**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA**

**SIXTH APPELLATE DISTRICT**

| | |
|---|---|
| PEOPLE OF THE STATE OF CALIFORNIA,<br><br>Plaintiff and Respondent,<br><br>vs.<br><br>BROCK ALLEN TURNER,<br><br>Defendant and Appellant. | No. HO43709<br><br>Santa Clara County Super. Court No. B1577162 |

# APPELLANT'S OPENING BRIEF

Appeal from the Judgment of the County of Santa Clara
Hon. Aaron M. Persky, Judge Presiding

ERIC S. MULTHAUP
State Bar No. 62217
20 Sunnyside Avenue, Suite A
Mill Valley, CA 94941
415-381-9311 / 415-389-0865 (fax)
mullew@comcast.net
Attorney for Appellant Brock Turner

## TOPICAL INDEX

## TABLE OF AUTHORITIES

TREATISES CITED

**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA**

**SIXTH APPELLATE DISTRICT**

| | |
|---|---|
| PEOPLE OF THE STATE OF CALIFORNIA,<br><br>Plaintiff and Respondent,<br><br>vs.<br><br>BROCK ALLEN TURNER,<br><br>Defendant and Appellant. | No. HO43709<br><br>Santa Clara County Super. Court No. B1577162 |

# APPELLANT'S OPENING BRIEF

## INTRODUCTION AND OVERVIEW

This case has generated an inordinate amount of publicity, public outcry, and vituperation, most of it directed against Brock Turner, but also a significant amount directed against Judge Persky for his allegedly unconscionable misconduct in imposing a sentence that was a dutiful implementation of the recommendation of the Santa Clara County Probation Department. In the course of this media excess, numerous misstatements, misrepresentations, and misunderstandings have pervaded the public perception of the facts of the case, and may have permeated the hallowed halls located on the 10th floor at 333 W. Santa Clara Street. Counsel for appellant makes a particular plea that this Court

distance itself from the media renditions of the case in favor of immersion in the actual evidence, which, under the standard of Jackson v. Virginia (1979) 443 U.S. 307 and People v. Johnson (1980) 26 Cal.3d 557, does not support any of the three convictions.

## STATEMENT OF THE CASE

On October 6, 2015, Information No. B1577162 was filed in Santa Clara County Superior Court, charging appellant with three counts arising from an incident on January 18, 2015: Count 1 charged a violation of Penal Code section 220(a)(1), assault with the intent to rape Ms. Doe; Count 2 alleged a violation of Penal Code section 289(e), sexual penetration of Ms. Doe who was prevented from resisting by an intoxicating substance; and Count 3 alleged the violation of Penal Code section 289(d), sexual penetration of Ms. Doe who was unconscious of the nature of the act. 1 CT 262-264.

On March 7, 2016, the People filed an Amended Information, which alleged the same charges, but amended the Penal Code section 220 count "to read "assault with intent to commit rape of an intoxicated or unconscious person," rather than simply "rape" unmodified. 1 CT 268-270.

Trial began on March 17, 2016; the People rested on March 23, 2016; appellant testified on his own behalf; and the jury began deliberating on March 29, 2016. 2 CT 456. After several requests to the court regarding testimony and

legal issues, the jury reached verdicts of guilty on all counts at approximately 4:20 p.m. on March 30. 2 CT 476. On June 2, 2016, the trial court, in accordance with the recommendation of the Probation Department, suspended the imposition of sentence and granted formal probation for a term of three years, with terms that included six months in the county jail. 3 CT 770. On the same date, a timely notice of appeal was filed. 3 CT 773. This appeal is from a final judgment and is authorized by Penal Code section 1237.

## STATEMENT OF FACTS

### A. Summary and Overview.

This Introduction summarizes certain basic and undisputed facts that are drawn from the testimony of multiple witnesses, and contains a timeline of the evening of January 17-18, 2015, in order to provide the Court with a context from which to view the more detailed summary of testimony set forth by topic area in section B ("The Prosecution's Case").

As of the weekend of January 17 – 18, 2015, Ms. Doe[1] was 21 years old, and was living at home with her parents in Palo Alto after having graduated from [redacted] in June 2014. On that weekend, Ms. Doe's younger

[1] The trial transcripts refer to the complaining witness as "Jane" or "Jane Doe." For continuity, appellant refers to her as "Ms. Doe" throughout. The transcripts refer to Ms. Doe's sister as "Jane II". For clarity, appellant refers to her as "Ms. Doe's sister."

sister was home from [redacted] where she attended college, and had made plans to get together with some of her college friends who were also home during winter break.

One of the sister's high school friends was a Stanford student named Julia, who belonged to the Kappa Gamma sorority, which was co-sponsoring a party that Saturday night with the Kappa Alpha fraternity, to be held at the Kappa Alpha fraternity house. Ms. Doe decided to accompany her sister and her sister's two friends, Colleen and Trea, to the Kappa Alpha party. In preparation for the party, Ms. Doe consumed four shots of whisky at the Doe residence (the other young women all imbibed comparable quantities), after which Ms. Doe's mother drove them to the Stanford campus and dropped them off around 11:00 p.m., when they entered the Kappa Alpha house and continued drinking.

Meanwhile, appellant, then a 19-year-old freshman, planned with some friends to attend the same Kappa Alpha party, and they were also drinking in preparation. Appellant arrived at the Kappa Alpha party at some point before midnight feeling "buzzed."

At some point shortly after midnight, Ms. Doe, her sister, and Julia left the Kappa Alpha house to urinate in some nearby shrubbery. When they returned to the party, they stayed outside on the patio talking to appellant and a friend of his. The conversation was characterized as "group chat" by Colleen.

Ms. Doe's last recollection of the evening is standing on the Kappa Alpha patio and drinking beer with her group.

From the combined accounts of Colleen, Julia, and Ms. Doe's sister, all of the young women were intoxicated but functioning adequately, except for Trea, who was displaying symptoms of excessive intoxication by slurring her words and acting sleepy. Ms. Doe's sister asked Julia if she could take Trea to Julia's dorm room to rest and recuperate. At 12:14 a.m., Colleen called an Uber for herself and Ms. Doe's sister to take Trea to the dorm. Ms. Doe's sister told Ms. Doe what they were doing, and at that time Ms. Doe "seemed fine" according to her sister. No one, neither Ms. Doe's sister, nor Julia, Colleen nor anyone else at the party, testified that Ms. Doe had done anything to alert them that she may have been excessively intoxicated.

Meanwhile, Ms. Doe had been calling her boyfriend in Philadelphia, where it was 3:00 a.m. The boyfriend described her speech was "rambling," and one of her voice mails to him at 12:16 a.m. contains a mixture of some slurred speech and some concise diction.

At 12:29 a.m., Ms. Doe called her sister, who was still attending to Trea, but the sister could not hear what Ms. Doe was saying, and asked her to call her back. Ms. Doe also called Julia but did not reach her. That was the last call or text from Ms. Doe's phone that evening.

Appellant testified that at about 12:30 a.m., he saw Ms. Doe dancing by herself, went up to her and told her he liked her dancing. Appellant asked her if he had met her earlier, and then asked if she had a sibling because he had been talking with someone who looked a lot like her. Ms. Doe responded that her sister was there. 9 RT 845. Appellant asked if she would like to dance with him, and she said "sure." They danced inside near the door of the patio. After dancing for about 10 minutes, he kissed her, and she was responsive. Appellant asked if she wanted to go back to his dorm, and she said "sure." Appellant asked her name while they were dancing, but he did not remember it. He had given her his name.

Appellant put his arm around her shoulder, and they walked away from the party. There is no testimony from any source that appellant carried, dragged, or otherwise maneuvered Ms. Doe as they walked away from the party. There were no independent witnesses to any of the interaction between appellant and Ms. Doe around the time that they left the party.

Appellant testified that as they left a concrete path they were walking on to take a shortcut, Ms. Doe immediately slipped and "kind of fell down." She "grabbed onto me to try and prevent her fall and that caused me to fall as well." They began kissing, and engaged in consensual sexual conduct that appellant described as "fingering" her.

At approximately 1:00 a.m., two graduate students were bicycling toward the Kappa Alpha party, and saw appellant on the ground immediately adjacent to the concrete basketball court, on top of a female who appeared to be inert. Appellant was fully clothed with his pants buckled and his zipper up, but was "thrusting aggressively" on top of her. The two graduate students asked appellant what he was doing, and they became contentious. Appellant attempted to run away, but was tackled and held down by the graduate students until the campus police arrived almost immediately at 1:05 a.m.

Ms. Doe was lying on the ground next to the basketball court, completely passed out, with her underwear off and with her dress hiked up to her waist. She was treated by paramedics, and woke up at the Valley Medical Center three hours later. Appellant was taken into custody.

Forensic testing established that neither semen nor appellant's DNA was detected in Ms. Doe's vaginal swab. There was no DNA of appellant detected on Ms. Doe's underwear or on any other part of her body. There were three identifiable traces of Ms. Doe's DNA on appellant: one under his left fingernail, one under his right fingernail, and one on his right finger.

Here is a summary timeline of the evening based in large part on cell phone records:

10:30 p.m. Ms. Doe, her sister, and their two friends engage in pre-party drinking at the Doe residence.

11:00 p.m. Ms. Doe's mother drops the four young women off on the Stanford campus where they join the Kappa Alpha party and continue drinking.

11:30 p.m. Appellant and his friends join the Kappa Alpha party and continue drinking.

11:54 p.m. Ms. Doe calls her boyfriend in Philadelphia, wakes him up, and engages in a two-minute conversation in which the boyfriend characterizes her speech as slurred and sometimes incomprehensible.

12:00 a.m.+ Ms. Doe, her sister, and Julia, leave the party to urinate behind some shrubbery, all are acting silly, and they return to the Kappa Alpha patio where they drink beer and chat with appellant and his friends.

12:16 a.m. Ms. Doe leaves a voicemail for her boyfriend, Exhibit 29, in which she vacillates between some slurred speech and some concise diction.

12:17 a.m. Colleen calls for an Uber to take her, Ms. Doe's sister, and Trea to Julia's dorm room for Trea to recuperate from excessive intoxication. Ms. Doe's sister informs Ms. Doe of this, and describes Ms. Doe's condition then as seemingly "just fine."

12:19 a.m. Ms. Doe's boyfriend calls her and describes her speech as rambling.

12:29 a.m. Ms. Doe calls her sister, who is still attending to Trea, and the sister asks Ms. Doe to call her back. Ms. Doe then called Julia but did not reach her.

12:30 a.m.+ Appellant approaches Ms. Doe and within a few minutes, they leave the party and begin walking together in the direction of appellant's dorm room.

1:00 a.m. Two graduate students bicycling toward the Kappa Alpha party encounter appellant and Ms. Doe on the ground, adjacent to the Kappa Alpha basketball court, 116 feet from the Kappa Alfa patio. Appellant is fully clothed on top of Ms. Doe, and "thrusting aggressively." Ms. Doe is inert, with her underwear off and her dress hiked up to her waist. The graduate students confront appellant, another student calls the police, and appellant is arrested.

B. The Prosecution Case.

1. Testimony from Ms. Doe's sister and friends regarding the events of Saturday, January 17, 2015.

a. The testimony of Ms. Doe's sister.

Ms. Doe's sister testified she is 21 years old and a senior at [redacted] in San Luis Obispo. 7 RT 583. She came home on the weekend of January 17-18, 2015 to visit her family because she had just returned from being abroad the weekend before. 7 RT 585. She spent the day with Ms. Doe and her friend Julia from Stanford, and had dinner at a Mexican restaurant. She and Julia had plans to go to a party at the Kappa Alpha fraternity at Stanford, and Ms. Doe had no plans at that time. 7 RT 586. When the Stanford party was broached, Ms. Doe "did not want to go initially" because "she doesn't like Greek life that much," and she "felt kind of silly going to a college party after being out of college." 7

RT 586. At the same time, the three wanted to spend time together "so she decided she would come with us and possibly meet her friends in downtown Palo Alto afterward." 7 RT 587. Ms. Doe and her sister went back home, and Ms. Doe's sister called Colleen and "asked her if she wanted to come with us to Stanford." Ms. Ms. Doe's sister described Colleen as "one of [her] best friends." 7 RT 588.

Colleen and her friend, Trea, arrived at the Doe residence around 10:30 p.m., and the group began drinking shots of alcohol. Colleen and Trea drank champagne that they brought. 7 RT 589. Ms. Doe and her sister each had approximately four shots of alcohol before going to the party. Ms. Doe's sister asked her mother to drop them at Stanford "just to save money for an Uber and [her] mom was still awake." 7 RT 598. Ms. Doe's sister had been to parties at Stanford more than 20 times, some during high school and some after she began college. 7 RT 599.

When they entered the party, "everyone was being really silly," especially Ms. Doe who "was just making a lot of fun of the situation, like being really goofy." Julia found a large bottle of vodka and began drinking it with Ms. Doe and their friends. 7 RT 592. According to her sister, Ms. Doe was acting silly and "making fun of the fact that she was there." 7 RT 593.

The party became crowded, and they were "taking photos and dancing inside." 7 RT 593. At one point after midnight, Ms. Doe, her sister, and Julia went outside to urinate behind some shrubbery a short distance from the party. When asked to describe their levels of intoxication, Ms. Doe's sister replied that "we were all really drunk" 7 RT 594. Regarding Ms. Doe, specifically her sister "wasn't really paying directly attention to [her]," but she was doing things "that were really silly." 7 RT 594. She and Ms. Doe were "pretty drunk" at this point.

They walked back to the party and stayed outside where it was "really mellow and people were just drinking beers and talking." Ms. Doe's sister ran into a couple of Julia's friends and was talking to them. She also "started talking to three males," and one of them, Tommy, was referring to a sibling who went to [redacted] as a topic of conversation. 7 RT 595, 7 RT 597. While on the deck, Trea "started to feel sick and really tired because she had been drinking for so long" and lay down on a bench. Colleen checked on her periodically, and their conversation lasted for perhaps 15 minutes. Colleen was with two other males, including appellant. 7 RT 597.

During this period, one of the males found beer and asked if they wanted to shotgun them, "so then we started shot-gunning the beers." 7 RT 598. At some later point, Ms. Doe's sister was standing with Colleen, and appellant

"approached [her] and started to kiss [her]." She was uncomfortable and very drunk, so she pulled back and away. 7 RT 599. When appellant came over, Julia and Colleen were to her left, and "Julia tried to take a photo because she like, she thought it was funny." 7 RT 600. Ms. Doe's sister took a closer look at appellant, and "thought he looked exactly like this person I know from my college." 7 RT 600. Colleen noticed the resemblance as well, and Colleen "referred to him as the nickname ["Casey Clarkson"] for the rest of the night." 7 RT 600.

When asked whether "when he like, like, reached into kiss you, did you kiss him back," she answered, "maybe initially for the first, like, three seconds when I was trying to gauge what was happening," but she then decided that she "did not want to be making out with someone random that [she] didn't know who was making out with [her]." 7 RT 601.

They had a second encounter when she was walking back into the party to get a beer, and she saw him again, looked at Colleen and said, "Casey Clarkson is here." 7 RT 601.

After that, Ms. Doe's sister was talking to Colleen about Trea, "who was doing worse," and appellant "stepped in between our conversation and tried to kiss [her] again." She turned her face and walked away. 7 RT 602. She commented to Colleen that "Casey Clarkson keeps coming up to me." 7 RT

603. Appellant had put his hands on the sides of her waist, "just the normal, like, waist area," and she "wiggle[d] away." That was the last time she saw appellant during the evening. 7 RT 603. She and Colleen wanted to put Trea in Julia's bed, asked her for the keys, and told Ms. Doe that she was going to do that. 7 RT 604 – 605 – "I told her that I was leaving to put Trea in Julia's dorm but that was the only exchange." When asked whether there was a reason that she did not have Ms. Doe come with her to Julia's dorm room, she replied, "I was very focused on Trea" and "at that time, she was my only concern because she looked like she was not doing well at all." 7 RT 605.

As Ms. Doe's sister was walking into Julia's dorm with Trea, Ms. Doe called her. Ms. Doe's sister could not understand what she was saying, and asked her to call her back. After putting Trea to bed, Ms. Doe's sister and Colleen took the same Uber back to the party. At that time, there were police officers present, and Ms. Doe's sister and Colleen needed to show their identifications to get back into the party. 7 RT 607. Ms. Doe's sister asked her friends if they had seen Ms. Doe, but none had. 7 RT 608. Ms. Doe's sister was "kind of scared" because Ms. Doe was not responding to her phone calls and texts, and "if she was downtown, I wanted to know that." 7 RT 609.

They (Ms. Doe's sister, Colleen, and Trea) went back to the Doe residence, and Ms. Doe was not there. Ms. Doe's sister was concerned, but

"not concerned that anything had happened to her" because she felt "very safe in Palo Alto" and "very safe at the party."

The next morning, she received a telephone call from someone at Stanford and went to pick Ms. Doe up at the Valley Medical Center. 7 RT 612.

On cross-examination, Ms. Doe's sister was asked how Ms. Doe appeared when she left to take Trea to Julia's room, and she answered, "I'm not a reliable source to say how her state was, but I just thought she would be fine if I left," although "[she] didn't actually engage her at all or converse with her directly." 7 RT 616. When referred to her statement to the police that when she left, Ms. Doe "appeared to be fine," Ms. Doe's sister acknowledged that Ms. Doe "was standing and her eyes were open, so I just walked over to her and said I was leaving for five minutes." 7 RT 617.

Ms. Doe's sister acknowledged her testimony at the preliminary hearing that when she, Ms. Doe, and Julia left the party to urinate outside, "we were down there for probably 10 minutes," during which time "[Ms. Doe] seemed drunk but not out of control at all," "still, like, speaking totally fine." 7 RT 618.

When asked about the calls she received from Ms. Doe when she was in Julia's dorm, she acknowledged that she "couldn't hear anything on the phone" [as opposed to hearing speech that was incoherent]. 7 RT 619. On redirect, Ms. Doe's sister was asked about the telephone call she received from Ms. Doe at

12:29, and she stated that she "couldn't hear because [she] couldn't understand what [Ms. Doe] was saying or it was too loud on the other line." 8 RT 693. She then added the possibility that she couldn't understand what was being said because "she was slurring too much for me to be able to understand what she was saying." 8 RT 694.

b. The testimony of Julia Maggioncalda.

Julia Maggioncalda testified that she was a 22-year-old junior at Stanford. 5 RT 203. She knew Ms. Doe's younger sister because they went to middle school and high school together and had become best friends during their senior year of high school. Ms. Doe's sister visited Julia at Stanford when she came home fro[redacted], and they would get together for lunch and attend parties on the Stanford campus. 5 RT 205.

On Saturday, January 17, 2015, Julia met up with Ms. Doe and Ms. Doe's sister to go to the Arastradero Preserve for a walk and some photography. 5 RT 206. They got some food at a local Mexican restaurant at about 6:00 p.m. The three discussed their plans for the evening. Julia was going to have dinner with a friend named Caroline, and then was going to meet up with Ms. Doe and her sister at the Kappa Alpha fraternity house for a mixer cosponsored by Kappa Gamma sorority, to which Julia belonged. 5 RT 210. She had been to

the Kappa Alpha fraternity house many times with Ms. Doe's sister. The three of them were "all very excited to go together." 5 RT 208.

Julia arrived at the Kappa Alpha party at around 11:00 p.m. after some pre-party drinking at a friend's residence. 5 RT 209. The party was not very full at that time. Julia played a drinking game called Rage Cage at the party and drank some beer, at which point she was feeling "[d]efinitely under the influence, but not out of control in any way." 5 RT 211.

The Kappa Alpha fraternity house has two stories and a basement. Student rooms are on the second story, some additional student rooms and a lounge area are on the ground floor, and the basement with a dining area is "where the partying happens." 5 RT 212. At some point after 11:00 p.m., Ms. Doe arrived with her sister, another friend named Colleen whom Julia knew, and fourth friend whom she did not know. 5 RT 212. When they met up, Julia did not have any impression whether Ms. Doe and her group had been drinking. Julia found a bottle of vodka and they all drank some. 5 RT 213. In addition, Ms. Doe and her sister had brought a plastic Arrowhead bottle filled with alcohol. 5 RT 215.

There was music and dancing in the basement area. At one point around midnight, Ms. Doe, her sister, and Julia went into the bushes outside the Kappa

Alpha house and urinated, which was "easier than waiting in line for the bathroom." 5 RT 216.

When they returned to the Kappa Alpha fraternity house, they "sort of got split up" and were all talking with different people out on the patio. Julia knew a number of people attending the party and was hanging out with them. Julia did not see Colleen or the other friend during the evening.

Julia had "a vivid memory" of someone "making out" with Ms. Doe's sister, who was "looking extremely uncomfortable." Julia did not recognize the person and described him to the extent of wearing dark clothing. 5 RT 219.

Julia did not see Ms. Doe flirting with anyone or dancing with anyone because "the last thing I recall [with Ms. Doe] is going to the bathroom in the bushes." 5 RT 226. At that point, Julia was "significantly intoxicated."

Later, Ms. Doe's sister and Colleen asked Julia for her room key because Colleen's friend Trea was "too drunk," and they wanted to put her to bed on the futon in Julia's dorm. 5 RT 227. After Julia gave Ms. Doe's sister her room key, she did not have any further contact with Ms. Doe at the party. 5 RT 228.

Later in the evening, she and others were looking for Ms. Doe throughout the Kappa Alpha fraternity house and were calling and texting her. 5 RT 229. Julia then went to Kappa Sig, another fraternity, and eventually went home around 2:00 a.m. 5 RT 231.

On redirect, Julia described Ms. Doe's sister as "significantly intoxicated." 5 RT 242.

When asked what Ms. Doe's state of intoxication was, she answered:

> I was significantly intoxicated; so I don't think I'd be the best judge of it, but the last time I saw her, we were all just being super-goofy. 5 RT 243.

When asked again to specify a level between "very intoxicated," "not intoxicated at all," or "not able to gauge," Julia answered that Ms. Doe "seemed intoxicated," but at the same time "I was very intoxicated." 5 RT 243.

c. The testimony of Colleen McCann.

Colleen McCann testified that she was a 22-year-old college student at [redacted] and a friend of Ms. Doe's sister since freshman year. 6 RT 322. Colleen had met Ms. Doe a few times when visiting her sister but did not know her well.

Colleen came home from [redacted] to her home in San Bruno on the weekend of January 17, 2015 because her best friend, Trea, was home from school in New York. 6 RT 323. Colleen formed a plan for her and Trea to go to the Doe residence, after which the four of them would attend a Stanford party. 6 RT 324.

Colleen drove to the Doe residence at approximately 10:30 p.m., where she and Trea drank champagne, while Ms. Doe and her sister had three or four

shots of alcohol each. 6 RT 326. Ms. Doe's mother drove the four of them to the Stanford party. At that point, Ms. Doe, her sister, and Trea were getting pretty drunk. Colleen was relatively sober. 6 RT 327.

They entered the Kappa Alpha house and went downstairs to the basement where people were listening to music and dancing. There was alcohol being passed around. 6 RT 329. Colleen and other members of her group were dancing. Ms. Doe was the only one of their group who danced on a table, although other people were doing that also. 6 RT 330.

Colleen had never been to a party with Ms. Doe before, but on one occasion she had gone to [redacted] with Ms. Doe's sister, and the two of them had picked Ms. Doe up from a party and took her home when she was "pretty drunk." 6 RT 331.

Colleen did not see Ms. Doe or any in their group dancing with any of the men at the party. At some point around midnight, they went out to the patio where it was quieter. Trea was "getting too drunk" and "like really sleepy," so Colleen focused her attention on her. 6 RT 332. Trea was "slurring speech" and "having trouble staying awake." Colleen wanted to take her to Julia's dorm room to rest. At one point, Julia, Ms. Doe, and her sister went into the bushes to urinate, and someone showed Colleen a video of that event. 6 RT 333.

When Ms. Doe, her sister and Julia came back, Colleen saw them "talking to two boys," one of whom was appellant. 6 RT 334. When asked to specify "who did you observe talking to the defendant and the other boy," Colleen answered, "[a]ll three girls: [Jane II – Ms. Doe's sister], [Jane – Ms. Doe], and Julia." 6 RT 335. Colleen was "kind of moving back and forth from that group to Trea." 6 RT 335. The interaction between appellant and her friends was "pretty just conversational, like group chat," but "one thing that stood out as odd was that he [appellant] tried to kiss [Ms. Doe's sister] at one point." 6 RT 335. When asked about the kiss, she said that "Out of the blue, we were all talking like I said, and then, he just, out of nowhere, kind of leaned forward and tried to kiss her but she pulled back." 6 RT 336. From Colleen's vantage point, there was no actual contact made between appellant and Ms. Doe's sister.

Colleen called for an Uber at 12:17 a.m., 6 RT 357, and she and Ms. Doe's sister took Trea to Julia's dorm room at around 12:20 a.m. 6 RT 338. When asked about Ms. Doe's level of intoxication the last time she saw her, Colleen said "I would say she was obviously drunk, as were the rest of the girls." 6 RT 339.

Colleen and Ms. Doe's sister came back from dropping Trea off at Julia's room at around 12:45 a.m. They first went to the patio area, but there was no

one out there when they got back. 6 RT 340. They looked for Ms. Doe that night but could not find her. 6 RT 341. At about 1:00 a.m., Colleen, Trea, and Ms. Doe's sister returned to the Doe residence. They saw the police in the vicinity of the Kappa Alpha house but thought they were there "just to shut down the party." The three girls were concerned about Ms. Doe, but "thought that maybe she had gone downtown" because "she was 21 at the time." 6 RT 343.

On cross, she confirmed that when she left the Kappa Alpha house to get the Uber to take Trea to Julia's room, Ms. Doe "was still standing and talking when [she] left." 6 RT 350. Ms. Doe was "acting silly." Colleen acknowledged she had previously told Det. Kim that when she had seen Ms. Doe drunk before, "she was silly and hyper then, too." 6 RT 351.

On redirect, Colleen testified that she and Ms. Doe's sister thought appellant looked like a student from their school named Casey Clarkson, and Ms. Doe's sister mentioned that resemblance to appellant. 6 RT 352.

/

/

/

2. Testimony of Ms. Doe regarding the events of Saturday, January 17, 2015.

Ms. Doe testified that she was 23 years old and had graduated from college in 2014. She had grown up in Palo Alto, attended Gunn High School, and was currently living at home and working for a company that makes educational applications for children.

On the weekend of January 17-18, 2015, her sister came home from college. 6 RT 419. On Saturday, January 17, she, her sister, and her sister's friend Julia went to the Arastradero Preserve. Ms. Doe knew Julia from high school. They went to a Mexican restaurant for some food, where her sister and Julia discussed their plans for the evening regarding a party at Stanford. Ms. Doe explained that Julia and her sister "were definitely going to hang out," but she "wasn't sure if [she] was going to backpack onto their plan." Ms. Doe stated she doesn't "usually go with [her] sister to parties because [she] feel[s] like [she is] more her mom than her sister." 6 RT 421. Ms. Doe told her sister and Julia that she would think about whether she would accompany them to the party. Back at their residence, her sister began getting ready for the party, and Ms. Doe was still thinking about going. Her other option was to stay home by herself. At that time, she was in a relationship with [redacted], who was in graduate school in Philadelphia. 6 RT 424. They texted and Facetimed every day, and traveled to visit each other in November and December. 6 RT 424.

She described her relationship as "very stable and very exciting," and she was not dating anyone else, nor was [redacted]. 6 RT 424.

Ms. Doe had not previously attended a party at Stanford, although she was familiar with the campus from having grown up in Palo Alto. 6 RT 425.

Ms. Doe knew that her sister's friend, Colleen, was also going to join them and go to the party. At some point, Ms. Doe decided to go to the party with them. They started drinking shots of whiskey at their residence around 10:00 p.m. Colleen and Trea brought champagne. 6 RT 428. Ms. Doe had four shots of whiskey and one glass of champagne at her residence between 10:00 p.m. and 10:45 p.m., and she was feeling "just slightly buzzed." 6 RT 430.

Ms. Doe's mother drove the four of them to the Stanford campus, and her sister navigated them to the party. 6 RT 431. Ms. Doe was "starting to feel buzzed and more silly and loose, peaceful." They reached the Kappa Alpha house and went to the basement where the kitchen was open. Ms. Doe was making silly concoctions from juice, "being goofy and making [her] sister laugh." There were probably about 40 other people in attendance at that time. After they left the kitchen, there was a table near the entrance door to the dining area, which Ms. Doe, her sister, and Julia stood behind like "a welcoming committee" and "were just singing songs and acting really goofy." Ms. Doe

was “embarrassing [her] sister but definitely not trying to impress anybody.” 6 RT 432.

During this time, Julia discovered a large Costco size handle of vodka, and Ms. Doe free-poured some into her cup. 6 RT 434. The other people in her group were also drinking vodka from their cups.

Ms. Doe described the overall ambience as “everybody was dancing” – “boys and girls [were] dancing on tables and [she] was dancing by [herself] on a chair.” Ms. Doe was dancing “ridiculous” – “the opposite of sensual” – and her sister motioned for her to get down. 6 RT 435.

More people came to the party, the lights were turned off, and it became very crowded. She did not dance with anyone else at the party. No one came up to her to make her feel uncomfortable while she was at the party.

At some point, Ms. Doe, her sister, and Julia went outside and urinated in a cluster of trees. They were about 40 feet from the party, and it was really dark so she “felt hidden.” 6 RT 437.

The three of them came back to the patio area, and began talking to some young men. 6 RT 437. She drank part of a beer that one of them gave her. When asked whether there was anything about the guys that she and her sister were talking to that she remembered, Ms. Doe answered, “I knew I wasn’t conversing with them, but my sister was.” She described her sister as “just

talking to people" and herself being "very out of it at this point." She described herself as "pretty much empty minded," "kind of just a dud," "vacant, not articulating much." 6 RT 439.

She did not recall her sister leaving the party. Her next memory after drinking beer on the patio was awakening in the hospital. 6 RT 440.

When she woke up, she was "feeling really out of it" and saw "like dried blood on my hands and my elbows and bandages." She initially thought she had fallen or was in trouble because she had become too drunk and was in an administrative office at Stanford. 6 RT 441. Ms. Doe did not have her phone and was lying on a gurney. She was feeling "extremely tired and confused," not knowing where her sister was or where she was. 6 RT 443. She went to use the restroom and noticed her underwear was gone, at which point "it hit [her] that what the deputy…had been talking about was real," and she was "suddenly very scared." 6 RT 444. She felt scratching on her neck and realized it was pine needles. She looked in the mirror and saw that her hair was disheveled with "little things poking out of it." 6 RT 445. She went back to sleep.

She informed about the SART exam and signed a lot of paperwork. She described the SART exam as "invasive," and described the various aspects of it.

She was shown a photograph of People's Exhibit 9, the area where her cell phone and underwear were found, and was asked if she ever willingly go with anyone to an area like that, and she answered no. 6 RT 450.

When asked "When you went out to Stanford, did you have any intention of meeting anybody," she answered no, and asserted that she had absolutely no intention of hooking up with anyone or of kissing the defendant. She had no recollection of seeing appellant and had no interest in him at all. 6 RT 456.

Ms. Doe testified that her cell phone records reflected a 35-second telephone call with her sister at 12:29 a.m., 6 RT 468, and a call to Julia either before or after, but she did not remember making either call.

On cross, she acknowledged telling a Stanford police officer that she had had blackouts in the past and when it occurred, "[her] friends took care of [her]." 6 RT 474. On rebuttal, she testified that she had had maybe four or five blackouts during her college years. When she moved back home, her alcohol tolerance changed because she "was working full time and not going out nearly as much," also drinking "much less." 6 RT 477. When asked whether she ever had a prior blackout where she "had zero memory of the night before," she answered "no." 6 RT 477-478. This blackout was "different" because her memory "completely cut off in the night, and I was told that I had been found

exposed. And in previous blackouts, I've never been half-naked outside." 6 RT 478.

When asked how she learned about her prior blackouts, Ms. Doe said that her friends would tell her "your neck was getting loose. You were getting bobble-heady," or "you were slurring your words, and so we decided to take you home." 6 RT 478.

3. Testimony of the two graduate students who interceded with appellant and Ms. Doe.

Carl-Fredrik Arndt testified that he is a native of Sweden and currently a 28-year-old Ph.D. student at Stanford. 4 RT 126. As of January 2015, he had been at Stanford for three and a half years and was familiar with the campus. He used a bicycle to get around. During the evening of January 17, he had been to a couple of birthday parties and had been playing video games and drinking beer during the course of the evening. Another Swedish friend, Peter Jonsson, wanted to go to the Kappa Alpha fraternity party, and they biked from his apartment to the party. 4 RT 130.

As they approached Kappa Alpha and were riding across the basketball court, they saw a couple lying on the ground about eight to 12 feet off the side of the court. 4 RT 131. When he first saw the couple, he assumed it was a consensual encounter. As he and Peter biked across the basketball court and

got closer to the couple, Peter said, “It doesn’t look like she’s moving.” 4 RT 136. Carl looked more closely and also got the impression that she was not moving. He and Peter stopped because the situation seemed very weird. 4 RT 138. They then saw the male “start[] like more doing thrusting movements.” Carl saw the man’s “hips was moving,” and it looked like sexual activity. 4 RT 139. They approached closer, perhaps six or eight feet away from them, and Peter said, “What’s going on,” and then “What the fuck are you doing” in a loud voice. 4 RT 140.

Carl testified that before they had reached the Kappa Alpha fraternity area, the passed barbeque pits adjacent to Lake Lagunita and saw a couple standing up engaged in physical activity that included kissing. 5 RT 148.

Carl clarified that when he and Peter approached the couple on the ground, the female was lying on her back with her arms open wide, her legs somewhat spread, the male on top of her, and “his feet in between the legs.” 5 RT 157. The male was fully clothed. He described the male’s activity as “thrusting,” and “it looked pretty aggressive.” 5 RT 158.

After having his recollection refreshed by his preliminary hearing testimony, Carl testified that Peter said to appellant “She’s fucking unconscious.” 5 RT 161.

Appellant stopped thrusting when Peter spoke to him loudly, and he started "rising up." 5 RT 162. Peter talked briefly to him," and "[h]e started backing away and then he started running." Carl identified appellant in court. 5 RT 163. Peter ran after appellant, and Carl checked to see whether the female was breathing by putting his hand close to her nose and feeling the air come out. 5 RT 166. Carl said "hey" and shook her, "but nothing happened." 5 RT 166. At that point, Carl ran toward Peter, where Peter was "sitting on top of [appellant]." 5 RT 171.

Other students gathered, and one called the police, who arrived in approximately four minutes and arrested appellant. 5 RT 180.

On cross-examination, Carl acknowledged he never saw appellant touch Ms. Doe with his hands at any point. 5 RT 191. When Carl joined Peter, who was sitting on appellant, appellant said "I didn't do anything." 5 RT 195.

On redirect, Carl described appellant as "able to speak in a clear manner" and not slurring his speech or showing other signs of being particularly intoxicated. 5 RT 200.

Lars Peter Jonsson testified that he is also a Swedish graduate student at Stanford, 6 RT 274, and corroborated Carl's testimony about the encounter. 6 RT 275-316.

4. Deputy Sheriffs' testimony about the scene of the incident and appellant's arrest.

Deputy Sheriff Jeff Taylor testified that he was employed at Stanford University since May 2014. On January 17, 2015, he was working the graveyard shift. 4 RT 75. At 1:00 a.m. on January 18, he was dispatched to the Kappa Alpha fraternity house regarding a person who was unconscious, apparently related to alcohol poisoning. 4 RT 76. He identified People's Exhibit 1 as a diagram of the Kappa Alpha fraternity and the surrounding area where the complaining witness was found. 4 RT 77.

Deputy Taylor was guided to where he saw a female lying on the ground "wearing a black, fairly skin-tight dress, which was actually pulled up, gathered near her waist," such that "her entire buttock was visible and exposed." 4 RT 81. She had a necklace with a feather pendant that was on backwards. Her dress was also pulled up in the front which exposed her pubic area and her navel. There was a pair of black and white polka dot underwear lying on the ground close to her. She had a gray sweatshirt that was "pulled most of the way down on her right arm," and "the top of her dress was pulled down around her shoulders," such that her left breast was exposed somewhat. 4 RT 81-82.

When Deputy Taylor checked her neck for a pulse, she made snoring noises. 4 RT 83. Deputy Taylor asked her in an increasingly loud voice

whether she was okay, but he got no response. 4 RT 84. There were pine needles on the ground, and "her hair was just completely disheveled and full of the pine needles." 4 RT 84.

Deputy Taylor described People's Exhibit 5, a photograph that displayed a wood-slatted fence structure that was open on one side and where a dumpster was usually positioned. 4 RT 86. He described the woman as lying "directly centered behind the shed" on "fairly flat" terrain that was "covered in dry pine needles." 4 RT 91-92. There was also a cell phone on the ground next to her. 4 RT 94.

Paramedics arrived and attended to the woman at the scene, during which time she was unresponsive, and their efforts to awaken her were unsuccessful. 4 RT 102-03. Deputy Taylor rode with her in the ambulance to the Valley Medical Center, where she was treated with intravenous fluids. 4 RT 104.

She regained consciousness at 4:15 a.m., and had a very surprised look when she saw Deputy Taylor in uniform. 4 RT 108. After about 30 to 60 seconds, she gave him her name and answered a few questions. Deputy Taylor told her "there was a chance she may have been sexually assaulted." She was "very groggy and a little bit out of it." 4 RT 109.

One of the medical personnel escorted her to a woman's bathroom. Her eyes were bloodshot and watery, and her breath smelled of alcohol. 4 RT 110.

Deputy Taylor observed her "kind of dragging her feet" as she walked to the bathroom.

She was medically cleared by a doctor at approximately 4:30 a.m., after which they waited for the Sexual Assault Response Team [SART] medical staff to respond. 4 RT 112.

The SART nurses arrived at about 7:30 a.m., described their roles, and drew blood from her. 4 RT 112. Deputy Taylor was relieved by Deputy Kim at approximately 8:30 a.m. 4 RT 113.

Deputy Sheriff Braden Shaw testified that he is employed by the Stanford Department of Public Safety as a Deputy Sheriff, 8 RT 774, and was called out to Kappa Alpha fraternity at around 1:01 a.m. on January 18, 2015. He responded to reports of an unconscious female in a field. He and his partner, Eric Adams, pulled up to the fraternity and walked over to where Deputy Taylor was standing next to a female on the ground. The female had clothes on, "but they were all messed up in various array" with her skirt or dress hiked up to her waist, her bra area "was completely in a mess," and "the rest of her clothing was all bunched up." 8 RT 776. Within a minute of his arrival, someone ran up and said, "We have him other there," and he and Adams went in the direction that the person had pointed.

He found two male subjects detaining appellant, who was lying on his back. 8 RT 778. Appellant had an odor of alcohol, and his general demeanor suggested he had been drinking. 8 RT 780. Shaw guided appellant to his vehicle, and "he walked fine." He noticed that appellant had "bloodshot, watery eyes." Appellant was wearing brown pants and a black shirt. In the crotch area of his pants, there was "a cylindrical bulge" that Shaw "believed…was an erection." 8 RT 781.

Shaw took photographs of Ms. Doe as she lay on the ground, People's Exhibits 10 through 14. After Ms. Doe was transported by medics, he interviewed Jonsson, Arndt, and two other witnesses. 8 RT 786. He took a photograph of appellant, People's Exhibit 36. 8 RT 789. In People's Exhibit 70, in the photograph he identified appellant's wallet and a Trojan condom found in it. 8 RT 789.

5. Testimony from [redacted], Ms. Doe's boyfriend in Pennsylvania.

[redacted] testified that he was 26 years old, from Los Gatos, California, and currently living in Philadelphia, Pennsylvania. 5 RT 244. Ms. Doe is his girlfriend whom he started dating in November 2014, and they were in an "exclusive relationship." 5 RT 245. They talked on the telephone most

days of the week. [redacted] was interviewing for jobs in California, so they could see each other more often.

On January 17, 2015, they talked during the day, and Ms. Doe mentioned she was going to Stanford. 5 RT 246. He spoke to her at 7:00 p.m., and she called him at 11:54 p.m. while he was sleeping. Ms. Doe's speech was "severely slurring to the point that she was incomprehensible." [redacted] "couldn't understand most of the words that she spoke," and Ms. Doe "could not process what I was saying to her as if I had not spoken at all." 5 RT 248. He stayed on the telephone with her for about two minutes, but "could not communicate with her because she was not responding to anything I was saying." 5 RT 249.

At 12:14 a.m., [redacted] sent her a text saying, "You are done. Tell Neegus [a nickname for Ms. Doe's sister] to take care of you, please." "You are done" is slang for "you're really drunk." 5 RT 249. A prior text from Ms. Doe at 11:30 p.m. said "too turnt at baseball house," which is also slang for "too drunk."

At 12:16 a.m., Ms. Doe called [redacted] and left a voicemail. [redacted] heard the call but did not answer it. On one hand, he was worried because she was drunk, but on the other hand he was "listening to someone who was rambling

incoherently, couldn't understand what she was saying, other than my name from time to time, and wanted to get to sleep." 5 RT 250.

He listened to the voicemail immediately, in which Ms. Doe said, "she missed me and she said that males were presenting themselves to her but that she liked me." There was "a lot of the other voicemail [he] couldn't understand," and he was worried because he "sort have had hoped someone was around her to take care of it." 5 RT 251.

[redacted] wanted to call Ms. Doe's sister but did not have her number. He called Ms. Doe directly and when she "started rambling," [redacted] said, "Can you find your sister?" He then left the phone on his pillow "until either she hung up or fell asleep." This was a 10-minute call. 5 RT 252. The prosecutor played a recording of Ms. Doe's 12:16 a.m. voicemail, Exhibit 29. 5 RT 253. Based on her speech in the phone calls, he had never heard her to be that intoxicated. 5 RT 257.[2]

/

/

---

[2] Counsel for appellant requests that this Court to listen to the recording (Exhibit 29) in conjunction with the transcript (Exhibit 29A, 2 CT 517) to assess its evidentiary value. On one hand, Ms. Doe was clearly intoxicated. At the same time, she vacillated between some slurred words and some concise diction, leaving the listener uncertain how to assess her degree of impairment and uncertain how she would have appeared to others at the party.

6. Testimony from Kristine Setterlund, SART nurse.

Kristine Setterlund testified that she is employed by the Valley Medical Center Sexual Assault Response Team. She has been a SART nurse since 1987. 6 RT 359. Their procedure when conducting an exam is to interview the patient, collect swabs, take photos, and conduct a pelvic exam. 6 RT 360.

Part of the exam includes putting a dye on the patient's skin on the outer surface of her vaginal area, which "adheres to newly-traumatized skin," "a substance called Toluidine Blue." 6 RT 363. The SART procedure entails packaging up the patient's clothing and any other materials to give to the police as evidence. 6 RT 363.

On Sunday, January 18, Setterlund conducted a SART exam on Ms. Doe beginning at approximately 7:00 a.m, 6 RT 366, and took a blood sample.

Nurse Setterlund attempted to take a history from the patient, but Ms. Doe "was not able to remember the incident." 6 RT 371.

Regarding injuries, she found erythema, which is redness to the skin, and abrasions on her gluteal cheeks. 6 RT 373. There were abrasions on the left side of her neck. 6 RT 375, and on her right clavicle. 6 RT 376.

In the vaginal examination, there was an abrasion on the inside of the labia minora but outside of the vagina. 6 RT 380. There was also some debris

found inside the labia minora. There was some Toluidine Blue staining on some tissue in her vagina. There was no evidence of sperm. 6 RT 381.

Nurse Setterlund was asked if she had an opinion "whether the observation of [Ms. Doe's] physical SART exam are consistent with a consensual sexual penetration," and she answered:

> The evidence that we found here, the debris and the abrasions and the physical evidence show us that there was some type of trauma to the body. We don't know specifically what happened to her, but this is significant trauma inside the labia minora. So what the debris, which would not normally be there, and the erythema and the abrasion, this would be significant trauma. 6 RT 388-389.

She also conducted a SART investigation on appellant and took swabs from his hands and from underneath his fingernails. 6 RT 391. Appellant was "quiet," "cooperative," and "made good eye contact with [her]." She noted that his shirt was "disheveled and torn, with debris in the back of it." 6 RT 406. She took swabs from his hands and underneath his fingernails. 6 RT 391. There were a number of abrasions on appellant's arms, hands, and ankles. 6 RT 407.

7. DNA evidence.

Craig Lee testified that he is a Criminalist for the Santa Clara County Crime Lab assigned to Forensic Biology. 7 RT 480. He had testified as a DNA expert approximately 20 times. 7 RT 482.

His DNA findings were as follows. The vaginal swabs were presumptively positive for blood and negative for semen. 7 RT491 – 492. He examined Ms. Doe's underwear and swabbed for DNA on the interior and exterior of the waistband of the underwear "to see if someone had pulled down or may have touched that area," 7 RT 493. He found a mixture of DNA from two individuals, with Ms. Doe as the major contributor, and "Brock Turner is excluded as a possible contributor to the minor DNA component." When asked by the prosecutor if that result meant that appellant "did not touch the underwear," Mr. Lee responded, "It may not mean that" because "what it essentially means is that I did not detect his DNA if all the minor DNA comes from one individual." 7 RT 494.

He found that the presumptive test for blood was positive with respect to the swab from appellant's left fingernail, his right fingernail, and from his right finger shaft. 7 RT 494. He found that Ms. Doe was the source of the DNA in the swab of appellant's left fingernail. The DNA from appellant's right fingernail is a mixture of at least three individuals including an unidentified male, Ms. Doe, and appellant himself. Finally, the DNA from appellant's "right fingernail shaft's swab is a mixture from at least two individuals," one of which is a male and the other is Ms. Doe. 7 RT 495.

In response to a question from a juror whether DNA from appellant was found on Ms. Doe or any of her items of clothing, Lee answered that with respect to the only item of Ms. Doe's clothing he examined (her underwear), he was not included. 7 RT 500.

On cross, Lee acknowledged that on the swab taken from appellant's penis, he found appellant's DNA and another male DNA profile that was "very similar to [Lee's own] DNA." 7 RT 503.

8. Toxicology evidence.

Alice King testified that she supervises the Toxicology Unit at the Santa Clara County Crime Laboratory. 7 RT 532. She identified People's Exhibit 68, a large chart that illustrates her opinions of the effects of alcohol on humans. 7 RT 538. She testified that for similarly-sized men and women, the same amount of alcohol will produce a higher blood alcohol amount in women. 7 RT 539. She described general symptoms associated with different levels of alcohol consumption, 7 RT 541, and stated that "[t]he mental impairment always takes first," and "physical symptoms come after that." 7 RT 543. She opined that "All people are impaired [for driving] at .08 or greater," but there is no bright line rule as to when someone will pass out. 7 RT 545. She extrapolated back from Ms. Doe's blood draws on Sunday morning that her blood alcohol content

at 1:05 a.m. would have been between .241 and .249, a level consistent with passing out.

She also calculated appellant's blood alcohol content as .171 at 1:05 a.m. 7 RT 554.

The parties stipulated that Ms. Doe's blood sample was taken between 7:00 a.m. and 8:00 a.m. on January 18, and the blood alcohol content was .127/.129. Appellant's blood sample, taken at 3:15 a.m. on January 18, was .130. 11 RT 1027.

Regarding blood alcohol concentration and blackouts, Ms. King testified that "You can black out at any level that we're looking at" because it "depends on the person." Overall, she opined "I don't think there's enough study [sic] to show at what point blackout or pass out." 7 RT 558.

Regarding blackouts, a drinker in a blackout does not know they are in one at the time, nor Ms. Does someone else who is looking at the person who is having a blackout. 7 RT 562.

9. Det. Kim's investigation.

Mike Kim testified that he is employed by the Stanford Department of Public Safety as a Deputy Sheriff assigned to investigations. 9 RT 805. He was specifically trained to investigate sexual assault cases beginning in the Police

Academy and then in follow-up courses. He has investigated about 12 sexual assault cases in his 11-year police career. 9 RT 806.

On January 18, 2015, he was on call and received a message about a possible sexual assault at 1:43 a.m. 9 RT 807. He received some basic information from Deputy Shaw, including the fact that appellant was in custody. Deputy Adams requested a SART nurse to collect evidence from appellant. 9 RT 811. Eventually Det. Kim went to Valley Medical Center at 8:30 a.m. to relieve Deputy Taylor. Ms. Doe appeared "uncomfortable," "kind of like fidgeting" when he was talking to her. He also spoke to Ms. Doe's sister, who was "crying a lot, very distraught." 9 RT 813.

As part of his investigation, he attempted to find surveillance cameras in the vicinity of the Kappa Alpha house. He put together a photo lineup that included appellant's photograph and asked the [redacted] Police Department to show it to Ms. Doe's sister. 9 RT 815. It was also shown to Colleen, who identified appellant with 70% certainty. The investigation included taking photographs and measurements of the location and walking through the incident with the Swedish graduate students. 9 RT 819. Among other measurements, the position where Ms. Doe was found was 116 feet from the back patio of the Kappa Alpha house. 9 RT 823.

10. Paramedic testimony re: Ms. Doe's condition at the scene.

Shaohsuan Fanching testified that he is employed by the Palo Alto Fire department, 7 RT 506.

On July 18 at 1:01 a.m., he went out as a paramedic on an ambulance with his partner, Adam King. 7 RT 510. The initial dispatch information was "unconscious female on Stanford campus." 7 RT 512. His initial contact with the patient was at 1:14 a.m. The woman was unresponsive on the ground, so they initially tried to wake her up, which is called a "shake-and-shout." 7 RT 513. There was no response. He then conducted a "painful stimulus," which is either a pinch of the finger or a tight squeeze on the shoulder. 7 RT 514. He applied the finger pinch, and "she had some sort of response and her eyes opened briefly," which was "pertinent finding that she responded to pain." 7 RT 515.

He documented that he smelled alcohol when he first arrived. He noted she had vomited at the scene when the paramedics were putting her on the spinal immobilization board. 7 RT 520. Her vital signs were all within normal limits. 7 RT 523. The ambulance took her to Valley Medical Center because that was the only facility that performed rape kit examinations. In transit, he put an IV into the patient with normal saline solution.

C. The Defense Case.

1. Alcohol expert Kim Fromme, Ph.D.

Dr. Kim Fromme testified that she is a Professor of Clinical Psychology at the University of Texas at Austin. 8 RT 707. Her primary area of research is the effects of alcohol intoxication related to alcohol-induced blackouts, sexual risk-taking, and driving under the influence. 8 RT 707. She has testified as an expert more than 30 times. 8 RT 718. She testified that one of the effects of alcohol consumption is that it "can lead people to engage in behaviors when they're drinking that they might not otherwise engage in when sober and they might even later regret." 8 RT 720.

She described a blackout is a "period of amnesia during drinking in which the person is fully conscious and aware to be able to engage in all kinds of activities – walking, talking, driving a car, dancing, having sex, etc., they're simply not just forming memories for those events." 8 RT 721. The difference between a "blackout" and a "pass out" is significant – "within a blackout, the person is fully conscious – walking, moving about, engaging, making voluntary decisions – but simply not forming a memory of them." In contrast, "a person passes out from alcohol when the alcohol reaches a certain level in the brain that parts of the brain shut down and the individual loses consciousness, [such that] they are no longer able to move about or make decisions," and "it's very

difficult to rouse them." 8 RT 721-722. She stated that with respect to passing out, "most experts in the field agree that a person must reach a blood alcohol level of .30 and above to pass out from alcohol." 8 RT 722. When a person is in an alcohol blackout, another person observing them cannot tell that the person is in a blackout. 8 RT 724.

Dr. Fromme reviewed police reports and reports of blood alcohol levels, and a recording of Ms. Doe's voicemail to [redacted] 8 RT 725. Only about 50-60% of heavy-drinkers experience blackouts. Females are more likely to black out than males and are likely to black out at lower amounts of consumption than men. 8 RT 727. Based on hypothetical facts of Ms. Doe's situation, she was in a blackout at least between 12:30 and 1:00 a.m. 8 RT 728.

Dr. Fromme testified that she believed Ms. Doe was either passed out or asleep during the time she was transported in the ambulance until she regained consciousness in the hospital. She described those as "different states of consciousness," with "a greater level of responsivity in the brain during sleep than there is to being passed out." She testified that a blood alcohol content of .20 is necessary to cause a blackout, and that an alcohol level of .30 is generally necessary to cause someone to pass out. 8 RT 748.

Regarding the voicemail, she agreed that the person in the voicemail "sounds extremely intoxicated." 8 RT 754. When asked whether the phone call

changes her opinion that Ms. Doe could voluntarily engage in activities, Dr. Fromme answered, "The brain regions that govern decisions and voluntary activities are different than those that govern speech" because "different functions are driven by different brain regions." 8 RT 754.

She also testified that there are a number of studies that show that people are inaccurate in judging another person's level of intoxication, and the accuracy deteriorates further if the observing person is also intoxicated. 8 RT 761.

She was shown People's Exhibits 10 through 14, photographs of Ms. Doe passed out, and stated that she "cannot tell us at what point someone goes from a blackout to a pass out." 8 RT 767.

2. Appellant's testimony.

Appellant testified on his own behalf. 9 RT 929. He was 19 years old as of January 17, 2015 and was a freshman at Stanford. 9 RT 830. Appellant had been to the Kappa Alpha house on a few prior occasions for parties because he knew three other people on the swim team who lived there. 9 RT 831.

At Kappa Alpha parties, there was dancing that he described as "grinding," dancing on tables, and drinking alcohol. 9 RT 832. The consumption of alcohol included drinking games. At that time, appellant

understood the phrase, "hooking up" to mean "sexual activity" that entailed more than "just kissing." 9 RT 834.

Earlier in the evening, appellant was at a party at the residence of another swimmer named Peter Arnett. Appellant drank approximately five Rolling Rock beers at Arnett's, 9 RT 836, plus a few sips of Fireball whiskey. 9 RT 838. At approximately 11:00 p.m., he and others left Arnett's room for the Kappa Alpha house, which was less than five minutes away.

At the Kappa Alpha house, appellant went inside through the patio entrance and saw drinking games going on. He saw two friends from the swim team and joined them. Appellant "danced and drank beer and talked to people." 9 RT 839. At one point while he was talking with one of the swim team captains, "the lights went out and people started dancing on the tables," and appellant joined in. He danced with a girl for five or 10 minutes, whose name he did not know. 9 RT 840.

Appellant recognized Julia Maggioncalda as a fellow student in his computer science section. 9 RT 841. Appellant did kiss Ms. Doe's sister once during the evening. Appellant was listening to his friend, Tom Kremer, and Ms. Doe's sister talk about mutual acquaintances at [redacted] Ms. Doe's sister "got up close to me and said oh, my gosh. You look really like one of my friends from school. And then, we laughed about it for a second. And we

looked into each other's eyes, and then I leaned in to kiss her." 9 RT 842. Their teeth touched, which "felt weird" so "we each pulled away and kind of laughed about it afterwards." 9 RT 842.

Around 12:30 a.m., appellant saw Ms. Doe dancing by herself and went up to her and told her he liked her dancing. 9 RT 844. Appellant asked her if he had met her earlier, and then asked if she had a sibling because he had been talking with someone who looked a lot like her. Ms. Doe responded that her sister was there. 9 RT 845. Appellant asked if she would like to dance with him, and she said "sure." They danced inside near the door of the patio. After dancing for about 10 minutes, he kissed her, and she was responsive. 9 RT 846. Appellant asked if she wanted to go back to his dorm, and she said "sure." Appellant asked her name while they were dancing, but he did not remember it. He had given her his name.

Appellant put his arm around her shoulder, and they walked away from the party. 9 RT 847. They walked along the access road between Jerry House and Kappa Alpha House and then along a concrete path, which was the fastest way to get to Lagunita Residence. Before he reached the shed that housed the dumpster, "we cut through to get to that path." 9 RT 848. Appellant identified that path in Defendant's Exhibit D.

After they left the concrete path, she slipped and "kind of fell down." She "grabbed onto me to try and prevent her fall and that caused me to fall as well."

After they fell, they "laughed about it," appellant asked if she was okay, and she said she "thought so." At that point, they started kissing. After some kissing, "she rolled on her back, and I rolled on her front while we were still kissing." After some more kissing, appellant asked her "if she wanted me to finger her," and she said "yeah." Appellant "took off her underwear." He got up on his knees and took off her underwear from her dress. 9 RT 851. Ms. Doe assisted and "lifted up her hips to help me." He then got back on top of her, kissed her, and fingered her. Appellant was asked "When you say 'fingered her,' did you put a finger from your hand into her vagina," and appellant answered, "Yes, I did." 9 RT 852.

Appellant also touched her breasts by moving her dress down. Appellant fingered her and "thought she had an orgasm." During that time, he had asked her if she liked it, and she answered "uh-huh." Ms. Doe had her arms around his back and at one point wrapped around his neck. Ms. Doe was "moaning initially and breathing heavily and then it just increased more frequently," which gave him the impression that she had an orgasm. At that point, he stopped fingering her and started kissing her. They then started "dry humping

each other," which means "grinding each other's hips against each other." 9 RT 853. Ms. Doe said "Oh. Okay," he then got on all fours, felt dizzy, and eventually stood up and stumbled down the incline. 9 RT 854.

At that point, he realized there "was a guy standing right next to me" who said something like "what the fuck, man, like, you're sick." At first, appellant could not make out what he was saying, the person repeated himself, and appellant said, "I didn't do anything." The person then put his hand on appellant's shoulder to restrain him and was talking with a friend in a foreign language. 9 RT 855. The person "tried putting me in like an arm lock," which scared appellant and he decided to run. 9 RT 856. He described the first person as Peter Jonsson. Jonsson caught him from behind and tackled him to the ground. 9 RT 856.

When he was on the ground, appellant "started screaming out for help immediately," and Jonsson "kept calling me sick and, do you think that's okay?" Appellant "had no idea what he was taking about." 9 RT 857. A police officer showed up, the two students got off him, and appellant stood up. The police officer told him to get back on the ground and put his hands behind his back, which he did. 9 RT 858.

On cross-examination, when asked whether he was surprised that there was Ms. Doe's DNA under a fingernail on his right hand, he said "my fingers

were in her vagina at one point." 9 RT 860. When asked whether there was a reason her DNA would be on a finger of his left hand, appellant answered that when he was in handcuffs, his hands were together, and the DNA could have been transferred to his left hand.

The last time he saw Ms. Doe that evening, she was conscious. There was nothing about their conversation that led him to believe she did not understand what he was saying. He never had an intention to rape her, and there was nothing that caused him to believe she was unconscious when he was fingering her. 9 RT 862. There was no reason for him to believe she was too intoxicated to understand their conversation. Ibid.

On cross, appellant rated himself as a six or seven on an intoxication scale of one to 10. Appellant was feeling "pretty buzzed" from the five beers and Fireball whiskey earlier in the evening. 9 RT 865. Appellant was asked whether his drinking that night affected his ability to make decisions, and he said it did not. 9 RT 867. Appellant reiterated that he kissed Ms. Doe's sister because he "thought she was flirting with [him]." 9 RT 868.

Regarding his subsequent interview with Det. Kim, appellant stated he was honest with him. When asked why he denied running, appellant responded, "I had been charged with such a heinous crime that I never thought in a million years I would be charged with," and "my mind was going a million miles an

hour and it was impossible for me to think clearly about what happened." 9 RT 892. At the same time, appellant agreed that he was "pretty calm in that interview." He was asked twice why he ran and he denied running, as opposed to saying he thought that the two guys were going to hurt him. He acknowledged that he did run and what he told Det. Kim was a lie. 9 RT 893.

When Det. Kim asked how he ended up on the ground, appellant answered "I don't remember," which the prosecutor characterized as "a lie" because he now "remember[s] vivid detail about how [he] went to the ground." Appellant responded, "It's not a lie. I didn't remember at the time."

Regarding Det. Kim's question whether Ms. Doe was unconscious, appellant answered, "I don't think she was unconscious." 9 RT 894. Appellant responded, "Look, the entire time I was with her, if she was ever unconscious, I would have gone for help." 9 RT 895.

Regarding Det. Kim's question about how appellant encountered Ms. Doe, he acknowledged that he did not tell Kim that he had danced with her at the Kappa Alpha house. When asked why he did not tell him, appellant answered, "I couldn't think clearly at the time." The prosecutor responded, "You had six hours to come up with a story about why two random guys had chased you down and detained you," but "you couldn't tell him the story about how you met the girl that you fingered behind the dumpster?" 9 RT 896.

Appellant acknowledged that he did not tell Det. Kim that he asked if she would go back to his dorm room and that she agreed. 9 RT 896.

Appellant was asked whether he had heard Ms. Doe's voicemail, and he agreed that "she sounds super intoxicated." When asked whether appellant viewed her as "very drunk," he answered, "Not more than anybody else that I had been with." He acknowledged that she was "more drunk than [he was]," 9 RT 897, but that was "based on the blood alcohol." Appellant repeated that "She didn't appear any more drunk than anyone else I had been with." When asked "Is it normal for you to hook up with drunk girls," appellant answered, "At a party, yes." 9 RT 899.

3. Character witnesses.

Andrew Cole-Goins testified that he was currently 21 years old and a student at the University of Buffalo in New York. 10 RT 932. He grew up near Dayton, Ohio and met appellant when he was 12 or 13 on the Dayton Raiders co-ed swim team. 10 RT 933. Both were acquainted with each other's families, and they traveled together for swim meets. 10 RT 936. They were close during high school and remained close after he went to college. 10 RT 937.

Appellant had a high school girlfriend, Lydia Pocisk, and Cole-Goins observed the two together. When asked whether he had an opinion about appellant's high moral character regarding sexually assaultive behavior, Cole-

Goins answered, “There’s no way he would ever do something like that.” 10 RT 938. On cross, he acknowledged he had never been with appellant when he was drinking to excess and had never seen him when he was intoxicated. 10 RT 940.

Gary Galbreath testified that he is a swimming coach and met the Turner family in the early-2000s when they came to the YMCA in Dayton where he was coaching. 10 RT 943. Appellant’s older brother, Brent, was also on the swim team. Galbreath coached the Dayton Raiders from 2008 to 2014. 10 RT 943. Galbreath hired appellant at one point to be the lifeguard at a pool that he managed. 10 RT 945.

When asked his opinion about appellant’s high moral character, Galbreath testified “I don’t believe that he would do anything that would harm anybody” because appellant “is a very respectful and courteous and, you know, that he knows what right and wrong is.” 10 RT 947.

On cross, he acknowledged that he had never gone to a frat party with appellant, had never gone drinking with him, and had never seen him intoxicated. 10 RT 948-949.

Lydia Pocisk testified that she was currently a student at the University of Kansas. 10 RT 950. She had known appellant from elementary school. She was also on the Dayton Raiders swim team. She and appellant started dating in their junior year of high school and continued through senior year – “most of it

kind of just happened because he's been my best friend my – as long as I've known him so." 10 RT 952. Their relationship "was and still is very respectful." Their dating relationship was exclusive. It ended as a "mutual decision" because they were going separate ways. 10 RT 954. Nonetheless, they've maintained "a really close relationship." Regarding her opinion about his moral character, she testified that "I do know plenty enough to know that is not what Brock would have done," and he has "great moral character about him." They were sexually intimate during their relationship, and she never felt pressured. 10 RT 955.

On cross, she acknowledged that she had never drunk alcohol with him and never saw him intoxicated. 10 RT 958.

Jennifer Jervis testified that she lives in Tigard, Oregon and taught French in Dayton Oakwood High School for 13 years. She met appellant in approximately 2005 in relation to swim team activities, where she was a swim coach. She got to know the Turner family generally through Brock and his older siblings, as well as swim activities. Regarding her opinion about appellant's moral character, she testified "That would be the farthest type of behavior, the sexually aggressive or assaultive behavior that I would ever, ever, ever, ever associate with Brock Turner." 11 RT 1012. On cross, she

acknowledged that she has never seen appellant when he has been drinking or at a frat party. 11 RT 1013.

D. Prosecution Rebuttal.

Det. Kim testified that he interviewed appellant at 6:30 a.m. at the Stanford police annex. 10 RT 960. Kim reviewed a transcript of the interview, 3 CT 594, declared it accurate, and it was played for the jury. 10 RT 964. Det. Kim testified that at the beginning of his investigation, he was attempting to determine whether it was a case of digital penetration or penile rape. 10 RT 965.

Peter Jonsson, recalled, testified that as he approached appellant, appellant backed away from the female. 10 RT 978. Jonsson denied ever putting his hand on appellant's shoulder or putting him in an arm lock.

Deputy Shaw, recalled, testified as to photographs of appellant taken on January 18. 11 RT 1017. Shaw repeated his belief that appellant had an erection. 11 RT 1021. On cross, he conceded that appellant's belt was buckled and his zipper was fully up. 11 RT 1024.

/

/

/

/

## ARGUMENT

### I. APPELLANT WAS DEPRIVED OF DUE PROCESS, A FAIR TRIAL, AND HIS RIGHT TO PRESENT A DEFENSE BY THE TRIAL COURT'S ERRONEOUS EXCLUSION OF ALL TESTIMONY BY CHARACTER WITNESSES ATTESTING TO HIS HONESTY AND VERACITY.

#### A. Summary of Facts.

On March 9, 2016, before voir dire began, the People filed motions in limine. 2 CT 336. Motion (2) was captioned "The People seek to limit the scope of the character witnesses." 2 CT 337. The People referred to permissible character testimony as provided for in Evidence Code section 1102(a), and requested that the trial court set limits on the scope of the character witnesses' testimony:

> The defense has indicated they seek to introduce at least four character witnesses. The People have attached as an exhibit (Exhibit 1) the defense offer of proof of the statement from the character witnesses. First, the defense should be required to state the specific character trait each witness will testify to and demonstrate how the character trait relates to a disputable issue. Further, some of the character witnesses make references to the Defendant's lack of ability to sexually assault a female. That is an improper character trait and Ms. Does not meet the standards in Stoll and McAlpin for character for non-sexual deviance.
>
> Also, many of the character witnesses make reference to defendant's swimming career and his performance and dedication as a swimmer. The defendant's swim career is not an issue in dispute, it is not relevant, and the People seek to exclude any reference to it as unduly prejudicial. Furthermore, the defendant's performance in school is not relevant and should be excluded.

> Additionally, other witnesses' observations about the defendant's character, experience or habit drinking is not a relevant character trait and should be excluded. 2 CT 337.

The defense witness list and offer of proof designated as People's Exhibit 1 listed Andrew Cole-Goins, Lydia Pocisk, Jennifer Jervis, and Gary Galbreath as the prospective character witnesses, accompanied by a summary of their relation to appellant and their observations and opinions about his character. 2 CT 340.[3]

The motion was addressed during the proceedings on the afternoon of March 9, 2016 as follows:

> The Court: All right. And then, number 2 is the People's request to limit the scope of the character witnesses' testimony. And that would be deferred until Friday. As I understand it, the character traits that have been identified by the defense as subject or subject of these witnesses' testimony will be character for honesty and non-sexual aggression, essentially. And so I want to look at the cases and to have some further discussion on this one. So we'll revisit this Friday afternoon. 1 RT 18.

The Clerk's Minute Order for Friday, March 11, 2016 reflects "counsel in chambers for discussions with the court," which were "not reported." 2 CT 342. On March 17, 2016, trial began, and defense counsel informed the jury in opening statement that appellant would testify and "tell [the jury] everything

[3] The four character witnesses plus psychologist Kim Fromme were the witnesses listed on the defense official witness list filed on March 16, 2016. 2 CT 379.

that happened." Augmented Reporter's Transcript, p. 11 (hereafter "ART").[4] Appellant testified on March 23, and was cross-examined extensively (46 pages of transcript, 9 RT 863-909) about the incident itself and particularly about putative inconsistencies between his January 18, 2015 statement to Det. Kim and his trial testimony.

The trial court summarized the preceding discussions regarding the scope of defense character witnesses, noting that "[a]t an earlier discussion about the scope of the testimony of those witnesses, the defense had offered the character traits of one, honesty, and two, for lack of a better term, sexual non-aggression." 10 RT 924. The court then stated, "[u]pon further research, review and discussion, I indicated that the character trait for honesty didn't appear to be relevant to the crimes charged under Evidence Code section 1102. And then we discussed some case law related to the appropriate scope or characterization of the sexual trait as it relates to sexual assault." The court permitted the defense witnesses to "testify that the defendant is of high moral character as it

---

[4] Brock Turner will testify, and he will tell you everything that happened from the very beginning of the evening all the way through after he's found on the ground with [Ms. Doe]. He will tell you exactly what happened in terms of how much he drank, everything happened during the time he was with her at the Kappa Alpha fraternity house. They left together. And everything that happened – he will answer every question that anybody here has about that. ART 11-12.

relates to sexual assaultive behavior," but not as to appellant's honesty – "In other words, honesty is out. High moral character as it relates to sexual assaultive behavior is in." 10 RT 924 (emphasis supplied).[5]

B. The Trial Court's Error.

The trial court took an erroneous view of the permissible scope of defense character testimony, restricted it to the trait of sexual non-aggression relevant to his conduct at the time of the offense (Evidence Code section 1102), and excluded it as to appellant's honesty and veracity (Evidence Code section 780).

Section 1102 provides that "[i]n a criminal action, evidence of a defendant's character or trait of his character in the form of an opinion or evidence of his reputation is not made inadmissible by section 1101 if such evidence is…[o]ffered by the defendant to prove his conduct in conformity with such character or trait of character." Thus, section 1102 provides one basis for the admission of character evidence, i.e., to prove defendant's conduct at the time of the offense.

[5] There were further discussions on peripheral matters, such as the People's request that "all character witnesses be admonished not to mention the fact that the defendant is no longer a student at Stanford, not to mention any facts related to his potential to be in the Olympics or what consequences he has suffered as a result of this incident." 10 RT 927.

Section 780 provides a separate basis for the admission of character evidence, i.e., to prove defendant's credibility at the time of his testimony. Evidence Code section 780 specifically provides "The court or jury may consider in determining the credibility of a witness any matter that has any tendency and reason to prove or disprove the truthfulness of his testimony at the hearing, including…[h]is character for honesty or veracity or their opposites" (emphasis supplied). The trial failed to recognize the clear relevance and critical importance of character testimony regarding appellant's honesty and veracity to assist the jury in assessing the credibility of his testimony. The trial court's error in excluding character testimony regarding appellant's honesty violated not only the statutory authorization in Evidence Code section 780(e), but also violated appellant's Sixth Amendment right to present exculpatory evidence on his own behalf. Crane v. Kentucky (1986) 476 U.S. 683; Olden v. Kentucky (1988) 488 U.S. 227.

1. The statutory and decisional law that confirms a defendant's right to support his testimony with evidence of his good character for honesty and veracity.

Evidence Code section 780 "is a general catalog of those matters that have any tendency in reason to affect the credibility of a witness." Law Revision Commission Comments to Evidence Code section 780. The Comments further explain that section 780 "provides a convenient list of the

most common factors that bear in the question of credibility." Section 780(e) identifies a witness's "character for honesty or veracity or their opposites" as one of these "most common factors."

People v. Taylor (1986) 180 Cal.App.3d 622, 629 reversed a conviction for the erroneous exclusion of good character testimony as to defendant's honesty and veracity. Defendant Taylor, an employee at a center for developmentally disabled persons, had been convicted of the rape of a mentally incompetent resident of the center. The Court of Appeal ultimately concluded that defendant's "motion to introduce evidence of his reputation for truth and veracity was erroneously denied," and that "in this close case where credibility was a key issue, that error requires reversal." Id. at 626.

In reaching that conclusion, the Court of Appeal contrasted the character evidence contemplated under Evidence Code section 780(e) with that contemplated under section 1102. The Court of Appeal stated that "[t]he character evidence permitted a defendant under section 1102 is limited to evidence of the character or trait of character relevant to the offense charged." The Court of Appeal then noted that "[d]efendant's reputation for truth was relevant not to the elements of the rape itself, but only on the issue of whether he was testifying truthfully." In light of the difference between the two statutes, the Court of Appeal noted that "the defendant's reliance on Evidence Code

section 1102 is unavailing," id. at 629, but that "the character evidence was admissible at trial under section 780(e) for the purpose of proving the truthfulness of his testimony." Id. at 632.

In sum, section 1102 governs the admissibility of character evidence that relates to a trait at issue in the commission of the charged offense, while section 780 governs the admissibility of character evidence that relates to credibility, independent of what the charges involve. In this case, the trial court correctly admitted the character evidence that under section 1102 supported an inference that appellant's character was inconsistent with the commission of the offense charged, but erred in excluding the character evidence that under section 780 supported an inference that he testified truthfully.

People v. Taylor, supra, found reversible error in the trial court's exclusion of appellant's character evidence for truthfulness due to the trial court's erroneous belief that the evidence was excludable pursuant to Evidence Code section 790. Evidence Code section 790 provided that "evidence of the good character of a witness is inadmissible to support his credibility unless evidence of his bad character has been admitted for the purpose of attacking credibility." Taylor held that section 790 was abrogated by the passage of the "right to truth-in-evidence" provision of Proposition 8, passed on June 2, 1982,

which "commands that 'relevant evidence shall not be excluded in any criminal proceedings…" People v. Taylor, supra, at 631.

After rejecting Evidence Code section 790 as a basis for the exclusion of the character evidence as to honesty and veracity, Taylor identified several factors that established its admissibility under section 780. First, Taylor noted that "[t]he defendant's credibility was highly relevant to the case," but that "[t]he jury was deprived, however, of any extrinsic evidence relating to the defendant's credibility." Given that "[t]he primary task facing the jury was assessing credibility," the "[e]vidence of defendant's reputation in this regard can only assist the jury in this determination." Id. at 633.

The Taylor analysis applies with equal force in this case. Appellant was the only witness who testified regarding the sexual conduct relating to the digital penetration counts, and was the primary witness as to the conduct underlying the assault with intent to rape count. Under these circumstances, appellant's credibility was "highly relevant," and the "extrinsic evidence relating to defendant's credibility" was critical to assist the jury.

Taylor has been cited with approval in subsequent cases, such as People v. Harris (1989) 47 Cal.3d 1047, 1081 ["We, therefore, agree with the conclusion of the Court of Appeal in People v. Taylor (citation) that section 28(d) effected a pro tanto repeal of Evidence Code section 790"]. See also "The

Victims' Bill of Rights – Thirty Years under Proposition 8," 25 Stan. L.&Pol'y Rev. 379,402 (2014) ["People v. Taylor holds that a criminal defendant who takes the stand is entitled to offer good character evidence of his honesty and veracity even if the prosecution has not first attacked the defendant's character as a witness"].

2. The federal right to present character evidence under the federal common law and under the Sixth Amendment.

Michelson v. United States (1948) 335 U.S. 469 recognized the importance of character evidence as part of the defense in a criminal case. Defendant Michelson was convicted of bribing a federal revenue agent, notwithstanding Michelson's testimony that he "admitted passing the money but claimed it was done in response to the agent's demand, threats, solicitations, and inducements that amounted to entrapment." Based on that defense, the Supreme Court noted that "[i]t is enough for our purposes to say that determination of the issue turned on whether the jury should believe the agent or the accused." 335 U.S. at 471.

In his defense, Michelson called five witnesses to testify that his "reputation for honesty and truthfulness and for being a law abiding citizen" was "very good." Id. at 471. The Supreme Court reviewed federal law confirming that a defendant "may introduce affirmative testimony that the

general estimate of his character is so favorable that the jury may infer that he would be unlikely to be commit the offense charged." Id. at 476. The Supreme Court then addressed the permissible scope of the impeachment of good character testimony as to honesty and veracity.

The Supreme Court has further recognized that the right to present evidence relevant to the weight the jury should give a particular witness's testimony is grounded in the defendant's Sixth Amendment right to present a defense. Crane v. Kentucky, supra. The Supreme Court affirmed that "[t]he Constitution guarantees criminal defendants 'a meaningful opportunity to present a complete defense'." 476 U.S. at 690. The Court concluded that the Kentucky rule excluding evidence regarding the circumstances of a confession infringed that right – "That opportunity would be an empty one if the State were permitted to exclude competent, reliable evidence bearing on the credibility of a confession where such evidence is crucial to the defendant's claim of innocence." Ibid. The Sixth Amendment must equally preclude exclusion of "competent, reliable evidence bearing on the credibility" of defendant's testimony itself.

Similarly, Olden v. Kentucky, supra, held that it was constitutional error to preclude a defendant in a rape case from introducing evidence to demonstrate bias on the part of the complaining witness. The same constitutional principle

entitles the defendant in a sexual assault case to introduce evidence that corroborates his own testimony in the face of a prosecutorial claim of fabrication and bias.

3. The proffered evidence and the trial court's error.

Prior to trial, defense counsel provided the prosecutor with a list of proposed character witnesses, their contact information, and a brief summary of their relationship with appellant and their proposed testimony. 2 CT 340. The summaries are drafted in a narrative form without legal references, but the crux of the proposed character testimony is readily apparent. With respect to Andrew Cole-Goins, the summary states "Brock is honest and polite to all, and would not sexually assault a woman." With respect to Lydia Pocisk, she is described as a current student at the University of Kansas and appellant's girlfriend during high school. "She describes Brock as very caring, calm, a harder worker both in school and swimming." Jennifer Jervis is described as Brock's French teacher in high school and one of his swim coaches, and who was well acquainted with the Turner family. She described appellant as "always very respectful to girls." Gary Galbreath was the head coach of the YMCA swim team, who described Brock as "just a great kid," and commented that appellant "would never assault a woman like he's accused of here" and "is an honest person."

The prosecutor sought an order "to limit the scope of the character witnesses." The People recognized that "the defendant may introduce opinion or reputation evidence of his or her own character to prove conduct and conformity therewith when such evidence is relevant to defense," 2 CT 337, citing California Evidence Code section 1102(a), and requested that "the defense should be required to state the specific character trait each witness will testify to and demonstrate how the character trait relates to a disputable issue." The People objected that "some of the character witnesses make reference to defendant's lack of ability to sexually assault a female," but "[t]hat is an improper character trait and Ms. Does not meet the standards in Stoll and McAlpin for character for non-sexual deviance." Ibid.

As noted above, the trial court initially deferred ruling on this request and returned to it toward the conclusion of trial on March 25, 2016. The court referred to prior discussions between the court and counsel and issued its ruling that "honesty is out" and "[h]igh moral character as it relates to sexual assaultive behavior is in." 10 RT 924. The trial court specifically stated that "at an earlier discussion about the scope of the testimony of those witnesses, the defense had offered the character traits of one, honesty, and two, for lack of a better term, sexual non-aggression."

The trial court clearly erred in ruling that "honesty is out." Appellant had just testified and had been subjected to grueling cross-examination as to numerous matters that putatively impeached his testimony that Ms. Doe was conscious and consented to sexual activity. The prosecutor cross-examined appellant in a manner that suggested implausibility in appellant's testimony that Ms. Doe agreed to accompany him to his dorm room after some relatively brief conversation and interaction. 9 RT 874. The prosecutor impugned appellant's character for running away from the two graduate students rather than attending to Ms. Doe. 9 RT 886. The prosecutor starkly contrasted appellant's denial to Det. Kim that he did not try to run away with appellant's acknowledgement at trial that he did try to run away. 9 RT 893. The prosecutor extracted appellant's acknowledgement that a number of details about his interaction with Ms. Doe were not included in his initial statement to Det. Kim. 9 RT 896.

In sum, the trial court could not have been on any clearer notice that appellant's testimonial credibility had been put at issue by the prosecution. "Honesty" was not only "in," but was crucial to the effective presentation of the defense. People v. Taylor, supra; Crane v. Kentucky, supra.

/

/

/

C. The Resulting Prejudice.

1. The critical importance of the jury's assessment of appellant's credibility.

Where "credibility was the key issue, …the error requires reversal." People v. Taylor, supra, 180 Cal.App.3d at 626. In its discussion of prejudice, Taylor stated that "The case hinged on a credibility contest between [the complaining witness] and defendant." Id. at 633-634. In this case, Ms. Doe did not remember events from approximately 12:15 a.m. until she awoke in the hospital, but she was adamant in her testimony that she would never do anything remotely resembling what appellant testified that she consented to do so. 6 RT 456; 478. Moreover, appellant's credibility was ferociously attacked by the prosecutor.

Taylor emphasized that "[t]he defendant's testimony…was precise and detailed, but uncorroborated," due to the trial court's exclusionary ruling. Under those circumstances, the Court of Appeal "conclude[d] that had the competing extrinsic evidence from the defendant's pastor, employer and friends of defendant's reputation for truth and veracity been admitted, it is a reasonable probability that the jury would have found for the defendant." Id. at 634.

Taylor applied the standard of People v. Watson (1956) 46 Cal.2d 818, 836 to conclude that "it is reasonably probable a result more favorable to the

defendant would have been reached in the absence of the error." Ibid. A similar conclusion is compelled under the circumstances of this case. The conclusion is even more obvious when "harmless beyond a reasonable doubt" standard of Chapman v. California (1967) 386 U.S. 1, 18. In the absence of any other eyewitnesses, the jury had to assess appellant's credibility without any "extrinsic evidence" to support it. Taylor at 634. The crucial nature of appellant's credibility militates in favor of a finding of prejudice under both standards.

2. The prosecutor's attack on appellant's credibility based on discrepancies with his initial statement to Det. Kim.

The prosecutor's closing argument contained a protracted attack on appellant's credibility based on, inter alia, putative falsities in his statement to Det. Kim and putative discrepancies between his trial testimony and his statement to Det. Kim.

The prosecutor asked why appellant denied running in his statement to Det. Kim, and appellant answered that he was upset about being charged with a heinous crime, and "it was impossible for me to think clearly about what happened." 9 RT 892. Appellant acknowledged that he had run from the confrontation with Jonsson and Arndt. Eventually, the prosecutor elicited the following:

Q: And as you sit here today, you admit that you ran?

A: Yes.

Q: So what you told Det. Kim was a lie, wasn't it?

A: Yes. 9 RT 893.

Thus, even though appellant had an explanation for not admitting to Det. Kim that he ran, the prosecutor could plausibly claim to have inflicted a blow to appellant's credibility under Evidence Code section 780(h), "a statement previously made by [the witness] that is inconsistent with any part of his testimony at the hearing." Not surprisingly, the prosecutor emphasized that discrepancy in her closing argument:

> Page 17 and 18, he's asked, why did you run? Now, I made a big deal about this in my cross-examination because this is very pivotal to your understanding and your assessment of the credibility evidence in this case, what's going on in his state of mind. And he answers to Det. Kim six hours after being detained, "I don't think I ran."
>
> Question: You don't remember running?
>
> No. 11 RT 1099.

The prosecutor then quoted at length from her cross-examination of appellant regarding whether he was truthful with Det. Kim and specifically read to the jury the same testimony quoted above that concluded with "so what you told Det. Kim was a lie, wasn't it?" 11 RT at 1102. From this point of

impeachment, the prosecutor urged the jury to consider discounting or ignoring appellant's testimony. 11 RT 1102-03. In light of the prosecutor's sustained assault on appellant's credibility, he was entitled to present countervailing extrinsic evidence, and the erroneous exclusion of that evidence cannot be deemed harmless.

3. The particular importance of character testimony regarding honesty and veracity compared to the other character evidence.

The testimony that was admitted with respect to appellant's moral character for sexual non-aggression was treated dismissively by the prosecutor in her argument to the jury:

> This won't be the first or the last trial that people will come into court and say this guy is a great person. I have never seen or can't imagine him raping somebody in the way that you say. Those character witnesses don't really add anything of value as to what the facts of this case are. They all say he's a good guy and they can't imagine him doing this. None of them were there. None of them have seen him intoxicated. So what good is the information that they have to provide to you? It's just not well informed. 11 RT 1107 (emphasis supplied).

That argument may well have carried considerable weight with the jury because of the clear differences between the circumstances in which the character witnesses formed their opinion of appellant's moral character for sexual non-aggression versus the circumstances in which they formed their opinion of his honesty and veracity at the time of the offense. The prosecutor

may well have persuaded the jury that even though appellant behaved in conformity with his character for sexual non-aggression back in Ohio during high school, but that he may have behaved differently at a fraternity party far away from home with free-flowing alcohol.

Character testimony as to honesty and veracity would not have been subject to any comparable challenge. The witnesses would have testified to appellant's character for truthfulness based on a much wider range of interactions with him on than their interactions with him regarding his treatment of women. People generally form their opinions of another's truthfulness based on their overall range of experiences together, not merely based on one facet of their interaction. The prosecutor would not have been able to minimize character testimony for honesty and veracity as she did with the character testimony for sexual non-aggression. The prosecutor argued that the character witnesses who testified were essentially irrelevant because they had never seen appellant in a fraternity party situation to see how he behaved under those specific circumstances. The excluded testimony as to appellant's honesty and veracity would not likely be viewed by the jury as situation-specific.

In sum, testimony as to his character trait for honesty and veracity was equally if not more important to the defense than the testimony regarding moral character for sexual non-aggression.

4. The case law recognizing the importance of corroboration of a defendant's testimony.

A defendant who testifies on his own behalf is in an intrinsically difficult situation. On one hand, jurors often hold the belief that an innocent defendant will want to tell his story to obtain an acquittal. At the same time, the jury may well feel (and the prosecutor will certainly argue) that a guilty defendant has a great incentive to tell the jury a false story to avoid the consequences of his actions. Given the inherent questions about a defendant's credibility, the case law recognizes the importance of corroborating evidence to an effective defense that is primarily based on the defendant's own testimony.

Brown v. Myers (9th Cir. 1998) 137 F.3d 1154 emphasized the importance of corroborating evidence to support a defendant's testimony. Defendant Brown was convicted of assault with a deadly weapon, and testified that at the time of the shooting, he was at his girlfriend's house in the presence of his girlfriend and two other people. Defense counsel did not interview the girlfriend or the other two individuals, and presented no corroborating evidence to defendant's alibi testimony.

The Ninth Circuit found that trial counsel's failure was prejudicial because "[Brown's] own testimony would have appeared more credible because it coincided in important respects with those of his alibi witnesses," and the

alibi witnesses' testimony "was consistent with [Brown's] account that he arrived at [his girlfriend's] house too early to have participated in the shooting." 137 F.3d at 1158-59. The Ninth Circuit concluded that "without any corroborating witnesses, [Brown's] bare testimony left him without any effective defense."

Riley v. Payne (2003) 352 F.3d 1313 also granted habeas corpus relief to a defendant convicted of assault with a deadly weapon. The defendant acknowledged the shooting, but testified that it was done in self-defense. Riley testified regarding the incident at the time the victim threatened to shoot Riley. The other person then ran away and was not present when the shooting actually occurred. Nonetheless, the Ninth Circuit determined that it was deficient performance for trial counsel not to interview the other witness, and that the deficient performance was prejudicial because "[t]he use of [the other person] as a corroborating witness for Riley might have been all important to corroborate critical parts of Riley's version of the events." Id. at 1324[6].

---

[5] Because Riley's counsel did not interview or call a key witness who would have corroborated Riley's testimony that Riley was not the first aggressor and drew his gun in response to a threat, a key witness who himself fled from the threat, fearful of violence, our confidence in the verdict is undermined, and we are left with the firm conviction that Riley did not get a fair shake from the legal system. 352 F.3d at 1325.

Brown and Riley both involve failures to present corroborating evidence due to ineffective assistance of counsel. The case law equally recognizes the prejudicial effect of an erroneous judicial exclusion of corroborating evidence. United States v. James (9th Cir. 1999) 169 F.3d 1210 (en banc) reversed a conviction for accessory to manslaughter because of the trial court's exclusion of documentary evidence confirming prior violent acts committed by the decedent and known to the defendant. Defendant James testified that she gave her daughter a loaded handgun at a time when her boyfriend, the decedent, was drunk and acting violent. James testified that the decedent had acted violently toward her on several occasions, and had also told her of other incidents in which he had robbed, beaten, or otherwise injured people. The trial court excluded extrinsic evidence consisting of police reports that the victim had in fact committed the other incidents of robbing, assaulting, and injuring people on the basis that defendant James had never seen those reports.

The Ninth Circuit found that was error because "James' only defense was that she believed that she and her daughter were in danger of grievance bodily harm or death from [the victim]," and "[e]ssential to that defense was her belief in [the victim's] stories of previous acts of vicious violence committed by him." The Ninth Circuit noted that "[t]hese stories were such a remarkable character of atrocity that one might doubt that he had told them of himself or doubt that

they had really occurred." Thus, the records of the actual incidence "if admitted, would have had two legitimate functions: to corroborate Ernestine James' own testimony that she had heard Ogden tell her these things and to corroborate her statement that she had reason to be afraid of Ogden and his vicious drunken mood." 169 F.3d at 1214. The materiality of the police reports was that "the records proved that what Ernestine James testified to had actually taken place," i.e., they corroborated her testimony. Ibid. The Ninth Circuit concluded that "because of the crux of James' defense rested on her credibility and because her credibility could be directly corroborated through the excluded documentary evidence, exclusion of the documents was prejudicial and more probably than not affected the verdict." Id. at 1215.

The same analysis applies here. Appellant's defense rested on his credibility, which could have been directly corroborated through the character witnesses as to his honesty and veracity. Exclusion of that testimony was prejudicial under either the Watson or Chapman standard.

## II. APPELLANT WAS DEPRIVED OF DUE PROCESS AND A FAIR TRIAL BY THE PROSECUTION'S FAILURE TO PRESENT CONSTITUTIONALLY SUFFICIENT EVIDENCE AS TO ANY OF THE THREE COUNTS OF CONVICTION.

The evidence as to the charge of assault with intent to rape an intoxicated or unconscious person is insufficient because the prosecution established that

appellant engaged in two forms of sexual conduct, both of which were "short of [and] different from intercourse." People v. Craig (1994) 25 Cal.4th 1593, 1604. Appellant's actual course of conduct, coupled with the undisputed evidence that he never attempted to get his penis out of his pants, precludes a finding beyond a reasonable doubt of specific intent to engage in intercourse.

The evidence as to the two digital penetration counts is insufficient because the prosecution's evidence fails to establish that Ms. Doe was too intoxicated to knowingly consent to sexual activity with appellant when she left the Kappa Alpha party in his company and walked with him 116 feet to where the sexual conduct occurred. The evidence is even less adequate to establish appellant should have reasonably known that she was too intoxicated to knowingly consent to sexual conduct when they left together. None of the other young women in her group, including Ms. Doe's own sister, testified that they observed any symptoms of excessive intoxication on Ms. Doe's part at the party. The unanimous view was that Ms. Doe was intoxicated as were they all, and the unavoidable inference is that Ms. Doe was not as intoxicated as Trea, whom the group identified as being excessively intoxicated.

The digital penetration occurred at some point between Ms. Doe's departure from the party with appellant under her own volition, and under her own steam, and her eventual passing out. The prosecution presented no

evidence to prove that Ms. Doe had crossed the line from general intoxication to incapacitating intoxication or unconsciousness at the time that the digital penetration would have occurred. Jackson v. Virginia, supra, and People v. Johnson, supra.

A. Summary of Circumstantial Evidence Relevant to All Three Charges.

There is testimony from a variety of sources as to the conduct of both appellant and Ms. Doe at the Kappa Alpha fraternity party, including the critical 30 minutes between 12:00 a.m. and 12:30 a.m. when appellant and Ms. Doe left the party together.

Ms. Doe testified that at some point around midnight, she, her sister, and their friend Julia left the party briefly to urinate behind some shrubbery. 6 RT 436. The three of them went back to the party area and joined a group who were drinking beer on the patio area. She drank part of a beer that one of them had given her. Her sister was talking to some young men who approached them, but she was "very out of it at this point." 6 RT 439. She did not have any memory of any events after drinking beer on the Kappa Alpha patio with her sister and other party goers.

The telephone records of Ms. Doe, her boyfriend [redacted] her sister, and her sister's friends provide a reliable timeline of the activities between

approximately midnight and 12:30 a.m. At 11:54 p.m. California time, Ms. Doe called [redacted] in Philadelphia and awakened him. He described her speech as "severely slurring to the point she was incomprehensible." He stayed on the phone with her for about two minutes, but "could not communicate with her because she was not responding to anything I was saying." 5 RT 248-249.

Sometime after midnight, Ms. Doe, her sister, and Julia left the party to urinate behind some shrubbery. They returned and joined Colleen on the Kappa Alpha patio. The four young women began talking to some young men, one of whom was appellant. As Colleen described the situation, "it was pretty just conversational, like group chat" and "[t]he only thing that stood out as odd was that he [appellant] tried to kiss [Ms. Doe's sister] at one point." 6 RT 335.

Around this time, Colleen noticed that Trea was too intoxicated to participate in the party activities, and she asked Julia for her dorm key to take Trea to recuperate, which Julia gave to her. 6 RT 338. Colleen's cell phone records show she called for an Uber at 12:14 a.m. Colleen and Ms. Doe's sister left with Trea shortly afterward. The clear implication of this testimony is that Ms. Doe must have appeared to not require special attention in the manner that Trea did. In this regard, Ms. Doe's sister testified at the preliminary hearing that when she, Julia, and Ms. Doe left the party to urinate in the trees, "[Ms.

Doe] seemed drunk but not out of control at all," and "still, like, speaking totally fine."

At 12:14 a.m., [redacted] sent Ms. Doe a text saying "You are done. Tell Neegus [a nickname for Ms. Doe's sister] to take care of you please." He explained that "You are done" is slang for "you're really drunk." 5 RT 249. At 12:16 a.m., Ms. Doe called [redacted], but he did not answer. However, he immediately listened to the voicemail she left. [redacted] reported Ms. Doe as saying, "She missed me and she said that males were presenting themselves to her but that she liked me." 5 RT 250-251. He could not understand other parts of her voicemail message. [redacted] called her back, and "she started rambling" and "didn't respond when [he] said 'can you find your sister'." [redacted] "left the phone on [his] pillow until either she hung up or fell asleep [sic]." 5 RT 252.

At 12:29 a.m., Ms. Doe called her sister, who was in Julia's dorm room with Trea, but Ms. Doe's sister could not hear what Ms. Doe was saying and asked her to call back. Ms. Doe also c[redacted] after the call to her sister, but did not r[redacted] communications from Ms. Doe's cell p[redacted]

Ms. Doe acknowledged t[redacted]ere instances during her college years at [redacted] when she became too intoxicated, and "[her] friends took care of [her]." 6 RT 474. She had blackouts during these episodes and

described certain specific symptoms that her friends noticed when she became excessively intoxicated. Her friends told her "Your neck was getting loose. You were getting bobble-heady," and "were slurring your words, so we decided to take you home." 6 RT 478. Neither Ms. Doe's sister nor her two friends in her immediate proximity described those symptoms of excessive intoxication. As Ms. Doe's sister told the police, when she left the party to take Trea to Julia's room, Ms. Doe "appeared to be fine" – "she was standing and her eye were open, so I just walked over to her and said I was leaving for five minutes." 7 RT 617.

The absence of the distinctive physical symptoms Ms. Doe displayed in the past when she had drunk to excess at parties were simply not apparent on this evening to the people who knew her well, and nothing she did or said at the party set off alarm bells among either her immediate circle or anyone else at the party.

At some point between 12:30 a.m. and 12:45 a.m., Ms. Doe left the party with appellant, and together they began walking in the direction of his dorm. Det. Kim measured the distance between the patio of the Kappa Alpha house and the spot where Ms. Doe and appellant were at the time the two graduate students intervened as 116 feet. There was no testimony from any witness to the effect that they saw appellant carry, drag, or otherwise maneuver an

unwilling female for a distance equivalent to the goal line of a football field to the 40-yard line. The unavoidable inference from this objective evidence is that Ms. Doe left the party with appellant of her own volition, and walked with him down a path toward his dorm.

In addition, just 15 minutes or so before leaving the party with appellant, Ms. Doe left the voicemail for her boyfriend in Philadelphia that some young men were "presenting to her," indicating that she recognized overtures of sexual interest from young men at the party. Thus, there is clearly insufficient evidence to establish beyond a reasonable doubt that Ms. Doe was unable to knowingly consent to sexual activity from excessive intoxication or unconsciousness at the time she left the party with appellant.

B. The Insufficiency of Evidence of Assault with Intent to Commit Rape.

People v. Johnson, supra, set forth the California standard for appellate review of sufficiency in light of Jackson v. Virginia, supra. "In determining whether a reasonable trier of fact could have found defendant guilty beyond a reasonable doubt, the appellate court 'must view the evidence in a light most favorable to respondent and presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence'." In addition, "[t]o be sufficient, evidence of each of the essential elements of the

crime must be substantial and we must resolve the question of sufficiency in light of the record as a whole." People v. Johnson (1993) 6 Cal.4th, 1, 38.

1. The elements of assault with intent to rape an intoxicated or unconscious person.

The elements of a charge of assault with intent to commit rape are set forth in CALCRIM 890, and the jury in this case was instructed as follows:

> The defendant is charged in Count 1 with assault with intent to commit Rape of an Intoxicated or Unconscious person in violation of Penal Code section 220(a).
> To prove that the defendant is guilty of this crime, the People must prove that:
> 1. The defendant did an act that by its nature would directly and probably result in the application of force to a person;
>
> 2. The defendant did that act willfully;
>
> 3. When the defendant acted, he was aware of facts that would lead a reasonable person to realize that his act by its nature would directly and probably result in the application of force to someone;
>
> 4. When the defendant acted, he had the present ability to apply force to a person;
>
> AND
>
> 5. When the defendant acted, he intended to commit Rape of an Intoxicated or Unconscious Person. 2 CT 441.

2. Summary of the relevant evidence and the accompanying inferences.

Counsel for appellant acknowledges that the testimony of Peter Jonsson and Carl Arndt is sufficient to establish the first four elements of the charge. In

contrast, the evidence relevant to intent viewed most favorably to the judgment negates any inference beyond a reasonable doubt of an intent to rape.

Carl Arndt testified that he and his friend Peter were on their way to the Kappa Alpha fraternity party, and as they approached Kappa Alpha on their bicycle, they saw a couple lying on the ground adjacent to a basketball court. 4 RT 131. He first assumed it was a consensual encounter (he had seen another couple kissing in the open shortly before, 5 RT 148), but as they biked across the basketball court and got closer to the couple, Peter said, "It doesn't look like she's moving." 4 RT 136. The male on top was "moving around" and "doing thrusting movements." 4 RT 138. The female was lying on her back with her arms open wide, her legs somewhat spread, the male on top of her, and "his feet in between the legs." 5 RT 157. The male was "fully clothed," 5 RT 157, and was "thrusting" in a manner that "looked pretty aggressive." 5 RT 158.

When Carl approached to within 15 feet of the couple, Peter spoke loudly to appellant, who "stood up," "started backing away and then he started running." 5 RT 162. Peter's testimony was consistent.

That testimony establishes an intent on appellant's part not to rape Ms. Doe, but rather to engage in a different form of sexual activity short of sexual intercourse. The fully clothed "thrusting" that Carl and Peter observed may fall within the scope of Penal Code section 242 ["battery"] or section 243.4 ["sexual

battery"], but neither of those offenses was charged or offered as a lesser included offense.

By any commonsense calculus, appellant's election to remain fully clothed while engaging in a form of sexual activity precludes an inference of intent to rape beyond a reasonable doubt. Since time immemorial, college students (and others) have engaged in sexual activities that do not contemplate or entail sexual intercourse. These activities, including manual, oral, and the type of fully-clothed stimulation observed here, are viewed as safe sex alternatives to sexual intercourse. The available evidence in this case supports only an inference that appellant intended to engage in sexual activity that did not entail sexual intercourse.

3. The application of the case law regarding insufficiency of evidence of assault with intent to rape to the evidence in this case.

California case law that addresses claims of insufficiency of evidence regarding a conviction for assault with intent to rape has long recognized the distinction between evidence sufficient to prove beyond a reasonable doubt that the defendant intended to have unlawful sexual intercourse with the victim, vs. evidence that the defendant intended to engage in some other type of sexual activity different from and short of sexual intercourse. People v. Greene (1973) 34 Cal.App.3d 622 vacated a conviction for assault with intent to rape where an

18-year-old boy accosted a 16-year-old girl at 11:00 p.m. as she was walking a few blocks home from a baby-sitting job. The defendant approached her, put his arm around her waist and turned her around, saying "Don't be afraid. I have a gun. Don't move." The girl not surprisingly was afraid, and complied with defendant's direction. They walked along while defendant fondled her body. She asked, "What do you want," and he answered, "I just want to play with you." She tried to break away from him, but he told her to stop and be quiet. She complied briefly and then "broke from defendant's embrace without a struggle, screamed and ran to a friend's home," 34 Cal.App.3d at 650.

The Court of Appeal drew upon cases that distinguished between evidence of unwanted assaultive conduct that may have been indicative of "lewdness, indecency and even of lasciviousness [but that] would not be sufficient to warrant the finding that he was guilty of an assault with intent to commit rape," id. at 651, citing People v. Mullen (1941) 45 Cal.App.2d 297, 301. The Court of Appeal reduced the conviction to simple assault, noting that defendant's conduct supported an inference of some kind of sexual intent, but that "the failure of defendant to exhibit his private parts or offer money on the occasion in question renders the prior offenses of little if any persuasive value on the issue of the intent to commit sexual intercourse, as distinguished from lascivious acts, on the subsequent occasions," id. at 653 (emphasis supplied).

Accord: People v. Cortez (1970) 13 Cal.App.3d 317, 327 ["a distinction is recognized between the intent to rape, and lewdness, indecency and lasciviousness either alone or accompanied by an intent to seduce"].

In this case, appellant had ample opportunity to "exhibit his private parts," but he did not. That undisputed fact by itself constitutes a virtually insuperable evidentiary barrier to a finding of intent to rape beyond a reasonable doubt. The evidence may well show a sexual intent of some type, but the weight of the evidence militates against an inference that the intent was to have sexual intercourse. Rather, the evidence establishes that at most appellant intended to have sexual contact while "fully clothed," 5 RT 157, patently insufficient to prove intent to have sexual intercourse beyond a reasonable doubt.

Greene was followed in, inter alia, Watson v. Nix (S.D. Iowa 1982) 551 F. Supp. 1, which granted federal habeas corpus relief to a petitioner convicted of assault with intent to rape. The 17-year-old complaining witness was walking from her parents' residence to a downtown store, and accepted a ride from two young men who pulled up next to her. However, rather than let her out when she requested, they drove her to a secluded area, and violently restrained when her when she tried to get away. She "struggled with the men and screamed," at which point one of the men "told her to shut up or she would really get hurt,"

id. at 8. At that point a passing motorist intervened, and one of the men grabbed her purse and they fled.

The district court reviewed a number of cases from several jurisdictions regarding the sufficiency of evidence to support a conviction for assault with intent to rape, including People v. Greene, supra, and concluded that the evidence of intent to rape was constitutionally insufficient:

> One may reasonably conjecture that petitioner and Halsted desired sexual intercourse with Miss Berry, and one may reasonably conjecture that they intended to satisfy that desire notwithstanding her refusal and resistance. However, as the Mississippi Supreme Court lucidly noted in Green v. State [(Miss. 1890) 7 So. 326], conjecture is something less than an inference reasonably drawn from the evidence. Probability of guilt springing from instincts rather than proved facts is not enough to sustain an intent to rape conviction. There must be evidence of the intent. The "what else could they have had in mind?" reasoning of the respondents is not sufficient. Id. at 12 (emphasis in original).

The cases that distinguish Greene and affirm convictions of assault with intent to rape do not have the type of evidence present in this case that precludes an inference of intent to have sexual intercourse beyond a reasonable doubt. In People v. Craig, supra, defendant followed a woman who was driving home, pulled into her driveway immediately behind her, and began a sexual assault in her vehicle. He "shoved his free hand up inside her sweater or shirt," and "placed his hand flat against her chest, touching both of her breasts outside her bra," id. at 1596. At that point, the woman's boyfriend came out of the

house, punched Craig, and locked him into his vehicle until the sheriff arrived.

The Court of Appeal affirmed because "[a]ll of his conduct was consistent with th[e] intent [to rape]," and "[n]othing he did or said indicated that he intended only to place his hands on her body or to accomplish some sexual act short of or different from intercourse," id at 1604.

Here, nothing appellant did was consistent with an intent to have sexual intercourse, and everything he did indicated an intent "to accomplish [a] sexual act short of or different from intercourse." Defendant testified that he asked her if he could finger her, indicating in intent to accomplish a different sexual act than intercourse. The primary indicator that appellant did not intend to have intercourse is that he made a decision to remove Ms. Doe's underwear but not his own, and not to otherwise expose his penis.

The clear implication from Carl and Peter's observations of appellant's "thrusting" is that he would have continued to the point of ejaculation as the completion of the particular sexual act he intended. The evidence negates an inference of intent to have sexual intercourse.

4. The prosecutor's argument.

Notwithstanding the adage inscribed in CALCRIM 103 that the arguments of counsel "are not evidence," counsel for appellant has considerable confidence that if there existed substantial evidence to support this conviction,

the prosecutor in this case would have cited it early and often during closing argument. For that reason, counsel offers the following review of the prosecutor's argument regarding the charge of assault with intent to rape.

The prosecutor began with a fairly standard admonition that the defendant's intent would likely have to be proven through circumstantial evidence, because criminals rarely provide a contemporaneous commentary on their criminal behavior:

> And lastly, Count 5 [sic] of the first element [sic] shows the intent, state, the mental state that I must prove to you that the defendant intended to commit the rape of an intoxicated or unconscious person. So this is where the subjective state of mind of the defendant comes into play. Now, when we're dealing with intent, where people commit a crime and say, I'm committing this crime. I'm going to walk into the store and commit this theft, and as I'm leaving, I just robbed somebody. Usually, they commit the crime, and then, through the circumstantial evidence, you can associate and determine what was going on in their mind. And that's how we prove the intent element as it relates to rape of an intoxicated person or rape of an unconscious person. 11 RT 1068.

The prosecutor did not make any argument as to any specific evidence that purportedly established an intent to have sexual intercourse during her opening argument. Defense counsel straightforwardly argued "[i]t was never his intent to rape her," 14 RT 1128. The prosecutor responded as follows in her concluding argument:

> Now, he's digitally penetrating her and he then stops and starts thrusting her, on top of her body, when these two independent

> witnesses see. That is the assault with intent to commit rape. All he had to do to complete that rape was to unzip his pants. That is the only thing that he has to do to complete the rape. 14 RT 1133.

That's it, that is the entirety of the prosecutor's argument as to circumstantial evidence that appellant intended to have sexual intercourse with Ms. Doe. The prosecutor fails to acknowledge the glaring fact that appellant initially engaged in a particular type of sexual activity that was "short of or different from intercourse," Craig, supra, at 1604, i.e., the "fingering," and then proceeded to a second type of sexual activity that was equally "short of or different from intercourse." That course of conduct negates any inference that he intended to engage in sexual intercourse.

Based on the patent paucity of evidence of intent on appellant's part to have sexual intercourse with Ms. Doe, the conviction under Penal Code section 220 must be vacated. Jackson v. Virginia, supra.

C. The Insufficiency of Evidence of Digital Penetration of an Intoxicated Person.

1. The elements of digital penetration of an intoxicated person.

The elements of digital penetration of an intoxicated person are set forth in CALCRIM 1047, and the jury was instructed as follows:

> The defendant is charged in Count 2 with sexual penetration of a person while that person was intoxicated in violation of Penal Code section 289(c). To prove that the defendant is guilty of this crime, the People must prove that:

1. The defendant committed an act of sexual penetration with another person;

2. The penetration was accomplished by using a foreign object;

3. The effect of an intoxicating substance prevented the other person from resisting the act;

   And

4. The defendant knew or reasonably should have known that the effect of that substance prevented the other person from resisting the act. 2 CT 375.

2. Summary of the relevant evidence and the accompanying inferences.

The testimony of Ms. Doe's sister and her party companions is consistent in that none of them viewed Ms. Doe as too intoxicated to take care of herself during the course of the evening. At 12:15 a.m., her sister told her that she [the sister] was going to leave the party with Colleen to take Trea to Julia's dorm room because of Trea's excessive alcohol consumption. If Ms. Doe had displayed any comparably alarming or concerning behavior, her sister and Colleen had every incentive and opportunity to take Ms. Doe to Julia's room as well.

The voicemail that Ms. Doe left on [redacted] cell phone at approximately 12:16 a.m. reflects some coherent speech and some slurred speech. [redacted] testified that during his 12:19 a.m. telephone call to Ms. Doe

she was "rambling." No one present at the actual party testified that Ms. Doe was verbally incoherent or otherwise perceptibly unable to function in an apparently competent manner.

Ms. Doe testified that when she had become excessively intoxicated at parties during her college years at [redacted] she displayed certain distinctive physical symptoms in that her neck would "get[] loose" and she would appear "bobble-heady," 6 RT 478. Neither her sister nor any of the party acquaintances reported any of that distinctive behavior.

Somewhere between 12:30 a.m. and 12:45 a.m., Ms. Doe and appellant left the party together and walked about 116 feet away from the Kappa Alpha patio to a wooded area. At that point, the party was attended by a large number of people, and there was no testimony that appellant carried, dragged, or otherwise assisted Ms. Doe in her ambulation. As set forth in section A, supra, there is no way that the prosecution's evidence establishes beyond a reasonable doubt that at the time appellant and Ms. Doe left the party together that she was too intoxicated to consent to sexual activity, and that appellant knew she was incapacitated.

The prosecution next had to prove beyond a reasonable doubt that at the time of the digital penetration in the wooded area that Ms. Doe was prevented

from consenting due to alcohol intoxication, and that appellant knew that she was incapacitated. This is where the prosecution's evidence fatally falters.

Appellant testified that they began consensual activity, and that Ms. Doe cooperated in the removal of her underwear:

> We kissed for a little bit after that, and then I asked her if she wanted me to finger her.
>
> Q. Did she reply to you?
>
> A. Yes.
>
> Q. What did she say.
>
> A. She said yeah.
>
> Q. So after she said yeah, what did you do?
>
> A. I took off her underwear and –
>
> Q. How did you do that?
>
> A. I got up on my knees and I took off her underwear from her dress.
>
> Q. Did she assist you to do that in any way?
>
> A. Yes, she did.
>
> Q. What did she do?
>
> A. She lifted up her hips to help me.
>
> Q. And what happened after you did that?
>
> A. I got back down on top of her, and I started kissing her again, and then I fingered her.

Q. When you say “fingered her,” did you put a finger from your hand into her vagina?

A. Yes, I did. 9 RT 851 – 52.

Of course, the jury was free not to credit appellant’s testimony that Ms. Doe was conscious and consenting. However, the fact that the jury could have doubted appellant’s testimony Ms. Does not relieve the prosecution of satisfying its burden of proof.

The only other evidence that is probative as to Ms. Doe’s capacity to consent and appellant’s awareness of that capacity at the time of the sexual activity came from criminalist Craig Lee under examination by the prosecutor. This undisputed physical evidence from criminalist Craig supports an inference of both consent on Ms. Doe’s part and of awareness of that consent on appellant’s part:

Q. Okay. So at a later time, did you examine underwear from [Ms. Doe]?

A. Yes. If you’ll allow me a moment, I think I left those notes in my bag. I’ll just grab my notes.

(pause in proceedings)

The witness. Yes.

Q. (by Ms. Kianerci): And can you describe what you tested.

A. I examined the underwear, and semen was not confirmed or detected in the interior crotch area. It was in used condition with a lot of dirt or debris on it. So I took an attempt to swab or collect DNA from the waistband area, the interior and the exterior, in order to see if someone had pulled down or may have touched that area.

Q. And what did you find?

A. I found that, on the waistband, it was a mixture from at least two individuals. [Ms. Doe] is the source of the major DNA profile from this mixture. Assuming the minor DNA contributor originated from one individual, Brock Turner is excluded as a possible contributor to the minor DNA component. [explanation of the difference between "major" and "minor" contributor].

Q. Now, the fact that Brock Turner was excluded, does that mean that he did not touch the underwear?

A. It may not mean that. What it essentially means is that I did not detect his DNA if all the minor DNA comes from one individual. 7 RT 493 – 94 (emphasis supplied).

This evidence is very important in the sufficiency of evidence review for several reasons. First, Mr. Lee elected to test the waistband of the underwear "to see if someone had pulled [the underwear] down," which indicates his belief that there would likely have been a transfer of DNA in the course of putting on/taking off one's underwear. Mr. Lee's belief was born out by his detection of Ms. Doe's DNA on the underwear waistband.

The clearly exculpatory implication from the absence of appellant's DNA is that Ms. Doe cooperated in his removal of her underwear. If appellant had

wrestled the underwear off an inert and/or uncooperative person, the likelihood of a DNA transfer from appellant to the underwear would be much higher due to the greater friction involved in pulling underwear off someone who is lying flat on the ground.

Appellant testified that Ms. Doe lifted her hips to assist him in removing her underwear. The jury did not have to credit that testimony, but this Court must acknowledge the exculpatory implication of the DNA evidence, and recognize its particular importance as the only physical evidence relevant to the consent issue.

The prosecutor certainly recognized that exculpatory inference, and did her best to do damage control with her follow-up question to Mr. Lee as to whether the absence of DNA conclusively established that appellant did not touch the underwear. His answer implied that the result did not conclusively establish that appellant had never touched the underwear, but that did not rebut the exculpatory inference that the absence of appellant's DNA supports an inference that Ms. Doe cooperated in the removal of her underwear.

At some indeterminate point after the fingering activity, Ms. Doe did pass out, and was apparently passed out at the time that the two Swedish graduate students stopped to inquire. The record contains no evidence or testimony that supports a finding beyond a reasonable doubt that her

unconsciousness at a subsequent point in time proves her incapacity to consent earlier or appellant's awareness of any incapacity at the earlier time.

In sum, the prosecution elected to proceed on a charge that was virtually impossible to prove in light of the absence of any evidence as to when Ms. Doe's level of intoxication began to exceed the level of mere intoxication achieved her sister, Colleen, Julia, and apparently the vast majority of other party goers. There is no substantial evidence that she ever entered a more intoxicated state in which her capacity to consent was overcome by alcohol. She may well have been operating in an intoxicated but competent state up until the time that she passed out.

Moreover, there was undisputed evidence that militated against an inference that she had reached that point of intoxication. Neither Ms. Doe's sister nor her friends viewed her as excessively intoxicated in the manner that they viewed Trea. In addition, none of them reported any of the "bobble-heady" symptoms that Ms. Doe had previously displayed when excessively intoxicated. Finally, the DNA evidence supports the inference that Ms. Doe cooperated in the removal of her underwear at a time immediately preceding the sexual activity, which would by itself preclude a finding beyond a reasonable doubt that appellant was or should have been aware that her capacity to consent had

been overcome by alcohol. This count of conviction must be vacated as well. Jackson v. Virginia, supra.

D. The Insufficiency of Evidence of Digital Penetration of an Unconscious Person.

The facts and argument in support of this claim track that of Argument C, above, but are even stronger in light of the undisputed evidence. As noted in Argument C, the evidence is ambiguous and conflicting as to the state of intoxication on Ms. Doe's part at the time that she and appellant left the party together. That same evidence is clear and undisputable that she was not unconscious at the time that she and appellant left the party together. There was no testimony that appellant carried her away from the party. She walked of her own volition and under her own power with appellant for approximately 116 feet, evidence that refutes an inference that she was unconscious at that point.

The prosecution presented no further evidence that she became unconscious at or before the time of the sexual conduct that included the fingering. The DNA testimony from criminalist Lee supports an inference that Ms. Doe was conscious at the time that the fingering occurred and assisted in the removal of her underwear. The prosecution presented no evidence that supports a contrary inference, much less that constitutes proof beyond a reasonable doubt.

The testimony of the two Swedish graduate students is that appellant was "thrusting" when they arrived, and that activity is physically incompatible with "fingering." The "fingering" necessarily stopped at some previous point at which it is more likely than not according to the available evidence that Ms. Doe was conscious. For these reasons, Count 3 must also be vacated for insufficient evidence. Jackson v. Virginia, supra.

## III. APPELLANT WAS DEPRIVED OF DUE PROCESS AND A FAIR TRIAL BY THE COURT'S FAILURE TO INSTRUCT SUA SPONTE ON LESSER-INCLUDED OFFENSES.

### A. The Standard of Review.

The prosecution took a calculated risk in charging three particularly serious felony offenses, notwithstanding the dubiousness, if not legal insufficiency, of the evidence to support the charges. See Argument II, supra. The odds favoring the prosecution's gamble increased significantly when the trial court failed to instruct on lesser-included offenses and improperly "forc[ed] and all-or-nothing choice between conviction of the stated offense[s] on one hand, or complete acquittal on the other. People v. Banks (2014) 59 Cal.4th 1113, 1159. Banks found error in the trial court's failure to enforce "[t]he rule that juries must be instructed on lesser included offenses." The purpose of that rule is to "prevent [] either party, whether by design or inadvertence, from forcing an all-or-nothing choice between conviction of the

stated offense on one hand, or complete acquittal on the other." Id. at 1159. The rule requiring lesser-included offenses "encourages a verdict, within the charge chosen by the prosecution, that is neither harsher nor more lenient that the evidence merits," id. at 1161.

On appeal, the court must "review independently the question whether the trial court improperly failed to instruct on a lesser-included offense." Id. at 1160. "So long as the prosecution has chosen to allege a way of committing the greater offense necessarily subsumes a lesser offense, and so long as there is substantial evidence that the defendant committed the lesser offense without also committing the greater, the trial court must instruct on the lesser included offense." Ibid. The fundamental policy underlying the requirement of lesser-included offense instructions is that "[t]ruth may lie neither with the defendant's protestations of innocence nor with the prosecution's assertion that the defendant is guilty of the offense charged, but at a point between those two extremes." People v. Barton (1995) 12 Cal.4th 186, 196.

B. Summary of Facts.

The record on appeal reflects that most of the discussions of jury instructions between court and counsel were conducted off the record in chambers. See 2 CT 425 ["Off the record, the above listed counsel are present to meet with the Court in chambers to review and discuss jury instructions"].

That is the only entry in the Clerk's Minutes from March 24, 2016. The Reporter's Transcript for March 23 states that "tomorrow we are also going to be dark" and will "resume the presentation of evidence on Friday morning [March 25, 2016]." 9 RT 917.

There is no Reporter's Transcript for March 24, 2016. Volume 10 for Friday, March 25, begins with the court's summary of the discussions the day before – "Yesterday, we had an in-chambers conference with respect to the proposed jury instructions," and "we'll continue to discuss the jury instructions with respect to – and eventually, we'll put on the record the substance of our discussions." 10 RT 923. The court noted that it had given counsel a draft of proposed jury instructions the day before and reiterated that there would be "further discussion." Ibid.

The People's proposed jury instructions do not contain any lesser-included offenses as to any of the charges. See 2 CT 432-446. Counsel for appellant proposed a pinpoint instructional additional addition to CALCRIM 1048. 2 CT 4468.

On March 28, 2016, there was a discussion of jury instructions. When the court reviewed its list of instructions in comparison to the prosecutor's list, the court indicated it would give all the instructions requested by the People, plus additional instructions that the court believed were required. Among the

matters discussed were the People's request for a pinpoint instruction regarding the definition of "penetration" because, as the prosecutor argued, "[t]he word 'penetration' has common misconceptions legally versus colloquially." 11 RT 998. The trial court gave that instruction. 2 CT 444 – "Penetration of the genital opening refers to penetration of the labia majora, not the vagina." The trial court agreed to give the defense pinpoint instruction with modifications. 11 RT 1031.

The court and counsel had a final discussion of jury instructions, particularly focusing on a defendant's reasonable belief as to consent. 11 RT 1036-1037. The trial court asked whether there was "any objection to the court's current proposed jury instructions that counsel have," and neither counsel expressed any objection. 11 RT 1038. The instructions as actually given to the jury are found at 2 CT 435-446, and there are no instructions on lesser-included offenses.

/

/

/

/

/

/

C. The Trial Court's Errors in Failing to Provide Lesser-Included Offense Instructions.

1. The failure to instruct on simple assault as a lesser-included offense of Count 1.

a. The elements of Count 1 and its lesser included offenses.

Count 1 charged appellant with a violation of Penal Code section 220(a) described as "assault with intent to commit rape of an intoxicated or unconscious person." The jury was instructed with the elements that the prosecution had to prove pursuant to CALCRIM 890A:

> To prove that the defendant is guilty of this crime, the People must prove that:
>
> (1) The defendant did an act that by its nature would directly and probably result in the application of force to a person;
>
> (2) The defendant did that act willfully;
>
> (3) When the defendant acted, he was aware of facts that would lead a reasonable person to realize that his act by its nature would directly and probably result in the application of force to someone;
>
> (4) When the defendant acted, he had the present ability to apply force to a person; and
>
> (5) When the defendant acted, he intended to commit rape of an intoxicated or unconscious person.

The jury was also instructed that "[s]omeone commits an act willfully

when he or she Ms. Does it willingly or on purpose." The jury was further instructed in the judicial gloss to this and the simple assault statute, Penal Code section 240 that "[t]he terms application of force and applied force mean to touch in a harmful or offense manner," and "the slightest touching can be enough if it is done in a rude or angry way." The instruction continues, "Making contact with another person, including through his or her clothing is enough," and "[t]he touching does not have to cause pain or injury of any kind." CALCRIM 890. The elements of simple assault under Penal Code section 240 are set forth in CALCRIM 915, and are identical to the first four elements of assault with intent to rape as charged here.[7] Thus, simple assault and assault

---

[7] 915 Simple Assault (Pen. Code, § 240)

The defendant is charged [in Count ] with assault [in violation of Penal Code section 240].

To prove that the defendant is guilty of this crime, the People must prove that:

- 1. The defendant did an act that by its nature would directly and probably result in the application of force to a person;
- 2. The defendant did that act willfully;
- 3. When the defendant acted, (he/she) was aware of facts that would lead a reasonable person to realize that (his/her) act by its nature would directly and probably result in the application of force to someone;

  [AND]

- 4. When the defendant acted, (he/she) had the present ability to apply force to a person.

with intent to rape are identical overlapping offenses, with the exception that Penal Code section 220 entails an additional intent element, the intent to commit rape. Thus, simple assault is a necessarily included offense subsumed within the greater charge of assault with intent to commit rape. An instruction on simple assault must be given to the jury as an alternative to conviction for the greater offense of assault with intent to rape where either (1) the prosecution's evidence of the intent to rape is debatable; or (2) the defendant contradicts or otherwise calls into question the prosecution's evidence.

People v. Breverman (1998) 19 Cal.4th 142, 162 "affirm[ed] that a trial court errs if it fails to instruct, sua sponte, on all theories of a lesser-included offense which finds substantial support in the evidence." The operative definition of substantial support was defined as "evidence from which a jury composed of reasonable persons could conclude that the lesser offense, but not the greater, was committed." Id. at 162. The Supreme Court emphasized the underlying policy that "When the evidence suggests that the defendant may not be guilty of the charged offense, but only of some lesser included offense, the jury must be allowed to consider the full range of possible verdicts – not limited by the strategy, ignorance or mistakes of the parties, so as to ensure that the verdict is no harsher or more lenient than the evidence merits." Id. at 160.

Breverman confirmed that "[i]n deciding whether there is substantial evidence of a lesser offense, courts should not evaluate the credibility of witnesses, a task for the jury." Finally, "the sua sponte duty to instruct on lesser included offenses…arises even against the defendant's wishes, and regardless of the trial theories or tactics the defendant is actually pursued." Id. at 162.

Numerous decisions of the Courts of Appeal recognize that simple assault is a lesser-included offense of assault with intent to commit a particular sex act under Penal Code section 220. People v. Carapeli (1988) 201 Cal.App.3d 589, 595 ["The court correctly instructed the jury that simple assault is a lesser included offense in both assault with intent to commit rape and sexual battery by restraint"]. Accord: People v. Elam (2001) 91 Cal.App.4th 298 ["In as much as an assault with intent to commit forcible oral copulation [Penal Code section 220] is merely a simple assault committed with specific intent to force the victim to perform oral copulation [citation], simple assault is a lesser offense and necessarily included in the greater offense"]; People v. Greene, supra, 34 Cal.App.3d at 648 ["The jury in weighing the evidence concerning the nature of the offense against Teresa found that there was no intent to rape, and convicted the defendant of simple assault"].

In addition to Penal Code section 220, there are other Penal Code provisions that define various sorts of aggravated assault, often related to the

status of the victim. Where the evidence regarding the aggravating element presents a question of fact for the jury, the court must instruct sua sponte on simple assault. People v. Hood (1969) 1 Cal.3d 444, 450 reversed the conviction for assault with a deadly weapon on a police officer for failure to instruct on the lesser offense of assault with a deadly weapon. The evidence raised a question of fact whether the officer involved was properly performing his duties at the time of the incident. "It was therefore error for the court to fail to instruct on the lesser included offense of assault with a deadly weapon."

The Bench Notes accompanying CALCRIM 890 contain a section called "lesser included offenses," and prominently displayed are "simple assault" with a citation to Penal Code section 240 and a citation to People v. Greene, supra. Thus, the trial court had ample notice of the need to instruct on simple assault.

There are other Penal Code sections that have parallel provisions to simple assault (Penal Code section 240) and aggravated assault (Penal Code section 220), and the same requirement of instructions on lesser included offenses applies. People v. Hayes (2006) 142 Cal.App.4th 175 reversed a felony conviction for battery with injury on a probation officer (Penal Code section 243, subd. (c)(1) for failure to instruct sua sponte on the lesser included misdemeanor of battery on a probation officer without injury (Penal Code section 243, subd. (b). Section 243, subd. (f)(5), defines "injury" as "any

physical injury which requires professional medical treatment," and "[a]reasonable jury could conclude that the injury to Phillips was not severe enough to require professional medical treatment," id. at 181. The Court of Appeal concluded that because "the record contains substantial evidence that would absolve appellant of battery with injury but justify conviction of the lesser included offense of battery without injury," the trial court erred in failing to instruct sua sponte on the lesser included offense," id. at 182.

b. The evidence that triggered the sua sponte duty to instruct on lesser offenses.

In this case, appellant expressly testified that he engaged in thrusting against Ms. Doe, without any intent to have sexual intercourse with her. Breverman notes that it is not within this Court's purview to evaluate the credibility of appellant in determining whether there is substantial evidence of a lesser-included offense, and appellant's testimony by itself constitutes sufficient evidence to require lesser included offense instructions. "In deciding whether evidence is 'substantial' in this context, a court determines only its bare legal sufficiency, not its weight," People v. Breverman, supra, 19 Cal. 4th at 177.

Moreover, there is substantial independent evidence negating an intent to have sexual intercourse. As noted in Argument II, supra, appellant engaged in two types of sexual conduct, both of which inherently fell "short of" sexual

intercourse, People v. Craig, supra. The fact that appellant remained fully clothed during both types of sexual conduct clearly calls into question whether he had an intent to engage in sexual intercourse, if not negating any such intent entirely. Because the record contains substantial evidence that tends to absolve appellant of the intent to rape element of Penal Code section 220, that would justify conviction of the lesser included offense of simple assault, Penal Code section 240.

c. The requirement of reversal.

People v. Breverman also established that the standard of appellate review for failure to instruct on lesser included offenses is People v. Watson, supra – "error in failing sua sponte to instruct, or to instruct fully, on all lesser included offenses and theories thereof which are supported by the evidence must be reviewed for prejudice exclusively under Watson," such that "[a] conviction of the charged offense may be reversed in consequence of this form of error only if, 'after an examination of the entire cause, including the evidence' (Cal. Const., art. VI, § 13), it appears 'reasonably probable' the defendant would have obtained a more favorable outcome had the error not occurred," 19 Cal.3d at 178.

People v. Hayes, supra, found reversible error for reasons that apply equally to this case – "Applying the Watson harmless error standard, it is

reasonably probable that appellant would have obtained a more favorable outcome if the jury had not been presented with an unwarranted all-or-nothing choice between conviction of the charged offense and complete acquittal," 142 Cal.App.4th at 183. Noting that the evidence regarding the seriousness of the injury was equivocal, the Court of Appeal concluded that it was "therefore likely that the jury would have returned a guilty verdict on the lesser included offense had the jury been given that option" and "[t]he judgment, consequently, must be reversed." Ibid.

In sum, the law of California is well settled that in any prosecution for any charge of aggravated assault, that is the crime defined by an assault with an additional element relating to either the identity of the victim, the means of assault, or the assailant's intent, an instruction on simple assault is necessary where either (1) the prosecution's evidence as to the additional element is sufficiently uncertain as to present a question of fact for the jury; or (2) the defendant presents evidence which, if believed, would absolve the defendant of harboring the aggravating mental state. The failure to instruct was clearly prejudicial in this case.

/

/

/

2. The court's error in failing to instruct on lesser-included offenses as to Counts 2 and 3.

The lesser-included offense analysis with respect to Counts 2 and 3 is virtually identical and is, therefore, discussed in this single section.

a. The elements of Counts 2 and 3.

CALCRIM 1047 and 1048 set forth the elements of "sexual penetration of an intoxicated person" and "sexual penetration of an unconscious person," respectively. The first two elements are identical – "(1) the defendant committed an act of sexual penetration with another person; and (2) the penetration was accomplished by using [a foreign object/substance/ instrument/device/or unknown object." The third element in each differs. CALCRIM 1047 requires proof that "[t]he effect of an intoxicating substance prevented the other person from resisting the act," and CALCRIM 1048 requires proof that "[t]he other person was unable to resist because she was unconscious of the nature of the act."

The fourth element in each is that the defendant knew that the other person was unable to resist.

The Bench Notes to both instructions include identical enumerations of lesser-included offenses: (1) assault (Penal Code section 240); (2) attempted sexual penetration of intoxicated person (Penal Code section 664, 289(d/e));

and (3) battery (Penal Code section 242). The case law confirms that these are all lesser-included offenses. See People v. Ortega (2015) 240 Cal.App.4th 956, 965 ["The court instructed the jury on forcible sexual penetration [Penal Code section 289] and the lesser included offenses of attempted sexual penetration by force (§§ 664, 289, subd. (a)(1)), assault with intent to commit sexual penetration by force (§§ 220, subd. (a), 289, subd. (a)(1)), simple battery (§ 242), and simple assault (§ 240)"].

b. The evidence that triggered the sua sponte duty to instruct on lesser offenses.

The prosecutor correctly pointed out during a jury instruction discussion that there was an issue as to whether "sexual penetration" occurred within the meaning of the two charges – "[t]he People, when they cited or requested a pinpoint instruction, they cited a case directly on point that explained the word 'penetration,' because the word 'penetration' has common misconceptions legally versus colloquially." 11 RT 998. The prosecutor requested a pinpoint instruction, 2 CT 433, "to help explain to the jury what penetration means."

Appellant had stated to Det. Kim in his initial statement and during the course of his testimony that he had "fingered" Ms. Doe. The term "fingered" in a sexual context does not have a precise definition in colloquial English, and is not synonymous with the "digital penetration" element of Penal Code section

289. The Online Slang Dictionary defines "finger" when used as a verb in a sexual sense as "to stimulate the female genitals with a finger," and provides the example "I fingered her to orgasm last night." See http://onlineslangdictionary.com/meaning-definition-of/finger. That operative definition obviously includes but does not necessarily entail stimulation that includes penetration.

Appellant stated on direct examination that "I fingered her," after which defense counsel asked:

> Q: When you say "fingered her," did you put a finger from your hand into her vagina?
>
> A: Yes I did. 9 RT 852.

The cross-examination was as follows:

> Q: Okay. And it's your testimony that you fingered her for how long?
>
> A: A minute.
>
> Q: A minute? And a minute, she had an orgasm?
>
> A: Yes.
>
> Q: Did you finger her in a special way that caused her to orgasm so quickly?
>
> A: I don't think so. 9 RT 879.

Defense counsel neither conceded nor disputed the allegation of digital penetration in his opening statement:

> There will be people, as Ms. Kianerci told you, who come upon the scene later when they're out on the ground. They don't see any sexual activity at all. They don't see digital penetration. Augmented Reporter's Transcript, p. 12 (hereafter "ART").

The prosecutor called Det. Kim as a rebuttal witness, who authenticated the recording of his interview with appellant and played it to the jury. 10 RT 964. In that interview, appellant states that "I fingered her." 3 CT 595. Det. Kim followed up as follows:

> Officer: 'Cause, um, obviously you weren't there them um, we got to you. Um, and when you uh, you said that you, you fingered her –
>
> Turner: Mm-hmm.
>
> Officer: Okay, um, did you do anything else, did you –
>
> Turner: No.
>
> Officer: You know, play with her breasts, or uh, anything else, 'cause her, her clothing was a little bit disheveled.
>
> Turner: Uh, I mean, yeah, I guess I, like, felt her, like using my hands on her breasts a little bit. 3 CT 598.

The only subsequent reference to fingering was as follows:

> Turner: Like that. Like it was, she's definitely responsive when I was making out with her, and when I was fingering her, so, yeah.

Officer: So was there at any point, when she just stopped responding to you, where she stopped kissing you, or –

Turner: No.

Officer: Okay. 3 CT 620-621.

Those references to "fingering" must be read in the context of appellant's other statements and testimony that he was quite intoxicated and at the time of his 6:30 a.m. statement on January 18, the events of the previous night were "just kind of a blur":

Officer: Or did you just, you met her there during the party?

Turner: Well, we were outside drinking beers together at K.A., and then like we just started kissing, and –

Officer: Okay, okay. Um, do you even know if she's a student or not, do you know her age?

Turner: No.

Officer: Nothin'? Okay. Um, at that point when you guys started hooking up, how well do you remember that?

Turner: Uh, I mean not that well, but like it was, I mean, and it's just kind of a blur, but it seemed like we were just kind of hooking up. 3 CT 596-97 (emphasis supplied).

At the same time, appellant was explicit that he never had any intent to rape her – "I mean, like I'll just, like literally my intentions were not to try and rape a girl, like, without her consent last night. Like, I was just trying to hook up with a girl." 3 CT 604. When asked about how intoxicated he was, Det. Kim

asked, "So you weren't like plastered, no," to which appellant responded "No, I mean, I, like I, it, I, it's fuzzy, but like I remember it." 3 CT 607.

The prosecutor gave this evidence as much of a positive spin as she could:

> Now, there were certain things in this trial that are undisputed. You're probably going to get bored hearing about it because it's clear that the parties are not disputing them. Number one, it's pretty much not disputed that he digitally penetrated her vagina with his fingers. The physical evidence supports that. He admitted that. So that makes your job a little bit easier.
>
> It's also undisputed that she was .24, almost three times the legal limit. It's undisputed that she had made a – left a voicemail for her boyfriend, [redacted] without any memory of that. She admitted that. We don't dispute that. 14 RT 1065 (emphasis supplied).

The prosecutor's modifier -- "pretty much" -- acknowledges the ambiguity inherent in the testimony, both direct and circumstantial. The prosecutor referred to appellant's testimony that he asked Ms. Doe's permission, "Can I finger you," and later "told Det. Kim about the fact that he fingered the girl that he was on top of." 14 RT 1095. The prosecutor argued, "We know from Brock Turner and from the DNA evidence that he put his finger into her vagina." 14 RT 1115.

The reference to the DNA evidence consists of criminalist Lee's testimony that Ms. Doe's DNA was found under appellant's fingernail, but Mr. Lee did not testify that the DNA sample necessarily came from Ms. Doe's

vagina, as opposed to a skin fragment from any other part of her body. Appellant had testified that he and Ms. Doe were holding hands as they walked away from the party, that he took off her underwear, and had other contact with her skin. Of particular importance is the undisputed testimony that appellant's DNA was not found in the vaginal swab taken from Ms. Doe.

The prosecutor was manifestly over-optimistic in her characterization of the DNA testimony:

> Craig Lee, the DNA expert, confirmed exactly what Brock had told Det. Kim in the first interview, that he fingered [Jane]. And the proof is, because under his fingernail on his right hand, there was [Jane's] DNA. It's exactly consistent with what he told Det. Tim at first – Det. Kim – excuse me. 11 RT 1116.

The fingernail DNA Ms. Does not in any way "confirm" that appellant digitally penetrated Ms. Doe; it is at most "consistent" with digital penetration. As noted above, appellant could have acquired that DNA skin fragment when he was holding hands with Ms. Doe, when he was taking off her underwear, or when he was rubbing or massaging her vaginal area without necessarily penetrating her vagina.

In closing argument, defense counsel reviewed appellant's statement to Det. Kim, using throughout the term "fingering," without either expressly conceding or denying digital penetration. See 11 RT 1123-1124.

Counsel stated in his concluding remarks:

> I suggest to you that you have an eminently reasonable conclusion here that Brock Turner did what he admits doing. He put his finger in the vagina of 'Jane'. It was never his intent to rape her. And he did it when she was consenting, conscious, and there was no way he could have believed from what he saw and heard that she wasn't capable of consenting at that time. 11 RT 1128.

Based on this evidence and argument, the jury certainly had questions as to whether digital penetration had occurred. The jury first asked for a readback of the testimony of SART nurse Setterlund regarding exhibits 56 – 62, 2 CT 464, which were the vaginal photographs, 2 CT 479. The jury then asked a follow-up question, 2 CT 465:

> With respect to Count 3, last paragraph 1048A. ~~If the defendant did not believe he was penetrating the victim, did he not have the mental state to commit the crime~~.
>
> If the defendant did not know or mistakenly believe his act was not penetration dies it negate the required mental state to commit the crime under Count 3. 2 CT 465.

The jury clearly had questions with respect to the penetration issue for which they sought clarification from the court.[8]

The trial court responded by requesting clarification and sent the jury a note: "Is the question accurately rephrased as: If the defendant did not know his act was penetration, or if the defendant mistakenly believed his act was not penetration, does it negate the required mental state to commit the crime under

[8] The trial court unfortunately failed in its response to these critical questions that arose during deliberations. See Argument V, infra.

Count 3? Please respond in writing on a juror question form." 2 CT 466. The trial court's response was not a "rephras[ing]" of the question; rather, it was a verbatim reiteration of the jury's original question, and the jury responded with its own verbatim reiteration of the identical question. 2 CT 467.

The jury sent another follow-up question with respect to the penetration issue:

> Is ~~touching, contact with the inner labia majora or labia minora,~~ Is contact with the inner lining of the labia majora or any portion of the labia minora considered penetration?

The trial court responded with the standard instruction that "sexual penetration means penetration, however slight, of the genital or anal opening of the other person," and "refers to penetration of the labia majora, not the vagina." 2 CT 470.

The jury was clearly debating whether the evidence proved beyond a reasonable doubt that appellant's fingering of Ms. Doe qualified as "penetration" within the meaning of the statute, or, implicitly, whether it was merely exterior massaging. The fact that the jury had multiple questions regarding the penetration issue demonstrates that the evidence had raised sufficient factual questions to trigger the duty to instruct on lesser-included offenses, at a minimum, simple assault and simple battery. The jury could well have been debating whether appellant's testimony established only that he had

"stimulat[ed] the female genitals with a finger" in a manner that fell short of digital penetration. The jury could have assimilated all of the evidence, recognized that appellant's recollection was "just kind of a blur," 3 CT 596 – 97, viewed his testimony on this point as not particularly reliable, and found itself on the fence as to whether the prosecution had proved that only he had been groping around Ms. Doe's vaginal area, without necessarily penetrating it.

The trial court erred in not instructing on assault with the intent to commit digital penetration, simple assault, battery, and sexual battery. People v. Ortega, supra. The jury could have viewed the evidence as establishing beyond a reasonable doubt that appellant intended to stimulate Ms. Doe's genitals with his finger, but had significant doubts whether the evidence proved beyond a reasonable doubt that he penetrated her.

D. The Requirement of Reversal.

In light of the overall unreliability of the evidence as to exactly what happened, the lesser-included offense instructions were necessary to provide the jury with an alternative to convicting appellant of the very serious charges that the prosecutor elected to pursue.

It was not necessary for appellant to expressly state that he never committed a digital penetration in order to qualify for lesser-included offense instructions. The overall testimony contained areas of uncertainty. This is not a

situation where a sober complaining witness testifies unequivocally as to a particular sex act, and the defendant acknowledges the sex act but claims consent. Under that type of circumstance, the defendant is either guilty of the offense as charged or not guilty at all. See People v. Elam, above, supra. In this case, there was no complaining witness with unequivocal testimony as to what happened, and there was a defendant with a blurry recollection of what happened, the combination of which left the jury with major evidentiary questions as to the degree of offense, if any, that appellant committed. At the same time, the jury was forced into "an all-or-nothing choice between conviction of the charged offense on one hand, or complete acquittal on the other." People v. Banks, supra, 59 Cal.4th at 1159. Had the jury been given lesser included offenses, it is reasonably likely that they would have returned a more favorable verdict. People v. Watson, supra.

## IV. APPELLANT WAS DEPRIVED OF DUE PROCESS AND A FAIR TRIAL BY PROSECUTORIAL MISCONDUCT IN REPEATEDLY PORTRAYING CERTAIN EVIDENCE IN A FALSE, MISLEADING, AND PREJUDICIAL MANNER.

### A. Introduction and Overview.

The site of the sexual contact in this case was an open area adjacent to residential dorms and to a basketball court – a clean, well-maintained area shaded by pine trees, typical of the sylvan Stanford campus. The site was

approximately 116 feet from the Kappa Alpha patio from which appellant and Ms. Doe left together at approximately 12:30 a.m., and walked along a path toward appellant's dorm room in Lagunita residence. The specific area where Ms. Doe was found passed out was strewn with pine needles, as are many parts of the campus. As Deputy Sheriff Taylor testified, Ms. Doe was found in an open area adjacent to a three-sided wooden enclosure where a dumpster was usually kept. On this night, the dumpster was out of the enclosure and not in the immediate proximity of the site where Ms. Doe was found. Deputy Taylor stated that she was "lying on the ground" in a position where "[h]er head was closest to the dumpster enclosure and her feet were furthest away from it." 4 RT 81. He elaborated that she was "[d]irectly center behind the shed." 4 RT 91.

The photograph of the scene clearly depicts the spot where Ms. Doe was found in between the basketball court and one side of wood-slatted dumpster enclosure. 2 CT 505; 511. The dumpster was not in Ms. Doe's immediate proximity, but was off to the side of the wooden enclosure, about 20-30 feet away. The dumpster had no connection to the site where the sexual conduct occurred other than as an incidental terrain feature that Deputy Taylor had to walk past en route to the actual place where Ms. Doe was found.

When asking various witnesses about their observations at the site, the prosecutor referred to the dumpster 46 times, and in 10 of those, [9] she used the specific phrase, "behind the dumpster," ostensibly as a reference to orient the witness. Her closing argument was rife with the refrain that the incident had occurred in an isolated place "behind a dumpster." The prejudicial aspects of this "behind-the-dumpster" characterization were twofold: (1) it implied an intent on appellant's part to shield and sequester his activities with Ms. Doe from the view of others; and (2) it implied moral depravity, callousness, and culpability on appellant's part because of the inherent connotations of filth, garbage, detritus and criminal activity frequently generally associated with dumpsters. The cumulative effect of this misleading course of conduct deprived appellant of a fair trial.

B. Summary of Facts.

1. The objective evidence regarding the open and public setting of the incident.

The schematic diagram of the area drawn by Det. Kim and introduced as Exhibit 1 provides an overview of the area. Exhibit 1. The dashed lines mark the path that the two graduate students traversed on their bicycles as they approached the site where appellant and Ms. Doe were. The "v" represents the

[9] See 4 RT 79; 5 RT 151; 9 RT 823; 876; 882; 886; 894; 896; 904; and 907.

place where the point where Ms. Doe was found passed out. The three-sided rectangle represents the slatted wood structure in which the dumpster was usually positioned. The dumpster itself was on the far side of the rectangular structure. From the perspective of eyewitnesses Arndt and Jonsson, Ms. Doe was clearly in front of the dumpster, not in any way "behind" it.

Deputy Taylor was the first law enforcement officer on the scene, and was called as the prosecution's first witness to orient the jury to the area where the incident occurred. 4 RT 77-80.

Deputy Taylor had testified that he had parked near the access driveway to Jerry House and walked down a path as witnesses directed. 4 RT 76-78. As he approached the scene from that direction, he first encountered the dumpster and had to walk around it before he reached Ms. Doe. 4 RT 78. From that perspective, he "came down on the right side as I was facing the dumpster and walked around to the left on the backside of the dumpster." [10]

Deputy Taylor was then asked to "describe when you first saw the body, what did you see," and he answered as follows:

> So as I came down behind the dumpster, I noticed that there was a female subject lying on the ground. She was facing the Kappa Alpha house. So she was actually facing away from me as I came

[10] Deputy Taylor used the phrase, "the backside of the dumpster" based on where the hinges of the lid were located, as opposed to the side of the dumpster where the lid opened.

> down behind the dumpster. Her head was closest to the dumpster enclosure and her feet were furthest away from it. 4 RT 81 (emphasis supplied).

Deputy Taylor further explained with respect to Exhibit 7 that the dumpster was adjacent to a three-sided wooden structure with no top that was made of a "wood-slatted fence," which was "the enclosure that usually surrounds the dumpster." He suggested that "sometimes there's golf carts or bicycles also parking there, which is probably why this dumpster is moved to the left."

The testimony of graduate students Carl Arndt and Peter Jonsson was clear that they approached the site where Ms. Doe was found from the basketball court, the opposite side that Deputy Taylor approached from, and that the site was entirely in the open. See Statement of Facts, section B-3, supra. The photographs that they referred to are clear that Ms. Doe was in the open, between the basketball court and one side of the wooden dumpster enclosure, with the dumpster itself virtually out of view. Exhibits 22-17; 2 CT 502-512.

/

/

/

/

2. The prosecutor's exploitation of the "behind-the-dumpster" image to prejudice the jury.

The prosecutor incorporated Deputy Taylor's off-hand phrase "behind the dumpster" into her questioning of virtually all of the eyewitnesses, and particularly persistently included it in many of her questions to appellant.

On one hand, the two eyewitness graduate students were unmistakenly clear in their markings of the photographs of the area that Ms. Doe was in front of the open wooden fence structure in which the dumpster was usually situated. Exhibits 26 and 27, 2 CT 510 - 513 clearly illustrated the completely open setting where Ms. Doe was found.

Nonetheless, the prosecutor manipulated the graduate students into adopting her "behind the dumpster" characterization through her formulation of questions to them. The prosecutor asked graduate student Arndt "Was there anything blocking your view when you first were alerted to the couple behind the dumpster by Peter," and he answered, "No." The prosecutor responded, "So any trees between you and the couple when Peter first alerted you to their location," and he answered, "No. No." 5 RT 151. The jury was not looking at the exhibit photos during that testimony, but was instead hearing the phrase, "behind the dumpster."

The prosecutor returned to the spatial relationships with Mr. Arndt:

Q: Okay. So I'm trying to understand. Where was she lying in relation to the dumpster?

A: Sure. She was lying straight behind it.

Q: Okay.

A: With her head facing it.

Q: Head facing the –

A: Dumpster.

Q: Okay. With her head closest to the dumpster?

A: Than?

Q: Than the basketball court.

A: Yeah. 5 RT 168.

In fact, the dumpster cannot even be seen in the exhibit photograph because it is entirely obscured by the wooden enclosure structure, see Exhibit 27, 2 CT 513. The insidiousness of the prosecutor's questioning is apparent here, because from Mr. Arndt's personal perspective as he approached Ms. Doe was that she was, if anything, <u>in front</u> of the dumpster, i.e., she was between Arndt and the dumpster enclosure. As Deputy Taylor so clearly stated, "[h]er head was closest to the dumpster enclosure," 4 RT 81, and the dumpster itself was clearly farther away, if not out of sight. However, after the prosecutor fed Mr. Arndt the "behind the dumpster" line, he regurgitated it back to her.

Her cross-examination of appellant was similarly loaded with the "behind the dumpster" phrase:

Q: It's your testimony today that you took the path behind a dumpster that was a shortcut, true?

A: Yes. 9 RT 876.

* * *

Q: You didn't hear her say, Hey, it's cool. I wanted him to finger me behind the dumpster?

A: No. 9 RT 882.

* * *

Q: So you were thinking of [Jane] when you had her behind a dumpster on the ground half-naked… 9 RT 886

* * *

Q: You were asked by Detective Kim how you ended up on the ground behind the dumpster. 9 RT 894.

* * *

Q: And you couldn't tell him [Det. Kim] the story about how you met the girl that you fingered behind the dumpster? 9 RT 896.

* * *

Q: The detective came in and interviewed you and confronted you about the girl you were with, the girl that you fingered behind the dumpster. 9 RT 904.

* * *

Q: You admit you were with Jane behind the dumpster and you took off her underwear. 9 RT 907.

When the prosecutor argued the case to the jury, she characterized Ms. Doe's position as being hidden and imputed nefarious intent to appellant because of this:

> Ladies and Gentlemen, what you do in the dark that puts you into the light. We're here today because Brock Turner made a series of calculated decisions in the dark. He decided to take advantage of a girl when no one was looking, in an isolated area, all in an effort to hook up. All in an effort to please himself. 11 RT 1061-1062 (emphasis supplied).

The dumpster figured prominently in her next characterization of the incident:

> Now, there are two Brock Turners that you've been exposed to in this trial. There's a Brock Turner that comes from a good family, that has people come in and say what a great guy he was, character witnesses. And there is the Brock Turner that was on top of a lifeless [Ms. Doe] on the ground behind the dumpster and effectively had to be pulled off by two innocent people. 11 RT 1064 (emphasis supplied).

The prosecutor next repeated the "behind the dumpster" characterization when challenging the defense – "The defense stood up here in opening statement and told you that Mr. Turner is the only one that can tell you what happened in those moments when they were behind the dumpster." 11 RT 1064 (emphasis supplied). See also 11 RT 1066 – "And the last question you must

answer is, whether she was unconscious and he knew that she was unconscious when he did these acts to her behind the dumpster" (emphasis supplied).

The prosecutor addressed the element of intoxication and legal consent – "That means she must be able to appreciate that, once she's back there behind the dumpster, that he's intending to either penetrate her with his finger or his penis, and she understands what that means." 11 RT 1069 (emphasis supplied). The prosecutor repeated this characterization in summarizing witness testimony – "You have Peter, who is also not drunk, also saw the first couple and kind of shrugged it off, also saw the defendant behind the dumpster with – on top of [Jane], also didn't jump to conclusions, gave him the benefit of the doubt." 11 RT 1087 (emphasis supplied).

The prosecutor made an ostensibly facetious comment regarding the possibility that appellant was merely unlucky that Ms. Doe passed out at the time she did – "Now, defendant is not the most unlucky man that happens to hook up with a totally willing chick behind the dumpster that he just met," who "all of a sudden, when these two guys interrupt, she just goes blackout cold for three hours." 11 RT 1089-1090 (emphasis supplied).

The prosecutor suggested that appellant's exculpatory statement to Det. Kim was fabricated because it would have "clicked in his brain that this is a pretty serious situation" – "I better have a good explanation of why I was on top

of a half-naked girl who happened to be passed out behind the dumpster on the ground." 11 RT 1090 (emphasis supplied).

The prosecutor concluded her initial argument with an attack on appellant's character:

> And the measure of a man's real character is what he would do if he knew he would never be found out. That's what he had hoped to do to [Jane] in the dark underneath the light behind the dumpster. He was not wanting anyone to find out what was going on, not even [Jane]. 11 RT 1108 (emphasis supplied).

Defense counsel did not object to any of this, but in his argument to the jury, he used the phrase "in front of the dumpster" when describing the site of the sexual conduct. 11 RT 1122-1123 (emphasis supplied).

The prosecutor reiterated the "behind the dumpster" theme in her concluding segment – "Fact of the matter is that most of the people testified that when they found [Jane]'s body laying [sic] there behind the dumpster, the party was pretty much over." 11 RT 1132 (emphasis supplied).

C. The Applicable Law Regarding Prosecutorial Misconduct.

People v. Hill (1998) 17 Cal.4th 800, 823 affirmed that "[a]lthough prosecutors have wide latitude to draw inference from the evidence presented at trial, mischaracterizing the evidence is misconduct." Hill emphasized that "[a] prosecutor's 'vigorous' presentation of facts favorable to his or her side 'does not excuse either deliberate or misstatements of fact'." Ibid, quoting from

People v. Purvis (1963) 60 Cal.2d 323, 343. The standard of review under the due process guarantee is whether the prosecutor's comments "constitute a pattern of conduct so egregious that it infects the trial with such unfairness as to make the conviction a denial of due process." People v. Cortez (2016) 63 Cal.4th 101, 129 explained that prosecutors commit misconduct under state law "if they involve use of deceptive or reprehensible methods to attempt to persuade either the court or the jury."

The misconduct in Hill included a prosecutor making misstatements about the strength of the serological evidence tying the defendant to the murder; and misdescribing the knives in evidence when questioning witnesses in a manner that "creat[ed] jury confusion over the two knives," such that "the prosecution gained an unfair advantage." Id. at 825. Thus, Hill recognized that misstating the evidence can occur both in the manner by which a prosecutor formulates a question to witnesses, and also the manner in which the prosecutor argues the import of evidence to the jury.

Hill further noted that "a series of trial errors, though independently harmless, may in some circumstances rise by accretion to the level of reversible and prejudicial error', id. at 823. Repeated instances of prosecutorial misconduct have been recognized as cumulatively prejudicial. "As we recently recognized in Hill, although single instances of misconduct may not require

reversal of a conviction, the cumulative effect of a pattern of such conduct may." People v. Frye (1998) 18 Cal. 4th 894, 978.

D. The Absence of Any Waiver on Appeal.

Defense counsel did not object to either the prosecutor's use of the phrase "behind the dumpster" in questioning witnesses nor the use of the phrase in the prosecutor's closing argument. Hill recognized that as a "general rule a defendant may not complain on appeal of prosecutorial misconduct unless in a timely fashion – and on the same ground – the defendant made an assignment of misconduct and request the jury be admonished to disregard the impropriety." Id. at 820. However, Hill noted various exceptions to that rule, including a case where "failure to request a jury be admonished does not forfeit the appeal if 'an admonition would not have cured the harm caused by the misconduct'." Ibid. The Supreme Court found that defense counsel had objected to some instance of prosecutorial misconduct but not others. The trial court found they were nonetheless cognizable on appeal because defense counsel "was subjected to a constant barrage of prosecutor Morton's unethical conduct, including misstating the evidence, sarcastic and critical comments, demeaning defense counsel, and propounding outright falsehoods. Id. at 821.

The prosecutor's conduct in this case may not have the glaring reprehensibility of prosecutor Rosalie Morton's in Hill, but it was nonetheless

sufficiently pervasive and insidious to render the trial fundamentally unfair. As will be discussed in more detail below, the prosecutor's primary area of misconduct was the sustained campaign to indoctrinate the jurors to view appellant as having lured Ms. Doe to a place of vulnerability where no "self-respecting" female would ever agree to engage in sexual conduct.

The prosecutor's ploy of incorporating Deputy Taylor's happenstance description of the site of the sexual conduct as "behind the dumpster" into her questioning of the other eyewitnesses put defense counsel into a difficult dilemma. He may have sensed that the prosecutor's repeated reiterations of the "behind the dumpster" motif were harmful, but at the same time been uncertain as to the existence of a legal objection. There was no viable objection to Deputy Taylor's initial use of the phrase, so when the prosecutor began incorporating it into her questions, what meritorious objection would have come to counsel's mind – "leading the witness"?

The case law recognizes that prosecutorial misconduct may take the form to propounding questions to witnesses for the purpose of imparting prejudicial implications rather than eliciting relevant information. "The rule is well established that the prosecuting attorney may not interrogate witnesses solely 'for the purpose of getting before the jury the facts inferred therein, together with the insinuations and suggestions they inevitably contained, rather than for

the answers which might be given'." People v. Wagner (1975) 13 Cal.3d 612, 619–620. The prosecutor's extensive "behind the dumpster" campaign was propaganda, incompatible with the facts in the record but all too likely to resonate with the jury.

That was the prosecutor's intent in this case, but the improper manipulation would not have been apparent on the first few occasions that the prosecution interject the phrase "behind the dumpster" into her questions. Once counsel realized that the prosecutor had embarked on a calculated plan to indoctrinate the jury toward a view of the evidence that was adverse to appellant, as contrived as that view may have been, the damage had been done and any judicial admonishment "would not have cured the harm caused by the misconduct," Hill, supra 17 Cal.4th at 820.

E. The Prejudicial Impact of the Misconduct.

The prosecution elected to pursue charges that were inherently difficult to prove in light of the available evidence. The weight of the evidence was that appellant did not to have sexual intercourse with Ms. Doe, but rather to engage in sexual contact short of sexual intercourse. Regarding the digital penetration charges, there were no eyewitnesses as to Ms. Doe's condition at the time the sexual contact occurred. The prosecutor offered no argument to explain why Ms. Doe voluntarily accompanied appellant for a considerable distance, 116

feet, from the patio of the Kappa Alpha party to the wooded area next to the basketball court if she had not been able to consent. She certainly could not have been unconscious if she ambulated with appellant for that distance, and the issue of whether she was too intoxicated is highly debatable.

The prosecutor attempted to caulk those holes in the case by mischaracterizing the evidence in a manner that made appellant look more like a calculating predator, and made Ms. Doe look more like a vulnerable victim. The image that the sexual contact occurred "behind the dumpster" implies a sordid and debasing interaction in a place where no woman would voluntarily engage in sexual contact. There is no reported instance in American culture for the last 50 years in which two enamored young people elected to express their sexual urges behind a dumpster. Law-abiding citizens simply do not congregate behind a dumpster.

In contrast, criminals are frequently associated with dumpsters as part of their felonious activities. See People v. Dejourney (2011) 192 Cal.App.4th 1091, 1098 ["Dejourney put his arm around Krystina's shoulder and walked at a fast pace that she could not control, essentially dragging her to a fenced dumpster area behind the businesses," where "he opened the gate and closed it

after they entered, placed his coat on the ground and told her to get down," where he raped her][11].

The prosecutor's campaign to instill in the jury the image of the offense as having occurred in a squalid and hidden area behind a dumpster must be viewed as both factually unsupportable and malevolently designed to taint the jury against appellant. The factually unsupportable aspect of the campaign is particularly apparent by juxtaposition to the sentencing letter submitted by

[11] See also People v. Kipfer (Ill.App. 2005) 356 Ill.App. 3d 132 [lurking out of sight before committing some heinous crime]; to perpetrate a sex offense, People v. Sutton (Ill.App. 1993) 252 Ill.App.3d 172, 177 [police officer "observed a man jump from behind a garbage dumpster and run past his patrol unit," at which point the officer "approached the dumpster at which time he observed a female sitting on the ground crying" with "her pants and underwear…pulled down to her ankles"]; see Phillips v. State (Ark. 1996) 327 Ark. 1, 2 ["just as [the 10-year-old victim] was passing some trash dumpsters behind the cafeteria of the high school, the man grabbed her, placed his hand over her mouth, dragged her behind the dumpsters, and through her down on the ground" where he raped her]; People v. Geiger (1984) 35 Cal.3d 510, 516 [a police officer who responded to a reported burglary at 3:00 a.m. "saw defendant emerge from behind a dumpster in an alleyway or yard and approach another officer with blood on his hands, apparently from the broken glass point of entry]; People v. Robbins (1988) 45 Cal.3d 867 [defendant put the murder victim's body in a dumpster, lighted a fire, and left]; and People v. Ochoa (1998) 19 Cal.4th 353, 381-82 [the complaining witness testified that "she was returning to her apartment shortly before midnight" when "defendant grabbed her from behind" and "forcibly took her behind a garbage dumpster," where he demanded money and subsequently raped her a few blocks away]. This sampling of felonious activity reported to have occurred "behind a dumpster" is illustrative of a much larger body of unpublished decisions in which comparable felonious activities occur in the immediate proximity of a dumpster.

Stanford Law Professor Michele Dauber, who was recruited by the prosecutor to assist in persuading Judge Persky not to follow the recommendation of the probation officer. Professor Dauber, writing to the court in her "private and personal capacity," noted that she had "known the victim in this case extremely well for more than 10 years," and that as a Stanford Law Professor, she had "been deeply involved in efforts to improve Stanford's prevention and response to sexual assault on campus." People's Sentencing Memorandum, Exhibit 15.[12] Notwithstanding Ms. Dauber's lack of any discernible training, experience or knowledge about California criminal sentencing policy or procedure[13], she nonetheless launched an argument that under Rule 4.413, California Rules of Court, the offense under consideration was not "substantially less serious than the circumstances typically present in these cases" which is a factor relevant to the probation eligibility determination under Penal Code section 1203.065(b). See Exhibit 15 to the People's Sentencing Memorandum.

Ms. Dauber's factual argument as to the seriousness of this offense for sentencing purposes was diametrically different from what the prosecutor had emphasized to obtain convictions, and from what the prosecutor continued to

[12] The People's Sentencing Memorandum is found at 3 CT 691 - 719. The Sentencing Memorandum refers to Ms. Dauber's letter at 3 CT 707 as Exhibit 15, but none of the People's exhibits are included in the CT.

[13] See https://law.stanford.edu/directory/michele-landis-dauber/.

emphasize in the Sentencing Memorandum. The prosecutor wrote that appellant "purposefully took her [Ms. Doe] to an isolated area, away from all of the party goers, to an area that was dimly lit, and assaulted her on the ground behind a dumpster," 3 CT 705. That characterization is belied by the photographs and testimony.

It is also belied by Ms. Dauber's characterization of the offense, which emphasized the "public" nature of the offense – "He degraded and humiliated her by assaulting her in public," noting that "[p]assersby could observe the assault, and observe her in that utterly defiled condition":

> The facts here are in some ways especially egregious when compared with many other assaults on campus. The fact that this sexual assault occurred in public and that the victim was observed being penetrated and assaulted while her genitals were exposed to view is more serious and more traumatizing than many other cases. Exhibit 15, p. 2.

Obviously, a particular incident cannot credibly be characterized as having occurred both in a hidden and sordid place behind a dumpster, and in a place so totally open to public view as to be "especially egregious." Ms. Dauber correctly characterized the factual setting of the incident, i.e., that it occurred in a "public place" that was entirely "exposed to view."

Judge Persky, to his judicial peril, did not accept either of the mutually inconsistent arguments presented by the prosecutor and Ms. Dauber,[14] apparently recognizing the factual flaw in the People's position and the analytic flaw in Ms. Dauber's position,[15] and followed the more tempered and tenable recommendation of the Probation Department. Under these circumstances, the prosecutor's manipulation of the jury by mischaracterizing the evidence in her questions to witnesses and in her argument to the jury in this case must be viewed as deceptive and reprehensible, People v. Hill, supra, and violated appellant's right to a fair trial.

/
/

[14]After sentencing, Ms. Dauber immediately launched the campaign to recall Judge Persky. See http:/www.latimes.com/opinion/opinion-la/la-ol-stanford-rape-dauber-turner-judge-persky-20160701-snap-story.html. ["Alongside campaign manager John Shallman, Dauber is now leading the charge for voters to remove Persky from the bench – to "recall" him – in response to this ruling."].

[15] Penal Code section 1203.065(b) and Rule 4.413 of the Rules of Court permit a grant of probation where the crime is "substantially less serious than the circumstances typically present in other cases." Ms. Dauber argued that "when compared with many other assaults on campus" "[t]he facts here are in some ways especially egregious." Exhibit 15, p. 2 (emphasis supplied). The provisions of the Penal Code and the Rules of Court clearly envision a comparison between the circumstances of the case at bar and the general category of other convictions under the same Penal Code provisions in the jurisdiction at large, not a comparison to the subcategory of "other assaults on campus" to which Ms. Dauber limited her comments.

## V. APPELLANT WAS DEPRIVED OF DUE PROCESS AND A FAIR TRIAL BY THE TRIAL COURT'S FAILURE TO ADEQUATELY RESPOND TO A CRITICAL JURY QUESTION DURING DELIBERATIONS.

### A. Summary of Facts.

The jury certainly had questions as to whether digital penetration had occurred. The jury first asked for a readback of the testimony of SART nurse Setterlund regarding exhibits 56 – 62, 2 CT 464, which were the vaginal photographs, 2 CT 479. The jury then asked a follow-up question, 2 CT 465:

> With respect to Count 3, last paragraph 1048A. ~~If the defendant did not believe he was penetrating the victim, did he not have the mental state to commit the crime~~.
>
> If the defendant did not know or mistakenly believe his act was not penetration does it negate the required mental state to commit the crime under Count 3. 2 CT 465.

The jury clearly had a serious question with respect to the penetration issue for which they sought clarification from the court. At the same time, the question contained certain anomalies that required clarification before an appropriate answer could be formulated. The question referred to "Count 3, last paragraph 1048A," and phrased the question in terms of "the" mental state for Count 3. However, there were three mental states that the prosecution had to prove to convict on Count 3: (1) the general intent to commit the act of penetration; (2) the specific intent to commit the act for "the purpose of sexual

abuse, arousal or gratification"; and (3) the knowledge that the other person was unconscious. The last paragraph of section 1048A as given begins with a general statement of the mistake of fact doctrine, but subsequently refers only to the prosecution's obligation to prove the knowledge of unconsciousness mental state. In contrast, the jury's question specifically refers to knowledge or belief regarding penetration, a different mental state than the one addressed by the instruction. The trial court was obligated to clarify what the jury actually wanted guidance about.

The trial court recognized that the question was unclear, but the court's response to the jury was not framed in a manner to elucidate the anomaly or ambiguity in the question. The court did not call the jurors in to ask what they meant, but responded with the following written communication:

> Is the question accurately rephrased as: If the defendant did not know his act was penetration, or if the defendant mistakenly believed his act was not penetration, Ms. Does it negate the required mental state to commit the crime under Count 3? Please respond in writing on a juror question form. 2 CT 466.

The trial court's response did not ask for clarification the penetration/mental state issue that was clearly was clearly on the jury's mind, and instead consisted of a virtually verbatim reiteration of the jury's initial question in a slightly altered grammatical format. The jury replied as follows:

> If the defendant did not know his act was penetration, or if the defendant mistakenly believed his act was not penetration, does it negate the required mental state to commit the crime under Count 3." 2 CT 467.

This exchange provided no clarification of the jury's actual concerns.

The trial court then answered the jury's re-formulated question with an unequivocal "no," coupled with an explanation that was entirely non-responsive to the jury's penetration concern:

> No. The last paragraph of Instruction 1048A applies to Element 4 of the Instruction, which contains the required mental state: the People must prove that the defendant knew that the other person was unable to resist because she was unconscious of the nature of the act. 2 CT 468.

The jury then asked a follow-up question regarding the technical definition of "penetration" in the section 289 charges, 2 CT 469, and the trial court responded with an expanded version of the pinpoint instruction that had previously been given at the People's request.[16]

B. The Trial Court's Errors in Failing to Convene the Jurors in Open Court; Failing to Clarify the Point of the Jury's Question; and Failing to Provide an Accurate Response.

[16] The original instruction read "[p]enetration of the genital opening refers to penetration of the labia majora, not the vagina," 2 CT 444. The expanded version read "Sexual penetration means penetration, however slight, of the genital or anal opening of the other person for the purpose of sexual abuse, arousal or gratification. Penetration of the genital opening refers to penetration of the labia majora, not the vagina. Penetration of the external genital organs is sufficient to constitute sexual penetration," 2 CT 470.

Penal Code section 1138 sets forth the trial court's responsibilities when, inter alia, a deliberating jury asks for guidance regarding a jury instruction:

> After the jury have retired for deliberation, if there be any disagreement between them as to the testimony, or if they desire to be informed on any point of law arising in the case, they must require the officer to conduct them into court. Upon being brought into court, the information required must be given in the presence of, or after notice to, the prosecuting attorney, and the defendant or his counsel, or after they have been called. (emphasis supplied)

In addition to Penal Code section 1138, a defendant has a federal constitutional right to due process and an accurate judicial response to a jury question or request for guidance during deliberations. McDowell v. Calderon (9th Cir. 1997) 130 F.3d 833, The trial court in this case committed three errors with respect to the jury's question penetration and the accompanying mental state element.

1. The trial court erred in failing to bring the jurors into open court to address their question.

Penal Code section 1138 is clear that if deliberating jurors "desire to be informed on any point of law arising in the case," they must be brought into open court to address their question. The trial court in this case failed to bring the jury into open court, and failed to obtain any waiver from counsel and appellant for this breach of statutory procedure. The case law confirms that the statute means what it says, must be followed unless there is an explicit waiver.

People v. Hawthorne (1992) 4 Cal. 4th 43, 69, confirmed that" Penal Code section 1138 requires that any questions posed by the jury regarding the law or the evidence be answered in open court in the presence of the accused and his or her counsel, unless presence is waived."

The open court provision of section 1138 provides a number of salutary functions, including an opportunity for the defendant to be heard as to the appropriate response to the jury's question, and equally for the jury to be heard as to the meaning of its question. The benefit of direct communication between judge and jury in addressing legal questions during deliberations is incorporated into section 1138, but was scuttled in this case by the trial court's circumvention of the requirement without any kind of waiver. There was manifest prejudice accruing from this error in that the trial court's written communications never clarified what it was that the jury actually wanted to know, such that the trial court's written response was both off-point and misleading, see section C, infra.

2. The trial court erred in failing to clarify the jury's question as a foundation for relevant response.

A primary responsibility of a trial court faced with a jury question during deliberations is to ensure that it understands the point of the question. Obviously, the most efficacious means to that end is to call the jury into open

court and ask the foreperson directly to explain any apparent anomalies or ambiguities. However, even if the trial court restricts itself to written communications, it still must drill down to obtain an accurate understanding of the jury's question. The trial court here did not do that, but merely restated the question with slightly altered phraseology, leaving the apparent anomalies and ambiguities unresolved.

McDowell v. Calderon (9th Cir. 1997) 130 F.3d 833 granted relief to a California habeas corpus petitioner because of the trial court's failure to ascertain the crux of the jury's concern and to provide a useful answer to a mid-deliberation question. The question indicated that eleven of the jurors in a penalty trial believed that the factors viewed by the twelfth juror as mitigating were not proper under the jury instructions, and requested guidance. The trial court simply re-read the instruction previously provided to the jury.

The Ninth Circuit found constitutional error because, inter alia, "the trial judge did not identify the exact problem confounding the eleven jurors," and instead "simply referred the jurors to the original instructions defining mitigating circumstances," id. at 838. The Ninth Circuit summarized the controlling law when the jury expresses confusion – "The unremarkable prescription for such confusion is that 'when a jury makes explicit its difficulties a trial judge should clear them away with concrete accuracy'," citing

Bollenbach v. United States (1946) 326 U.S. 607, 612-13. See also Davis v. Greer (7th Cir. 1982) 675 F.2d 141, 145 [Bollenbach places on the trial judge "a duty to respond to the jury's request with sufficient specificity to clarify the jury's problem"].

The Ninth Circuit was particularly critical of the trial judge for not making an effort to elicit directly from the jurors what the crux of their misunderstanding was – "The foreman's affirmative response to the judge's parting inquiry about whether he had answered their question proves little" because "[t]he response was perfunctory" and "came without conversation with the rest of the jurors and before the jurors had any opportunity further to study the instruction to which the court had referred," id. at 839 (emphasis supplied).

The same failure of inquiry infected the proceedings here. The court did not understand the jury's questions, but rather than ask the foreman directly in open court what was meant, the court sent a note that reiterated virtually verbatim the juror's question which the court did not understand, and asked the jury to respond if that was in fact their question. Of course, the jury sent back the same question in haec verba because the jury had an understanding of what the question meant, and apparently believed that the question as framed was clear and unambiguous.

The trial court's failure to clarify was prejudicial in this case because the trial court's purported answer to the jury's question was not responsive to the jury's actual concern regarding penetration, and was almost certainly misleading, see part C, infra.

3. The trial court's error in giving the jury a non-responsive and misleading answer to its question regarding mental state and penetration.

The final component of the trial court's errors was the failure to provide a responsive instruction to the jury's actual question, and to instead wrongly inform the jury that a mistake of fact defense was not viable. "[T]he statute [section 1138] imposes a 'mandatory duty' to clear up any instructional confusion expressed by the jury," People v. Gonzalez (1990) 51 Cal. 3d 1179, 1212. The trial court attempted but failed to fulfill that mandatory duty in this case.

People v. Giardino (2000) 82 Cal. App. 4th 454, 464 reversed a conviction for rape by intoxication for providing the jury with a non-responsive and misleading answer to a mid-deliberation question. The jury was initially and correctly instructed that one of the elements of rape by intoxication was that "the alleged victim was prevented from resisting the act by an intoxicating substance…," and "after several hours of deliberation the jury asked the court for the legal definition of 'resistance'." The trial court rejected a proposed

instruction by the defense, and instead in effect told the jury that it was on its own -- "this is an area in which you must use your common sense and experience to determine the everyday meaning of resistance." 82 Cal.App.4th at 484. The Court of Appeal held that this was error because there existed legal reference points that further explained the meaning of “resistance” in this context, which was different from the “everyday meaning of resistance” that connotes physical resistance. The Court of Appeal noted that there was no handy source for the trial court to fashion an appropriate response to the question, but “the unfortunate fact that it is difficult to determine the meaning of Penal Code section 261(a)(3) only serves to explain how the error occurred; it does not render it any less erroneous,” id. at 467.

Similarly, this Court found reversible error in the trial court’s failure to directly answer a jury’s question as to the meaning of mutual combat – “That further guidance may not come easily to hand, or is not supplied by counsel, does not excuse the court from its statutory duty.” People v. Ross (2007) 155 Cal. App. 4th 1033, 1047.

The answer provided by the court was non-responsive on its face, because it addressed only the knowledge of unconsciousness mental state, while the jury question had expressly focused on the penetration mental state. That was a breach of the court’s duty to “honor the [jury’s] request” for clarification.

People v. Miller (1981) 120 Cal. App. 3d 233, 236 ["Only by answering the jury request does the court fulfill its duty to instruct on those elements of the case necessary for the jury to reach an informed decision"].

Moreover, the instruction given was likely viewed by the jury as eliminating any mistake of fact defense regarding the penetration element of Counts 2 and 3. The emphatic "no" of the instruction effectively terminated the jury's consideration of reasonable doubt based on mistake of fact and reasonable belief, in violation of state and federal due process. Conde v. Henry (9th Cir. 1999) 198 F.3d 734 granted habeas corpus relief to a California petitioner where the trial court had modified a jury instruction that "eviscerated the immediate presence requirement" of the offense charged, "thereby violating due process". Id. at 740, citing In re Winship (1970) 397 U.S. 358. The erroneous instruction in this case eviscerated a potential basis for reasonable doubt that the jury was actively considering.

C. The Requirement of Reversal.

Penal Code section 1138 error due to the trial court's failure to adequately answer the jury's question is subject to the prejudice standard of People v. Watson, supra, i.e., "whether the error resulted in a reasonable probability of a less favorable outcome." People v. Roberts (1992) 2 Cal.4th 271, 326. In this context, "'reasonable probability' means 'merely a reasonable chance, more

than an abstract possibility,' of an effect of this kind." People v. Blakeley (2000) 23 Cal.4th 82, 99. The standard of reversal for federal constitutional error is whether "there is a reasonable likelihood that the jury has applied the challenged instruction in a way that prevented the consideration of constitutionally relevant evidence," McDowell, supra, at 841.

It is not possible to attain certainty as to what the jury was really asking from the text of the questions. In fact, the jury's question is difficult to understand in the light of charges and evidence. However, the most likely meaning of the jury's question is as follows. The original question referred to the last paragraph of CALCRIM 1048A as a reference point. The first sentence of that paragraph is "[t]he defendant is not guilty of this crime if he did not have the mental state required to commit the crime because he did not know a fact or mistakenly believed a fact." 2 CT444. That language is reflected in the jury question – "If the defendant did not know or mistakenly believed his act was not penetration, does it negate the required mental state to commit the crime under count 3?" 2 CT 465.

The jury was likely considering whether appellant's statement that he "fingered" Ms. Doe was used in the colloquial sense of "to stimulate the female genitals with a finger," without any intent to insert his finger into the female genitals, was exculpatory and negated the intent required to convict.

In fact, there are three mental states that must be proven in order to convict under section 289 – the intent to do the act of penetration, the intent to do it for the purpose of abuse, arousal or gratification, and the knowledge that the victim is unconscious. The first intent is a general intent, and the jury certainly appeared to be honing-in on the legal implication of a mistake of fact on appellant's part regarding penetration of Ms. Doe's sexual organ, even if penetration did occur by accident or inadvertence.

That is the most likely meaning underlying the jury's question, and if so, the answer should have been an emphatic "yes," not the flat "no" that was actually given. Counsel for appellant cannot formulate an alternative possible meaning for the jury's question that could be correctly answered "no."

The trial court erroneously responded with a negative answer accompanied by a reference to element four of CALCRIM 1048A, "the defendant knew that the other person was unable to resist because she was unconscious of the nature of the act." That was entirely unresponsive to the jury's reference to the last paragraph of 1048A regarding mistake of fact, and it specific reference to the mental state for penetration, not knowledge of unconsciousness. A proper instruction would have informed the jury that "if you have a reasonable doubt as to whether defendant intended to digitally penetrate Ms. Doe's vagina, or if you have a reasonable doubt as to whether he

knew he penetrated Ms. Doe's vagina at the time of the incident, you must acquit him."

The error and resulting prejudice apply equally to Count 2, because the actus reus of penetration and the accompanying mens rea as to penetration are identical for both Counts 2 and 3.

Under these circumstances, the judgement must be reversed as to counts 2 and 3 because "there is a reasonable likelihood that the jury has applied the challenged instruction in a way that prevented the consideration of constitutionally relevant evidence," McDowell at 841, citing Boyde v. California (1990) 494 U.S. 370, 380; Conde v. Henry, supra.

VI. CUMULATIVE PREJUDICE.

Arguments I, III, IV and V entail harmless error analysis, and appellant requests that this Court conduct a review of cumulative prejudice resulting from the combination of trial errors. there for subject to harmless error analysis that includes an assessment of cumulative prejudice. Killian v. Poole (9th Cir. 2002) 282 F.3d 1204, 1211 granted habeas corpus relief for cumulative prejudice because "[e]ven if no single error were [sufficiently] prejudicial, where there are several substantial errors, 'their cumulative effect may nevertheless be so prejudicial as to require reversal'." People v. Hill, supra, reversed a capital murder conviction based on cumulative prejudice from a number of trial errors

– "Considering the cumulative impact of [the prosecutor's] misconduct, at both the guilt and penalty phases of the trial, together with the Carlos error and the other errors throughout the trial, we conclude defendant was deprived of that which the state was constitutionally required to provide and he was entitled to receive: a fair trial," 17 Cal.4th at 847.

The same considerations apply here, and cumulatively entitle appellant to a new trial. When the jury began deliberating in this case, the defense was a an unfair disadvantage on three fronts: (1) the jury had been deprived of evidence of his character for honesty and veracity in support of his testimony; (2) the jury had been deprived of alternative lesser offenses for consideration; and (3) the jury had been subjected to the prosecutor's extensive "behind-the-dumpster" propaganda. Then, the trial failed to provide an accurate and appropriate response to the jury's question regarding the reasonable mistake of fact instruction and penetration, and combined weight of the errors rendered the trial fundamentally unfair.

## CONCLUSION

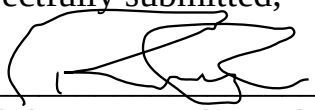
WHEREFOR, for the foregoing reasons, petitioner respectfully requests that this Court reverse his convictions.

/

/

Dated: December 1, 2017.

Respectfully submitted,

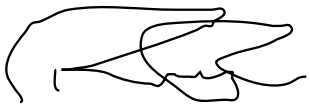


ERIC S. MULTHAUP, Attorney for
Appellant BROCK TURNER

## CERTIFICATE OF WORD COUNT

I certify that this Appellant's Opening Brief consists of 36,442 words.

Dated: December 1, 2017.



ERIC S. MULTHAUP

## DECLARATION OF SERVICE

RE: People v. Brock Turner; No. HO43709
Santa Clara County Super. Court No. B1577162

I, Eric S. Multhaup, am over the age of 18 years, am not a party to the within entitled cause, and maintain my business address at 20 Sunnyside Avenue, Suite A, Mill Valley, California 94941. I served the attached

**APPELLANT'S OPENING BRIEF**

on the following individuals/entities by placing a true and correct copy of the document in a sealed envelope with postage thereon fully prepaid, in the United States mail at Mill Valley, California, addressed as follows:

Attorney General
455 Golden Gate Avenue
San Francisco, CA 94102

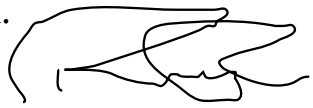
Clerk, Santa Clara Superior Court
270 Grant Avenue,
Palo Alto CA 94306

Santa Clara District Attorney
270 Grant Avenue,
Palo Alto CA 94306

Michael Armstrong, Esq.
600 Allerton St Ste 200
Redwood City, CA 94063

Brock Turner
[address withheld per Court Rule]

I declare under penalty of perjury that service was effected on December 1, 2017 at Mill Valley, California and that this declaration was executed on December 1, 2017 at Mill Valley, California.



ERIC S. MULTHAUP