann Lynn Jones,

Defendant and Appellant.

Court of Appeal
No. F068996

Tulare County
Superior Court
No. VCF219203

Petition for Review

To the Honorable Tani Cantil-Sakauye, Chief Justice, and the Honorable Associate Justices of the California Supreme Court:

Under California Rules of Court, rule 8.500,[1] defendant Ryann Lynn Jones petitions for review of the May 17, 2017 Court of Appeal opinion affirming his judgment of second degree murder and fatal child assault. The unpublished opinion (opn) is attached, followed by an order modifying it and denying rehearing. (Appendices A, B.)

Defendant recognizes this court isn't one of error review — at least, not in the sense of testing "every case" to figure out if it was "handled correctly." (How Cases Come to the Supreme Court, <http://www.courts.ca.gov/documents/casescome.pdf>, p. 3.) But what about *systemic* error in appellate review itself? As this case reveals, it's real; it's serious — and it needs this court's attention.

[1] Further unspecified rule citations are to the California Rules of Court.

Issues Presented for Review

Re the proper functioning of appellate courts, consistent with constitutional due process and jury trial guarantees and this court's supervisory power:

1. Given the Fourteenth Amendment's command that California must "guarantee[] a criminal appellant … certain minimum safeguards necessary to make [his or her] appeal 'adequate and effective'" and ensure it isn't "decided … in a way that [is] arbitrary with respect to the issues involved" (*Evitts v. Lucey* (1985) 469 U.S. 387, 392, 404), does this state's direct-appeal system fulfill the Constitution's promise? Or does it violate due process where, with no meaningful remedy available, the Court of Appeal may commit material errors in affirming a criminal judgment by, as occurred here:
   a. finding and relying on facts without record support;
   b. substituting a more deferential standard of review for a stricter one required by settled law;
   c. purporting to apply the federal *Chapman* harmless-error test[2] by finding the "[d]efendant has failed to demonstrate prejudice" (cf. *People v. Jackson* (2014) 58 Cal.4th 724, 793, 808 (conc. & dis. opn. of Liu, J.); and
   d. determining harmless error by making its own appellate findings as to weight and credibility of evidence and ignoring settled close-case factors?

---

[2] *Chapman v. California* (1967) 386 U.S. 18, 24 [state's burden to prove constitutional error harmless beyond a reasonable doubt].

2. As to the last-noted example, does a reviewing court's appellate fact-finding violate the constitutional right to a jury trial (U.S. Const., 6th Amend.; Cal. Const., art, I, § 16)?

3. Regardless of, or in addition to, federal due process, what "minimum safeguards" does California's own due process guarantee (Cal. Const., art. I, § 15) require from its appellate justice system?

4. To the extent due process imposes no specific "minimum safeguards" in California appeals, what safeguards does this court require through its supervisory power?

Re due process and the admission of uncharged misconduct evidence despite unfairly suggestive identifications:

5. Where in a circumstantial-evidence, cause-of-death case an officer develops uncharged misconduct evidence (Evid. Code, § 1101, subd. (b)) by choosing not to use an existing six-pack photo lineup and instead showing each eyewitness a single picture of defendant, while also choosing not to give any *Simmons*-type admonition:[3]

    a. were the identifications unfairly suggestive and unreliable, so that the evidence violated due process principles; and if so,

    b. can the error properly be deemed harmless beyond a reasonable doubt by rejecting defense evidence and finding the "[d]efendant has failed to demonstrate prejudice"?

[3] *Simmons v. United States* (1968) 390 U.S. 377.

Re prosecutorial misconduct in importing a penalty phase closing argument into the guilt phase of a capital trial:

6. Where, in a capital-case guilt trial focused on cause of death, the prosecutor ends her initial closing argument with a lengthy plea for jurors to identify with the child decedent, her mournful father, and "nature's way" as reflected in the prosecutor's mother's death; and the argument proceeds to its conclusion despite defense counsel's seven objections; and the trial court refuses to admonish the jury; and the trial court, Attorney General, and Court of Appeal agree the argument was improper:
   a. was the trial fundamentally unfair and a denial of due process (U.S. Const., 14th Amend.); and
   b. whether state or federal error, can it reasonably be deemed harmless by relying on generic pattern instructions and sustained objections ignored by the prosecutor?

Re cumulative error and its impact on a trial's fundamental fairness:

7. Did the cumulative impact of the errors at defendant's trial deny him the federal due process right to a fundamentally fair trial?

Brief in Support of Request for Review

Statement of Case and Facts[4]

I. Introduction; procedural history

On March 22, 2009, three-year-old Natalynn Miller died. As Natalynn's then-caretaker, her mother's boyfriend Ryann Jones was charged with special-circumstance torture-murder; as of early 2010, this was a capital case. (2CT 374, 425.). According to the prosecution, defendant beat Natalynn to death, while he insisted from the incident through trial that he'd tried helplessly to save her as she appeared to be choking (opn 9-11, 24-25); both sides presented expert testimony as well as many lay witnesses (opn 3-25). After deliberating more than 18 hours over five court days (7CT 1786; 8CT 1867-1878), the jury acquitted defendant of first-degree murder but convicted him of second-degree murder and fatal child assault; he's serving a 25-life prison sentence. (Opn 1-2.)

At issue on appeal: whether defendant was fairly convicted in an emotionally-charged, reasonably close trial where the prosecution evidence veered into several inflammatory incidents based on unfairly suggestive identifications of defendant (opn 25-30), and where the prosecutor improperly ended her opening argument by urging the jury to consider matters such as her own mother's death (opn 30-39; see also opn 40 [cumulative error]).

[4] Appellant generally adopts the opinion's review of case and facts (opn 1-25), except where noted.

II. Factual issues

For purposes of this petition, defendant leaves the overall story to the opinion (opn 3-25), while briefly explaining why — as to all significant factual areas — both parties offered credible evidence and presented theories that reasonably would have supported, for the prosecution, guilty verdicts; for defendant, acquittal (cf. *In re Richards* (2016) 63 Cal.4th 291, 312 ["the case against [defendant] was entirely based on circumstantial evidence, and much of that evidence was disputed"]):

A. Expert witnesses disagreed about

1. the coroner's autopsy decisions (opn 8-11; e.g., 28RT 3462-3464, 3466-3467, 3473-3476 [Dr. Cohen criticized autopsy but didn't believe its errors affected cause-of-death finding]; 28RT 3623-3633, 3640 [Dr. Bonnell found it inconsistent with acceptable child-autopsy practices, resulting in inadequate assessments of possible infection, bleeding source, and nature and timing of bruises]);

2. the extent, timing, and sources of Natalynn's bruising (opn 8-11); e.g., 28RT 3479-3480, 3500, 3628, 3630, 3646-3648 [Drs. Cohen and Bonnell: Dr. Hartman's reliance solely on bruise observation less reliable than testing tissue samples, not done here]; 22RT 2523; 23RT 2530, 2541, 2543, 2548-2549, 2593-2594; 27RT 3314, 3318-3319, 3332, 3344-3345; 28RT 3433, 3435-3448, 3454-3455 [Drs. Hartman, Bruhn, and Cohen believed Natalynn's head bruises and bleeding probably resulted from traumatic impacts in close proximity while she was alive]; 28RT 3636-3643, 3646-3650, 3665-3666, 3673-3674, 3690, 3701-3705 [Dr. Bonnell: trauma may have produced sub-

dural hematomas, but timing and sources weren't at all clear, especially without tissue analysis; scalp injuries not particularly severe]);

3. CPR's possible role in causing injuries (opn 8, 10-11); e.g., 22RT 2515-2516; 23RT 2556, 2579-2581, 2583-2584, 2592-2593; 27RT 3313-3316, 3319, 3350-3351, 3352-3353 [Drs. Hartman and Bruhn didn't believe injuries could have been CPR-caused, while conceding it wasn't impossible]; 22RT 2340 [hospital pediatrician: CPR efforts on child could cause bruising]; 28RT 3646, 3653-3659, 3673, 3688 [Dr. Bonnell: upper chest bruising, abdominal bleeding, and chin, mouth, and back injuries all could have been from CPR efforts, including defendant's]; 29RT 3744-3748, 3750, 3754-3758, 3766-3671, 3789-3791, 3794, 3799 [CPR expert David Satterlee: Natalynn's back, chest, and chin bruises appeared to be resuscitation-caused]);

4. whether abuse was shown (opn 9-11; e.g., 27RT 3317-3318, 3329-3333, 3336-3337, 3342-3343, 3348, 3353-3354 [Dr. Bruhn: some bruises may have been accidental, but location and quantity suggested intentional infliction]; 28RT 3702, 3712-3713 [Dr. Bonnell: even multiple injuries might not reflect abuse; and even abused children can die accidentally]);

5. the possibility and impacts of infection, falling, and choking (opn 4, 7, 9-10, 14, 21, 23-24; e.g., 28RT 3434-3435, 3488-3490 [Dr. Cohen: nostril mark not infection]; 28RT 3632-3635, 3669-3671 [Dr. Bonnell: could have been from infection, consistent with evidence Natalynn had inserted shell]; 23RT 2599-2600, 3411; 28RT 3646-3647, 3668-3669 [Dr. Hartman: infection may enter through nose; symptoms may include vomiting and dizziness]; 28RT 3639; 31RT 4187-4209 [Dr. Bonnell: short fall can cause subdural hema-

toma; Dr. Bruhn criticized articles concluding short falls can be fatal for children, would be extremely rare]; 28RT 3465, 3500 [Dr. Cohen: even if Natalynn choked on food, not fatal]; 28RT 3631, 3654-3661, 3671-3672, 3701, 3713 [Dr. Bonnell re paramedic testimony about dislodging food from Natalynn's airway: she couldn't breathe, likely from collapse through EMT arrival]); and

6. the cause of death itself and whether it even involved a homicide (opn 9-11 [Dr. Hartman: multiple blunt force trauma; Drs. Bruhn and Cohen: same, homicide; Dr. Bonnell: asphyxiation, i.e., choking to death on food]).

B. Lay witnesses offered contradictory opinions about many facts, including

1. whether Natalynn was prone to accident/injury (opn 7, 11, 15, 17; e.g., 26RT 3200, 3239; 27RT 3262, 3265-3266; 30RT 3885-3887 [defendant's brother and friend: uncoordinated or awkward]; 29RT 3809-3811, 3839-3841, 3850-3852, 3856; 30RT 3942 [grandmother: investigative child who sometimes got injured]);

2. whether she was afraid of defendant and the significance of "monster" (opn 13, 15, 22, 30); and

3. whether defendant seemed scared or in grief after Natalynn's death (24RT 2802-2803, 2805-2806; 30RT 3890-3891).

C. Witnesses gave competing versions of key events, e.g.,

1. whether defendant cared for Natalynn (opn 14, 22-23, 29);

2. whether he had intentionally hurt her (opn 7-8, 12-13; e.g., 24RT 2771-2775, 2868-2869 [Natalynn said defendant accidentally hit her while they were playing]; 25RT 2935-2936, 2942,

2947; 26RT 3188-3189; 29RT 3842-3843; 30RT 3871-3872, 3874 [five mandated abuse reporters knew Natalynn during this period but made no report]);

3. whether loud noises came from the apartment shortly before her death (opn 5-6; 31RT 4095-4096 [defendant identified rumbling as speaker noise and believed neighbor was incorrect about hearing thumps]; 31RT 4095; 7CT 1768-1770 [several times during 911 call defendant urged Natalynn, "Come on baby," as reported by neighbor]); and

4. whether the police performed CPR at the scene (opn 3).

D. The jury heard evidence suggesting bias in important witnesses who testified they were concerned about defendant mistreating Natalynn:

1. Troy Miller said he would beat up anyone who got involved with Natalynn's mother (24RT 2723, 2818-2822);

2. Jessica Rosales was overly possessive of Natalynn (26RT 3106-3107 [defendant's mother]; 29RT 3848 [Natalynn's maternal grandmother]); and

3. While defendant was dating Natalynn's mother, Andy Rose wanted to reunite with and marry her (25RT 2894-2895, 2903-2904, 2923-2924).

E. The McDonald's uncharged-incident evidence was rebutted with evidence casting doubt on the eyewitness identifications (opn 17-21, 27-28; see arg II, *post*).

Argument: Necessity for Review

I. Review is necessary in order to breathe life into the due process requirement that California must provide "minimum safeguards" in support of an "adequate and effective" direct appeal: What safeguards apply to the appellate opinion?

True, the United States Constitution doesn't guarantee criminal defendants the right of appeal. (*Johnson v. Fankell* (1997) 520 U.S. 911, 922, fn. 13.) But where a state provides that right — as does California (Pen. Code, § 1237) — "the procedures used in deciding appeals must comport with the demands of the Due Process … Clause[] of the Constitution." (*Evitts v. Lucey, supra,* 469 U.S. 387, 393; U.S. Const., 14th Amend.; Cal. Const., art. I, § 15.) It's clear that these procedures must include support for the indigent appellant, such as effective appointed counsel and free transcripts (*Evitts v. Lucey, supra,* 469 U.S. 387, 392-396); but what about the most important appellate procedure of all: the *decision itself*?

Decades after the high court cited due process's "demands," that territory remains woefully unexplored. Which leaves defendants subject to standard-free, unreviewable appellate decision-making. Standard-free, because case law has identified virtually no due process checks on the opinion itself. Unreviewable, because even if the Court of Appeal issues a materially erroneous opinion, the error itself, however significant, isn't a ground for this court's discretionary review. (Rule 8.500(b).)

There's no practical or policy rationale for standardless, unreviewable appeals; on the contrary, due process offers a powerful

constitutional reason to consider, adopt, and implement meaningful standards. Defendant urges this court to open that long-locked door.

A. For the sake of criminal appellants and California's entire appellate justice system, the issue needs resolution.

1. Established due process and related principles are so vague as to provide insufficient guidance.

Here's what (little) we know: "[T]he Fourteenth Amendment guarantees a criminal appellant pursuing a first appeal as of right certain minimum safeguards necessary to make that appeal 'adequate and effective'…." (*Evitts v. Lucey, supra,* 469 U.S. 387, 392; *Griffin v. Illinois* (1956) 351 U.S. 12, 20 ["adequate and effective appellate review"]; accord, *Smith v. Robbins* (2000) 528 U.S. 259, 279.) So the state must "offer each defendant a fair opportunity to obtain an adjudication on the merits of his appeal." (*Evitts v. Lucey*, *supra,* 469 U.S. 387, 405.) And just a bit more specifically, the state must "reasonably ensure[] that an indigent's appeal will be resolved in a way that is related to the merit of that appeal." (*Smith v. Robbins*, *supra*, 528 U.S. 259, 276-277.)

Due process is violated, then, where the state "decide[s] the appeal in a way that was arbitrary with respect to the issues involved." (*Evitts v. Lucey, supra,* 469 U.S. 387, 404; *id.* at 393-394 [appeal must be "more than a 'meaningless ritual'"].)

Naturally, this court has acknowledged the Fourteenth Amendment's guarantee of a "defendant's due process right to meaningful appellate review. [Citation.]" (*People v. Hawthorne* (1992) 4 Cal.4th 43, 67; *People v. Taylor* (2010) 48 Cal.4th 574, 660.) As for state due process (Cal. Const., art. I, § 15), defendant is unaware of

any decisional law expressly applying it in this context, but whatever the source(s) may be, California mandates "meaningful" appellate review. (*People v. Alvarez* (1996) 14 Cal.4th 155, 196, fn. 8, citing *People v. Howard* (1992) 1 Cal.4th 1132, 1165.) In any event, "[t]he duty of this court is to help determine what ['due process'] means in California." (*Robins v. Pruneyard Shopping Center* (1979) 23 Cal.3d 899, 909, aff'd sub nom. *Pruneyard Shopping Center v. Robins* (1980) 447 U.S. 74.)

As for specifics — in what ways can an appellate opinion either ensure or deny due process? — there's little if any guidance. One exception, inapplicable here: Where a reviewing court applies a novel statutory construction to affirm a conviction, due process is violated. (*Bouie v. Columbia* (1964) 378 U.S. 347, 362-363.)

It's not as though due process is an entirely empty promise: Along with defendants' statutory right of appeal, they have due process rights to (1) reasonably complete transcripts (*Griffin v. California, supra*, 351 U.S. 12, 20; *People v. Howard, supra*, 1 Cal.4th 1132, 1165) and (2) the assistance of competent appellate counsel who must (a) make sure the record is adequate (*People v. Barton* (1978) 21 Cal.3d 513, 519-520), (b) submit a brief raising "all … arguable" issues, complete with relevant transcript citations and "discuss[ion] of legal issues with citations of appropriate authority" (*People v. Feggans* (1967) 67 Cal.2d 444, 447), and (c) "play the role of an active advocate" in "assist[ing] the defendant to obtain a fair decision on the merits" (*Evitts v. Lucey*, *supra*, 469 U.S. 387, 394-395). In this way, the state "ensure[s] the fairness of the appellate process." (*People v. Scott* (1998) 64 Cal.App.4th 550, 564.)

And yet, something — the elephant in the room — is missing. We know quite a bit about clerks' and counsels' constitutional duties in a process whose culmination is a decision that must "adequately," "effectively," "meaningfully," "fairly," and "non-arbitrarily" resolve appellate issues — but there's no case law explaining what that actually *means*, or even testing an appellate opinion against those standards. It must be "in writing with reasons stated" (Cal. Const., art. I, § 14) — a requirement designed to "promote[] a careful examination of the facts and the legal issues, and a result supported by law and reason." (*People v. Kelly* (2006) 40 Cal.4th 106, 117.) But those are only ideals; defendant is unaware of any case turning ends into means. And a written-reasons mandate doesn't protect an appellant from material error. So although an opinion fulfills the mandate even with "only essential facts," "only essential issues," and without "extended discussion of legal principles" (*Id.* at 121), what does it mean if, for example, the opinion's fails to include an "essential fact"? Or includes one that isn't, in fact, a fact? Or relies on an inapplicable "legal principle"? This petition seeks those answers.

Beyond the written-reasons requirement, state law provides no meaningful details. In a defendant's criminal appeal, Penal Code section 1252 sets forth a duty to "consider and pass upon" "the issues raised by the defendant" and state-adverse rulings if argued by the Attorney General; but decisional law hasn't explored the statute in this context. As for the Rules of Court, rule 8.260 governing "Opinions" has been "Reserved" and so unwritten since 2007; the only detailed requirement is that an opinion must identify the participating justices. (Rules 8.264(a)(2), 8.366(a).)

So it's unnecessarily ironic that, as a constitutionally-based standard, "meaningful" is meaningless. That can and should change, and "[t]his case offers … an opportunity to clarify the constitutionally required duties of California … appellate judges …." (*People v. Gutierrez* (June 1, 2017, S224724) ___ Cal.5th ___, rehg petn pending, <http://www.courts.ca.gov/opinions/documents/S224724A.PDF>, slip opn, p. 2; *Amwest Surety Ins. Co. v. Wilson* (1995) 11 Cal.4th 1243, 1266 [constitutional "adequacy of the decision of the intermediate appellate court" addressed by this court "because this is an issue of statewide importance that is likely to recur"]; *Shelley v. Kraemer* (1948) 334 U.S. 1, 15, 18-20 [where state courts violate due process, Supreme Court has "obligation" to provide remedy].)

2. Material appellate error is an important, systemic issue.

To the extent the right to a fair, meaningful appeal remains unexamined and unenforced, the Court of Appeal is free to ignore it or treat it as if it had no specific meaning. For that matter, just as "few if any trials are entirely free from error" (*People v. Jackson, supra*, 58 Cal.4th 724, 793, 789 (conc. & dis. opn. of Liu, J.), there's no reason to presume all appellate decisions are error-free. And just as trial error may affect the judgment and trigger reversal, so appellate error may be material enough to affect the decision, triggering — nothing in particular.[5] Given the minuscule odds of further review, especially where the opinion is unpublished, it's normally the last word on the subject.

[5] In this petition defendant refers to errors reasonably likely to have affected the appellate result as "material."

For defendants in these circumstances, the right of appeal might as well be nonexistent. This gap between due process theory and appellate practice presents "an institutional concern" calling out for this court's attention, as "justice and fairness remain the touchstone of our criminal justice system." (*People v. Hill* (1998) 17 Cal.4th 800, 847.) And due process for criminal defendants aside, that institutional concern is equally valid for civil appellants, with the same right of appeal (Code Civ. Proc., §§ 902, 904) and substantial property or other interests at stake. Where the appellate opinion is likely the last judicial word on a case, it shouldn't be a materially erroneous one.

Defendant acknowledges it's difficult to determine the *extent* of appellate error in California. By its very nature, the problem is as invisible as it is important. Law libraries and legal databases are largely catalogs of trial court error, with relatively little attention paid to the appellate variety. A Google-Scholar California case law search for "trial error" yields 719 hits; "appellate error," nine. (<https://scholar.google.com>, accessed June 22, 2017.) Practice seminars routinely offer tips in how best to discover, develop, and argue issues on appeal, but relatively little discussion about the problem of appellate error itself. And for all the publicly debated issues involving criminal legislation, policing, bail, prosecution, trials, conviction of the innocent, sentencing, and prisons, probation, and parole, scant attention is given to the appellate process in general and decision-making in particular.

But there are scattered exceptions — noting that, for example, appellate error as to facts or issues "is usually invisible to everybody

but the parties themselves." And "when an appellate court fails to correct an error it ought to have rectified, this *appellate* error can only be identified and fixed if a higher appellate court exercises its power of review, and review by an upper level court, typically the state supreme court, is a rare event." (Mathieson & Gross, Review for error, *Law, Probability and Risk* (2003) 2, p. 263, original italics.) More recently, former Supreme Court and Court of Appeal Justice Cruz Reynoso lamented his "sense of personal frustration, and a sense of injustice" when, while he served on this court, "the memorandum prepared for the justices noted errors of law or fact but concluded that the case did not meet the criteria for granting a hearing." (Reynoso & Greenberg, *A New Ground for Review and Transfer*, S.F. Daily Journal (Aug. 2, 2016), p. 8.) And the fledgling website CalAppErrors (<http://www.calapperrors.com>) has begun collecting and documenting arguably erroneous appellate decisions, as "a resource for anyone concerned with appellate error in the state of California: How often does it occur? In what ways, and in what sorts of cases? Is it a problem worthy of attention, or not?" The site's objective is "to collect information that will help in exploring these questions and, ideally, lead to a more meaningful appellate review process, one with greater accuracy and accountability." (*Ibid.*, home page, accessed June 22, 2017.) Its premise: "To the extent that the appellate justice system tolerates even occasionally erroneous decision-making, with no effective remedy, the system is arguably flawed." (*Id.*, Why CalAppErrors?, http://www.calapperrors.com/faq/.)

In any event, for purposes of this petition, a quantitative analysis shouldn't be necessary; on the contrary, demanding one

would likely ensure the problem will remain unsolved. Still, this is a petition for review, not a theoretical paper, so defendant identifies multiple material errors in the attached opinion — both to illustrate his point and, he hopes, stir this court's interest in the systemic issue. (Sections A-6, B, *post*.) But his case is hardly unique, and he's not the first petitioner to seek review of the appellate due process issue raised here. (See, e.g., *People v. Sanders*, No. S238154, rev den 12/14/2016, petn arg I, pp. 22-28 ["The Court of Appeal deprived appellant of due process by failing to consider the entire record"], <http://www.calapperrors.com/people-v-sanders-9292016/>; *People v. Prock*, No. S218164, rev den 7/23/2014, petn arg I, pp. 16-21 ["Where the Court of Appeal isn't alone in relying on an exclusively judgment-favoring view of the record to find no error or harmless error, despite no claim of insufficient evidence, such an approach violates California law and federal due process"]; *People v. Aguilar*, No. S209226, rev den 5/15/2013, arg I, pp. 11-16 [same issue], <http://www.calapperrors.com/petitions-for-review/Aguilar(5)PFRev.pdf>; *People v. Roots*, No. S198035, rev den 1/11/2012, petn arg I, pp. 9-14 ["In introducing a material issue, relying on its unbriefed resolution, and denying rehearing, the Court of Appeal violated Government Code section 68081 and federal due process"].)

With this background, it's fair to ask what exactly does California do to ensure adequate, effective, meaningful appellate review? At least formally, little if anything; parties simply hope for a fair result, with no assurance they'll get one, and no meaningful remedy if they don't. Even if, somehow, not a single material error

ever occurred, we'd have to chalk it up to remarkable luck — not a reflection of the state's concerted effort to provide due process.

But if, instead, erroneous decisions are even sometimes issued, that would be an inexcusable result damaging not only to the losing parties, but also to Californians' sense of confidence in our justice system. (*In re Steven B.* (1979) 25 Cal.3d 1, 9 [inadequate appellate review "does not advance the cause of justice"].) Paraphrasing this court's recent observation, "[i]t is not only litigants who are harmed when the right to [appeal] is abridged. [An unfair legal procedure] erode[s] confidence in the adjudicative process, undermining the public's trust in courts. [Citations.]" (*People v. Gutierrez, supra*, No. S224724, slip opn, p. 2.)

Moreover, material appellate errors may result in prejudicial trial errors going forever uncorrected, with criminal defendants paying the heaviest price. (*Evitts v. Lucey, supra*, 469 U.S. 387, 399-400 ["A system of appeal as of right is established precisely to assure that only those who are validly convicted have their freedom drastically curtailed."]; *People v. Jackson, supra*, 58 Cal.4th 724, 792 (conc. & dis. opn. of Liu, J.) [adherence to settled appellate standards "serves to maintain the crucial role of appellate review in promoting adherence to the law"]; *id.* at 808 [failure to faithfully apply proper standard "compromises the fairness of the proceeding" and "weakens the role of appellate review in deterring future errors"].)

As a single petitioner, then, defendant shouldn't have to establish a certain minimum incidence of appellate error in order to show why it's an "important question of law[.]" (Rule 8.500(b)(1).)

3. Due process concerns aside, this court should exercise its supervisory powers to ensure the integrity of appellate review.

Whether or not the due process issue per se merits review, defendant urges this court to "exercise [its] inherent authority to ensure the orderly administration of justice and to settle important issues of statewide significance. [Citations.]" (*Elkins v. Superior Court* (2007) 41 Cal.4th 1337, 1346.) As defendant has explained, appellate error is just such an issue, and one that's long escaped judicial scrutiny. Review would allow this court to "provid[e] guidance to the [appellate] courts" (*ibid.*) where it's been in short supply. (See also, e.g., *People v. Thompkins* (1987) 195 Cal.App.3d 244, 252-253 [sensitivity to overriding legal principles and to a lower court's burdens may require both reversal and guidance].)

4. California provides no meaningful remedy for appellate error.

The problem isn't just that there are no guidelines to ensure meaningful appeals; it's also that should a violation occur — if, say, an opinion relies on a material error in affirming a judgment — California provides no meaningful remedy. Rehearing petitions are even more standard-free (rules 8.268(a)(1), 8.366(a) ["a reviewing court may order rehearing"]) and are routinely denied. And while trial error is a proper basis for appeal, appellate error per se isn't a ground for review (rule 8.500(b)) or certiorari (U.S. Supreme Court Rule 10); not surprisingly, only a relative handful of those discretionary petitions are granted. (How Cases Come to the Supreme Court, *supra*, p. 3 [this court "receives thousands of petitions for review every year and it grants fewer than 5 percent of them"]; *Caperton v. A.T. Massey Coal Co., Inc.* (2009) 556 U.S. 868, 899 (dis. opn. of Roberts, C.J.) ["The

success rate for certiorari petitions before this Court is approximately 1.1%"].)

A limited class of appellate parties aggrieved by error — in-custody criminal defendants seeking post-appellate relief from constitutional trial error — can also turn to the federal district court. But that's only for increasingly "limited authority on habeas review" of state decisions. (*Schriro v. Smith* (2005) 546 U.S. 6, 8; *Arrendondo v. Neven* (9th Cir. 2014) 763 F.3d 1122, 1125; see Reinhardt, The Demise of Habeas Corpus and the Rise of Qualified Immunity (2015) 113 Mich. L.Rev. 1219, 1220, <http://michiganlawreview.org/the-demise-of-habeas-corpus> [federal habeas regime "resembles a twisted labyrinth of deliberately crafted legal obstacles that make it as difficult for habeas petitioners to succeed in pursuing the Writ as it would be for a Supreme Court Justice to strike out Babe Ruth, Joe DiMaggio, and Mickey Mantle in succession — even with the Chief Justice calling balls and strikes"].)

Upon full review, this court should consider what remedies the state will offer where material appellate error occurs. (See, e.g., *A New Ground for Review and Transfer*, *supra*, p. 8 [proposing a "formal ground for review and transfer" as a new subsection of rule 8.500; "[e]ssentially, if the Court of Appeal opinion was materially erroneous in some way, the Supreme Court may send the case back for reconsideration — and must do so, if the decision violated Government Code Section 68081"]; *Elkins v. Superior Court*, *supra*, 41 Cal.4th 1337, 1346 ["We observe that this problem may merit consideration as a statewide policy matter, and suggest to the Judicial Council that it establish a task force for that purpose"]; *People v. Galland* (2008) 45

Cal.4th 354, 369 [same]; re rehearing standards, see, e.g., *In re Jessup* (1889) 81 Cal. 408, 471-472: "If we are satisfied, from the petition, that, owing to any mistake of law or misunderstanding of facts, our decision has done an injustice in the particular case, or if the principle involved is important, and the decision will make a precedent establishing a rule of property or of right, and it is seriously doubted whether we have correctly decided, we grant a rehearing.")

5. Holding appellate courts to meaningful due process or supervisory standards would impose no unreasonable burden on the state.

"[A]s a general matter, we do not subject constitutional rights to the kind of cost-benefit analysis employed by an economist." (*Powers v. City of Richmond* (1995) 10 Cal.4th 85, 181 (dis. opn. of Lucas, C.J.).) But even if such an analysis were applicable, taking steps to ensure appellate decisions are materially accurate should impose no great burden, and certainly not an unreasonable one. On the contrary, long-term impacts would likely include fewer and/or shorter review petitions and would certainly include fewer rehearing petitions. And benefits would be incalculable, among them a much more accountable, integrity-infused appellate justice system.

6. This case is an ideal vehicle to address the issue.

By its very nature, a lower court isn't likely to resolve this issue; nor will it percolate through the Courts of Appeal until contradictory holdings grab this court's attention. (Rule 8.500(b)(1) [review appropriate "[w]hen necessary to secure uniformity of decision"].) Appellate briefing necessarily focuses on identifying and evaluating *trial* error, not the appellate variety. (*Uriarte v. United States Pipe &*

Foundry Co. (1996) 51 Cal.App.4th 780, 791 ["the purpose of an appeal is … to review for trial court error"].) If — as occurred here — an appellant believes the opinion is plagued by error, a rehearing petition may be in order. (*In re Jessup, supra*, 81 Cal. 408, 471-472.) But if rehearing is denied with errors intact — as also occurred here — only then is it clear that the appellate process has failed to live up to its promise.

Moreover, as defendant next outlines, the opinion he challenges includes almost all categories of error and so permits a thorough evaluation of the issue.

B. Review would allow this court to identify significant elements of an "adequate and effective" appellate decision.

1. Facts: The reviewing court mustn't rely on a material mischaracterization of or material failure to consider facts in the record.

a) Relevant principles

Reviewing the trial court proceedings, an appellate court identifies "all the significant facts" in light of the appeal. (*In re S.C.* (2006) 138 Cal.App.4th 396, 402.) What's "significant" in the record is a matter of context: a reviewing court must "ferret[] out all of the operative facts that affect the resolution of issues tendered on appeal." (*Lewis v. County of Sacramento* (2001) 93 Cal.App.4th 107, 113, disapproved on another ground as recognized in *Kaufman & Broad Communities, Inc. v. Performance Plastering, Inc.* (2005) 133 Cal.App.4th 26, 41-42.) But the appellate "ferreting" must be accurate and materially complete; after all, a judicial ruling based on an erroneous view of the facts — or where "'all the material facts in evidence'" aren't

"'both known and considered'" — is itself erroneous. (*People v. Cluff* (2001) 87 Cal.App.4th 991, 998; *In re Cortez* (1971) 6 Cal.3d 78, 85-86 [re abuse of trial court discretion]; see also *Cooter & Gell v. Hartmarx Corp.* (1990) 496 U.S. 384, 405 [same, re "clearly erroneous assessment of the evidence"].) So evidence can't be arbitrarily disregarded. (*People v. Cross* (2005) 127 Cal.App.4th 63, 73 [same].)

Similarly, where reviewing courts "plainly misapprehend or misstate the record in making their findings, and the misapprehension goes to a material factual issue that is central to [a] claim, that misapprehension can fatally undermine the fact-finding process, rendering the resulting factual finding unreasonable. [Citations.]" (*Taylor v. Maddox* (9th Cir. 2004) 366 F.3d 992, 1001.) Thus, the "failure to consider, or even acknowledge, ... highly probative [evidence] casts serious doubt on the state-court fact-finding process and compels the conclusion that the state-court decisions were based on an unreasonable determination of the facts." (*Id.* at 1005.)

The Judicial Council has also acknowledged that a Court of Appeal opinion might be marred by "omission or misstatement of" a record fact: A party who believes that sort of error has occurred normally must cite it in a petition for rehearing before arguing the point to the Supreme Court. (Rule 8.500(c)(2).)

b) The Court of Appeal opinion

In connection with the McDonald's eyewitness uncharged-incident evidence, the opinion's factual mischaracterization is unreasonable, all the more so because it goes to a major appellate issue (AOB arg. I; opn 25-30):

1. *"One witness had seen pictures of Natalynn and defendant in news stories before telling investigators."* (Opn 19; PFRg 26-27.) To clarify: In context, the opinion is asserting that *only* "one witness" initially recognized Natalynn and defendant from their news photographs. The opinion's purported "one witness" was Debra Bentz, who "saw a picture on the news of the man and of a little girl who had been killed; she also saw pictures in a newspaper article. They were the same people Bentz had seen in the restaurant." (*Ibid*.) But she wasn't alone. Although ignored in the opinion (opn 20, 27), the evidence also showed that Tracy (Dysart) Griffin, like Bentz, became involved with this case after seeing the same people in news photos. (26RT 3131, 3142.)

2. *"One of the workers at McDonald's recognized Natalynn and defendant from video images taken by the restaurant."* (Opn 17; PFRg 27-29.) Although the "worker[]" isn't identified, she must have been either Sabina Cardenas or Tracy Griffin. The opinion summarizes Cardenas's testimony (opn 18, 27) without reference to video images; and indeed, no such evidence appears in the record.

That leaves Griffin, who "identified Natalynn from the girl in the photograph Arnold showed her and identified defendant in court …." (Opn 20, 27.) And "*Griffin was able to identify* [Natalynn's mother] *Lee from surveillance video* of her at McDonald's, not from seeing her on television. After seeing the video, Griffin identified Lee from the photograph Arnold showed her." (Opn 20 & 27, italics added; see also 28: "Griffin was able to identify Lee from video recordings even though the defense investigator and Arnold could not definitely find any of the trio in video recordings.")

There are three problems here:

a. Not acknowledged in the opinion, but the heart of the appellate issue: Long before the court identification noted in the opinion, Griffin (like Cardenas and Bentz) had identified defendant from the single photograph Arnold showed her. (26RT 3122, 3131-3132, 3141.)

b. Even if "Griffin was able to identify Lee from surveillance video," that doesn't support the opinion's assertion about her recognition of "*Natalynn and defendant* from video images taken by the restaurant." (Opn 17, italics added.)

c. In any event, the record doesn't reasonably support even the opinion's characterization of the Lee identification. True, at one point Griffin recalled having identified Lee "from cameras at the store," explaining this happened when Investigator Arnold visited and reviewed the videotape with her. (26RT 3142.) But in the context of all trial evidence, such a factual finding would be entirely unreasonable. The Arnold-Griffin interview took place on April 1, 2009 (26RT 3141; 6CT 1408); but Arnold didn't even *request* — let alone have an opportunity to review on his own, let alone with a witness — the month's worth of surveillance videos until the following day. (25RT 2962-2963; 26RT 3179-3180; 30RT 3901, 3916 [tapes covered period from February 21 through March 24, 2009].) Nor does the non-trial identification evidence — including an interview transcript (6CT 1407-1421) — support the opinion's assertion. (See AOB 50-54.)[6]

---

[6] The opinion analyzes only the trial evidence on this issue, but there was more. As defendant pointed out, appellate evaluation of

3. *"Arnold did not name Lee, defendant, or Natalynn when he showed Bentz individual photographs of them."* (Opn 19; PFRg 29.) Arnold testified that, as to each identifying witness, he'd showed single photographs and named their subjects. (25RT 2961-2962.) At trial, Bentz was asked about Arnold showing her those pictures: "Did Investigator Arnold give you the name and the date of birth of Ryann Jones?" Her response: "It's down here, yes, it is." (26RT 3070; see also 6CT 1444-1446 [interview transcript: "And then also I showed you a photograph of a Ryan Lynn Jones. DOB of 6-29 … -83"].)

4. *"Arnold did show Bentz photographs of different males and Bentz identified defendant."* (Opn 19; PFRg 29-32.) If so, Bentz was an important exception to the single-picture problem, as Arnold would have let her compare "different males" — presumably in some sort of six-pack or other photo array — before settling on defendant. But reasonably read — and as the trial court found and the prosecutor conceded — the record doesn't support the opinion's assertion.

The factual issue popped up during Bentz's cross-examination, when defense counsel repeatedly fought through the witness's confusion as to whether she'd seen such an array or not. (26RT 3075-3079.) Had the record stopped there, it arguably might support the opinion's characterization. But it kept going, as counsel requested a conference with the jury absent, noting that if Bentz re-

---

his exclusionary motion should also include what was presented to and considered by the court as of its ruling. (AOB 51, fn. 22.) That additional evidence included "Investigator Arnold's testimony at defendant's and Lee's preliminary hearings and the transcripts of his witness interviews [record citations]." (AOB 50.)

called seeing a photo lineup, "then we have a significant discovery violation." The court cited Detective Arnold's testimony and noted there was "no evidence" he showed Bentz a six-pack; and the prosecutor agreed that as a matter of historical fact, she hadn't seen one. (26RT 3079-3081.)

Back in open court, defense counsel clarified with the witness, asking if Exhibit 190 was "*the only photograph of any male that Frank Arnold showed you on April 2, 2009*[?]" Bentz: "*Yes*, he showed me this photo." (26RT 3081, italics added.) And again: "That's *the photograph of the male* that Mr. Arnold showed you?" Answer: "Yes." (26RT 3082, italics added.)

In sum, viewing the relevant record as a whole, it's as clear as it could be: Arnold showed Bentz just a photograph of defendant. Even the opinion itself elsewhere acknowledges this point, referring to Arnold's "use of single photographs for each subject …." (Opn 26; see also 18: "The three witnesses were shown Department of Motor Vehicle photographs of Lee and defendant and a family photograph of Natalynn.")

5. *Material omissions* (PFRg 32-33). The opinion fails to acknowledge multiple items of evidence material to the identification issue:

a. Arnold chose not to give any of the eyewitnesses a *Simmons* admonition (that the person in the photograph might not be the person originally seen), as he would normally do in introducing a comparative array. (1RT 166; 25RT 2954-2955, 2959-2960, 2966-2967, 2991; 6CT 1421.)

b. Defendant's work hours, as documented by his employer (Parker & Parker Plumbing), showed he worked a full-day workweek schedule throughout the period including the McDonald's incidents, with lunch breaks from 11:30 – 12:30. (30RT 3867, 3910-3913.) The Griffin-Cardenas incident occurred mid-morning (shortly after 10:30 a.m.) during the workweek. (25RT 2976-2977, 2993; 26RT 3123-3124, 3140, 3143.) And defendant testified he hadn't met Lee for lunch while working for Parker & Parker. (30RT 3962-3963.)

c. During workdays throughout that same period, defendant wore shirts with his company's name and logo (30RT 3916, 3960-3961); but the man involved in these incidents didn't have a work shirt or uniform on. (25RT 2993 [Cardenas].)

d. According to Bentz, the angry man raised his left fist at the little girl. (25RT 3054.) Defendant is right-handed. (30RT 3924.)

e. According to Bentz, the little girl was in a high chair. (25RT 3053.) Defendant and his mother testified that when out in restaurants, Natalynn sat in booster seats or on laps or her knees, not in high chairs. (26RT 3107-3108; 30RT 3982-3983.) Police found no high chair in Lee's apartment, but her cell phone photos included three of Natalynn in a high chair at 2 ½ to 3 ½ years old. As of her February 2009 visit to her grandparents' house, she wasn't sitting in a high chair. (26RT 3177-3178; 29RT 3835-3838, 3845-3846, 3849-3850.)

Additionally, in analyzing the other major appellate issue, the trial court's failure to protect defendant from prosecutorial miscon-

duct in closing argument (AOB arg. II; opn 30-39), the opinion cites and relies on a fact directly contradicted by the record:

7. *"We note, in contrast to the prosecutor's comments in* Vance, *the prosecutor here did not continue with improper argument after the objections were sustained."* (Opn 35, as modified in App B, p. 2, point 2; also at opn 35, 1st ¶; PFRg 19-20.) The record of the entire five-page argument at issue (32RT 4294-4299) — as quoted in defendant's new trial motion (8CT 1902-1905), appellant's opening brief (AOB 78-81), and respondent's brief (24-27) — shows that the prosecutor indeed continued her improper argument, after every objection, and regardless of the court's rulings, including the final one.

2. Facts: The reviewing court mustn't rely on its own factual or credibility determinations, where those are reserved for the trier of fact.

a) Relevant principles

Resolution of conflicts and inconsistencies in the testimony is the exclusive province of the trier of fact. [Citation.]" (*People v. Young* (2005) 34 Cal.4th 1149, 1181.) Accordingly, "[t]he appellate court cannot reweigh the credibility of witnesses or resolve conflicts in the evidence. [Citation.]" (*Rufo v. Simpson* (2001) 86 Cal.App.4th 573, 622.) In effectively revisiting and reevaluating the evidence so as to make judicial findings, the reviewing court errs. (*In re Stephanie M.* (1994) 7 Cal.4th 295, 319: "[T]he Court of Appeal improperly reweighed the evidence and substituted its judgment for that of the juvenile court. Its decision cannot stand.")[7]

[7] Defendant distinguishes two unusual exceptions as inapplicable here: A reviewing court may find insufficient evidence to support a judgment or finding where "the testimony is physically impossible

Indeed, in a criminal case, an appellate court is constitutionally prohibited from fact-finding, assessing credibility, or weighing competing inferences. A defendant has a "Sixth Amendment right to have essential facts found by a jury beyond a reasonable doubt" (*Dillon v. United States* (2010) 560 U.S. 817, 828); so "it is the responsibility of the jury — not the court — to decide what conclusions should be drawn from evidence admitted at trial." (*Cavazos v. Smith* (2011) 565 U.S. 1; *Weiler v. United States* (1945) 323 U.S. 606, 611 ["We are not authorized to look at the printed record, resolve conflicting evidence, and reach the conclusion that the error was harmless because we think the defendant was guilty. That would be to substitute our judgment for that of the jury and, under our system of justice, juries alone have been entrusted with that responsibility."]; *People v. Merritt* (2017) 2 Cal.5th 819, 835 (conc. opn. of Liu, J.); *id.* at 836 (dis. opn. of Cuéllar, J.).)

Nor can appellate fact-finding be properly framed as a determination of what a reasonable jury "would surely have found" absent the error. "The Sixth Amendment requires more than appellate speculation about a hypothetical jury's action, or else directed verdicts for the State would be sustainable on appeal; it requires an actual jury finding of guilty. [Citation.]" (*Sullivan v. Louisiana* (1993) 508 U.S. 275, 280, italics omitted; see also *California v. Roy* (1996) 519

---

or inherently improbable[.]" (*People v. Young, supra,* 34 Cal.4th 1149, 1181.) And an appellate court has extremely limited authority, on a party's motion, to make independent factual findings and take additional evidence. (Code Civ. Proc., § 909; rule 8.252(b), (c); see *In re Zeth S.* (2003) 31 Cal.4th 396, 405.)

U.S. 2, 7 (conc. opn. of Scalia, J.): "To allow the error to be cured in that fashion would be to dispense with trial by jury.")

b) Court of Appeal opinion

In determining any possible error doesn't require reversal (opn 28-30, 35-40), the Court of Appeal expressly relies on its own fact and credibility determinations. (PFRg 34-36.) For example, in holding the McDonald's eyewitness evidence was harmless if erroneously admitted, the opinion acknowledges that both sides called medical experts, but the prosecution's "three expert physicians" contrasted with "*[o]nly one* doctor called by the defense" who believed Natalynn choked to death on food. (Opn 29, italics added.) So the latter's opinion of death by asphyxiation was "implausible in light of the weight of the testimony of medical experts opining Natalynn died from multiple blunt force trauma." (Opn 29; see also 39: misconduct harmless, given "the strength of the People's case against defendant"].)

In sum, apparently: With three prosecution doctors and "only one" defense doctor, reasonable jurors had no choice but to convict defendant, regardless of any trial error(s). (Compare CALCRIM No. 302 [instruction read to defendant's jury, 32RT 4233-4234]: "Do not simply count the number of witnesses who agree or disagree on a point and accept the testimony of the greater number of witnesses. …. What is important is whether the testimony or any other evidence convinces you, not just the number of witnesses who testify about a certain point.")

3. Law: The reviewing court mustn't rely on a material misstatement of or material failure to acknowledge settled law, or on an inapplicable legal principle.

a) Relevant principles

Where a court "applies the wrong legal standard" to the facts, error occurs. (*Costco Wholesale Corp. v. Superior Court* (2009) 47 Cal.4th 725, 733 [re abuse of trial court discretion]; *Cooter & Gell v. Hartmarx Corp., supra,* 496 U.S. 384, 405 [same, re ruling "based ... on an erroneous view of the law"]); *Schlup v. Delo* (1995) 513 U.S. 298, 333 (conc. opn. of O'Connor J.) ["a paradigmatic abuse of discretion"].) It's no different for appellate courts, as they also must avoid "apply[ing] an incorrect legal standard" to the facts. (*Wade v. Terhune* (9th Cir.2000) 202 F.3d 1190, 1197.) And such an error can be far-reaching; for example, where "the state court's legal error infects the fact-finding process, the resulting factual determination will be unreasonable ...." (*Taylor v. Maddox, supra*, 366 F.3d 992, 1001.)

Of the types of legal error that may cloud an appellate opinion, relying on an inappropriate standard of review is particularly significant; after all, "[t]he standard of review is the lens through which the court will view the lower court's rulings, and in many cases, it can control the outcome." (Roussos, *How to Maximize Your Chances of Showing an Abuse of Discretion on Appeal*, The Daily Recorder (Apr. 20, 2009); see, e.g., *Haraguchi v. Superior Court* (2008) 43 Cal.4th 706 [Court of Appeal relied on incorrect standard of review in reversing trial court ruling; applying proper standard, this court upheld ruling]; *Johnson v. California* (2005) 543 U.S. 499, 502, 505 [cert.

granted to determine correct standard of review; because lower courts had applied wrong standard, case remanded].)

b) *Court of Appeal opinion*

In defendant's first claim of trial error — unfairly suggestive identifications denying due process (AOB arg I) – review is de novo. (*People v. Kennedy* (2005) 36 Cal.4th 595, 608-609, disapproved on another ground in *People v. Williams* (2010) 49 Cal.4th 405, 459 [a ruling that identification procedure was not unduly suggestive is subject to independent review, because it implicates constitutional rights and is a mixed question of fact and law].) Both parties identified this standard in their briefing. (AOB 58; RB 20; ARB 11.)[8]

In rejecting this claim, the opinion concludes by identifying only one standard of review for error determination — and it's the wrong one: "The trial court *did not abuse its discretion* in admitting the identifications challenged by defendant." (Opn 25-30, italics added.)

4. Issues: The reviewing court mustn't materially mischaracterize or fail to consider or resolve a properly briefed issue.

a) *Relevant principles*

An appellate opinion "should address every issue raised" in the briefing. (1 Appeals & Writs in Criminal Cases (3d ed. Cal CEB), § 5.8, p. 5-12, citing Pen. Code, § 1252 [appellate court "shall ... pass upon" "the issues raised by the defendant" as well as "all rulings of

---

[8] Respondent added that the trial court's fact and credibility determinations are reviewed deferentially (RB 20), but as defendant noted (AOB 58, fn. 28), no such findings are at issue here; and the Court of Appeal doesn't hold otherwise.

the trial court adverse to the State which it may be requested to pass upon by the Attorney General"]; see, e.g., *People v. Thomas* (2013) 218 Cal.App.4th 630, 633 [Court of Appeal initially failed to address appellant's federal constitutional claim; this court granted review and transferred case back with directions to resolve it, resulting in reversal of trial court judgment]; *Bell v. Cone* (2005) 543 U.S. 447, 460 (conc. opn. of Ginsburg, J.) [noting scenario where briefed issue may be "unaddressed" by state court because it was "simply overlooked"].)

Of course, the appellate court has the discretion to ignore (or treat as forfeited) an improperly briefed issue, such as one unsupported by argument and authorities. (*People v. Stanley* (1995) 10 Cal.4th 764, 793.) But where an issue is suitably presented, the opinion must evaluate and resolve it.

In criminal cases, appellate review and counsel must ensure "full consideration and resolution of the matter …." (*Anders v. California* (1967) 386 U.S. 738, 743.) Appellate proceedings "require careful advocacy to ensure that rights are not forgone and that substantial legal and factual arguments are not inadvertently passed over." (*Penson v. Ohio* (1988) 488 U.S. 75, 85.) Of course, such a requirement would be meaningless if a court may "pass over" counsel's substantial arguments.

Additionally, an opinion errs by materially "mischaracteriz[ing] the issue." (*Federal Ins. Co. v. Workers' Comp. Appeals Bd.* (2013) 221 Cal.App.4th 1116, 1122 [criticizing Worker's Compensation Judge's analysis]; *California School Bds. Assn. v. State Bd. of Education* (2010) 186 Cal.App.4th 1298, 1330 [reframed issue "has its own

internal logic [but] is largely unmoored to the actual allegations of the complaint or to relevant legal principles"].)

The Rules of Court acknowledge a Court of Appeal opinion might be marred by either "omission or misstatement of" a briefed issue: A party who believes that sort of error has occurred must normally cite it in a petition for rehearing before arguing the point to the Supreme Court. (Rule 8.500(c)(2).)

b) Court of Appeal opinion

The opinion below doesn't include this sort of error; defendant discusses it only for purposes of identifying components of the due process issue.

5. Issues: The reviewing court mustn't materially rely on an unbriefed issue.

a) Relevant principles

Under Government Code section 68081, an appellate decision can't be based on an unbriefed issue: Either supplemental briefing must be offered, or rehearing granted. (See *People v. Taylor* (1991) 6 Cal.App.4th 1084, 1090, fn. 5: "The purpose behind section 68081 is to prevent decisions based on issues on which the parties have had no opportunity for input." (Original italics omitted.)) And all doubts should be resolved in favor of the parties' right to brief an opinion-worthy issue. (*People v. Alice* (2007) 41 Cal.4th 668, 676, fn. 1.)

In criminal appeals, the state denies due process when it resolves a case without permitting counsel to "act[] in the role of an active advocate" (*Anders v. California, supra*, 386 U.S. 738, 744) — which counsel can't do when an issue first appears in the opinion.

Only when counsel is able to act in that capacity can the court provide the "full consideration and resolution of the matter" required by the Constitution. (*Id.* at 743.) Even if counsel files a no-issues brief, the Court of Appeal, "upon finding an arguable issue, should inform counsel for both sides and provide them an opportunity to brief and argue the point" before resolving it. (*People v. Wende* (1979) 25 Cal.3d 436, 442, fn. 3; *Smith v. Robbins, supra*, 528 U.S. 259, 280 [approving California's *Wende* procedure in part "because the court orders briefing if it finds arguable issues"]; *Penson v. Ohio, supra*, 488 U.S. 75, 83: "Most significantly, the Ohio court erred by failing to appoint new counsel to represent petitioner after it had determined that the record supported 'several arguable claims.'")

b) Court of Appeal opinion

As originally issued, the opinion addressed defendant's single misconduct issue (AOB arg I) by dividing it into two discrete claims and finding one of them forfeited. (App A, pp. 33-36.) In petitioning for rehearing, defendant raised a number of problems with that finding, among them violation of Government Code section 68081. (PFRg arg I; see, e.g., *People v. Schmitz* (2012) 55 Cal.4th 909, 915, fn. 4 [unbriefed "forfeiture issue" is subject to § 68081].) In response, the Court of Appeal modified this section of the opinion to clarify that although the forfeiture finding remains, the court isn't relying on it. (App B.)[9] So on the one hand, the statutory violation remains; on the other, the error is less material than beforehand.

---

[9] Defendant's rehearing petition identified additional problems with the opinion (PFRg args II-III), but the order addresses only this one.

6. Prejudice/harmless error: Where the reviewing court finds or presumes error, the court must conduct relevant "whole-record" review and not simply recite evidence supporting the judgment.

a) Relevant principles

With rare exceptions requiring per se reversal, trial error must be evaluated for its impact on the judgment. (Cal. Const., art. VI, § 13.) Properly performed, this "prejudice" analysis is strikingly different from "'the familiar substantial evidence rule.'" (*Bankhead v. ArvinMeritor, Inc.* (2012) 205 Cal.App.4th 68, 77.) The latter tests the sufficiency of evidence to support the judgment, so a recitation of only those facts, viewed in a judgment-favoring light, is appropriate. (*People v. Jones* (1990) 51 Cal.3d 294, 314.) But even with legally sufficient evidence, if the "possibility" of prejudice from error is "more than ... abstract[,]" reversal is necessary under the state standard. (*People v. Wilkins* (2013) 56 Cal.4th 333, 351, citing *People v. Watson* (1956) 46 Cal.2d 818, 836; see also *People v. Giardino* (2000) 82 Cal.App.4th 454, 467 [under *Watson* review, reversal is required where "the evidence supports conflicting conclusions" as to the matter in dispute]; *Richardson v. Superior Court* (2008) 43 Cal.4th 1040, 1050 [*Watson* standard is equivalent to the prejudice prong in evaluating trial counsel's Sixth Amendment effectiveness under *Strickland v. Washington* (1984) 466 U.S. 668, 694; *Wong v. Belmontes* (2009) 558 U.S. 15 [per *Strickland*, "the reviewing court must consider all the evidence — the good and the bad — when evaluating prejudice"].)

Given the inadequacy of a "substantial evidence" approach to *Watson/Strickland* prejudice (*Hardy v. Chappell* (9th Cir. 2017) 849 F.3d 803, 818-820), that sort of analysis is even further from the mark un-

der the much less forgiving *Chapman* harmless error standard (*People v. Mil* (2012) 53 Cal.4th 400, 417-418; *Fry v. Pliler* (2007) 551 U.S. 112, 116; *Chapman v. California, supra*, 386 U.S. 18, 24.) Expressly or implicitly applying the substantial evidence test to *Chapman* error, therefore, is itself erroneous. (See *People v. Mil, supra,* 53 Cal.4th 400, 417-418 [required standard is the "*opposite*" of the "less demanding" substantial-evidence review employed by the Court of Appeal] (original italics); see *Haraguchi v. Superior Court, supra*, 43 Cal.4th 706, 712, fn. 6 [propriety of reliance on correct standard of review determined not by words used but by "what the Court of Appeal actually did" in purporting to apply it].) Indeed, under *Chapman* itself, even an appellate declaration of "'overwhelming evidence'" in support of the judgment doesn't shield it from reversal. (386 U.S. 18, 23.)

Under any standard, then, an appellate court errs by taking a substantial-evidence approach to error impact review. After all, the closer the factual issues for the trier of fact, the stronger the case for prejudice, as this court has long recognized. (*People v. Garcia* (2005) 36 Cal.4th 777, 804; *People v. Newson* (1951) 37 Cal.2d 34, 46; *People v. Fleming* (1913) 166 Cal. 357, 383.) And a relative-closeness analysis can't fairly proceed from a lopsided summary. (*Holmes v. South Carolina* (2006) 547 U.S. 319, 331 ["by evaluating the strength of only one party's evidence, no logical conclusion can be reached regarding the strength of contrary evidence offered by the other side to rebut or cast doubt"].)

Nor is proper prejudice review limited to evidence: All standards require analysis of the *entire relevant record*. (*People v. Guiton* (1993) 4 Cal.4th 1116, 1130 [re *Watson*, "the entire record should be

examined, including the facts and the instructions, the arguments of counsel, any communications from the jury during deliberations, and the entire verdict"]; see *Watson* itself, 46 Cal.2d 818, 836 [calling for "an examination of the entire cause, including the evidence"]; *People v. Mil, supra*, 53 Cal.4th 400, 417 [re *Chapman*, appellate court's threshold duty is "to 'conduct a thorough examination of the record'"]; *United States v. Hasting* (1983) 461 U.S. 499, 509 ["Since *Chapman*, the Court has consistently made clear that it is the duty of a reviewing court to consider the trial record as a whole"].) Whole-record review encompasses matters beyond the evidence, such as (relevant to this case):

• Whether the prevailing party exploited the error in closing argument or otherwise. (*LeMons v. Regents of University of California* (1978) 21 Cal.3d 869, 876; *Arizona v. Fulminante* (1991) 499 U.S. 279, 297-298, 300; *Satterwhite v. Texas* (1988) 486 U.S. 249, 260 (1988) [prosecutor "highlighted" erroneous evidence in closing argument].)

• Whether the record of jury deliberations suggests difficulty reaching a decision. (*People v. Anderson* (1978) 20 Cal.3d 647, 651 ["jury took several days of deliberation to reach its verdict"]; *People v. Dominguez* (2006) 39 Cal.4th 1141, 1160-1161 [jury question]; *People v. Thompkins* (1987) 195 Cal.App.3d 244, 251-252 [deadlock].)

• Whether a split or lesser verdict reveals the jury's "readiness to scrutinize the evidence" and "convict on lesser charges than the prosecution requested." (*People v. Brown* (2016) 245 Cal.App.4th 140, 155-156.)

In sum, if a reviewing court finds harmless error without undertaking a proper whole-record review — all too typically, by sim-

ply finding the evidence sufficient to support the judgment — the decision is erroneous. (*People v. Mil, supra*, 53 Cal.4th 400, 417-418; *Sears v. Upton* (2010) 561 U.S. 945, 955 [*Strickland* prejudice "inquiry requires precisely the type of probing and fact-specific analysis that the state trial court failed to undertake below"]; *Satterwhite v. Texas, supra*, 486 U.S. 249, 258-259 [disapproving state court *Chapman* analysis: "The question ... is not whether the legally admitted evidence was sufficient to support the death sentence, which we assume it was, but rather, whether the State has proved 'beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained' [citation]"].)

As an element of appellate error, the failure to conduct proper whole-record review is as material as it gets; it can be the sole difference between affirmance and reversal. (See, e.g., *People v. Mil, supra*, 53 Cal.4th 400, 405, 417-419.) It's also a widespread problem, as outlined in California Appellate Defense Counsel's amicus curiae letter (April 30, 2015) to this court in *People v. Riley*, No. S225382, <http://www.calapperrors.com/amicus/S225382_Riley_Amicus_Letter.pdf> [citing 34 recent opinions in arguing, "Where the Court of Appeal is far from alone in mistakenly relying on what amounts to substantial evidence review to find even federal constitutional errors harmless, this court should intervene"].)

b) Court of Appeal opinion

Determining whether the McDonald's eyewitness evidence was harmless if erroneously admitted (opn 28-30),[10] the Court of

[10] The opinion finds any such error doesn't require reversal under

Appeal is satisfied with an explanation of why the prosecution evidence was weightier than that offered by the defense. The former was "particularly strong"; and as noted earlier — and significant in this cause-of-death case — the court is impressed with the three state doctors as compared to "only one" for defendant. The court rejects defendant's consistent statements and testimony as "implausible," and the defense theory of death by choking on food — supported by the defense medical expert and paramedic testimony — as equally "implausible" because the prosecution doctors rejected it. "There was evidence defendant had physically abused Natalynn" — and that he hadn't, but the opinion disregards the latter.

As for the McDonald's evidence itself, it's merely "cumulative"; the opinion fails to acknowledge its uniqueness — which the prosecutor relied on in arguing to the jury (32RT 4281, 4285, 4429 [McDonald's incidents particularly compelling because witnesses didn't know defendant]), a point ignored in the opinion. And any error must have been innocuous where the evidence at issue was "relevant only to uncharged acts showing intent or lack of accident. (See Evid. Code, § 1101.)" But this point, too, ignores the record, which shows the jury received no instructional guidance on using that evidence. (7CT 1787-1833; 32RT 4223-4249, 4449-4454 [court didn't give CALCRIM No. 375]; *People v. Harris* (1994) 9 Cal.4th 407, 428 [prejudice/harmless error analysis looks to actual evidence con-

---

either state or federal standards. (Opn 30.) But if there was error as defendant framed this due process issue, it was certainly federal. (AOB 57, 69-70; RB 23; ARB 11-12; *Neil v. Biggers* (1972) 409 U.S. 188, 196.) The opinion cites only *People v. Riccardi* (2012) 54 Cal.4th 758, 827, which wasn't dealing with an identification issue.

sidered by jury "under the instructions given"]; *People v. Thompson* (1980) 27 Cal.3d 303, 333, disapproved on another point in *People v. Rowland* (1992) 4 Cal.4th 238, 260 [prejudice evaluated re what "the jurors were informed" as to its use].)

Also ignored: the record of deliberations, which reveals jurors deliberated more than 18 hours over five court days. (7CT 1786; 8CT 1867-1873.) And their six written requests sought eight readbacks, some covering multiple witnesses (e.g., "*all* doctors" [italics added]), and multiple exhibits. (7CT 1834-1839; 32RT 4457-4460; 33RT 4463-4502.) The lesser verdict, too, reveals jurors unwilling to go as far as the prosecutor urged them. In short, though unreflected in the opinion, the record shows that for *this jury*, the case was reasonably close.

The opinion's rejection of defendant's misconduct claim — after finding the prosecutor's argument partially erroneous (opn 34, 36) suffers from the same (if shorter) defective analysis in finding "no prejudicial error under the state or federal Constitution." The bottom line: The prosecution introduced "very strong evidence of defendant's guilt. [Citations.]" (Opn 39.)[11]

---

[11] In this context the opinion notes the jury's lesser verdict and "lengthy deliberations" (opn 38-39), but the point is inscrutable; it certainly isn't to acknowledge the relative closeness of the case. (It's also erroneous. According to the opinion, after finding defendant guilty "only of second degree murder" in count 1, "[t]he jury further rejected the torture special circumstance after lengthy deliberations." (Opn 39.) But jurors were instructed to decide the special circumstance allegation only "[i]f you find the defendant guilty of first-degree murder" (32RT 4243) — which they didn't.)

7. Harmless error under federal Constitution: Where in a criminal case the reviewing court finds or presumes error, the court must hold the state to its burden of proving harmlessness beyond a reasonable doubt.

a) Relevant principles

The *Chapman* standard of review imposes a heavy burden on the state "to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." (*Chapman v. California, supra*, 386 U.S. 18, 24.) The burden is assigned to "the beneficiary of the error[,]" because "[c]ertainly error, constitutional error, ... casts on someone other than the person prejudiced by it a burden to show that it was harmless." (*Ibid*.)

So when a reviewing court finding or assuming federal constitutional error fails to hold the state to that — or any — burden, the harmless error conclusion is itself erroneous. *Chapman* is satisfied not only by accurately identifying it, but also by properly applying it. (Cf. *Haraguchi v. Superior Court, supra*, 43 Cal.4th 706, 712, fn. 6 [propriety of reliance on correct standard of review determined not by words used but by "what the Court of Appeal actually did" in purporting to apply it].) And four United States Supreme Court justices have warned that "in future cases the California courts should take care to ensure that their burden allocation conforms to the commands of *Chapman*." (*Gamache v. California* (2010) 562 U.S. 1083, 1085 (statement of Sotomayor, J., joined by Ginsburg, Breyer, and Kagan, JJ.).) After all, "the allocation of the burden of proving harmlessness can be outcome determinative in some cases. [Citations.]" (*Ibid*.) And to the extent the appellate court effectively places "the burden of persuasion" – i.e., of showing prejudice – on the defen-

dant, "that would contravene *Chapman*." (*Id*. at 1084; see also *People v. Jackson, supra*, 58 Cal.4th 724, 774-775, 777-778, 789-794, 805-808 (conc. & dis. opn. of Liu, J.).)

b) Court of Appeal opinion

It's difficult to imagine a more straightforward violation of the *Chapman* burden requirement. Concluding its analysis of the federal due process identification issue, the opinion declares, "*Defendant has failed to demonstrate prejudice under* either state law (*People v. Watson* (1956) 46 Cal.2d 818, 836) or *the federal Constitution* (*Chapman v. California* (1967) 386 U.S. 18, 24)." (Opn 30, italics added; PFRg 35-36.) Not only does the Court of Appeal turn the *Chapman* standard precisely upside-down; it treats that test as equivalent to the *Watson* standard, at least in the sense that both purportedly require the defendant to "demonstrate prejudice."

C. Review would allow this court to determine remedies for a less than "adequate and effective" appellate decision.

Finally, upon full review, this court should not only announce "front-end" minimum standards for appellate opinions. At the "back end" — what happens if an opinion doesn't measure up to those standards? — appellate litigants and courts need to know what meaningful remedies are available and how they'll work. (See discussion at arg I-A-4, *ante*.)

II. Review is necessary to determine whether, as to improperly suggestive eyewitness identification, a defendant is somehow entitled to less due process protection where the evidence was introduced as uncharged misconduct.

As his first appellate claim, defendant argued that because the evidence of his single-photo-based identification (by the three McDonald's witnesses) was unfairly suggestive and unreliable, its admission denied due process. (AOB 49-74; opn 25-30.) While seeking review of this issue as a whole, defendant is particularly concerned that both the detective and the Court of Appeal seem to believe that because the incidents involved uncharged misconduct evidence, due process somehow provides lesser coverage. As a matter of law and logic, that can't be so; and review would allow this court to clarify the point.

A. In determining whether due process was violated and whether the error was harmless, the evidence's character as uncharged misconduct has no significance.

According to Detective Arnold, the entire suggestive identification concept was irrelevant to his actions; in contacting witnesses Griffin, Bentz, and Cardenas, he was simply checking into their reports of non-criminal incidents at McDonald's. (1RT 166; 5CT 1137; 25RT 2954-2955, 2959-2962, 2966-2967, 2973, 2991-2992; 30RT 3902-3903.) Indeed, that was his purported reason for *not* using a photo array (even though he had one available) and *not* admonishing the witnesses as he normally would do.

But he was wrong, as a matter of law. This was a murder investigation; and Arnold was gathering evidence to be used in defendant's already-pending prosecution, as he admitted at trial.

(25RT 2959.) And because relevance was dependent on defendant's identity as the misconduct perpetrator, the Constitution's guarantee is fully applicable. After all, the proscription against "unnecessarily suggestive identification procedure" "protect[s] an *evidentiary* interest[.]" (*Manson v. Brathwaite* (1977) 432 U.S. 98, 113, original italics.)

The Court of Appeal doesn't address this point directly, but in finding any error harmless, it dismisses the McDonald's identifications as "not critical" because other evidence already placed defendant at the scene of Natalynn's death; instead, the McDonald's incidents "were admitted to refute defendant's assertion Natalynn died accidentally or from asphyxiation and were relevant only to uncharged acts showing intent or lack of accident. (See Evid. Code, § 1101.)" (Opn 29-30.)

Aside from the record problems with this point (see arg I-B-6-b, *ante* [evidence not cumulative where prosecutor argued its uniqueness; jury wasn't instructed re limited use]), it suffers from a gap in logic: The notion that "Natalynn died accidentally or from asphyxiation" was *the defense theory of the case*, so any evidence "admitted to refute" that theory was a big deal, as was evidence purportedly relevant to "lack of accident" — again, the defense theory at trial.

More broadly, uncharged misconduct evidence is admitted as "relevant to prove some fact" at issue in the defendant's trial for the charged crimes. (Evid. Code, § 1101, subd. (b); *People v. Ewoldt* (1994) 7 Cal.4th 380, 393.) Its erroneous admission doesn't automatically support a harmless error finding because it was "only" uncharged misconduct evidence. On the contrary, that sort of evidence has long

been recognized as, if anything, carrying a genuine threat of prejudice. (*Id.* at 404.)

B. The single-photo identifications were unfairly suggestive.

Reaching no conclusion on this point, the Court of Appeal assumes its truth for purposes of taking the next analytical step. (Opn 26.) But even the limited discussion is noteworthy for what it omits. Conceding "the single-photograph procedure has been criticized" in case law, the opinion finds "nothing *else* in the record to suggest Arnold *encouraged Cardenas or Bentz* to identify defendant. [Citation.]" (Opn 26, italics added.)

First, it's unclear why this analysis excludes Griffin, as one of the three witnesses whose identifications were at issue. (Opn 25.) Second, the constitutional test is whether the procedure was "unduly suggestive and unnecessary" (opn 25), not whether the police "encouraged" the identification. And on that score, there was indeed something "else" in the record — in fact, several something-elses, as defendant argued in his briefing (AOB 61-64): (a) The single-photo display problem was multiplied, as Arnold investigated incidents involving a man, woman, and little girl by showing individual photos of a particular man, woman, and little girl. (b) He named defendant when displaying his picture. (c) He *chose* not to admonish the witnesses that the photograph might or might not show the McDonald's perpetrator. (d) The single-photo display was entirely unnecessary, where (1) there no urgency (defendant was already in custody), and (2) Arnold *chose* not to use the lineup already in defendant's file.

C. Under all the circumstances, the identifications weren't independently reliable.

Assuming an unfairly suggestive pretrial identification, the court must determine whether "the indicia of reliability are strong enough to outweigh the corrupting effect of the police-arranged suggestive circumstances …." (*Perry v. New Hampshire* (2012) 565 U.S. 228, __ [132 S.Ct. 716, 720].) Reviewing what the opinion calls "the totality of the circumstances," it finds the identification reliable. (Opn 26-28.) But the cited "circumstances" include purported facts not established in the record. (See arg I-B-1-b, *ante*.) And other material circumstances are ignored (AOB 64-69):

(1) No evidence suggested why the witnesses would have been "pay[ing] scrupulous attention to detail" in closely examining the man's features for future reference. (*Manson v. Brathwaite* (1977) 432 U.S. 98, 114-115.) On the contrary, they were concerned only with his actions.

(2) No witness offered – or was asked to give – a description of the man. (Compare *id*. at 115.)

(3) "[T]he passage of weeks or months between the [incident] and the viewing of the photograph" weighs against reliability. (*Id*. at 115-116.) Here, the relevant periods were a month to a month and a half for Griffin and Bentz, over a year for Cardenas.

(4) Griffin and Bentz had already identified defendant based on his televised photo. But there was no evidence to suggest anything inherently reliable about those identifications; on the contrary, "[o]ut-of-court identifications volunteered by witnesses are

also likely to involve suggestive circumstances." (*Perry v. New Hampshire, supra*, 132 S.Ct. 716, 727.)

(5) Not only is a single-photo identification procedure more suggestive than a multi-photo one (opn 26); it's also less reliable. (*Simmons v. United States, supra*, 390 U.S. 377, 386, fn. 6.)

(6) The witnesses were unfamiliar with defendant. (*People v. Wright* (1988) 45 Cal.3d 1126, 1155 (dis. opn. of Mosk, J.); CALCRIM No. 315.)

(7) Although Arnold tried to come up with supplemental corroboration evidence, none materialized; even the McDonald's security videos didn't show defendant.

D. The error can't be shown harmless beyond a reasonable doubt.

As shown earlier (Statement of Case and Facts, Factual Issues, *ante*), the circumstantial cause-of-death evidence, including expert opinion, was truly two-sided — resulting in a greater likelihood of prejudice from uncharged misconduct evidence. (*People v. Thompson*, *supra*, 27 Cal.3d 303, 333.) Under the *Chapman* standard, with proper whole-record review and the burden placed on the state (args I-B-6–7, *ante*), it can't reasonably be found that the verdict was "surely unattributable to the error." (*Sullivan v. Louisiana, supra*, 508 U.S. 275, 279.)

III. Review is necessary to determine whether the reviewing court may treat as harmless error, based on generic pattern instructions, an extended guilt-phase argument urging jurors to identify with the decedent and her mournful parent, where the prosecutor ignores sustained objections and the trial court refuses to admonish the jury.

A. Trial court proceedings

Months before this capital trial began, the prosecutor filed a brief arguing that *for purposes of the penalty phase* "emotional testimony is admissible" — e.g., as to "the effect of the crime on the victim" and "the emotional impact of the crime on the victim's family[.]" (4CT 770, citing *Payne v. Tennessee* (1991) 501 U.S. 808.)

As it turned out, that emotional impact made its way into the guilt trial during testimony about and from Troy Miller, Natalynn's father. (22RT 2251-2252 [first trial witness, re Miller's demeanor at hospital: "inconsolable," "crying"]; 22RT 2388 [Sgt. Dominguez: Miller was "extremely agitated," "crying," "making accusations" and "angry at [Natalynn's mother and defendant] Jones"]; 23RT 2671-2672 [Miller as witness, re defendant: "I should have fucking killed that fucker, man. Goddamn."]; 23RT 2674-2675, 8CT 1901 [Miller wept while viewing photo of him with Natalynn]; 23RT 2680-2681 [Miller again lost composure when recalling when he last saw Natalynn; court announced break and explained to counsel it was so Miller could calm down after "two kind of emotional situations"].)

The emotion-triggering photograph displayed in court was Exhibit 29, attached as Appendix C. (Rule 8.504(e)(1)(B).) Admitted for the limited purpose of showing absence of injury when they last saw each other (19-A RT 249-251), the "selfie" features a beaming

Natalynn looking into the camera, with Miller smiling just behind her.

Apparently not satisfied with waiting for a potential penalty trial, the prosecutor turned to her emotional impact theory as the lengthy final section of her initial closing argument. With Exhibit 29 displayed on the big screen (8CT 1901), she urged jurors to look at father and daughter while considering: When Natalynn died, their beautiful relationship was destroyed; in Miller's place, Natalynn was forced to spend her last moments with defendant, the monster; and between Natalynn's terror, Miller's loss, and "nature's way" — a child isn't supposed to predecease her parents, as contrasted with the prosecutor's memory of visiting her own mother on her death-bed — guilty verdicts are in order. Defense counsel lodged seven "improper" objections, with rulings split between "sustained" and "overruled" — but each time the prosecutor continued in the same vein. Counsel finally asked for an admonition; request denied; and again the prosecutor proceeded until she was done. (32RT 4294-4299, quoted in full at AOB 78-81; opn 30-32; see arg I-B-1-b, point 7, *ante* [opinion's factual error].)

After the verdict, defendant cited this argument in seeking a new trial. The court agreed it was misconduct but denied the motion. (Opn 32-33.)

B. Appellate proceedings

On appeal, defendant renewed his claim (AOB arg II). The Attorney General conceded misconduct but argued it was harmless.

(RB arg II.) The Court of Appeal opinion takes much the same approach. (Opn 33-39; App B [modification].)

C. Review is necessary to explore the extent to which a guilt-phase victim-impact argument interferes with the due process right to a fair trial, requires court intervention, and can't be excused as harmless because generic pattern instructions were given.

As a purely emotion-based argument, the prosecutor's closing speech was grossly improper: She invited jurors to view Natalynn's last moments through her eyes (*People v. Seumanu* (2015) 61 Cal.4th 1293, 1343-1344; *People v. Vance* (2010) 188 Cal.App.4th 1182, 1187-1188, 1199-1200 ["'Golden Rule' argument"]; *Zapata v. Vasquez* (9th Cir. 2015) 788 F.3d 1106, 1113); she urged them to identify with Natalynn's grieving, angry father Troy Miller (*People v. Vance, supra*, 188 Cal.App.4th 1182, 1195-1196, 1200; she invoked her own mother's death and "nature's way" — matters well beyond the evidence — to condemn defendant; all while displaying an enlarged, sympathy-provoking photograph (a "beautiful picture" – just "look at that little face[,]" "frozen … in time where she feels happy and she's safe" "with her dad," "the protector, the provider") purportedly introduced for a limited, unrelated purpose.

Exacerbating the prosecutor's prolonged misconduct (mischaracterized in the opinion as "brief and isolated comments," opn 39), the trial court refused both to stop it and to admonish the jury to disregard it. (*Id.* at 1188, 1202, 1206.) Under the circumstances of this already-emotional trial, prosecutorial misconduct magnified by judicial error "so infected the trial with unfairness as to make the

resulting conviction a denial of due process." (*Donnelly v. DeChristoforo* (1974) 416 U.S. 637, 643.)

Whether federal or state error, it can't properly be deemed harmless by pointing, as the opinion does, to generic pattern instructions given well before the specific argument at issue. (Opn 36-38, citing CALCRIM No. 200, No. 220, and No. 222.) True, jurors learned arguments aren't evidence, but under these circumstances, that standard instruction "could have no palliative force because there was no likelihood the jury would have treated the prosecutor's argument as anything but argument." (*People v. Vance, supra*, 188 Cal.App.4th 1182, 1207.) And as highly improper, emotion-laden argument, it can't be dismissed as ineffective — not where it "shifted the jury's attention from the evidence to the all too natural response of empathizing with the victim's suffering and his family's resulting torment. Once such emotions are unbridled, they are hard to rein in. [Citations.]" (*Id.* at 1206; *Zapata v. Vasquez, supra*, 788 F.3d 1106, 1207 ["cases that have held prosecutorial misconduct nonprejudicial have pointed to the use of a specific limiting instruction," citing *Donnelly v. DeChristoforo, supra*].)[12]

Given such seemingly well-settled principles, why is review necessary? Because somehow they were completely lost on the prosecutor, the trial court, and the Court of Appeal. This court's last word on the topic examined it only briefly: Misconduct was limited

---

[12] The opinion also cites CALCRIM No. 222 as having "advised the jury not to consider matters upon which the court sustained an objection." (Opn 37.) But by its own terms, the instruction was referring to *evidentiary* matters ("you must ignore the *question*," italics added) — not argument.

to two brief Golden-Rule invitations, so the error was harmless. (*People v. Seumanu*, *supra*, 61 Cal.4th 1293, 1343-1344.) What's needed, unfortunately, is a serious, thorough examination of the problem, in a closely contested, emotional case where the prosecutor went far overboard in exploiting that emotionality and the trial court took no steps to rein her in. Accordingly, defendant seeks review.

IV. The cumulative impact of the errors denied defendant due process and a fair trial.

Even if the individual trial errors discussed above don't require reversal when considered separately, defendant seeks consideration of their cumulative impact on the fairness of his trial. (AOB arg. III; *People v. Hill*, *supra*, 17 Cal.4th 800, 844-845; *Taylor v. Kentucky* (1978) 436 U.S. 478, 487-488 [cumulative errors as violation of federal due process right to fair trial].) The Court of Appeal acknowledges and rejects this claim (opn 40); defendant urges this court to consider it.

Conclusion

For the reasons explained above, defendant urges this court to grant review, determine whether the Court of Appeal opinion denied due process, and in either event resolve his trial error claims.

Dated: June 26, 2017 Respectfully submitted,

/s/ Stephen Greenberg
Stephen Greenberg
Attorney for Appellant
Ryann Lynn Jones

Certificate of Length

I, Stephen Greenberg, counsel for appellant, certify pursuant to rule 8.504(d)(1) that the word count for this document is 13,336 words, excluding the tables and this certificate.

Dated: June 26, 2017

/s/ Stephen Greenberg
Stephen Greenberg

Declaration of Service

Case: *People v. Ryann Lynn Jones* No. S______/F068996

I am an active member of the State Bar of California (SBN 88495), over 18, and not a party to this action. My business mailing address is P.O. Box 754, Nevada City, CA 95959-0754; my address for e-mail and e-service is sgberg1@mac.com.

On June 26, 2017, I served the attached Petition for Review on the following parties by:

(a) electronic transmission: transmitting a .pdf version of the document by electronic mail to each party for whom an email address or internet webpage form address is noted, using that address; and

(b) mail: placing a true copy of the document in an envelope with prepaid first-class postage and depositing it with the U.S. Postal Service in Nevada City, California, addressed as follows to each party for whom an email address or internet webpage form address isn't noted:

Attorney General, California
SacAWTTrueFiling@doj.ca.gov
(for Respondent)

Tulare County Superior Court
Attn: Hon. Judge Joseph Kalashian
221 S. Mooney Blvd., Room 303
Visalia, CA 93291

Court of Appeal, 5th Dist.
http://www.courts.ca.gov/5dca-efile.htm
(submitted through TrueFiling)

Ryann Lynn Jones, AS8230
c/o Ken & Maria Jones
1124 W. Laura Ave.
Visalia, CA 93277
(Appellant)

Central California Appellate Program
eservice@capcentral.org

Phillip Cherney, Esq.
PHCESQ@aol.com

/s/ Stephen Greenberg
Stephen Greenberg