IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. AJAY KUMAR DEV, Defendant and Appellant.	Court of Appeal No. C062694 Superior Court No. 062444

APPELLANT'S OPENING BRIEF
(REDACTED)

Appeal from the Superior Court of Yolo County
The Honorable Timothy L. Fall

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Attorney at Law
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Attorney for Defendant/Appellant
Ajay Kumar Dev

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INTRODUCTION

Ajay Dev and his, wife Peggy, adopted Sapna Deo, Ajay's distant niece from Nepal, when she was 16 years old. She lied about her date of birth to be adopted because, in the United States, a minor must be under the age of 16 to be legally adopted. To comply with this requirement, she altered school records in Nepal to create a date of birth which would make her nine months younger. This false date of birth, indicating she was 15 at the time of the adoption, was used on all of her immigration and adoption paper work. Without the Dev adoption, Sapna would not be eligible for American citizenship.

The purpose of the adoption was to bring Sapna to the United States so she could support her biological family in Nepal by getting an education and pursuing a career. The Devs, as host parents, promised Sapna's Nepali family they would raise her with traditional Nepali values which included protecting her purity until she married. However, as an 18 year old college student living at home, Sapna wanted to date and have sex. Knowing this

was forbidden, Sapna engaged in sexual activity behind the Devs' backs and, when asked about it, vehemently denied it to the Devs and her Papa in Nepal. She knew exposure of her sexual activities would, in the eyes of the Nepali community, bring shame to her Nepali family and the Devs. Therefore, Sapna went to great lengths to cover-up her sexual exploits and pregnancy scares.

Over a one year period, when Sapna was 18 and 19 years old, Sapna had three pregnancy scares: one resulted in a natural miscarriage; one was terminated by taking an abortion pill; and one, reflected by a significantly late period, either was not a pregnancy [redacted] The Devs exerted tremendous pressure on her to maintain her purity. In this regard, they repeatedly expressed their frustration to Sapna's Papa in Nepal via lengthy e-mails copied to Sapna. In these e-mails, they insinuated, sometimes subtly and sometimes overtly, that they might cut off financial assistance to Sapna's biological family if she did not shape-up and emphasized their concern that Sapna's misbehavior, if exposed, would tarnish their reputation in the Nepali community.

However, the more pressure the Devs put on Sapna, the more rebellious she became until, one day, she moved out of the Dev home and declared her freedom as an "American girl." Sapna understood that no "Nepali girl" would be allowed to move out of the house unless she was married. Although the Devs and Sapna desperately tried to repair the relationship and find some kind of balanced middle ground, Sapna ultimately ended the relationship on February 1, 2004 after Ajay e-mailed her boyfriend, Will, to advise him that, if he was going to date Sapna, he had to respect Sapna's heritage and abide by Nepali cultural values. After reading the e-mail, Will broke up with Sapna almost immediately. Sapna was outraged and blamed Ajay. The next day, she went to the police and

accused Ajay of raping her two to three times a week for five years: from ages 15 through 20.

Once Sapna decided to end her relationship with the Devs, she, no doubt, feared she would also lose her path to American citizenship because she knew the Devs could reverse her adoption once they discovered the adoption was based on a false date of birth. In Sapna's mind, Ajay was to blame for her break up with Will and what she believed to be her pending deportation back to Nepal. To Sapna, Ajay took away her freedom and independence and now she would do the same by falsely accusing him of rape.

At trial, neither Sapna nor the prosecution were able to explain how Sapna only got pregnant or had pregnancy scares within a narrow window of time which perfectly coincided with her dating and having sex with older boys behind Ajay and Peggy's back. Similarly, neither Sapna nor the prosecution could explain why, given Sapna's allegation that Ajay raped her approximately 300 to 450 times from ages 15 to 18, Sapna never got pregnant nor had any pregnancy scares. These facts highly suggest that Sapna's allegations were false. Had Ajay been given a fair trial, these facts would have clearly come to light. Since he was not given a fair trial, reversal and a new trial are required.

STATEMENT OF APPEALABILITY

This appeal follows a final judgment following a trial and is authorized by Penal Code section 1237.

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STATEMENT OF THE CASE

The jury convicted petitioner of three counts of dissuading a witness [Pen. Code §136.1(b)(2)][1] (counts 90 and 91); [§136.1(a)(1)] (count 92)]; fourteen counts of lewd or lascivious act upon child fourteen or fifteen years of age [§288(c)(1)] (counts 1, 4, 9, 11, 14, 16, 19, 21, 24, 26, 29, 31, 34, 36); four counts of penetration of genital or anal opening of a person under sixteen years of age by foreign object by person over the age of twenty-one years [§289(i)] (counts 18, 23, 28, 33); nine counts of penetration of genital or anal opening of a person under eighteen years of age by foreign object [§289(h)] (counts 38, 41, 44, 47, 50, 53, 56, 59, 62); twenty-three counts of penetration of genital or anal opening by foreign object [§289(a)(1)] (counts 17, 22, 27, 32, 37, 40, 43, 46, 49, 52, 55, 58, 61, 66, 68, 70, 72, 74, 76, 78, 80, 82, 84); and twenty-three counts of rape by force or threat [§261(a)(2)] (counts 20, 25, 30, 35, 39, 42, 45, 48, 51, 54, 57, 60, 63, 67, 69, 71, 73, 75, 77, 79, 81, 83, 85).

The jury acquitted petitioner of the following: one count of lewd and lascivious acts upon a child fourteen or fifteen years of age [§288(c)(1)] (count 6); three counts of penetration of genital or anal opening of a person under sixteen years of age by foreign object by person over the age of twenty-one years [§289(i)] (counts 3, 8, 13); three counts of penetration of genital or anal opening by foreign object [§289(a)(1)] (counts 2, 7, 12); three counts of rape by force or threat [§261(a)(2)] (counts 5, 10, 15); one count of distribution or exhibition of lewd material to minor [§288.2(a)] (count 64); one count exhibiting matter depicting minors engaged in sexual conduct to a minor [§311.2(d)] (count 65); and one count of false imprisonment with force and violence [§236; 237(a)] (count 89). The jury

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[1] Unless otherwise indicated all further statutory references shall be to the Penal Code.

found not true an infliction of great bodily injury during commission of sex offense enhancement [§12022.8] (Enhancement 75a) and, as a result, necessarily found not true enhancement for sexual offenders [§667.61(b) and (e)] (Enhancement a). (19 RT 5185-5206; 12 CT 3277-3366)

The jury hung on one count of rape by force or threat [§261(a)(2)] (count 86); one count of threats to commit crime resulting in death or great bodily harm [§422] (count 87); one count of assault with intent to commit mayhem, rape, sodomy, oral copulation, or any violation of sections 264.1, 288, or 289 [§220] (count 88); and an infliction of great bodily injury during commission of sex offense enhancement [§12022.8)] (Enhancement 79a) and, as a result, necessarily found not true enhancement for sexual offenders [§667.61(b) and (e)] (Enhancement b). Therefore, the Court declared a mistrial as to these counts. (19 RT 5177-5183; 12 CT 3275)

On August 7, 2009, the trial court sentenced petitioner to 378 years and 4 months. Petitioner was given 85 days of credit.

The trial court determined Count 4 (lewd and lascivious act upon child fourteen or fifteen years of age) to be the principal term with the remaining counts serving as subordinate terms. The trial court imposed a three year sentence on Count 4 and imposed a three year consecutive sentence on Count 1 pursuant to section 1170.15. Counts 9, 11, 14, and 16 were sentenced consecutively, eight months each, based on one third the mid-term sentence.

Pursuant to section 667.6, the trial court imposed consecutive sentences of eight years for counts 17, 22, 27, 32, 37, 40, 43, 46, 49, 52, 55, 58, 61, 66, 68, 70, 72, 74, 76, 78, 80, 82, and 84 (penetration of genital or anal opening by foreign object).

Pursuant to section 667.6, the trial court imposed consecutive eight year sentences for counts 20, 25, 30, 35, 39, 42, 45, 48, 51, 54, 57, 60, 63, 67, 69, 71, 73, 75, 77, 79, 81, 83, and 85 (rape by force or threat).

Pursuant to section 1170.15, the trial court imposed two year consecutive sentences for counts 90 and 92, (dissuading a witness).

The following sentences were stayed pursuant to section 654:

Three year sentences for counts 19, 21, 24, 26, 29, 31, 34, and 36 (lewd or lascivious act upon child fourteen or fifteen years of age);

Three year sentences for counts 18, 23, 28, and 33 (penetration of genital or anal opening of a person under sixteen years of age by foreign object by person over the age of twenty-one years).

Three year sentences for counts 38, 41, 44, 47, 50, 53, 56, 59, and 62 (penetration of genital or anal opening of a person under eighteen years of age by foreign object); and

A three year sentence for count 91 (dissuading a witness). (19 RT 5270-5274; 14 CT 3836-3842)

A timely Notice of Appeal was filed August 7, 2009. (14 CT 3829.)

The initial record on appeal was filed on November 4, 2009. However, due to omissions in the record on appeal, settlement proceedings were conducted in the trial court resulting in the filing of a certified settle statement in this Court on or about September 30, 2011.

STATEMENT OF FACTS

I. Ajay and Peggy Dev Adopt Ajay's Distant Niece, Sapna Deo, From Nepal

[redacted] His family immigrated to the United States in 1980 when Ajay's father, Ganga Deo,[2] came to pursue his PhD at UC Davis. (14 RT 3894; 14 CT 3920, 3924) Ajay was 13 years old and his brother, Sanjay, was 16 years old. (14 RT 3893-3894) Ajay became a civil engineer and worked for the California Department of Water Resources. (4 RT 760-761; 15 RT 4108; 14 CT 3924) Sanjay became a professor of mathematics. (14 RT 3869-3870)

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2 The surname 'Deo' can also be spelled 'Dev'

Ajay and Margaret Easley (Peggy) met in 1992 and married in July 1997. (15 RT 4073-4074) In October 1998, Ajay, Peggy and Ajay's parents traveled to Nepal for six weeks. (15 RT 4162; 16 RT 4399) Ajay's parents had sponsored four to five Nepali people to come to the United States and were considering adopting the daughter of a relative from an economically struggling family in Nepal. (14 RT 3885; 15 RT 4162; 16 RT 4399-4400) This inspired Ajay and Peggy to adopt and help a Nepali family. (15 RT 4162, 16 RT 4399-4400) When in Nepal, Ajay and Peggy became close to three of Ajay's distant nieces, including Sapna. (15 RT 4162-4163) [redacted] After meeting with Sapna's parents, Ajay and Peggy introduced the idea of adopting Sapna to Sapna and her family. (4 RT 714-715; 15 RT 4165-4166, 4169) As explained by Sapna:

> My papa did not have a good job [in Nepal] and my mother does not work. So, they did not have enough money. Because of that they were hardly surviving.
>
> There is a dowry system in Nepal. In my dowry system, the bride's father has to pay a lot of money or give land property to the groom's father.... Due to that, he was drowning in the loans.
>
> One day my papa's cousin [Ajay] came from the U.S.A.... He also realized that our family had a very bad financial condition. And he wanted to help us. ... [He and his wife] ... planned to adopt me and take me with them to the U.S.A. They thought I was very responsible and I would take care of my family when I stood on my own feet. They also talked with my parents and my parents agreed with them. I thought it was a very good opportunity to help my family.

(9 CT 2608-2609).

Grateful for the opportunity, Sapna's parents approved the adoption with the understanding that they would continue to be involved in Sapna's life as her parents. (4 RT 714-716; 15 RT 4169; 9 CT 2607-2609) In this regard, Sapna understood that Ajay and Peggy would be her "guardians" in America and she would simultaneously maintain her relationship with her family in Nepal. (4 RT 714-716; 15 RT 4113) The adoption would allow Sapna to get a green card in the United States and obtain United States citizenship. (4 RT 715-716; 7 RT 1650; 15 RT 4010, 4124, 4166; 17 RT 4517; 9 CT 2725; 15 CT 4314, 4335, 4343, 4350) Ajay and Peggy promised Sapna's parents they would finance Sapna's education and career goals and maintain her Hindu and Nepali cultural values while in the United States. (15 RT 4113, 4166, 4169; 9 CT 2607-2609)

Upon their return from Nepal, Ajay and Peggy consulted with Nepali and American attorneys to determine whether they could adopt Sapna and bring her to the United States. Under Nepali law, the Devs could not adopt Sapna because she was over 10 years of age. (15 RT 4167; 16 RT 4400) Under United States' law, adoption was possible if it could be completed in the United States before Sapna turned 16 years old. (11 RT 2722; 13 RT 3456; 15 RT 4167; 16 RT 4400; 14 CT 3920) Birendra, Sapna's biological father (her "Papa"), told the Devs Sapna was under 16 so it was not a problem. (15 RT 4168; 16 RT 4403) Before Ajay and Peggy left Nepal, they explained to Sapna that moving to America is a big transition and if she was not happy in the United States she could return to Nepal with their full support. (15 RT 4169; 16 RT 4404)

Despite earlier support, Ajay's parents started to express strong disapproval over Sapna's adoption in November 1998. (15 RT 4170-4172) They began to fear Sapna's adoption would cause a division in the extended Nepali family by showing favoritism. (15 RT 4170-4172) Ajay and Peggy's decision to adopt Sapna, in spite of Ajay's parents' disapproval,

caused a serious rift in the immediate family. (15 RT 4172-4173, 4180-4184)

A. Sapna Arrives in the United States on January 23, 1999

On January 23, 1999, Sapna came to the United States to live with Ajay and Peggy. (3 RT 720; 14 CT 3921) According to her Nepali passport, she was 15 years old with a date of birth of January 5, 1984.[3] [4] (5 RT 979-980; 9 CT 2502) In February 1999, Sapna enrolled in 9th grade at Holmes Junior High School. (14 CT 3937, 3939) Sapna adapted well to school, grew comfortable living with Ajay and Peggy and made lots of friends. (13 RT 3735-3738, 3744; 15 RT 4190; 16 RT 4225, 4227; 8 CT 2094-2096, 2110-2112, 2131-2136, 2144; 9 CT 2607-2609)

In May 1999, Sapna gave Peggy a Mother's Day card which read, "For Being Like A Mother to Me." In the card, Sapna wrote, "I love you" and signed it, "From your niece as well as your daughter." (6 RT 1472; 9 CT 2527-2528) In June 1999, Sapna gave Ajay a Father's Day card addressed to "Uncle Ajay" which read, "For Someone Who's Like A Father To Me." (6 RT 1470-1471; 9 CT 2525-2526) Sneh Dahal, Sapna's close friend, remembered that Sapna called Ajay "Uncle" when she first came to this country, but as Sapna became closer to Ajay she started to call him "Dad." (14 RT 3743, 3979)

On September 14, 1999, Sapna wrote a paper for her English class entitled "My New Life." She wrote that she was initially scared to leave

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[3] At trial, Sapna testified that January 5, 1984 was her correct date of birth. (4 RT 701) In contrast, the defense attempted to introduce documents from Nepal to prove that Sapna's date of birth was, in fact, April 28, 1983. However, the trial court denied these defense motions. (2 RT 112-113, 135-137; 6 RT 1364-1367; 5 CT 1162, 1219; 6 CT 1532, 1549, 1665; 9 CT 2333; see also Argument IV)

[4] Unless otherwise indicated, references to Sapna's age and/or date of birth will be based on Sapna's purported date of birth of January 5, 1984.

her family in Nepal, but after "the first 15 to 16 days" she started to adapt to American life. (9 CT 2607-2609) She continued, "I felt like I wanted to be here with my uncle and auntie, so they adopted me." She concluded with, "And my uncle and auntie love me. So, now I like it here in Davis." (9 CT 2607-2609)

Friends and relatives noticed that Sapna appeared happy, well adjusted and was openly affectionate towards both Ajay and Peggy. (7 RT 1788-1789; 14 RT 3601-3603, 3673-3674, 3777; 15 RT 3915, 4058-4059) Sneh, who frequently stayed overnight with Sapna at the Devs, testified that Sapna had lots of friends and was happy except when she had to do chores or school work. (14 RT 3740-3742, 3763-3764, 3828) Sapna herself said she came to love her life in America. (9 CT 2607-2609; 14 CT 3914-3926)

B. In November 1999, Sapna Consents to the Adoption by Ajay and Peggy

In April 1999, Ajay and Peggy started the California adoption proceedings. (14 CT 3913-3926) In July 1999, incident to the adoption, Sapna underwent a thorough physical examination. (9 RT 2350-2353; 14 CT 3913-3926) [redacted] Sapna

consented to the adoption on November 4, 1999 and her adoption became final on December 6, 1999. (6 RT 1332-1333; 7 RT 1707; 15 RT 4174; 14 CT 3913-3926) Based on her purported date of birth, Sapna was one month shy of turning 16. (7 RT 1707)

Ajay's parents and his brother, Sanjay, were not happy about the adoption. Family tensions became so high that Ajay's parents and, eventually Sanjay, stopped speaking to Ajay and Peggy for approximately three years after the adoption. (14 RT 3878-3879; 15 RT 4183-4184) In November 1999, the strain caused Ajay and Peggy to move from their Concord Street home, located across the street from Ajay's parents, to a home located on J Street miles away. (4 RT 750-751; 15 RT 4183-4184) Ajay and Peggy, but Ajay in particular, were committed to proving Ajay's parents wrong by ensuring Sapna became a success. (15 RT 3945, 4183-4184; 16 RT 4247-4249; 17 RT 4525-4526; 15 CT 4345)

C. Ajay and Peggy Provide For Sapna In Their Will And Obtain Her Permanent Residency Status In America

Sapna quickly adapted to and embraced American culture. She played sports and invited friends over for big birthday party and holiday celebrations. In Nepal, these simple American traditions would be unaffordable and, as a consequence, seen as over-indulgent especially for a girl. (14 RT 3628-3629, 3766; 15 RT 4190-4193; 16 RT 4225-4227; 8 CT 2093-2096) Sapna also grew close to Peggy's extended family. Therefore, Ajay and Peggy flew Sapna out to Connecticut, by herself, to visit Peggy's sisters and her cousins: a freedom Sapna would have never experienced in Nepal. (14 RT 3628-3629, 3766; 15 RT 4190-4193; 16 RT 4225-4227; 8 CT 2093-2096) Nevertheless, like so many Americans, Sapna strove to maintain her ethnic heritage while assimilating into American culture. In this regard, Sapna was actively involved with the Nepali community in

Davis and participated in many Nepali cultural events including the Nepali New Year, Dashain, the Himalayan Fair, and Diwali. (14 RT 3628-3629, 3750-3752, 3793; 15 RT 4190-4193, 4200, 4222, 4229; 8 CT 2143)

On Father's Day 2000, Sapna gave Ajay a card with a personal message which read: "Thanks for being my special and wonderful Daddy. I love you. Sapna ♥." (6 RT 1473-1474; 10 CT 2529-2530) In 2000 and 2002, Ajay and Peggy traveled to Nepal and Sapna stayed with family friends. (15 RT 4058) Before the 2000 trip, Ajay and Peggy created a trust naming Sapna as a beneficiary. Then, before traveling to Nepal in 2002, Ajay and Peggy increased Sapna's share making her the highest beneficiary in their will. (16 RT 4295; 17 RT 4513)

In December 2001, Ajay and Peggy filed an application with the Immigration and Naturalization Service (INS) to adjust Sapna's citizenship status. (16 RT 4411; 14 CT 4071-4093) As the legally adopted daughter of Ajay and Peggy, Sapna, in a few years, would automatically qualify for United States citizenship through the INS's derivative citizenship program. (11 RT 2713, 2722, 2724; 13 RT 3456-3457) Absent her adoptive status, however, Sapna would have no guarantee of obtaining United States citizenship. (11 RT 2784-2785; 13 RT 3430, 3456-3457, 3460-3461) As explained by INS agent Luz Dunn, if Sapna was adopted after reaching age 16, she would not qualify for automatic derivative citizenship and could only gain citizenship through the rigorous and uncertain path of naturalization. (11 RT 2784-2785; 13 RT 3430, 3440-3441) On April 30, 2002, INS issued Sapna a permanent resident card, also known as a green card. (11 RT 2740; 16 RT 4411; 9 CT 2450) She was 18 years old.

II. At Age 18, After Receiving Her Green Card, Sapna Embraces Her Social and Sexual Independence in America As Ajay and Peggy Try To Maintain Her Traditional Nepali Values

Sapna graduated high school in June 2002. (4 RT 813; 15 RT 4118) To celebrate, Ajay and Peggy took Sapna and her friend, Cassandra, to Maui, Hawaii, in August 2002. (4 RT 814-815; 15 RT 4114) After returning home from Hawaii, Sapna started college. She enrolled in Sacramento City College and continued to live at home with increased independence as Ajay and Peggy provided her with a cell phone and use of the family car. (4 RT 822; 5 RT 1194-1195; 6 RT 1239; 15 RT 4115, 4200; 16 RT 4201) During Sapna's first semester, she became sexually active. (4 RT 825, 832-833; 14 RT 3754-3759; 15 RT 4199-4200; 16 RT 4201; 9 CT 2358, 2379) Pre-marital sex for girls is prohibited in Nepali culture. (13 RT 3545; 14 RT 3757-3758, 3875; 15 RT 4061) Consequently, Sapna lied to Ajay and Peggy and her parents in Nepal about her sexual activity. (9 RT 2231-2232; 13 RT 3553; 14 CT 3901, 3903, 3911; 15 CT 4335) Nevertheless, Ajay and Peggy started to suspect that Sapna might be dating and/or having sex behind their backs as Sapna had become more flirtatious and began wearing more revealing clothes. (14 RT 3746-3747, 3758-3759; 15 RT 4114-4115, 4200; 16 RT 4209, 4424) She also started to skip classes, text various boys, and stay out late without calling. (15 RT 4114-4115, 4118-4122; 16 RT 4208-4209, 4234-4237; 15 CT 4335-4337)

During this time, Sapna, age 18, met James, age 25. Sapna claimed he wanted to study with her, but Peggy and Ajay worried it would lead to sex and forbade her from calling him. (4 RT 877; 16 RT 4208-4209; 15 CT 4336) When Sapna ignored them, Ajay and Peggy had a three hour talk with her. (15 CT 4336) Despite this talk, Sapna continued to secretly e-mail James. After she moved out, she admitted she had been hiding her

communications with James because Ajay and Peggy did not approve of him. (14 CT 3911)

In another incident, on September 25, 2002, Sapna did not call or come home by her school night curfew. (15 RT 4119) When Peggy called her at 10:30 p.m., Sapna said she was at a friend's apartment. (15 RT 4121) After Peggy left to pick her up, Sapna called Peggy back and admitted she was in front of Safeway in South Davis instead. (15 RT 4120-4121) When Peggy arrived, she saw Sapna and Cassandra with a young man Peggy did not know. (15 RT 4121) On the drive home, Peggy confronted Sapna about lying to her. Sapna repeatedly denied that she lied. At her wits end, Peggy slapped Sapna across the face. (15 RT 4121-4122; 16 RT 4392; 9 CT 2550; 15 CT 4336) Sapna got so angry that she started to run away when they arrived home. Ajay went after her and calmed both her and Peggy down. (15 RT 4122-4123; 9 CT 2550) The next day, Sapna called her family in Nepal for eighty minutes costing Ajay and Peggy almost five hundred dollars. (16 RT 4201-4202; 17 RT 4522-4523; 15 CT 4353-4354)

Out of outrage and concern, Peggy e-mailed Sapna's Papa in Nepal and informed him that she was losing trust in Sapna and was concerned about her interest in boys and sex. She complained to Birendra, Sapna's Papa, that ever since Sapna turned 18, she has believed she has the freedom to do as she likes. In the e-mail, Peggy wrote:

> **Ajay and I expect Sapna to follow our rule of not dating or having sex before marriage as I know this will bring shame to her, us and your family as well. I don't have confidence in her to live by these requests at this time.** I pray that you may give her and me guidance as how to deal with this situation before it becomes too late.

(15 CT 4336, bold in original)

In November 2002, Ajay and Peggy suspected that Sapna was dating an Indian male, Siddhartha Jain (Sid), who had a bad reputation and was five years older. (15 RT 4199-4200; 16 RT 4201; 14 CT 3907, 3911) When confronted, Sapna insisted they were just friends. After Ajay and Peggy told her to stop calling him, she used the landline, rather than her cell phone, to call him so there would be no evidence of her clandestine activity. (15 RT 4200; 14 CT 3911; 15 CT 4336) After Sapna moved out of the house she admitted her deceptiveness to Ajay in an e-mail by boasting:

> I did not tell you that i was still calling Sidd from the house phone. I bet you did not know that either. Just because he is a college dropout, it does not mean he is a bad person.

(14 CT 3911)

Even during the trial, Sapna continued to maintain that her relationship with Sid was purely platonic and that she never brought him to the Dev home. (7 RT 1737) However, Sneh Dahal, Sapna's friend, testified that Sapna dated Sid for several months, regularly referred to him as her boyfriend, and would go to his apartment two to three times a week. (14 RT 3757-3758) She also testified that she saw Sid's Mercedes parked in front of the Devs' home on at least one occasion. (14 RT 3755-3756) Similarly, the Devs' neighbor testified that she saw a black Mercedes parked outside the Dev home several occasions. (7 RT 1737; 13 RT 3552) In addition, she witnessed Sapna close the living room curtains when "an Indian or Iranian man" entered the house and then re-open them when he left. (13 RT 3552-3553) The neighbors also saw Sapna bring other young men to the house when Ajay and Peggy were not home. (13 RT 3551-3552)

A. Sapna Gets Pregnant for the First Time at Age 18

On January 2, 2003, Sapna feared she might be pregnant. (10 RT 2604, 2612-2613; 9 CT 2358) She went to Ajay's office and explained the situation to him. (4 RT 825) Ajay purchased a home pregnancy test for her. (4 RT 826) The test indicated Sapna was pregnant. (4 RT 826) To be certain, Ajay took Sapna to the Pregnancy Consultation Center. (4 RT 826; 16 RT 4380) Laboratory tests indicated that Sapna had been pregnant for approximately five weeks - since November 2002 when Sapna was dating Sid. (4 RT 827; 10 RT 2613-2615, 2623; 14 RT 3757) Ajay paid for the visit on the family credit card. (15 RT 4087- 4088; 9 CT 2358, 2379; 1 ACT (8/10/2010) 6) Subsequent lab tests confirmed Sapna miscarried. (10 RT 2618, 2621; 9 CT 2358, 2379) Ajay told Peggy about Sapna's clinic visit in July 2003. He delayed telling Peggy because Peggy was undergoing fertility treatments from January through May 2003 and was emotionally fragile at the time. (15 RT 4078, 4084-4086, 4134; 16 RT 4382-4383; 11 CT 2990-2999; 15 CT 4285)

One month later, in February 2003, Sapna gave Ajay a birthday card which read:

> Hey, Dad—My taste in clothes and music may not be the same as yours. I may not always be around to help you with chores... I often fail to "tidy up" as often as should, and there have been times my attitude's not really been that good. I know I sometimes say things that may strike you as absurd... But when I say "I Love You, DAD," I mean it – EVERY WORD! Happy Birthday.

In her own handwriting she added,

> I love you daddy. You are a very special part of me. Without you I would not be able to express my emotions and I would not be able to be

myself. With all my heart & love[,] you[r] daughter Sapna.

(14 RT 4197; 9 CT 2531-2532)

Sapna, nevertheless, continued to sneak behind Ajay and Peggy's backs. One night in April 2003, Sapna did not come home after work and did not call. Ajay and Peggy were very worried and angry. At about 2:00 a.m., Sapna finally called home and informed Ajay and Peggy she had been at a friend's house. (16 RT 4210-4212; 11 CT 3000) This continual behavior made Ajay and Peggy question their ability to parent a teenage daughter and caused them great concern. (15 RT 4053-4056; 16 RT 4211-4212; 11 CT 3000) As a result, Ajay suggested that Peggy spend more time with Sapna and that Sapna return to Nepal to re-immerse herself into Nepali traditional culture. (16 RT 4211-4212; 15 CT 4312) After talking with Sapna, Ajay and Peggy arranged for Sapna to spend the summer in Nepal, but assured her Papa that if Sapna wanted to return earlier they would do their best to change her ticket so she could return sooner. (15 CT 4312)

B. Sapna Gets Pregnant for the Second Time in April 2003, at Age 19

Before leaving for Nepal, Sapna got pregnant again. (5 RT 1138; 9 CT 2350, 2382) At trial, she testified that she was dating Sid during this time period, but denied having sex with him. (7 RT 1678-1679) On May 8, 2003, she returned to the Pregnancy Consultation Center and terminated the pregnancy by taking an abortion pill. (5 RT 1138; 10 RT 2621-2623; 9 CT 2350, 2362)

C. Sapna Travels to Nepal and Asks to Return With Ajay

Ajay and Sapna left for Nepal on May 30, 2003. (4 RT 857, 884; 15 RT 4126; 15 CT 4310) They had a layover in Bangkok. (4 RT 857, 884; 15 CT 4310) While in Nepal, Ajay visited his relatives in both Nepal and India while Sapna spent the majority of her time with her family in

Janakpur, Nepal. (4 RT 855-856; 15 RT 4114, 4123- 4124) Less than a month into her stay, Sapna called Peggy and told her she wanted to return home. Sapna explained that she missed her friends and wanted to go back to work. (15 RT 4128) Sapna persuaded Peggy to move her return flight up a month. (15 RT 4128-4130) As a result, both Ajay and Sapna returned to the United States together on July 1, 2003. (15 RT 4127; 15 CT 4309-4311)

D. In Fall 2003, Sapna Has Sex with Araz, Has A Pregnancy Scare, [redacted].

When Sapna returned to Sacramento City College in the Fall of 2003, she met Araz Taifehesmatian, an Iranian male, in her physics class. (9 RT 2212; 14 CT 3944) At some point during the semester, Araz and Sapna started dating. (9 RT 2213-2215, 2220) Ajay and Peggy suspected Sapna may be having sex with Araz, but Sapna vehemently denied it and accused them of being too controlling and overly suspicious. (4 RT 870; 7 RT 1737; 9 RT 2290; 16 RT 4232-4233, 4445; 9 CT 2550-2551; 10 CT 2725) However, at trial, Araz testified that during the Fall semester of 2003 he and Sapna had sex at his mother's house once a week. (9 RT 2220, 2252, 2324) Sneh Dahal corroborated his testimony and verified that, during this time period, Sapna referred to Araz as her boyfriend. (14 RT 3767, 3772)

Ajay and Peggy were not simply concerned with protecting Sapna's reputation, especially within the Nepali community, they were equally concerned with Sapna's future and feared that her focus on boys and sex would derail her education, career, and ability to provide for her family in Nepal. Therefore, when Peggy discovered Sapna had been texting Araz at 1:00 a.m. the night before a midterm, she took Sapna's cell phone away for a day to impress upon Sapna that she needed to take her studies more seriously especially during exam week. (16 RT 4231-4232, 4234)

As Peggy feared, Sapna's focus on her social life over school impacted her grades. In fact, after midterm grades came out, Sapna had to withdraw from physics and pre-calculus because she was failing both classes. (4 RT 875; 16 RT 4215, 4457-4458) Ajay and Peggy were so concerned about Sapna's poor performance in school that Ajay personally went to her campus to determine whether Sapna was attending her classes. (16 RT 4234-4236) As suspected, Sapna was not in class. When Ajay later confronted her, Sapna denied she deliberately cut class and claimed she simply missed the bus. (16 RT 4234-4237) It was becoming increasingly difficult to trust Sapna.

Sapna went to Planned Parenthood on November 4, 2003. (4 RT 850-851; 13 RT 3309-3310; 9 CT 2385-2387) The clinic was located on 29th Street, but was internally referred to as the "B Street" Clinic. (13 RT 3309) It was the third time in a year Sapna feared she was pregnant. Sapna's medical records show she had unprotected intercourse and that her [redacted]. (13 RT 3311; [redacted]) This clinic visit perfectly coincided with the time period Araz and Sapna were having sex. (9 RT 2212-2213, 2220, 2252, 2289, 2324-2325; 14 CT 3944) Sapna took a pregnancy test, but it came back negative. (13 RT 3309-3311; 9 CT 2385) [redacted]

The very next day, however, Sapna went to a different Planned Parenthood located on 10th Street referred to as the Capitol Plaza Clinic. (13 RT 3310; 9 CT 2389-2395) At trial, she testified she went to the Capitol Plaza Clinic to get tested for Sexually Transmitted Diseases (STD) because she was anticipating having sex with either Will or Sid. (4 RT 849; 5 RT 1149-1150, 1155-1157; 7 RT 1678) Her medical records indicate she had a "new partner." (9 CT 2393; 13 RT 3319) The medical

records also indicate she first reported having sexual intercourse "a couple weeks ago" and believed the condom may have failed. (13 RT 3320; 9 CT 2393) The medical records also indicated, "Now reports sex with condoms two days ago." (13 RT 3321; 9 CT 21393) [redacted]

III. Sapna Moves Out

In November 2003, Sapna was fired from her job at Videos-To-Go for poor performance. (16 RT 4237-4243) Ajay and Peggy were at the end of their rope with Sapna.

Less than a month after losing her job, on December 1, 2003, Sapna called Peggy from a phone with a blocked line. This concerned Peggy as she had no idea who Sapna was hanging out with. When Peggy questioned her, Sapna refused to tell Peggy where she was and who she was with. (16 RT 4242-4245) Determined to get an honest answer, Peggy finally convinced Sapna to tell the truth. (16 RT 4242-4245) Later that day, Peggy vented her frustration over Sapna's evasive behavior to Ajay. (16 RT 4245) Within hours, Ajay told Sapna she must abide by their rules or move out by 8:00 pm. (7 RT 1625-1626; 9 CT 2552) Ajay and Peggy hoped this ultimatum would compel Sapna to shape-up, but Sapna packed her things and left. Before leaving, however, she went into Ajay and Peggy's closet and took her passport and green card, stored in a briefcase, without their permission. (5 RT 1198; 7 RT 1626-1628; 16 RT 4246-4249, 4453) Her departing note read:

> Hi, mom and dad! Thanks for everything that you have give [sic] me, love, food, and house. I will keep in touch. don't worry! I love you very much. Alejandra came to pick me up! I might come back to pick up my bike later tonight. ♥ Sapna.[5]

(6 RT 1480-1481; 9 CT 2518)

When Sapna left, Ajay and Peggy were shocked. (16 RT 4247-4248) Even Sapna admitted at trial that, "in our culture kids don't get out of the house, especially girls, until they get married." (6 RT 1241; 14 RT 3874) On December 2, 2003, Ajay e-mailed Sapna's Papa and told him Sapna moved out "to do things we don't approve of." (10 CT 2725-2726) Ajay explained to Sapna's Papa that he and Peggy both expected and wanted Sapna to move back to their home with the original intention of obtaining an education, pursuing a career, and eventually getting married. Feeling like her prior trip to Nepal had no effect, Ajay tried to enlist Sapna's Papa in convincing Sapna to return to Nepal again – this time for an entire semester. (10 CT 2725-2726)

On December 4, 2003, Sapna texted Ajay, "dad, please call me, I miss u very much! i love u." (10 RT 2576; 14 CT 3929) Despite her conciliatory message, Sapna refused to move home. A few days later, on December 9, 2003, when Ajay did not respond to Sapna's repeated phone calls, Sapna texted Ajay again. "[H]i dad I am sorry but I really miss u, I love u_ your daughter." (6 RT 1349-1350; 10 RT 2577; 14 CT 3927)

On December 10, 2003, Ajay sought refuge at the Motel 6 located next to his commuter bus stop. (13 RT 3327-3328; 16 RT 4252-4256) He was distraught and overwhelmed by the situation. He felt like a failure and dreaded the social ramifications that would inevitably come from his parents and the Nepali community at large. Peggy was worried sick and

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[5] Sapna dated her note December 1, 2003, but testified that she wrote it December 3, 2003.

frantic because she had no idea where Ajay was. She called him repeatedly without an answer. (16 RT 4252) Finally, Ajay called Peggy to let her know he was at Motel 6. Peggy rushed to bring him home. (16 RT 4253-4254, 4487-4488)

The next day, Peggy e-mailed Sapna's Papa and conveyed Ajay's heartbreak over the situation along with Ajay's anxiety over facing the Nepali community and his parents who he had little contact with since Sapna's adoption. Peggy asked Sapna's Papa to encourage Sapna to come home and straighten out. She also told Sapna's Papa that the adoption may have been a mistake which was conveyed to Sapna as she was copied on the e-mail. (16 RT 4275-4280; 10 CT 2728-2729)

A. Sapna Accuses Ajay and Peggy of Physical Abuse To Justify Her Decision to Move Out

Ajay and Peggy decided to avoid family during the holiday season by taking a cruise to the Caribbean alone. They left Davis on December 24, 2003. (16 RT 4287; 10 CT 2721) The night before they left, Sapna slept at the Devs' home. She agreed to house-sit for the Devs and take care of their pets while they were away. (15 RT 3969-3970; 16 RT 4275) Sapna texted Ajay and Peggy on the day they left: "Dad, mom i love u and miss u. Raja, kaya and sukhi miss u too."[6] (6 RT 1349-1350; 10 RT 2577; 14 CT 3928)

On December 31, 2003, while on their trip, Ajay e-mailed Sapna's Papa, with a copy to Sapna, cutting off all financial assistance to Sapna and her family in Nepal. (16 RT 4287-4289; 10 CT 2721-2723) He explained that Sapna moved out because she wanted unlimited freedom to be with boys and socialize and predicted that, due to her irresponsibility, she would never be able to provide financial support to her family in Nepal. (10 CT 2721-2723)

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6 Raja, Kaya and Sukhi were the Dev family pets.

Faced with Ajay's scathing criticism of her irresponsible and disrespectful behavior and the financial fall-out of being cut off, Sapna felt compelled to defend and justify her decision to move out especially since this decision not only impacted her financial condition, but would also have dire economic consequences for her entire family in Nepal. To this end, Sapna e-mailed her Papa the next day, with a copy to Ajay and Peggy, wherein she insisted that she feared Ajay and Peggy because they were over-controlling abusive host parents making it impossible for her to live with them. Sapna explained she started having problems with her host parents after she began hanging out with Cassandra. She described the 2002 incident, when Peggy slapped her, as the spark that ignited their troubles. Sapna also alleged that Ajay slapped her that night, in 2002, and that he "has done this to me many times in [sic] many occasions" and that "even for the smallest arguments we have he hits me because he can't control his emotions." (9 CT 2550) She concluded by telling her Papa that "I am really afraid of them and don't want to live with them." (9 CT 2550; see also 4 RT 861-862; 15 RT 4114, 4118-4122; 9 CT 2549-2550)

In the same e-mail, Sapna announced to her Papa that, as an American girl, she believes in speaking her mind and explained "I know the way I act is not like a tipical [sic] Nepali girl. I figured that I live in America not in Nepal where girls are mistreated and they are never heard." (9 CT 2550) Sapna insisted that her host family's suspicions about her romantic relationships with boys were not true and told her Papa she was tired of being questioned by Ajay and Peggy. She further advised her Papa that she had made her decision to move out and planned to "stick with it" assuring him she was confident she could support herself. (9 CT 2554)

Ajay and Peggy, still in the Caribbean, were outraged by Sapna's accusations because they never hit Sapna uncontrollably or physically abused her. (16 RT 4291-4293; 9 CT 2549-2554) Feeling hurt and

betrayed, Peggy e-mailed a family friend, Evanne O'Donnell, and called her sister, Terry Easley, about removing Sapna from their will. (15 RT 3921-3923, 3995-3996; 16 RT 4295; 15 CT 4196) The e-mail Peggy sent to Evanne read in relevant part:

> There has been a lot of development since last time we spoke with you. And, we will explain when we see you. [¶] For now, in case anything should happen to Ajay and I on our trip back, we wanted to change our beneficiary on our Trust. I am not sure what percentage we have down for Sapna (something like 15% or 20%); we need this percentage to be changed to zero percent . . . ."

(18 RT 4884; 15 CT 4196) On January 4, 2004, Sapna overheard Evanne's voice message on the Dev's answering machine divulging Ajay and Peggy's decision to zero her out as a beneficiary in their will. (15 RT 3921-3922, 3985-3986; 17 RT 4513) Sapna confided in her Aunt Terry that she heard the message although Terry feigned ignorance when she asked exactly what it meant. (15 RT 3985-3987)

At trial, Sapna insisted she did not house-sit for the Devs at Christmas time in 2003 and initially testified she did not recall the Caribbean trip. (5 RT 913-914; 6 RT 1231-1232) She also denied hearing Evanne's phone message about being disinherited and calling her Aunt Terry to find out what was going on. (5 RT 1196-1197; 6 RT 1274; 7 RT 1682-1683, 1738-1739)

B. Sapna Attempts to Repair Her Relationship with Her Host Parents After She Learns She May Be Disinherited.

Peggy and Ajay returned from their Caribbean trip on January 5, 2004, Sapna's purported 20th birthday. (10 RT 2541) When they arrived home, Ajay and Peggy greeted Sapna curtly, did not wish her happy birthday, and demanded that she return her cell phone to them before she left. (13 RT 3587-3590; 16 RT 4299-4300)

Sapna e-mailed Ajay on January 8, 2004. She told Ajay she missed him and Peggy "a lot," but was deeply hurt and needed to cool down. She signed off, "Miss you and love you. Your Daughter Sapna." (16 RT 4300-4301; 15 CT 4347) Ajay immediately replied that he could not understand how she could miss and love he and Peggy so much when Sapna claimed to be so afraid of them due to alleged physical abuse. (11 CT 3019; 15 CT 4348) In response, Sapna e-mailed the next day, on January 9, 2004, seemingly confused as to why Ajay and Peggy would be so upset by her allegations. As expressed by Sapna:

> Hi mom and Daddy! I never used the word "abusive" so i don't know where you got that from! I meant to say that you hit me when you were angry. I meant to say that I am old enough for any [sic] to hit me to make me understand about where I went wrong just because they are angry!! Therefore, now that I moved out I don't have to deal with any short [sic] of argument hopefully.

(15 CT 4349)

Although somewhat minimizing her prior allegations, Sapna ultimately maintained her position that the Devs hit her in fits of anger in order to justify her decision to move out.[7] In the same breath, however, she pled with Ajay and Peggy to reconcile.

> Personally, I really miss you guys more than anything right now and i really want to talk especially after you came from your trip. I don't know if you want to see me or not. I think and hope that you want to see me. I want to come and visit but i don't know how comfortable you are to see me right now. If you also want to see me please let me know through email....I love you and miss you very much. Your Daughter - Sapna.

(15 CT 4349)

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[7] In medical records Sapna filled out at ages 18 and 19 years of age, she indicated that she had never been hit, slapped, or physically hurt by anyone nor had she ever been in a relationship where she was threatened or made to feel afraid. (9 CT 2391, 2412)

Ajay responded that day with a heart-felt e-mail entitled "Where is my Daughter?" (14 CT 3907-3910) Ajay asked Sapna, "Where is your heart?" (14 CT 3909-3910) He told her she was more concerned with her green card, being disinherited, and spending time with strangers like James and Sid than about her own family. (14 CT 3907-3910) He continued, "We helped you to get your green card. Now, you want to shit on our face by wrongly accusing us of being abusive and disrespecting us." (14 CT 3909) He expressed his utter disappointment in Sapna telling her "You are heading towards a very dangerous path. You had everything going for you. I mean everything. Now, the biggest thing you came for [in] America is at risk --- your career and your future." (14 RT 3908) He reiterated his strong belief that it would be best if Sapna returned to Nepal to regain her values and perspective and advised her "The best thing for you today would have been to not go to school this semester and go to Nepal for 5 months and come back to live with us after Maduri's marriage[8] and resume your school for Fall of 2004." (14 RT 3910) Feeling this was his last straw with Sapna, Ajay signed the e-mail "Once your daddy, Now just Ajay." (14 CT 3910)

Sapna responded with a heart-felt e-mail, on January 10, 2004, wherein she agonizingly told Ajay and Peggy that, while she understood their position, she felt adamant about living on her own and making her own decisions without their interference. (10 CT 2734-2735) She unapologetically admitted to living a life behind their backs consisting of dance clubs, males, and other unknown friends. In reaffirming her decision to move out, Sapna told Ajay "there is nothing that i do behind your back anymore cause i don't need to." (10 CT 2734) In addition, Sapna admitted retaliating against Ajay and Peggy and explained "the only reason i wrote that latter [sic] to papa is because you wrote a latter [sic] to my papa about

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[8] Sapna's sister.

me and how everything was bad about me." (10 CT 2734) She expressed her sincere hurt and disappointment by confessing "I felt like you were not trying to heal the family but you were trying to destroy it. I guess the family is already destroyed." (10 RT 2734) Nevertheless, in reminiscing about the family they tried to create, Sapna expressed deep gratitude for everything Ajay and Peggy had done for her; acknowledged how deeply everyone had cared for one another; and vowed to continue to try to keep the family together. Specifically, she wrote:

> The support that you have provided to me and the unconditional love that you have given me. You prove that to me by being there for me before and after i moved out...But one thing I can tell you, no matter what i will never give up and i will still try to be your daughter no matter how much you want to hurt me by asking the tough questions and putting me in the spot.

(10 CT 2735) Juxtaposed with this sentiment, Sapna reiterated that "i like to live my life my way not someone else's way" and told Ajay and Peggy that if they don't want to accept this then there is nothing she can do about it because "[t]his is the way i deal with things." (10 CT 2735) Sapna closed the e-mail with the hope that,

> we can still be a family and still talk. I do care about this family and i don't know how else to show it or express it to you. I know i am probably not welcome there but i wish to come and see you guys some time.

(10 CT 2735) In contrast to Ajay who signed his e-mail "Once your daddy, Now just Ajay," Sapna signed her e-mail "continue to be your Daughter - Sapna." (10 CT 2735; 14 CT 3910)

Later that day, Sapna went over to Ajay and Peggy's house. Peggy told Sapna she was not welcome in their home until she apologized for making false accusations of physical abuse against her and Ajay and set the record straight with her Papa. (16 RT 4303-4305) As explained by Peggy at trial,

> I was laying on the couch in the living room [when Sapna came over]. And, you know, I couldn't really get up due to motion sickness, and she came there to comfort me. And I told her, you know, Sapna, you just accused me of being abusive, I can't take comfort from you right now. It is giving me too much grief. And she said I never used the word abusive. And I told her, but Sapna, you said that we hit you many times on several occasions, and you were afraid to live with us. That's the description, the definition of abusive.
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> She said that's not what I meant to say. I said if that's not what you meant to say, you need to write your father and tell him that because right now he's believing something different.

(16 RT 4304)

C. Sapna Voluntarily Goes To Motel 6 with Ajay On January 12, 2004, After She Has Moved Out.

Two days later, on January 12, 2004, Ajay and Sapna agreed to talk. (4 RT 881) Since Sapna had not yet apologized to Ajay and Peggy for falsely accusing them of physical abuse, she was not allowed in the Dev home. (16 RT 4305-4307) Given the personal nature of the family matters requiring discussion, Ajay did not want to have this conversation in public nor in front of Sapna's roommate, Megan. (16 RT 4305-4307) Therefore, they went to the motel by Ajay's commuter bus stop where he had sought refuge a month prior in December. (16 RT 4252-4256) Ajay wanted to find a way to work things out and restore honor to their family. Eventually, they were able to reach an agreement. Sapna returned her green card to Ajay; agreed to apologize to Peggy and her Papa; and discussed a budget and proposed contract to ensure Sapna would actually complete college as she originally intended before coming to this country. (16 RT 4306-4308; 11 CT 3025-3026) Later that day, Ajay told Peggy about their meeting at the motel and asked for Peggy's assistance in writing a contract reflecting

Sapna's promise to achieve these enumerated college goals. (16 RT 4306-4308; 11 CT 3025-3026)

Two days later, Sapna went to the Dev home and explained to Peggy that, due to a conversation she and Ajay had at Motel 6 a few days earlier, she now understood why Peggy was so angry and, then, apologized for falsely accusing Peggy and Ajay of physical abuse. (16 RT 4306-4308) Before Sapna left, Ajay and Peggy gave her the contract they prepared wherein she promised to pursue her college degree in exchange for tuition assistance from Ajay and Peggy. (16 RT 4284, 4306-4308, 4554; 15 CT 4343-4344) Approximately a week later, on January 23, 2004, Sapna returned the contract to Ajay and Peggy signed. (16 RT 4284, 4554; 15 CT 4343-4344)

Despite this progress, Ajay felt he had failed as Sapna's host parent. (16 RT 4248-4249, 4256, 4310-4312) Not wanting to admit his failure, he originally told his parents that Sapna moved out with his and Peggy's consent. (16 RT 4440) On January 20, 2004, after suffering bouts of severe depression, Ajay finally told his parents the truth: that Sapna moved out without consent. (17 RT 4525-4526) To his surprise and relief, both his parents were understanding. (17 RT 4525-4526, 4531-4532)

Ajay and Peggy continued to have contact with Sapna in an effort to salvage their relationship, but everyone had their guards up. In mid to late January of 2004, Ajay and Peggy stopped by Sapna's apartment to give Sapna her green card so she could apply for a job. (16 RT 4316, 4452-4453; 17 RT 4507) During this visit, Sapna told Ajay and Peggy about her boyfriend, Will, and let them know how much it would mean to her to introduce them to Will.

D. Sapna Chooses to Spend the Night at Ajay and Peggy's Home To Help Peggy with Her Post Surgery Recovery.

On January 29, 2004, Peggy had uterine exploratory surgery. (16 RT 4316-4318) Sapna rode her bike to the Dev home and accompanied Ajay and Peggy to the hospital. (5 RT 923-924) As she and Ajay waited for news about Peggy's status, Sapna told Ajay she really wanted to introduce Will to Ajay and Peggy. (16 RT 4363-4364) Ajay became agitated because he did not want to engage in a heated conversation about Will while he was worried about Peggy getting out of surgery safely. This was simply too much. Instead, Ajay tried to show Sapna pictures of his trip to the Caribbean with Peggy in order to avoid any further turmoil and to distract himself from worrying. Sapna, however, could not stop talking about Will. As a result, they got into a serious argument in which Ajay lost his temper and blurted out that he felt like getting a gun and killing himself and Sapna. (5 RT 926, 930; 16 RT 4318-4321, 4359-4360, 4363-4364; 15 CT 4155, 4160, 4165-4166) According to Araz, Sapna claimed Ajay threatened to send her back to Nepal that night. (9 RT 2256-2257)

After the surgery, Sapna rode back to the Dev home with Ajay and Peggy. Ajay and Sapna continued to argue about Will and Sapna's lack of priorities. (16 RT 4319-4321) After they arrived home, the argument got so heated that Peggy had to get out of bed twice to insist that they stop yelling. At approximately 11:00 p.m., Sapna stormed out leaving her shoes and bike behind. (6 RT 1417-1418; 16 RT 4321-4325)

E. Sapna Becomes Enraged When Ajay Interferes With Her Relationship With Will

On January 31, 2004, Ajay e-mailed Will and told him that he must respect the family's cultural values if he wants to be involved with Sapna romantically. (16 RT 4327-4329; 10 CT 2799) He attached a copy of a letter Peggy's sister, Terry, wrote to Sapna chastising Sapna for being

disrespectful and for confusing American values with promiscuity. (17 RT 4520; 10 CT 2799) Will broke up with Sapna the next day on February 1, 2004. He reported to Ajay in an e-mail: "Ajay Dev, I have done as you wish, and broken all romantic relations with Sapna." (17 RT 4518-4519; 10 CT 2800)

Will told Sapna that he broke up with her because of Ajay's e-mail. (5 RT 929; 7 RT 1712-1713) Sapna was outraged. (7 RT 1712; 8 RT 1979; 14 RT 3773-3774) On February 1, 2004, Sapna e-mailed Ajay and told him she wanted nothing to do with him anymore and to "Stay away from my life!!" (14 CT 3958) She told her friend Sneh, "I moved out, I moved on, I don't know why they keep bothering me." (14 RT 3773- 3774)

F. Sapna Accuses Ajay of Rape On February 2, 2004: One Day After Sapna Cut Off All Ties With Ajay For Causing Her Break-Up With Will.

On February 2, 2004, the day after Will broke up with her, Sapna, together with Megan, went to the police to accuse Ajay of rape.[9] (8 RT 1969, 1976, 1978, 1981-1982, 1996, 2065-2069, 2082) Sneh testified that Sapna called numerous friends and told them Ajay had been having sex with her. (14 RT 3826, 3828-3829) Sneh said Sapna also told her not to speak to any investigators and that she wanted to sue Ajay. (14 RT 3833)

On February 3, 2004, Detective Hermann interviewed Sapna about her rape allegations. (8 RT 2097- 2098) Sapna reported that Ajay raped her approximately two to three times a week starting two weeks after she came to the United States to live with the Devs until she moved out of the house in December 2003. (5 RT 1135; 10 CT 2744-2755) After Detective Hermann completed his video-taped interview, he asked Sapna whether she

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[9] Notably, Ajay and Peggy had taken Sapna to the Davis Police Department in November 2003, when she received a threatening text, to teach her how to file a complaint with the police. (16 RT 4237-4243)

was willing to do a "pretext" phone call in an effort to get Ajay to admit the rape allegations. Sapna agreed. (9 RT 2103-2104; 10 CT 2777-2779)

IV. The Pretext Call

On February 4, 2004, Ajay and Peggy were dining at Ajay's parents' house when Sapna called. Peggy answered. (16 RT 4350-4351; 9 CT 2453) Sapna asked to speak to Ajay, but Peggy repeatedly told her Ajay was not ready to speak to her. (9 CT 2453) When Sapna was unsuccessful at getting Ajay on the phone, per Detective Hermann's instructions, she threatened Peggy by claiming she would go to the police if Ajay did not call her back in five minutes. (9 CT 2454-2455) When Peggy still did not put Ajay on the phone, Sapna hung up. (9 CT 2457)

The phone rang again ten minutes later. This time Ajay answered. (16 RT 4354; 15 CT 4154) Now, Sapna, supervised by Detective Hermann, could initiate the pretext upon which they hoped to obtain a recorded admission from Ajay corroborating Sapna's claim that Ajay had raped her two to three times a week for five years from ages 15 to 20 years of age. No such admission was obtained.

The pretext for the call, devised by Detective Hermann, involved a lie that Sapna went to her school counselor and admitted she had three abortions, but refused to tell the school counselor who the father was. Sapna intimated that Ajay was the father and hesitantly told Ajay, "I did not really tell her anything about us.... Should I tell her, about you and me daddy?" (6 RT 1468-1469, 1482; 9 RT 2103-2105; 15 CT 4154)

Ajay did not know what to think of Sapna's newest allegations. From his perspective, Sapna was attempting to frame him because she was so enraged about the break-up with Will and the consequences she would suffer by severing all ties with the Devs as she vowed to do three days before. (16 RT 4359-4364; 15 CT 4164-4166, 4170, 4177, 4187-4188) Ajay believed Sapna had falsely accused him and Peggy of physically

abusing her in order to justify moving out of the home to pursue a life as an "American girl" and was now falsely accusing him of rape out of rage. He did not know how far Sapna would go to retaliate against him. In fact, moments prior, Peggy informed Ajay that Sapna threatened to go to the police if Ajay did not call her back. (16 RT 4350-4351) Dumbfounded, Ajay said nothing in response to Sapna's initial allegations. Finally, after a very long pause, he told Sapna, utterly exasperated,

> Sapna, you know what, go to police, arrest me. That's what you gonna have a justice. Go to counselor, go to police. Give Ajay Dev's name and tell everything. And, you would come and visit me in prison. It's ok, because that's exactly what you wanted in this life anyway.

(15 CT 4154)

As the conversation progressed, Sapna's accusations became more direct: "you had sex with me, ever since I was 15." (15 CT 4155) Ajay emphatically and repeatedly denied these accusations. After expressing his disbelief, Ajay told Sapna, "Sapna, it's wrongly accused." (15 CT 4155)

SD: (Sapna Dev): How is that wrongly accused? Didn't you do that to me, when ...

AD: (Ajay Dev): I did not.

SD: ... when I was 15?

AD: No, I did not.

SD: Are you lying?

AD: No, I am telling the truth.

SD: How are you telling the truth?

AD: You are lying. This is the worst possible accusation I could possibly have.

* * *

AD: ..You are making a threat

SD: I am not making any threats; I am just asking you your opinion. Should I tell the counselor about us? When you and I had sex up ever since 15, and that you made me pregnant three times.

AD: Why are you telling me all this?
SD: I am just, I am just asking you, should I talk about this, or should I not?

AD: This is the dumbest thing I ever heard. If you want to make me wrong accusation and kill me, kill my life, try to do whatever you want. I have my own voice to the police department. I have my own voice, and I have been wrongly accused many times in my life.[10]

* * *

SD: I'm really afraid of you.

AD: I will not tolerate certain things like this. This is humiliating and this is also wrongly accused of [UI]

* * *

AD: I am not accusing you of anything, but you are accusing me.

SD: I am not accusing you.

AD: You have already accused me of abuses, now you are accusing me of sexual abuse too.

SD: How am I abu [sic] how am I doing that daddy?

AD: You have already accused me of physical abuse, now you are [UI]

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[10] Ajay used the term "wrongly accused" when referring to Sapna's accusations against him and Peggy of physical abuse and when referring to his mother's accusation that he put Sapna before his parents when he adopted her without their consent. (16 RT 4368-4369; CT 3909)

SD: Well, you have hurt me, haven't you? You have hit me, haven't you?

AD: No, I have not. I have slapped you. I have not hurt you.

SD: You have hit me, you have.

AD: Sapna what do you want from me babu? What do you want from me? Why are you [UI]

SD: I just want your honesty, ok. I don't want you to say anything that's not true. You, you did have sex with me when I was 15, up until I moved out.

AD: No, not true.

SD: It's not true?

AD: It's a big lie and you are trying to frame me, in the negative way ...

SD: Oh, ok.

AD: ... with the police department.

SD: Alright.

AD: You can go ahead Sapna. I will tell you this much only. I know you are, you are refuse to talk to me and see me in person ... you are trying to frame me and it is not worth it.

SD: I am not trying to frame anyone.

* * *

AD: Sapna. Don't make a threat against me.

SD: I am not making any threats.

AD: What do you want from me? Tell me right now.

SD: Uh, uh…

AD: What do you want from me? What do you want from me, tell me honestly. The honest, what do you want from me?

SD: Uh uh …

AD: What do you want from me Sapna? You know what; you treat me like no one has ever treated me. No one. I shouldn't have deserve this.

SD: You shouldn't have deserved this?

AD: No, I shouldn't.-- I sacrificed everything for you and your family. And this is what I get [in] return.

SD: I guess I should just go to the police then daddy.

AD: Sapna.

SD: What?

AD: Why don't we both go to the police together.

(CT 4155-4159)

Throughout the call, Ajay implored Sapna not to frame him out of revenge simply because she was angry about Ajay's emotional outbursts on the night of Peggy's surgery and her break-up with Will which resulted in Sapna's decision to completely sever herself from the Devs causing serious consequences to her Nepali family and her future as an American citizen. (16 RT 4359-4364; 15 CT 4158, 4164-4166, 4170, 4177, 4179, 4187- 4188, 4195)

Approximately 30 minutes into the call, Ajay's parents, who could overhear Ajay's side of the call, told Ajay to speak Nepali. (16 RT 4355-4357; 15 CT 4173) They did not trust Sapna and feared she was trying to frame him. (16 RT 4355-4357; 15 CT 4173) In Nepali, Ajay tried to

explain to Sapna how humiliating it would be to have to explain her false accusations to his parents who were overhearing the conversation. Ajay pleaded with Sapna:

> **Listen very carefully, babu. My mommy/daddy is also now suspecting that there is something. [¶] Listen, because they think something is going on between you and me. My mommy/daddy is suspecting whether there is a sexual relationship or not. [¶] Why, babu, why can't you understand the matter, tell me what would you get from this, tell me, just tell me that much. I have been telling you from the very beginning that my life will be gone but how about your life, your life will be gone, how can you save your life, just tell me.**[11]

(15 CT 4174)

In response, Sapna asked, "How is my life re .. ruining daddy?" (15 CT 4174) Ajay angrily explained that her life could be ruined "**Because you have fucked me after 18 years of your age.**" (15 CT 4174) Sapna replied equally indignant, "Ok, so?" (15 CT 4174) After a long pause in the conversation, Ajay stated, "**That means you have given me consent**" which Sapna denied. (15 CT 4174) As discussed at length in Arguments II and III, *infra*, the prosecution and defense disputed the meaning of this highly ambiguous exchange at trial. What was not in dispute, however, was Sapna's comment, made seconds later: that she was angry at Ajay because he would not admit that any of her allegations were true.

AD: **Talk softly, why are you talking so angrily?**

SD: Because I want you to talk to me. I want you to say it.

(15 CT 4174)

Later in the conversation, there was another ambiguous exchange between Ajay and Sapna that was hotly contested at trial. The trial court permitted Sapna to translate Ajay's statement spoken in Nepali. (5 RT 962;

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[11] As reflected in Exhibit 799, the conversation spoken in Nepali during the pretext call will be denoted in bold.

9 CT 2480, 15 CT 4176) According to Sapna, Ajay purportedly said, "**But you had sex with me when you were 18.**" (15 CT 4176) The defense expert who translated the pretext call testified that Ajay's statement was inaudible, but was able to decisively rule out Sapna's translation because, although mostly inaudible, the expert could unmistakably hear the first syllable of the word in dispute which was incompatible with any Nepali word connoting "sex." (14 RT 3866-3867)

As before, what indisputably followed this exchange was repeated frustration on Sapna's part due to Ajay's continued refusal to admit any of the allegations. "**Why don't you admit?**," Sapna chastised Ajay. (15 CT 4180) And, towards the end of the call, Sapna again scolded Ajay, "I just wanted to ask you about things, but you aren't. Definitely you are not telling me anything about this. I am gonna go." (15 CT 4184)

In an effort to convince Sapna that her false allegations would backfire on her, Ajay suggested that her allegations would eventually be disproved by medical records which would surely expose the real person who impregnated her. As proposed by Ajay, "**You had abortion when you were 18 years old and they have the record. When they have the record, they will understand with which boy did you go with to give name.**" (15 CT 4180) In response, Sapna did not deny that she had been impregnated by a boyfriend. Instead, she simply stated that "**But the boy's name is not there.**" (15 CT 4180) Sapna implicitly admitted she had not been impregnated by Ajay, but, rather, by a "boy." She just wanted to convince Ajay that he could not disprove her false allegations so easily. This was one of the only times Sapna spoke in Nepali which effectively prevented Detective Hermann from understanding her concern.

Nevertheless, Ajay repeatedly warned Sapna that her medical records would show that he did not impregnate her. (15 CT 4174, 4180-4181) "**You have your abortion record; you have problem ...**

(inaudible); forget about things when you were 15 and the matter is of after 18 years of your age." (15 CT 4181) In fact, Sapna's medical records decisively show that her pregnancies perfectly coincide with the time periods Ajay and Peggy suspected she was dating older boys behind their backs and against their will. (4 RT 825-826, 829-833, 839-840, 847-848; 7 RT 1678-1679, 1736-1737; 9 RT 2116, 2212-2213, 2252, 2288-2289, 2324-2325; 10 RT 2401; 14 RT 3754-3759; 15 RT 4085, 4199-4201; 9 CT 2391, 2411, 2425; 15 CT 4335-4337)

As the pretext call came to a close, Ajay asked Sapna to tell, "mom what you just told me." (15 CT 4191) When Peggy got on the phone, Sapna initially tried to pretend that Peggy already knew about the accusations. (15 CT 4191) When Peggy asked what she was talking about, Sapna told Peggy that Ajay had been having sex with her since she was fifteen up until she moved out. (15 CT 4191-4192) Peggy handed the phone back to Ajay and Ajay instructed Sapna to, "go to [the] police department, go to the counselor and say exactly the same thing." (16 RT 4485-4486; 15 CT 4192) Then, Ajay expressed both his and Peggy's utter shock and dismay over Sapna's false allegations and her decision to frame him. (15 CT 4193, 4195) Ajay ended the phone call with, "...we brought you to this country with a Green Card, enjoy your life. ...May God bless you!" (15 CT 4195)

V. After The Police Execute A Search Warrant At The Devs' Home, Sapna Asks The Police To Stop Pursuing The Case Against Ajay

Given Sapna's threats to go to the police, Ajay and Peggy retained counsel to obtain advice about responding to the false allegations they feared might soon come from Sapna. (9 RT 2128-2829; 16 RT 4512) No doubt, Sapna put the Devs on notice that their lives would likely be scrutinized for evidence of nefarious conduct. Therefore, at the direction of

counsel, the Devs initiated an investigation of Sapna's life in Nepal. (5 RT 983-986; 16 RT 4338-4339)

On March 16, 2004, approximately a month and a half after the pretext call, the Davis Police executed a search warrant on the Dev home. (9 RT 2121) The police confiscated the Devs' computers and a plethora of other electronic media. (9 RT 2121-2122; 2932-2933; 1 CT 226-227) Of the 209 pieces of confiscated electronic media, one zip disk had four adult pornographic photographs. (11 RT 2932-2933) Forensic analysis of the computers showed pornography downloaded on both Ajay's Dell laptop and the family Dell tower.[12] (11 RT 2887, 2918, 2932-2933; 4 CT 1119) Peggy put the family Dell tower in Sapna's room in June 2003. (15 RT 4111) The police did not arrest Ajay after executing the search warrant.

On May 5, 2004, with no formal charges pending against Ajay, Sapna wrote a letter to the District Attorney wherein she requested that the police "withdraw the case against Ajay K. Dev." (9 CT 2501) Detective Hermann helped Sapna draft the letter which clarified she still believed in Ajay's guilt and, as a consequence, had not provided false information to the police. (5 RT 967-970; 8 RT 2140; 9 CT 2501) Sapna called Peggy on Mother's day to let her know the case had been dropped. (16 RT 4331)

VI. Sapna Is Arrested In Nepal Preventing Her Return To The United States and Jeopardizing Her Ability To Become A United States Citizen.

In June 2004, approximately one month after the case was dropped against Ajay, Sapna traveled to Nepal to celebrate her sister's wedding. (5 RT 964-965; 10 RT 2438, 2474) As feared by Ajay's parents, Ajay and

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[12] Ajay was charged with showing Sapna pornography while she was a minor. (4 CT 886-887) However, the jury acquitted Ajay of all pornography related charges. (19 CT 5200) Therefore, evidence concerning the pornography charges will not be included in the Statement of Facts, but will be discussed in more detail, *infra*, at Arguments V, VI and VII.

Peggy's decision to adopt Sapna resulted in tremendous family turmoil and division. (15 RT 4170-4173) Even Sapna acknowledged, at trial, that Ajay's cousin, Murali Narayan Deo, and Murali's family probably held a serious grudge against Sapna and her family because "their children could not go to America." (5 RT 1030) In this regard, Sapna understood why Murali would pursue criminal charges against her. (5 RT 1030) Therefore, having learned that Sapna lied about her date of birth on her 1998 passport, Murali went to the Nepali government on July 1, 2004 to bring a case against Sapna. (5 RT 982-986, 1025; 10 RT 2572-2574; 9 CT 2502-2504) On July 4, 2004, the Nepali government arrested Sapna, charged her with passport fraud, and confiscated her 1998 passport. (5 RT 977-980) Sapna was in jail for 19 days and legal officials allowed her mother to stay with her during this period. (5 RT 978-979) Without her passport, Sapna had no way of re-entering the United States and, as a result, risked losing her legal residency status and her path to American citizenship.

VII. Sapna Reinstates The Charges Against Ajay Which, Facilitated By Detective Hermann, Enables Her Return To The United States As A Legal Resident And Continue Her Pursuit Of American Citizenship

After Sapna's arrest, Sapna contacted her friend Araz Taifehesmatian and told him she was being held in Nepal against her will. She asked him to call Detective Hermann to facilitate her return to the United States. (9 RT 2141-2144, 2244-2245, 2247-2248) Sapna testified that Ajay called her from Kathmandu and asked her to either stay in Nepal or go to Canada. (9 RT 970-977) According to Sapna, Ajay offered to pay her expenses and promised to bring her back to the United States in a few years. Sapna claimed to refuse. (5 RT 975-976) Sapna gave Hermann the caller ID for Ajay's alleged call. (11 RT 2952-2953) However, the ID was not a Kathmandu phone number. (14 RT 3876)

In August 2004, after Sapna's arrest, Peggy's mother, Beverly Taylor, retained immigration attorney Charles Stebley, to inform the United States Government of Sapna's false allegations against Ajay and alert the government to Sapna's adoption and immigration fraud based on Sapna's use of a false date of birth. (10 RT 2438, 2445, 2450-2452, 2456; 13 RT 3455) At Ms. Taylor's direction, Mr. Stebley wrote a series of letters to different immigration agencies alerting them to Sapna's visa fraud and her possible attempt to illegally re-enter this country.[13] (10 RT 2444-2447, 2456; 13 RT 3467; 14 CT 3981-3983, 3985-3989) At trial, the prosecution referred to this collective legal correspondence as the "poison letters" in an effort to establish that the Devs wanted to prevent Sapna from returning to the United States to testify against Ajay. (9 RT 2185-2186; 10 RT 2407, 2420, 2423, 2513-2524, 2529-2536; 14 RT 3392-4400) The letters were equally consistent with the Devs' earnest desire to expose Sapna's fraud because it was painstaking for the Devs to watch Sapna reap the immigration benefits they put in place for Sapna after she decided to frame Ajay for rape.

In late October 2004, Peggy, Sanjay, Beverly and Ajay's mother, Goda, traveled to Nepal. (10 RT 2429, 2502; 16 RT 4332-4334) The purpose of the trip was to confront rumors in the Nepali community concerning Ajay. (10 RT 2430-2431; 16 RT 4332-4334) Peggy, Sanjay and Goda observed a hearing at Sapna's Nepali court proceedings. (7 RT 1602-1603; 10 RT 2430-2431; 16 RT 4340) At trial, Sapna testified that she never told the Nepali Court or her three Nepali defense attorneys that she believed Ajay was trying to keep her in Nepal against her will. (5 RT 1076-1077, 1081-1082)

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[13] Mr. Stebley contacted the following federal agencies: Immigration and Customs Enforcement (hereinafter "I.C.E."); Homeland Security; U.S. Citizenship and Immigration Services; and the U.S. Embassy in Nepal. (13 RT 3467)

On June 26, 2005, Sapna was convicted of passport fraud in Nepal. (14 CT 4071-4093) The Nepal court determined that Sapna's accurate birth date was April 28, 1983, not January 5, 1984.[14] (5 RT 985-986; 14 CT 4071-4093) Due to her conviction for passport fraud, Sapna was not allowed to re-enter the United States without a "waiver of police certificate." (11 RT 2756; 13 RT 3437-3439, 3447-3448, 3450-3452)

On October 3, 2005, at the behest of Detective Hermann, the U.S. Embassy in Nepal issued a waiver of police certificate allowing Sapna to re-enter the country. (9 RT 2157; 11 RT 2759, 2769-2771; 13 RT 3437-3439, 3446-3447; 14 CT 4087) Immigration specialist, Luz Dunn, testified that the embassy waived Sapna's police certificate because Sapna planned to testify in a criminal case.[15] (11 RT 2759; 13 RT 3439) When applying for a new passport, Detective Hermann advised Sapna to use the birth date of April 28, 1983, consistent with the Nepali court verdict. (5 RT 987-988, 1083-1084) After obtaining a new passport, Sapna re-entered the United States on November 16, 2005. (5 RT 1000; 9 RT 2153; 9 CT 2505) Upon

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[14] The trial court ruled that Sapna's conviction from Nepal and the Nepali court's finding that her accurate date of birth was April 28, 1983 could not be introduced for the truth of the matter asserted. (7 RT 1727; 14 CT 4071-4093; see also Argument IV, *infra*)

[15] [redacted]

entry, I.C.E. confiscated Sapna's green card because the birth date conflicted with the birth date on her new 2005 passport.[16] Detective Hermann testified that Sapna immediately applied for citizenship, but was denied as were her numerous appeals.[17] (9 RT 2183-2185) In contrast, Sapna testified that immigration officials advised her that I.C.E. would send her a new green card. (4 RT 897-898; 5 RT 1001-1002) However, at the time of trial, almost four years later, Sapna conceded that I.C.E. had still not sent her a new green card. (4 RT 897-898; 5 RT 1001-1002) Nevertheless, at trial, Sapna believed she was still in the process of becoming a United States citizen. (4 RT 897)

Luz Dunn further explained, at trial, that the United States government was still investigating Sapna's birth date and, given the date discrepancy, her adoption and derivative immigration status could be revoked. (13 RT 3422, 3440-3441) Dunn also confirmed through expert testimony that a person illegally residing in the United States can become an American citizen by proving he or she is a victim of domestic violence. (13 RT 3433-3434, 3446-3447)

On April 26, 2006, approximately five months after Sapna returned to the United States, and three days after her Visa expired, Ajay was arrested. (1 CT 1-3; 9 CT 2505) On March 27, 2009, one month before testifying against Ajay and three and a half years after re-entering the country, Sapna submitted an application with the INS to have her confiscated green card replaced. (4 RT 894, 897-898; 5 RT 1086-1087; 9 CT 2451-2452)

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[16] At trial, Sapna provided the court with a photocopy of her confiscated green card and this copy was entered into evidence. (5 RT 1085; 9 CT 2450).

[17] Detective Hermann testified that he did not include Sapna's citizenship applications or appeals in his report to the defense as he did not think they were relevant to the case. (9 RT 2185)

VIII. At Trial Sapna Testified That Ajay Raped Her Two To Three Times A Week For Five Straight Years From Ages 15 to 20.

A. Alleged Rapes in the Dev Home

At trial, Sapna testified that Ajay first touched her inappropriately in early February 1999, within the first couple weeks of her arrival. She claimed that Ajay laid down behind her while she was on the couch. (4 RT 754-755) According to Sapna, Ajay pressed his pelvis into her backside and touched her breasts over her clothes. (4 RT 757-758) After three to five minutes, Sapna claimed she got up and walked away. (4 RT 759) Sapna testified that Ajay told her not to tell anyone. (4 RT 760)

Sapna testified that the second incident occurred within a month of the first. (4 RT 763) According to Sapna, Ajay carried her to his bedroom and tried to undress her as she tried to get away. (4 RT 763-764) Sapna testified that Ajay told her to keep quiet and undressed her while holding her down. He then inserted his fingers into her vagina, then his penis. (4 RT 764-766) She said it lasted about 10 minutes. (4 RT 766) Sapna testified that she did not think Ajay used a condom. (4 RT 767)

Thereafter, according to Sapna, Ajay raped her, without fail, two to three times a week for five years. (4 RT 768, 774-775, 813, 824; 5 RT 1135-1136, 1150; 7 RT 1619) Sapna could not remember details about the subsequent rapes. (4 RT 769; 7 RT 1619-1620) As for the second rape, Sapna testified, "I think it was in my bedroom. . . . Yeah, I think. I'm not positive. I don't remember." (4 RT 769)

Sapna also testified that, in the beginning, Ajay digitally penetrated her "almost all the time," but during the latter rapes, "probably half the time." (4 RT 813) Sapna claimed she lost her virginity when Ajay put his finger in her vagina for the first time. She testified that it was so traumatic she would never forget it. (6 RT 1341-1342) She claimed it happened at the Concord house, but could not remember any other details. She initially

thought she may have bled on her underwear, but subsequently she indicated she was not sure whether she was wearing underwear. (6 RT 1341-1345)

Sapna testified that, for the first six months, Ajay raped her only when Peggy was out of the house. (4 RT 769, 775-776) Thereafter, Sapna testified that Ajay started raping her at night in her bedroom while Peggy was asleep. (4 RT 775-776) Sapna claimed that Ajay climbed into her bed while she was sleeping and told her not to make any noise. She could not recall details of the alleged rapes. (4 RT 776)

Sapna testified that the rapes made it impossible for her to love Ajay as a father, but she had to express love to him because he provided so much for her. (4 RT 774) Sapna testified the more Ajay raped her, the more she hated him and did not want to be around him. (6 RT 1462-1463; 7 RT 1540-1541) She testified that she did not tell anyone because he told her he would send her back to Nepal, her reputation and career would be ruined, and he and Peggy would get a divorce. (4 RT 760)

B. Alleged Oral Copulations

Sapna testified that Ajay made her put his penis in her mouth. (4 RT 803; 5 RT 1158-1160) She explained that Ajay made her watch a pornographic video called "Eighteen and Confused" and forced her to orally copulate him as depicted on the video. (5 RT 1159) Sapna claimed she was shown "Eighteen and Confused" on Ajay's laptop, in 1999, at age 15. (5 RT 1112, 1159) However, evidence at trial clearly established that the "18 and Confused" video did not exist in 1999, when Sapna was 15, but was produced in mid-January 2000. (12 RT 3032-3034; 10 CT 2810-2812) Moreover, Peggy testified and had a receipt to show that the laptop, allegedly containing the porn video, was not purchased until November 2001. (15 RT 4109-4110, ACT (8/10/2010) 16)

Sapna estimated that she was forced to give Ajay oral sex about three times a month totaling approximately 30 to 50 times over the course of three years. (5 RT 1162-1163) When asked for details, Sapna expressly testified, "All I remember is resisting him and feeling disgusted." (5 RT 1161) These repeated instances of oral sex were so traumatic for Sapna, she testified it was "something that I will always remember that was done to me." (5 RT 1160) At trial, Sapna could not remember if Ajay ever ejaculated during oral sex. (5 RT 1162-1163)

Contrary to her trial testimony, during her videotaped interview with Detective Hermann on February 3, 2004, Sapna adamantly denied that Ajay ever forced her to perform oral sex on him. She explained, "[b]ecause I just thought it was disgusting to do - put his thing in. I never - I mean, it's disgusting to put that thing in my mouth. ...I wouldn't do it." (10 CT 2764-2765) Similarly, Officer Briesenick testified that, when Sapna reported the charges against Ajay on February 2, 2004, she never included any allegation relating to oral copulation. (8 RT 2084)

C. Alleged Rapes and Assaults Outside the Dev Home

At trial, Sapna testified that Ajay raped her at Peggy's mom's house (Beverly), Peggy's sister's house (Terry), Ajay's brother's house (Sanjay), their friend's home (Evanne), at Motel 6 and in Bangkok, Thailand. (4 RT 808, 812-813; 7 RT 1569-1572, 1596-1599) When asked whether Ajay raped her during family vacations to Las Vegas, Washington DC, Grants Pass, Oregon and/or Kathmandu, Nepal, Sapna stated she could not recall. (7 RT 1508-1510)

Within her first month in the United States, Sapna testified that Ajay raped her while visiting her Aunt Terry and her cousins in Monterey. (7 RT 1593-1595) Sapna could not remember the exact date, but Peggy testified that the visit occurred at the end of February 1999. (15 RT 4192) Sapna testified that she slept on the living room floor that night with Terry's

sons, Benjamin and Nacho, and that Ajay raped her while Ben and Nacho were in the same room. (7 RT 1514, 1593, 1595) Sapna could not remember details, just that it occurred. (7 RT 1593, 1595) Ben testified that he, then age 12, slept next to Sapna on the living room floor and Nacho slept next to Ajay. (14 RT 3672, 3677-3678)

Sapna also testified she was raped at Beverly's home near Monterey. According to Sapna, Ajay raped her on the floor as Peggy slept in the bed adjacent to them. (4 RT 809-811; 7 RT 1585, 1587-1593) Sapna could not remember other details of the incident. (7 RT 1588, 1592-1593)

At the preliminary hearing, Sapna testified that no rapes ever occurred when she was sleeping in the same bed as Peggy. (7 RT 1560-1562) At trial, however, Sapna testified that Ajay was able to rape her in the same bed as Peggy on two occasions without waking up Peggy: once at Sanjay's house and once at Evanne's house. (7 RT 1595-1598)

At trial, Sapna testified that she was raped at Sanjay's house "probably once." (4 RT 812-813; 7 RT 1519, 1595-1597) In contrast, Sapna did not testify to any rapes occurring at Sanjay and Tasha's (Sanjay's wife) house at the preliminary hearing nor did she report any alleged rapes occurring at Sanjay's home to Officer Briesenick or Detective Hermann. (7 RT 1516-1519) At trial, Sapna could not remember when this particular rape at Sanjay's home occurred and could not recall the occasion for their visit to Sanjay's home which was odd because Ajay and Sanjay had barely spoken to each other since Sapna's adoption. (7 RT 1519-1520)

Sapna testified she, Ajay, and Peggy stayed overnight in Sanjay's basement and all slept together in the same bed. (7 RT 1521) According to Sapna, she was sleeping in the middle of the bed, between Ajay and Peggy, with her back towards Ajay. (7 RT 1521, 1527) Sapna claimed Ajay took her underwear half way off and put his penis in her vagina. She did not know if he was wearing a condom or if he ejaculated. Although Peggy was

very close to her in the bed, she did not touch her or say anything or try to stop Ajay. (7 RT 1521-1531) Sapna testified she slept in Sanjay's basement in the same bed as Ajay and Peggy "a lot of times," "probably two or three times." She could not remember if Ajay raped her on the other occasions. (7 RT 1531-1532) Sanjay and his wife, Tasha, both testified that Sapna never spent the night at their house. (14 RT 3877-3878, 3881, 3911)

Sapna also claimed to be raped at least two times at Evanne O'Donnell's home. (7 RT 1513, 1595-1597) According to Sapna, she and Peggy were sleeping in Sairsha's room (Evanne's daughter) when Ajay crept in during the night and raped Sapna while Peggy lay asleep beside them in the same bed. (4 RT 812-813; 7 RT 1597-1598) In the other instance, Sapna testified she was sleeping on the couch in the living room when Ajay raped her. (4 RT 812-813) Sapna did not remember any details of the rape except that maybe the dog got up and left. (7 RT 1598-1599) Evanne testified that Sapna always slept with Peggy in Sairsha's room and never in the living room with Ajay. (15 RT 3916-3917)

Sapna testified that during the family vacation in Hawaii in 2002, she walked into the hotel room to shower while Ajay was in the room. Peggy and Cassandra were on the beach. (4 RT 814-816) According to Sapna, Ajay grabbed her around the waistline in a sexual manner. When Cassandra walked in the room everything stopped. (4 RT 816-817, 1508) At the preliminary hearing, Sapna testified that Ajay never touched her sexually in Hawaii. (7 RT 1700)

D. Alleged Rape in Bangkok, Thailand in 2003

At the preliminary hearing, Sapna initially testified that Ajay never raped her outside of California. (7 RT 1511-1512) This testimony was consistent with Sapna's video-taped interview with Detective Hermann in 2004 where, when asked generally about the alleged rapes, Sapna never

mentioned anything about Thailand or Nepal. (7 RT 1601; 9 RT 2177-2178; 11 RT 2970-2971) However, on cross examination, when asked whether Ajay raped her when they traveled together to Nepal and shared a hotel room in Thailand during a layover, Sapna changed her testimony, at the preliminary hearing, and claimed Ajay had, in fact, raped her outside of California. (4 RT 857-860; 7 RT 1699-1702) At trial, she gave the same testimony. (4 RT 857-860; 7 RT 1699-1702)

When asked about whether Ajay had raped Sapna upon their return to the United States, Sapna stated she could not recall. (7 RT 1511-1512) However, she could not deny that, although she claimed Ajay had still been forcing her to have sex with him two to three times per week immediately before they left for Nepal, she begged Ajay and Peggy to return from Nepal a month early requiring her to travel home with Ajay. (4 RT 853, 856-857; 15 RT 4128-4130)

E. Alleged Rapes After Sapna Moved Out

Sapna testified at trial that she moved out of the Dev home in December 2003 to get away from Ajay because he had been raping her. (6 RT 1479-1480) She told Detective Hermann that the rapes stopped once she moved out: "Oh it lasted ever since, um, I moved out – until I moved out; probably just December, the month of December." (10 CT 2745) However, after Sapna moved out she stayed in frequent contact with Ajay. Phone records show Sapna called Ajay approximately 50 times in December 2003. (7 RT 1566-1567; 14 CT 3961-3978)

Despite what she initially told Detective Hermann about the rapes ending once she moved out, Sapna later changed her story and, at trial, testified that Ajay raped her at Motel 6 after she moved out of the Dev home. (7 RT 1569-1572) Specifically, she testified that Ajay picked her up at her apartment and, although she thought they were going to the park, he took her to the motel. Sapna testified that she voluntarily followed Ajay

into the motel room as she believed they would just talk. (4 RT 882; 7 RT 1536-1537, 1552-1556, 1570) Despite having been raped 500 to 700 times, Sapna stated she gave Ajay the "benefit of the doubt." (7 RT 1552-1553, 1556) Once in the room, Sapna testified that when she refused Ajay's advances and tried to leave, he grabbed her arm and took her purse to prevent her from leaving. (7 RT 1569-1572) Sapna testified she hit Ajay with her arms to get away. (7 RT 1571) According to Sapna, Ajay then pushed her on the bed, held her hands down with one hand and took off her clothes with the other while she struggled to get away. (7 RT 1574) Then, still holding her with one hand, he took off his clothes. (7 RT 1576) Sapna testified that while Ajay held her hands down with one hand he inserted his penis with the other. (7 RT 1572, 1578) Sapna testified she had nightmares about this experience and, it was so traumatic, she would never forget it. (7 RT 1548-1549)

Although the alleged rape occurred January 12, 2004, Sapna admitted she did not initially tell the reporting officer, Officer Breisnick, about this rape on February 2, 2004 or Detective Hermann February 3, 2004 because she didn't remember it. (7 RT 1549-1550, 1582-1583; 9 RT 2109-2120; 14 CT 3930-3933) Sapna told Detective Hermann about the alleged rape only after Ajay mentioned the motel during the pretext call. (7 RT 1549-1550, 1696-1697; 8 RT 2079; 9 RT 2107-2108, 2205) Megan, her roommate, and Araz both testified Sapna never told them she was allegedly raped at Motel 6. (7 RT 1549; 8 RT 2079; 9 RT 2205)

On January 29, 2004, also after Sapna moved out, Sapna claimed that Ajay tried to rape her the night of Peggy's surgery. (6 RT 1389-1393) Sapna claimed, while at the hospital, Ajay begged her to move back home and threatened to kill himself and her if she refused. (5 RT 926-927) Sapna testified Ajay was so desperate he offered to pay her for sex. (5 RT 926-930; 10 CT 2753) Sapna claimed she did not recall arguing about Will

that night. (7 RT 1708-1709) Despite Ajay's alleged threats and illicit sexual inducements, Sapna testified she wanted to spend the night at the Dev home to help Peggy. (6 RT 1391, 1407; 9 CT 2618) Sapna's descriptions of the alleged attempted rape that night vary. In her interview with Detective Hermann, Sapna claimed Ajay got on top of her, his pants were down and she felt him ejaculate into a condom outside her body before he climbed off. (6 RT 1420-1421, 1423-1426; 9 CT 2818-2621) Sapna didn't scream because Peggy was sick. (9 CT 2619) At the preliminary hearing, Sapna testified that Ajay tried to get on top of her, but was unsuccessful because she got away. (6 RT 1412-1414) At trial, Sapna testified they were both clothed, Ajay laid on top of her and humped her. (6 RT 1389-1395, 1404-1407) She did not feel or see him ejaculate. (6 RT 1395) Sapna testified that the event was so traumatic she screamed and ran out of the house. (5 RT 934-935; 6 RT 1394-1395) Peggy testified that she witnessed Ajay and Sapna sitting on the futon in Sapna's room, arguing, before Sapna abruptly left. (16 RT 4321-4325)

At the preliminary hearing and trial, Sapna testified she was terrified after this attack and immediately went to the police the same night to report it: January 29, 2004. (6 RT 1386-1389; 1394-1395, 1400-1401; 7 RT 1717) However, police reports show that Sapna did not go to the police on January 29, 2004 and that the initial police report made no mention of an attempted rape on January 29, 2004. (8 RT 1969, 1976, 1978, 1981-1982, 1996, 2065-2071, 2082) In fact, Officer Briesnick testified that Sapna never reported being sexually attacked on January 29, 2004. (8 RT 2068-2071) Rather, Briesnick testified that Sapna reported her last sexual encounter with Ajay to be before she moved out of the Dev home in December 2003. (8 RT 2075, 2077-2078, 2080-2081)

In an effort to clarify conflicting information about the exact date Sapna first went to the police to report these crimes against Ajay, Sapna

tried to explain that she and Megan went to the police department the night of Peggy's surgery, but the door was locked so they went home. (5 RT 942-944; 6 RT 1382-1386, 1396-1397; 7 RT 1717) Then, the next night (which would have been January 30, 2004 – not February 2, 2004) they went again and got in. (5 RT 942-944) Megan, however, testified that she and Sapna went to the police department only once. She testified it was at night and the department was locked, so they rang the "after hours bell" and were let in. (8 RT 1996) Officer Breisenick confirmed that the department is always accessible by the "after-hours" bell and that Sapna used the "after-hours bell" to get into the station on February 2, 2004 – not January 29, 2004. (8 RT 2065-2067, 2082)

The February 2, 2004 police report by Officer Briesnick was taken one day after Will broke up with Sapna – the same date Sapna emphatically told Ajay to "stay away from my life." (7 RT 1713; 8 RT 2065-2067; 10 CT 2800; 14 CT 3958)

The prosecution attempted to explain Sapna's delay in reporting these alleged rapes and her inconsistencies by introducing expert testimony from Dr. Anthony Urquiza. (8 RT 1863-1865) According to Urquiza, children who suffer from the Child Sex Abuse Accommodation Syndrome (CSAAS) may experience entrapment, accommodation and delayed and unconvincing disclosure. (8 RT 1880-1900) However, Dr. O'Donohue, the defense expert, testified that no psychological or psychiatric associations, including the AMA, have embraced CSAAS and its legitimacy has been greatly undermined by scientific research. (8 RT 1904-1908; 12 RT 3231-3237, 3240-3241)

F. Sapna Alleged That Ajay Impregnated Her Three Times.

At trial, Sapna testified that Ajay impregnated her three times as a result of raping her 500 to 700 times over a five year period. (4 RT 768, 774-775, 813, 824-825, 830; 5 RT 1135-1136, 1150; 7 RT 1619; 9 RT

2116; 10 RT 2401; 11 RT 2981; 9 CT 2389, 2404, 2406, 2423, 2425) These pregnancies occurred within an eleven month window: between November 2002 and October 2003 when Sapna was between 18 and 19 years old. (4 RT 825; 9 CT 2389, 2404, 2406, 2423, 2425) Sapna insisted that the pregnancies could only have been caused by Ajay because she was not having sex with anyone else when she got pregnant. (11 RT 2981; 10 CT 2770-2771) However, Araz directly contradicted Sapna's testimony by exposing the fact that they were having sex at his mother's house once a week during the Fall of 2003. (4 RT 870; 9 RT 2220, 2252, 2324; 16 RT 4445; 9 CT 2551) The evidence also showed that Sapna was dating Sid during her first two pregnancies, from November 2002 through May 2003, and dating Araz during the third pregnancy scare in November 2003. (4 RT 826-827, 849; 5 RT 1138, 1149-1150; 7 RT 1678-1679; 9 RT 2212-2213, 2220, 2252, 2289, 2324-2325; 10 RT 2613-2615, 2623; 13 RT 3309-3311, 3319; 14 RT 3754-3759; 15 RT 4085, 4199-4201; 16 RT 4380; 9 CT 2350, 2358, 2382-2383, 2393, 2404, 2406, 2423, 2425; 14 CT 3944) Sapna offered no explanation as to why she only got pregnant during the times in which she was dating older males Ajay and Peggy forbade her to see or why she never got pregnant from ages 15 to 17 even though she was fertile and claimed that Ajay rarely wore condoms during these alleged rapes. (4 RT 830; 9 CT 2391, 2411, 2425)

LEGAL ARGUMENT

I. APPELLANT WAS DENIED DUE PROCESS AND A FAIR TRIAL BY THE TRIAL COURT'S FAILURE TO INSTRUCT, *SUA SPONTE*, ON *CORPUS DELECTI*.

A. Introduction

To prove its case, the prosecution introduced the following evidence to convict Ajay of the crimes charged in this case: (1) evidence of a recorded pretext call; (2) testimony from the victim alleging a variety of

sex-related crimes and dissuading charges; and (3) pornography evidence found on the Dev computers which was used to support the intent elements of the sex-related crimes and two separately charged pornography charges. The pretext call involved a one hour conversation between Sapna and Ajay spoken in both English and Nepali. While Ajay explicitly denied having sex and/or raping Sapna on this recorded call, there were two highly disputed statements in the call, spoken in Nepali, which the prosecution argued were admissions of sex after the age of 18 and, in closing, relied on these statements in an attempt to persuade the jury that these "admissions" somehow retroactively applied to ages 15 through 18 as well. In contrast, the defense translator gave expert testimony that the statements were not necessarily admissions of sex. Ajay's out-of-court statements made during the pretext call were admitted as non-hearsay pursuant to Evidence Code section 1220. The trial court, however, failed to instruct the jury pursuant to CALCRIM No. 359. As a consequence, the jury was improperly permitted to rely solely on the pretext claim to convict Ajay. This error requires reversal.

B. The Trial Court Failed To Instruct The Jury, *Sua Sponte*, Pursuant to CALCRIM No. 359.

A court has a *sua sponte* duty to instruct the jury on *corpus delicti* whenever such statements form part of the prosecution's case. (*People v. Hawk* (1961) 56 Cal.2d 687, 707; Pen. Code § 1259.) In this regard, the California Supreme Court has explained: "In every criminal trial, the prosecution must prove the corpus delecti, or the body of the crime itself - i.e., the fact of injury, loss, or harm, and the existence of a criminal agency as its cause. In California, it has traditionally been held, the prosecution cannot satisfy this burden by relying exclusively upon the extrajudicial statements, confessions, or admissions of the defendant." (*People v. Alvarez* (2002) 27 Cal.4th 1161, 1168-1169.) The law also requires that

CALCRIM No. 359 be given whenever CALCRIM No. 358 and/or CALCRIM No. 357 is given since the *corpus delicti* instruction concerns statements of alleged guilt by the defendant. (*People v. Ray* (1996) 13 Cal 4th 313, 342; *People v. Jennings* (1991) 53 Cal.3d 334, 364. [discussing *corpus delicti* rule in the case of an affirmative admission; by analogy the rule also should apply to adoptive admissions.])

Here, Ajay's out-of-court statements made during the pretext call, alone, required the trial court to instruct the jury pursuant to CALCRIM No. 359. The fact that CALCRIM No. 357 and CALCRIM No. 358 were given only solidifies this independent duty. (12 CT 3247; *People v. Ray, supra,* 13 Cal. 4th at p. 342; *People v. Jennings, supra,* 53 Cal.3d at p. 364.)

C. Standard of Review

Review of a court's error in failing to give a *sua sponte* jury instruction involves an underlying question of law and, therefore, is entitled to *de novo* review. (*People v. Alvarez* (1996) 14 Cal. 4th 155, 217)

D. The Failure To Instruct The Jury On CALCRIM No. 359 Prejudiced Appellant Requiring Reversal As A Matter Of State and Federal Constitutional Law.

State law instructional error requires reversal where there is a reasonable probability that, but for the error, the jury would have returned a more favorable verdict. (*People v. Watson* (1956) 46 Cal.2d 818, 836.) Moreover, while the *corpus delicti* rule itself is not compelled by federal law, the arbitrary deprivation of a purely state law entitlement may also violate the Due Process Clause of the Fourteenth Amendment. (*Hicks v. Oklahoma* (1980) 447 U.S. 343; *Hewitt v. Helms* (1983) 459 U.S. 460, 466 [liberty interests protected by the Due Process Clause arise from two sources, the Due Process Clause itself and the laws of the States].) Therefore, reversal is also required where respondent cannot prove beyond a reasonable doubt that the error was harmless. (*Yates v. Evatt* (1991) 500

U.S. 391, 407; *Chapman v. California* (1968) 386 U.S. 18, 24; *People v. Roybal* (1998) 19 Cal.4th 481, 520; *Sullivan v. Louisiana* (1993) 508 U.S. 275, 279.)

In the case at bar, there is no way to rule out the possibility that the jury relied solely on the pretext call in reaching its verdicts. In this regard, the prosecution repeatedly implored the jury to find that Ajay made admissions and adoptive admissions to the crimes during the pretext call requiring the jury to convict Ajay of the crimes charged. (18 RT 5009; 19 RT 5139, 5143, 5145) In fact, the prosecution found the pretext call so significant it devoted most of its closing argument to Ajay's out of court statements made during the pretext call.[18] (18 RT 4960-5018; 19 RT 5120-5145) At the very end of its closing remarks, the prosecution told the jury that, in order to prevent getting lost while going through the 92 counts during deliberations, it needed to start with the pretext call: "you start with what he admits to, you start with the threats and the dissuasion." (19 RT 5143)

It is also reasonably probable that the jury solely relied on the pretext call evidence because the other evidence, primarily Sapna's testimony and the pornography evidence, were extremely weak and wrought with inconsistencies.

The evidence presented against Ajay was nowhere near overwhelming. Rather, taken as a whole, the evidence was equally consistent with his innocence. At the four day preliminary hearing wherein the prosecution introduced Sapna's testimony accusing Ajay of rape and molestation; the pretext call; most of the pornography evidence; and elaborate dissuading evidence, the presiding judge characterized the prosecution's evidence as "sparse." (2 CT 493) In the end, while the

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[18] The reporter's transcript reflects that out of a 75 page closing argument, 50 pages were spent exclusively on the pretext call. (18 RT 4960-5018; 19 RT 5120-5145)

preliminary hearing judge held Ajay over for trial finding "probable cause" with respect to most of the counts, it conceded, "there are many areas where someone may doubt." (3 CT 839) Therefore, given the amount of evidence that was considered at the preliminary hearing, this judicial assessment signifies this was a very close case.

1. A Victim Of Serial Rape Would Not Develop Sincere Feelings of Familial Love If Her Abuser Started Raping Her Two Weeks Into Their Relationship.

Absent Sapna's allegations, the evidence at trial clearly shows that Sapna was very happy living with the Devs and that within six months to a year developed a sincere love for them as host parents. (6 RT 1470-1474; 14 RT 3743; 9 CT 2525-2530; 14 CT 3914) Photographs, home videos, letters, e-mails, texts and phone logs all show this undeniable and heart-felt connection. (6 RT 1349-1350, 1470-1474, 1481; 10 RT 2576; 14 RT 3743; 9 CT 2525-2530; 10 CT 2734-2735; 14 CT 3927-3929; 15 CT 4349) Even the prosecution conceded in its closing that Sapna loved Ajay and Peggy Dev as parents. (18 RT 4966) However, while a loving father/daughter bond would naturally develop where a father/daughter relationship starts at birth or early childhood (even if rape or molestation later developed), it seems almost impossible to develop where, as here, the father and daughter relationship did not start until the daughter was 15 years old and, two weeks into the relationship, the father allegedly started molesting and raping his daughter two to three times a week for five years. (4 RT 768; 10 CT 2743-2745) That's a rape almost every other day. In these circumstances, it seems highly unlikely that such a deep and loving bond could occur. Therefore, since the evidence indisputably shows how much Sapna sincerely loved Ajay and Peggy, it seems less likely that her allegations could be true.

2. Unlike Other Rape Cases, Numerous Professionals Scrutinized The Relationship Between The Devs and Sapna To Determine Whether There Were Any Signs of Rape, Trauma Or Sexual Misconduct In Order To Sanction The Adoption.

In 1999, the Adoption Support Unit of the Department of Social Services instituted a home-study of the Dev home and required psychological and medical examinations of Sapna to determine whether Sapna suffered abuse or neglect. Based on these thorough examinations, completed prior to the adoption, the Department determined there was no evidence of abuse and the Devs were suitable parents.[19] (9 RT 2350, 2354, 2359, 2361-2363, 2365-2367, 2368 - 2370, 2379, 2383-2429; 14 CT 3914, 3925)

Unlike other rape cases, the relationship between Ajay and Sapna, the alleged perpetrator and victim in this case, was scrutinized for potential sexual abuse by professionals specifically trained to identify this very type of misconduct. In fact, both the defense and prosecution experts, Dr. O'Donohue and Dr. Urquiza respectively, testified at trial that persons who have experienced trauma, such as being raped two to three times a week for five years, would most likely exhibit treatable symptoms. (8 RT 1950; 12 RT 3233, 3238-3239) Specifically, Dr. Urquiza testified that victims may have sleep disturbances or other trauma symptoms and clinicians would treat them for their mental health problems. (8 RT 1950) Similarly, Dr. O'Donohue testified that persons who are suffering from severe abuse would suffer post traumatic stress symptoms early in the abuse scenario. (12 RT 3249-3250) Therefore the lack of evidence indicating any type of

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[19] Even years after the adoption, Vivian Walker, Sapna's healthcare practitioner and mandated reporter, continued to treat Sapna and performed approximately nine medical exams of Sapna beginning in 1999 through 2002. Similar to the 1999 adoption exam results, Walker's reports indicate that Sapna's exams were normal and she did not exhibit any signs or evidence of physical or sexual abuse. (9 RT 2361, 2363, 2365-2367, 2370)

abuse (sexual or otherwise) supports the defense theory of the case that Sapna's allegations were false.

3. Had Sapna Moved Out Of The Dev Home To Prevent Ajay From Raping Her, Rather Than As An Act of Independence, She Would Not Have Tried So Hard To Maintain and Repair Her Relationship With Ajay.

Sapna moved out of the Dev home on December 1, 2003 at age 19. She told the police and adamantly testified at trial that she moved out of the Dev home to finally escape the sexual abuse perpetrated by Ajay Dev over a five year period. (6 RT 1462, 1479-1480; 8 RT 2077-2078; 10 CT 2744-2745; 14 CT 3847) After she moved out, however, she made no effort to separate from the Devs and, to the contrary, made extraordinary efforts to maintain and repair her relationship to them as cherished family members. For example, her departing note read:

> Hi, mom and dad! Thanks for everything that you have give [sic] me, love, food, and house. I will keep in touch. don't worry. I love you very much! Alejandra came to pick me up. I might come back to pick up my bike later tonight. ♥ Sapna.

(6 RT 1480-1481; 9 CT 2518) Within days of moving out, Sapna reached out to Ajay again. Specifically, she sent Ajay a text message on December 4, 2003 stating, "dad, please call me, I miss u very much! i love u." (10 RT 2576; 14 CT 3929) Five days later, when Ajay did not respond, Sapna texted again: "hi dad i am sorry but i really miss u, i love u_your daughter" (6 RT 1349-1350; 10 RT 2577; 14 CT 3927) A few weeks later, when Ajay and Peggy left on their Caribbean trip, Sapna texted Ajay and Peggy again, completely unprompted, to express her sincere feelings of love for them stating, "dad, mom i love u and miss u. raja, kaya and sukhi miss u too." (6 RT 1349-1350; 10 RT 2577; 14 CT 3928)

In fact, in the month after Sapna moved out, Sapna called Ajay approximately 50 times from her cell phone. (7 RT 1566-1567; 14 CT 3961-3978) She also sent him numerous e-mails. (10 CT 2734-2735; 15 CT 4347, 4349) In one e-mail she wrote, "you forgot to mention the good times that we share with each other." (10 CT 2734) Sapna also wrote Ajay that his "support" and "unconditional love" were evident "...by being there for me before and after i moved out. [¶]...one thing i can tell you, no matter what i will never give up and i will still try to be your daughter no matter how much you want to hurt me by asking me tough questions and putting me in the spot." (10 CT 2735) Of all the exhaustive e-mail exchanges between Ajay and Sapna, Sapna never explicitly nor implicitly ever accused Ajay of any sexual impropriety.

Dr. O'Donohue, the defense expert on sex-abuse, testified that victims of rape and molestation experience trauma and one manifestation of this trauma is "avoidance" in which victims go out of their way to avoid places where they have experienced the trauma or situations that provide reminders of the trauma. (12 RT 3233) Therefore, Sapna's overwhelming efforts to stay connected to the Devs, especially Ajay, made shortly after Sapna moved out and just weeks before going to the police, are inconsistent with a rape victim finally breaking free from years of unyielding sexual abuse. In contrast, however, her behavior was much more consistent with a 19 year old young woman, angry with her overly restrictive parents, who was trying to assert her independence without losing the love of her surrogate parents.

4. The Implausibility of the Alleged Bangkok Rape Suggests The Rape Allegations Were False Because A Rape Victim Would Not Seek Out The Opportunity To Sleep In a Hotel Room With Her Alleged Rapist.

In early 2003, the Devs thought it would be a good idea to have Sapna spend the summer in Nepal in order to have her reconnect with her cultural heritage. (16 RT 4211-4212; 15 CT 4312) The original plan was to have Sapna and Ajay travel to Nepal together, then, have Ajay return July 1, 2003 and have Sapna return August 6, 2003. (7 RT 857, 884; 15 RT 4126; 15 CT 4309-4310) The trip to Nepal included a layover in Bangkok requiring Ajay and Sapna to share a hotel room.

At trial, Sapna testified that Ajay raped her in Bangkok on their way to Nepal from the United States. (4 RT 857-860; 7 RT 1699-1702) This testimony contradicted reports she gave to the police and her preliminary hearing testimony wherein she indicated she had only been raped in California. (7 RT 1511-1512, 1601; 9 RT 2177-2178; 11 RT 2970-2971) When asked about this discrepancy at trial, Sapna testified she "forgot" about this alleged rape when she was interviewed in depth by Detective Hermann. (4 RT 857-859) While it might be hard to distinguish details pertaining to serial rapes that allegedly took place in the Dev home two to three times a week, the Bangkok rape was unique and would stand out from the others in a rape victim's memory. (12 RT 3295) Both Dr. Urquiza and Dr. O'Donohue testified that a rape occurring in a place out of the ordinary is a "marker" or core detail that the victim is likely to remember. (8 RT 1932; 12 RT 3286) Sapna, however, not only failed to remember or report the Bangkok rape during her initial interviews with the police, she only claimed that a rape occurred in Bangkok once she realized how unrealistic it would sound to have shared a hotel room with Ajay and not been raped especially given her allegations of serial rape occurring in the Dev home two to three times a week. (7 RT 1511) That is, she only testified to this

fact in response to prompting from the defense on cross-examination wherein the defense attempted to expose the implausibility of her allegations. (7 RT 1511)

Sapna's testimony regarding the circumstances of her return trip from Nepal back to the United States was equally implausible. In contrast to Ajay and Peggy's efforts to reimmerse Sapna into Nepali culture for the summer, Sapna begged the Devs to return from Nepal early with Ajay. (15 RT 4127-4130; 15 CT 4309-4311) Given the choice, however, a rape victim would not voluntarily put herself in a position to be raped by her rapist. Dr. Urquiza and Dr. O'Donohue concurred that one who had experienced the trauma of serial rape would try to avoid putting herself in a situation where she is likely to be attacked again. (8 RT 1897; 12 RT 3233; 13 RT 3362) Nevertheless, Peggy testified Sapna decisively insisted that she return to the United States with Ajay with the understanding that, like before, she would have to share a hotel room with Ajay in Bangkok. (4 RT 857; 7 RT 1701, 15 RT 4128) In addition, Dr. O'Donohue testified that a rape victim would take the opportunity to live apart from her rapist in order to be free from such brutal sexual exploitation. (8 RT 1897; 12 RT 3233; 13 RT 3362) Yet, Sapna testified that she was looking forward to returning to the United States. (4 RT 857) Therefore, Sapna's decision to return home with Ajay to the United States highly suggests she did not fear being raped by him which, in turn suggests, he was not serially raping her at the Dev home.

5. The Implausibility of the Alleged Motel 6 Rape Equally Suggests The Rape Allegations Were False Because A Rape Victim Would Not Voluntarily Meet Their Rapist At A Hotel Room Especially After Moving Out To Escape Sexual Abuse.

The Bangkok incident was not the only time Sapna willingly chose to be in a hotel room with Ajay alone. On January 12, 2004, after Sapna

moved out of the Dev home because she could no longer bear the almost daily rapes allegedly perpetrated by Ajay, she voluntarily followed Ajay into a Motel 6 to talk with him about the schisms in the family and try to resolve them. (7 RT 1536-1537, 1553-1556, 1570; 14 CT 3847) Dr. O'Donohue testified that a serial rape victim would be hyper vigilant to avoid such a situation. (12 RT 3233, 3262) Like so many aspects of Sapna's story, this narrative makes no sense and is completely inconsistent with a rape victim's behavior.

Equally telling was the fact that Sapna failed to tell the police, in her initial interview(s), that she had been raped at Motel 6. (7 RT 1549, 1550, 1583; 10 CT 2737-2781; 14 CT 3847-3848) Rather, she told the police that she had been raped up until she moved out of the Dev home. (10 CT 2745; 14 CT 3847) Dr. O'Donohue and Dr. Urquiza both testified a rape occurring in a motel, separate and apart from alleged weekly rapes in a home, would be a core detail or "marker" and would likely be remembered by the victim. (8 RT 1932-1933; 12 RT 3286-3287) In addition, Dr. O'Donohue confirmed that an alleged rape occurring in such close proximity to the police interview would be remembered more readily. (12 RT 3280) In light of both Dr. O'Donohue's and Dr. Urquiza's testimony, it is hard to imagine a 20 year old rape victim simply forgetting about a rape that took place at a Motel approximately three weeks before she went to the police.

In fact, the evidence at trial suggests that her recounting of the alleged Motel 6 rape was more calculated. That is, Sapna did not claim to be raped at Motel 6 until after Ajay mentioned their meeting at Motel 6 on the pretext call. (15 CT 4177) In fact, Sapna changed her original story immediately after the pretext call and told Detective Hermann she was raped at Motel 6 after she moved out. (7 RT 1549-1550, 1696-1697; 8 RT 2079; 9 RT 2107-2108, 2205) Sapna must have realized how implausible it

would sound to be in a motel room with her alleged rapist and not be raped and, therefore, changed her story to better conform with her allegations – just as she did with the alleged Bangkok rape. (7 RT 1539, 1551, 1571-1572, 1578) These inconsistencies in Sapna's story suggest that she did not move out of the Dev home to avoid being raped by Ajay and, further, support the defense theory of the case which shows she moved out to assert her independence and need for sexual freedom in light of what she perceived to be over-restrictive parenting by the Devs. Again, it is hard to imagine a rape victim simply forgetting about a rape that took place at Motel 6 approximately three weeks before she went to the police. Both the inconsistency and implausibility in her testimony further supports the defense position that her allegations against Ajay were false.

6. The Cover-Up Surrounding the Alleged Rape On the Night Of Peggy's Surgery Suggests The Rape Allegations Were False.

From the outset Sapna could not keep her story straight. She claimed that she and her roommate, Megan, went to the police together to report the alleged rapes on January 29, 2004, the night of Peggy's surgery, but could not report the alleged crimes because the police station was closed. (5 RT 942-943; 6 RT 1382-1385; 7 RT 1717) However, Megan's testimony squarely contradicted Sapna's story as did testimony from Officer Briesenick.

As a starting point, Officer Briesenick testified that the police department does not close making Sapna's account of the events questionable. (8 RT 2082) Similarly, Megan testified that she and Sapna only went to the police station on <u>one occasion</u> and, on that occasion, Sapna was able to report the alleged offenses because an officer "buzzed" them in. (8 RT 1996-1997) This report was made on February 2, 2004 at approximately 10:00 p.m., not January 29, 2004, and it excluded any allegation of rape or attempted rape on January 29, 2004. (8 RT 2064)

Whether Sapna was prompted to report the alleged rapes after an allegedly terrifying attempted rape on the night of Peggy's surgery, as she claimed at trial, or whether she was prompted to report the alleged rapes, in revenge, after Will broke up with her on February 1, 2004, due to Ajay's meddling is extremely significant. A true rape victim would not get confused about these facts and would not forget to report the most recent and upsetting rape to the police, even if it was an attempted rape. In fact, Dr. O'Donohue testified that the closer the traumatic event is to the interview the better the victim's memory. (12 RT 3280) Here, the police report was made either hours after an alleged rape or, at most, four days after an alleged rape, yet Sapna neglected to report this most recent event to the police.

Dr. O'Donohue also testified that when investigating the veracity of sexual abuse allegations, he looks at whether the story is consistent, whether the details are fantastical and whether the alleged victim has an agenda with the perpetrator. (12 RT 3299) All of these factors, he testified, can be "red flags." (12 RT 3299) Therefore, Sapna's effort to conceal the timing of the police report highly suggests she was trying to fabricate a believable motive for going to the police (consistent with her allegations of rape) and cover-up the fact that she acted out of spite and revenge over escalating family tension that threatened her U.S. citizenship and her (sexual) freedom which culminated with Ajay's e-mail to Will.

7. Sapna's Overt Lies About Oral Copulation Suggest She Was Also Lying About the Rape Allegations.

On February 3 2004, Sapna adamantly explained to Detective Hermann that she never had oral sex with Ajay. (10 CT 2765) This conversation was video-taped and transcribed. According to the interview, Sapna clarified that if she had oral sex with Ajay she would have

remembered because it was such a disgusting act. Specifically, she explained as follows:

> Detective: -- real personal questions, okay? Um, at any point did he put his penis anywhere else inside of you, other than in your private spot?
>
> S. Dev: Um, --
>
> Detective: And when I'm referring to any other spot, that would include, um your anus, okay? It also includes your mouth. Um, --
>
> S. Dev: No.
>
> Detective: Okay.
>
> S. Dev: Because I just thought it was disgusting to do – put his thing in. I never – I mean, it's disgusting to put that thing in my mouth.
>
> Detective: Okay.
>
> S. Dev: I wouldn't do it.
>
> Detective: Okay. So that's no for both?
>
> S. Dev: Yeah.

(10 CT 2765)[20]

However, at the preliminary hearing and at trial, Sapna's story radically changed. She testified that Ajay made her orally copulate him several times often while watching pornography depicting oral sex. (4 RT 799; 2 CT 373-375) At trial, Sapna testified that Ajay made her put his penis in her mouth. (4 RT 803, 1158, 1160) She explained that Ajay would make her orally copulate him while he forced her to watch pornography. (4 RT 799) "He wanted me to do it the exact same way that

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[20] Sapna also never told Officer Briesenick that Ajay forced her to orally copulate him. (14 CT 3847-3848)

she was doing ....to put his thing in my mouth." (4 RT 799) At trial, Sapna estimated that she was forced to give Ajay oral sex about three times a month totaling approximately 30 to 50 times over the course of three years. (5 RT 1162-1163)

When asked to describe what happened, Sapna stated, "Yeah. I think he put my hands on his thing [penis], and he told me to move it, and he told me to put it in his mouth." (4 RT 801-802) She continued, "He forced me to put my mouth on his thing, in his penis." (4 RT 802) Sapna claimed that these repeated instances of oral sex were so traumatic she would "always remember that was done to me." (5 RT 1160) Sapna expressly testified, "All I remember is resisting him and feeling disgusted." (5 RT 1161; see also 4 RT 799-801) Sapna proclaimed she would never forget these episodes as long as she lived. (5 RT 1166)

These glaringly inconsistent statements do not simply show that Sapna's memory was unreliable; they strongly suggest that Sapna was blatantly lying about her accusations against Ajay. Reasonably, she explained that she could never forget such a traumatic event, but inexplicably she could not "remember" this traumatic event when pointedly asked about it by Detective Hermann. Dr. O'Donohue testified there are indicators to look at when verifying sex abuse claims such as whether the story is consistent and the overall truthfulness of the victim. (12 RT 3288, 3299) Sapna's claim that she was forced to orally copulate Ajay is wildly inconsistent and, like so many instances in this case, Sapna's underlying truthfulness was highly questionable further supporting the defense theory that her allegations were, in fact, false.

8. Sapua's Testimony That Ajay Forced Her To Watch A Pornographic Video Ou His Laptop Computer Entitled "18 & Confused" At 15 Years Of Age At The Concord House Was Not Believable.

Sapna testified that Ajay first showed her a pornographic video entitled "18 & Confused" in 1999 on his laptop while they lived at the Concord Street home. (4 RT 792-795, 819; 5 RT 1112, 1159; 6 RT 1322) She also testified that it was particularly traumatic because he forced her to perform oral sex on him while watching the video which she had never done before and found incredibly disgusting. (5 RT 1159; 10 CT 2765)

However, the evidence showed that "18 & Confused" was not produced until 2000. (10 CT 2810-2820) Therefore, it was impossible for Sapna's testimony to be true. In addition, according to Dr. O'Donohue and Dr. Urquiza, a rape victim would remember "core details" of a "marker" event, such as the first time an abuser forced her to watch pornography and perform oral sex, and would report the details of such events consistently. (8 RT 1929; 12 RT 3280, 3286-3288) However, concrete evidence established that Sapna's memory of the core details of this traumatic event were both incorrect and/or inconsistent.

The Devs moved from the Concord house to their J Street home in November 1999. (10 CT 2810-2820) Therefore, to be true, the alleged event would have had to have happened at the J Street house. However, Sapna testified it occurred at the Concord Street house. (4 RT 792-795, 819; 5 RT 1112, 1159; 6 RT 1322) Since it was unlikely that a rape victim, like Sapna, would fail to accurately remember a core detail of this "marker" event, this implausibility in her testimony suggests she may have been giving false testimony. Similarly, with respect to this event, Sapna's testimony was inconsistent because she testified that Ajay showed her "18 & Confused" at age 15 on a laptop, but the Devs did not purchase Ajay's laptop until November 2001 when Sapna was 17 years old. (4 RT 792-795,

819; 5 RT 1112, 1159; 6 RT 1322) In addition, the forensic evidence showed that 18 & Confused and the other porn videos did not appear on the Devs' computers before 2003 until after Sapna was an adult. (11 RT 2915) These basic inconsistencies in Sapna's story cast serious doubts on the veracity of her claims.

9. The Fact That The Pornography, Found On The Dev Computers, Was Only Viewed When Sapna Lived At The Dev Home Suggests Sapna and Perhaps A Boyfriend Viewed The Pornography Rather Than Ajay.

Sapna claimed that Ajay was showing her pornography from age 15 through age 19. However, the forensic evidence showed that the pornography had been downloaded onto the Dev computers and was viewed between April 2003 and November 2003. (11 RT 2926, 2932, 2983-2987; 15 RT 4102-4111; 17 RT 4728-4746; 10 CT 2864-2867, 2881-2882; 15 CT 4333-4334) This short window of time was commensurate with the time period Ajay and Peggy suspected Sapna was having sexual relations behind their backs which resulted in multiple unwanted pregnancies and/or pregnancy scares. Sapna started dating and becoming sexually active in late 2002. (4 RT 832; 14 RT 3757) In 2002, she was dating a young man five years older than her, in his mid-20s, and getting pregnant. (4 RT 826-827, 849; 5 RT 1138, 1149-1150; 7 RT 1678-1679; 9 RT 2212-2213, 2220, 2252, 2289, 2324-2325; 10 RT 2613-2615, 2623; 13 RT 3309-3311, 3319; 14 RT 3754-3759; 15 RT 4085, 4199-4201; 16 RT 4380; 9 CT 2350, 2358, 2382, 2383, 2393, 2404, 2423; 14 CT 3944) She worked at a video rental store in January 2003 that rented adult pornography in conjunction with regular movies. (6 RT 1435-1439; 9 RT 2170) By Fall of 2003, she was having sex with Araz Taifehesmatian, lying to Ajay and Peggy about it, and dealing with a pregnancy scare in November 2003. (4 RT 870; 9 RT 2220, 2252, 2324; 16 RT 4445; 9 CT 2551) Thereafter, in December 2003, Sapna moved out of the Dev home.

Once she moved out, no pornography was accessed or viewed at the Dev home. (11 RT 2882-2883)

The fact that the pornography was only viewed at the Dev home when Sapna lived there and was sexually active with other young men suggests that she, and perhaps a boyfriend, rather than Ajay was viewing the pornography.[21]

10. Sapna's Failure To Deny A Boy Impregnated Her, Rather Than Ajay, Suggests Her Allegations Were False.

Ajay tried to explain to Sapna, during the pretext call, that she would face unanticipated consequences if she falsely accused him of rape. Figuring that Sapna was pregnant in January 2003,[22] Ajay assumed that Sapna's medical records would be able to prove his innocence by identifying the boy who got her pregnant. As explained by Ajay on the pretext call: "You had abortion when you were 18 years old and they have the record. When they have the record, they will understand with which boy did you go with to give name." (15 CT 4180) Ajay explained that her false allegations would ruin both of their reputations and that, in the end, he would be exonerated due to proof in the medical file which would identify the boyfriend who actually impregnated her. As Ajay clearly indicated, "my name is not there on record" because he knew he did not impregnate her. However, he assumed, erroneously, that the medical records would contain the name of the boy who had actually impregnated her. Notably, during this exchange on the pretext call, Sapna did not deny that she had

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[21] After she moved out, forensic evidence showed that no porn had been viewed or accessed at the Dev home. (11 RT 2882-2883)

[22] At the beginning of the pretext call, Sapna told Ajay that she had three abortions. Ajay feared Sapna was framing him because in January 2003, after Sapna confided in Ajay that she might be pregnant, Ajay took her to the pregnancy center. At that time, he did not know whether a pregnancy had been confirmed by the clinic. (4 RT 826; 15 RT 4087-4088; 15 CT 4154, 4380; ACT (8/10/2010) 6)

been impregnated by another boy. Rather, she simply stated that the "the boy's name is not there [in the record]" in Nepali to prevent Detective Hermann from understanding her. (15 CT 4180) This tacit admission, that a boy impregnated her, further exposes Sapna's agenda.

11. [redacted] After she told Ajay about the first pregnancy scare, he and Peggy reacted by sending her back to Nepal for the summer to re-immerse her in Nepal's traditional culture. (16 RT 4211-4212; 15 CT 4312) When she went to the B Street Planned Parenthood on November 4, 2003, to resolve her third pregnancy scare, she told the clinic she last had intercourse a few weeks earlier [redacted] (10 RT 3309-3311, 3319, 3320[redacted]) [redacted]

However, rather than wait one to two weeks, Sapna went to a different Planned Parenthood, the Capitol Plaza Planned Parenthood, the next day, on November 5, 2003, [redacted]

[redacted] That is, she desperately feared exposure of her sexual activity because she knew this would greatly upset Ajay and Peggy by dishonoring the family reputation and likely result in their decision to return her to Nepal either temporarily or permanently.

[redacted]

As explained previously, false allegations of rape are a common defense to deflect against sexual activity where, in traditional cultures, a woman's sexual independence is morally and socially forbidden. (4 RT 761-762; 15 RT 4061-4062, 4067-4068) In sum, this evidence shows Sapna's willingness to lie at any cost to cover-up her sexual activity.

12. The Timing Of Sapna's Pregnancies Suggest She Was Trying to Cover-up Her Decision To Engage In Pre-Marital Sex, Against the Will of Her Papa and the Devs, By Falsely Accusing Ajay of Rape.

At trial, Sapna attempted to portray herself as an innocent virgin who never had sex with a boy while living with the Devs despite the Devs' strong suspicion to the contrary. (7 RT 1737; 11 RT 2981; 13 RT 3552-

3553; 14 RT 3755-3759, 3837; 15 RT 4200; 16 RT 4209, 4423-4424; 2 CT 382-383, 385; 9 CT 2549-2554; 10 CT 2770, 2772; 15 CT 4335-4337) Prior to trial, during her video-taped police interview with Detective Hermann in February 2004, Sapna explained that she had gotten pregnant three times while living at the Devs. She insisted that Ajay was the only person who could have impregnated her during this time period because she did not have sex with anyone else. (4 RT 831) However, Sapna's boyfriend, Araz, exposed her lies when he testified, at trial, that he and Sapna had sexual intercourse at his mother's house once a week while they dated. (4 RT 870; 9 RT 2220, 2252, 2288-2289, 2324-2325; 16 RT 4445; 9 CT 2551) Araz's testimony unequivocally showed that Sapna was trying to hide her sexual activity from the Devs, her Papa, and the police. This, in turn, demonstrated her ability to lie about the rape allegations and being impregnated by Ajay.

Sapna not only lied about her sexual relationship with Araz, she also lied about her sexual relationship with Will. She tried to claim that Will was the first person she had consensual sex with. (2 CT 385) However, Araz flatly debunked this lie at trial. (9 RT 2252, 2289) She also testified that she went to Planned Parenthood on November 5, 2003 to get tested for sexually transmitted diseases in anticipation of having sex with Will. (4 RT 849; 5 RT 1149; 7 RT 1679, 1745-1749; 9 CT 2393) However, as she admitted on the stand at trial during cross examination, she did not know Will in November 2003 and, therefore, lied about who she was contemplating having sex with at that time. (5 RT 1155-1157) When caught in her lie, she changed her testimony and stated she was actually contemplating having sex with Sid rather than Will. (7 RT 1679) Sapna's continual cover-up of her sexual relations with multiple partners reveals her shame over the situation, her fear that her sexual activity may become

public and, thus, shows her increasing motive to falsely accuse Ajay of rape consistent with the defense theory of the case.

Sapna's cover up also provides an explanation as to why she might lie about the allegations. Where women are punished for exercising sexual independence, especially in traditional cultures, often their only defense is rape. (4 RT 761-762; 15 RT 4061-4062, 4067-4068) Consequently, if Sapna feared that Ajay was going to expose her sexual exploits to her Papa she may have falsely accused him of rape as a preemptive measure – especially if she believed that Ajay and Peggy were intent on sending her back to Nepal where "tainted women" are socially ostracized and economically condemned. (4 RT 761-762; 15 RT 4061-4062, 4067-4068) This evidence strongly supported the defense theory that Sapna's allegations against Ajay for rape were patently false.

Moreover, as a general matter, Sapna told the police and repeatedly testified that Ajay raped her two to three times a week for five years from ages 15 to 20. (4 RT 768, 774-775, 813, 824; 7 RT 1619) This is approximately 500 to 750 rapes. Mysteriously, however, Sapna only got pregnant or had pregnancies scares three times within a one year period even though she claimed Ajay rarely wore a condom, she was not using birth control, and medical records show she got her period at age 14 or 15, before coming to this country, and, thus, was fertile. (4 RT 830; 9 CT 2391, 2411, 2425)

Even more suspicious is the fact that Sapna only got pregnant during the time period in which the Devs suspected she was having sexual relations with older males and condemning it. No explanation was given at trial as to why Sapna never got pregnant between ages 15 and 18 nor why she only got pregnant or had serious pregnancy scares three times, within a five month window, after the age of 18 despite the fact that she was equally at risk for pregnancy during the entire five year period. The fact that Sapna

only got pregnant during the periods she was dating Sid, Araz and/or Will, and never got pregnant during the three year period proceeding her sexual independence when Ajay was allegedly raping her two to three times a week, demonstrably supports the fact that Sapna's allegations were patently false.

In sum, given the overwhelming weaknesses in the prosecution's case, specifically the inconsistencies and implausibilities in Sapna's testimony, which were consistent with false accusation, along with the problems of the pornography evidence (see also Arguments V, VI and VII, *infa*), the trial court's failure to instruct the jury on CALCRIM No. 359 highly prejudiced appellant because it was reasonably probable that, due to this error, the jury solely relied on the pretext call in convicting appellant of the charged crimes. (*People v. Watson, supra,* 46 Cal.2d at p. 837.) No doubt the prosecution felt it was the most important piece of evidence in the trial as it relied on the pretext evidence almost exclusively in its closing arguments. For these same reasons, the instructional error rendered appellant's trial fundamentally unfair and could not have been harmless beyond a reasonable doubt justifying reversal on federal constitutional grounds. (*Chapman v. California, supra,* 386 U.S. at p. 24.) Therefore, since the failure to instruct the jury pursuant to CALCRIM No. 359 violated appellant's state and federal constitutional rights, this Court should reverse his convictions and grant him a new trial.

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II. THE TRIAL COURT ERRED BY ALLOWING THE VICTIM TO TRANSLATE THE PRETEXT CALL AS AN EXPERT WHICH RESULTED IN A VIOLATION OF APPELLANT'S DUE PROCESS RIGHTS AS THE VICTIM ATTRIBUTED ADMISSIONS TO APPELLANT IN DIRECT CONFLICT WITH THE DEFENSE EXPERT'S TRANSLATION.

A. Introduction

After Detective Hermann recorded the pretext call between Sapna and Ajay on February 4, 2004, the prosecution sent the tape to the United States Department of Justice, Federal Bureau of Investigations (hereinafter "FBI"), to translate the call as the conversation was held in both English and Nepali. (5 RT 947, 953-954; 4 CT 979-982) The FBI translation was completed on July 12, 2006. (4 CT 984) It is unclear exactly when the prosecution turned over the translation to the defense, but it was disclosed during discovery. (4 CT 979-982) On March 20, 2009, the defense filed a motion opposing the translation arguing that it was inaccurate, based on opinions and speculation, and was not a literal translation of the recorded call. (4 CT 979-982) To demonstrate the inaccuracies in the FBI translation, the defense attached an independent translation from Shakti Aryal an expert who translated for the Federal Courts and Department of State. (4 CT 979, 1058-1104).

At a pre-trial hearing held on April 20, 2009, the parties' attorneys advised the court they may be close to a stipulation regarding the discrepancies in the translations. (2 RT 115-117) However, at the start of trial, the parties attorney's advised the court that, while they had come to agreement with most of the translation, there remained one disputed phrase. In this regard, the defense and prosecution requested that the trial court appoint a court certified Nepalese interpreter. (4 RT 726-727) In response, the trial court advised counsel, "We may be able to get somebody in. I don't know." (4 RT 727) The following day, the trial court indicated it had

spoken with the interpreter coordinator who stated she was contacting Nepalese translators in the Bay Area, but one translator said "he is reluctant to be called into a courtroom in order to translate a document as opposed to interpreting testimony from one language back." (4 RT 834) The trial court concluded, "I don't know that it looks good to try to get one of the court interpreters to cover this for us. [¶] Now, whether either of you can find a professional interpreting service that would send somebody in that has the credentials, I don't know. It doesn't look like that's going to work for the way I was talking about." (4 RT 834) The defense objected and advised the trial court that "They're mistaken. It is not interpreting a document. It is actually listening to a voice just like they would in court." (4 RT 834) The prosecution agreed, "It is an audiotape." (4 RT 834) The trial court then found "At this point, I'm stumped, and I don't want to try to figure out how to get the evidence on since it is not my evidence. If either of you would like to talk to Chris Vanderford, who is our interpreter coordinator, that's fine." (4 RT 834)

Without concrete resolution of the translation issue, the trial continued. In an effort to lay a foundation to introduce the recorded pretext call and the prosecution translation of the call, Exhibits 10, 11 A, B, C and 11D, the prosecution elicited testimony from Sapna confirming that she made the pretext call on February 4, 2004 listened to the recording of the call; and verified that the recording was accurate. (5 RT 945-949) Sapna also testified that, before the preliminary hearing, she listened to the pretext call and followed along with an FBI translation. She was never explicitly asked if she believed the FBI translation was accurate. (5 RT 947, 960) She also listened to the pretext call again before trial. (5 RT 947-948) This time, she followed along with a translation prepared by defense expert Shakti Aryal 's translation. (5 RT 948-950) Sapna testified that, after reading Aryal's translation, she found that some of the translation was

inaccurate so she had to "make correction[s]."[23] (5 RT 948-950) Prosecution Exhibit 11D consisted of Sapna's translation of the pretext call. (5 RT 954-955; 9 CT 2458-2499)

Outside the presence of the jury, the trial court then asked both counsel whether "the transcript issue is straightened out enough to where we can go forward with this part of it?" (5 RT 950) In response, defense counsel objected to the use of the Aryal translation containing Sapna's "corrections" because it was inaccurate. (5 RT 950) The trial court overruled the objection finding:

> I've never had a completely accurate transcript ever on -- any time I've had a transcript used. I will admonish the jury appropriately as I always do . . . but I'm going to let [the prosecution] go ahead and use the transcript.

(5 RT 950)

Given the discrepancies in the prosecution and defense translations, the trial court held that the jury would get a copy of both translations during deliberations. (5 RT 950-951) However, when the pretext call was played for the jury during the trial, the jury was only given prosecution Exhibits 11C and 11D: the Aryal translation imbedded with Sapna's interpretations. Nevertheless, the trial court admonished the jury that the defense disagreed with one significant phrase appearing on page 23 of Exhibit 11D. (5 RT 952-958, 959-961; 9 CT 2453-2499) This disputed phrase concerned

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[23] In total, Sapna made changes to 17 sentences in the transcript originally translated by defense expert Shakti Aryal. Ten of those were translations from Nepali to English. (15 CT 4174, 4176, 4182, 4184-4186, 4189, 4192) At trial, testimony concerning the interpretation of the Nepali portion of the pretext call was focused on areas of disagreement only. Defense expert Aryal's testimony focused on four specific discrepancies in the translations and Sapna's testimony focused on three discrepancies. (5 RT 947-949, 960-964; 14 RT 3841, 3847-3848, 3858)

whether Ajay admitted having sex with Sapna when she was 18 or whether no such admission was made.[24] (5 RT 958)

At the close of trial, the trial court admitted the prosecution and defense translations into evidence. (7 RT 1761; 9 CT 2458-2499) The prosecution's translation, Exhibit 11D, consisted of Sapna's translation. The defense exhibit, Exhibit 799, consisted of Aryal's translation with handwritten "corrections" provided by Sapna. Missing from the evidence was a clean copy of Aryal's translation without Sapna's handwritten changes. (5 RT 954-955, 962-964; 14 RT 3847-3848; 9 CT 2458-2499; 15 CT 4154-4195) During deliberations, the jury requested a copy of the transcript of the pretext call. The court sent in prosecution Exhibit 11D and defense Exhibit 799. (12 CT 3261, 3264-3265)

B. Standard of Review

A trial court's refusal to appoint a certified interpreter pursuant to Evidence Code section 752 and its alternative decision to allow a biased un-certified interpreter testify, resulting in the admission of a transcript submitted to the jury during trial and deliberations (Exhibit 11D), is reviewed for abuse of discretion. (*People v. Augustin* (2003) 112 Cal.App.4th 444, 451; *Gardiana v. Small Claims Court* (1976) 59 Cal.App.3d 412, 418; *Hsu v. Mt. Zion Hospital* (1968) 259 Cal.App.2d 562, 582.)

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[24] During this colloquy with the court, defense counsel proffered that the defense translation was "kissed" rather than sex -- spoken in English rather than Nepali. (5 RT 958) However, defense counsel appeared to misunderstand Aryal's translation as Aryal specifically testified that, if spoken in Nepali (like the rest of the sentence), it was impossible to translate the word at issue as "sex" because the word at issue started with a "Ka" sound and no word for "sex" in Nepali started with a hard "K" or "Ca" sound. (14 RT 3861, 3864-3867). Furthermore, Aryal conceded that possibly the word could be "kissed" if spoken in English, but never independently translated the word as "kissed." (14 RT 3849-3851, 3861-3862, 3865-3867) Rather, Aryal testified that the word was inaudible. (14 RT 3849-3851, 3861-3862, 3865-3867)

C. The Trial Court Abused Its Discretion By Failing To Appoint A Certified Interpreter To Interpret The Portions of the Pretext Call Spoken in Nepali.

Evidence Code section 752 provides in relevant part:

> When a witness is incapable of understanding the English language or **is incapable of expressing himself or herself in English language so as to be understood directly by counsel, court, and jury,** an interpreter whom he or she can understand and who can understand him or her shall be sworn to interpret for him or her.

(*emphasis added.*)

Here, while Ajay did not require an interpreter to understand the trial or to communicate with his counsel, the court or the jury, his recorded statements made in Nepali and introduced against him by the prosecution were incapable of being understood by counsel, court, and jury without expert interpretation. For this reason, an interpreter was required. (*See generally, People v. Arceo* (1867) 32 Cal. 40, 42, 44 [acknowledging court proceedings must be conducted in English]; Cal. Rules of Court, rule 3.1110(g) [exhibits written in foreign language must be accompanied by an English translation, certified under oath by a qualified interpreter].) In fact, California law clearly provides that "where there is uncontradicted evidence that the witness does not speak or understand English, it would be an abuse of discretion to fail to appoint an interpreter." (*Gardiana v. Small Claims Court, supra,* 59 Cal.App.3d at pp. 418-419.) Similarly, it follows that where a recorded statement spoken in a language other than English is introduced at trial, the failure to appoint an interpreter is an abuse of discretion because, by its nature, that particular statement cannot be conveyed in English.

While the trial court attempted to appoint a certified interpreter, this attempt was inadequate and constituted an abuse of discretion for two reasons. First, the trial court erroneous advised the interpreter coordinator

that a Nepalese translator was needed to translate a written document rather than verbal communication. (4 RT 834) As a result, one interpreter suggested he was unqualified to perform this task. (4 RT 834) Second, there was more than one Nepalese translator to choose from and additional effort was required to secure an interpreter for the pretext call. (4 RT 834) Contrary to the trial court's assertion, it had a duty to appoint a certified interpreter for the pretext call making it an abuse of discretion to abdicate this role by concluding "I don't want to try to figure out how to get the evidence on since it is not my evidence." (4 RT 834) At a minimum, the trial court should have correctly conveyed to the interpreter coordinator that an audiotape required interpreting, not documents, and should have contacted the handful of Nepalese interpreters located in the Bay Area as opposed to relying on the response from one Nepalese interpreter who suggested he may not be qualified to interpret in these circumstances. Therefore, the trial court erred and abused its discretion since no meaningful effort was made to secure a certified Nepalese interpreter for the pretext call.

D. The Trial Court Abused Its Discretion By Permitting Sapna, A Highly Biased Interpreter, To Translate The Portions of the Pretext Call Spoken In Nepali.

As a related and independent error, the trial court permitted Sapna to interpret the portions of the pretext call spoken in Nepali by Ajay. In fact, just before the prosecution played the audiotape of the pretext call for the jury, it admonished the jury that, with respect to the conversation in Nepali, it would have to rely on the written transcript prepared by the prosecution which contained Sapna's interpretations. Specifically the trial court told the jury:

> As you're going through listening, since none of you told us during jury selection that you can speak Nepali, I'm going to assume that all of you are just going to not be able to

understand that part as you listen to it in Nepali, and you'll be relying on the transcribed translation.

(5 RT 955-956) The jury was then given Sapna's translation, Exhibit 11D, to read as the pretext call was played in court. (5 RT 959, 961) While Exhibit 11D was being handed out to the jury, the trial court advised the jury that Sapna qualified as an expert translator.

> She [Ms. Dev] speaks English and Nepali. She says that -- and can tell you what was on there, and apparently she reviewed it, and this is part of her testimony now that this is what she heard, and it's accurate under her understanding of the two languages as far as the translation goes, so that's the state of the evidence where we are now.

(5 RT 957; see also *Gardiana v. Small Claims Court, supra*, 59 Cal.App.3d at p. 420 ["interpreters are treated as expert witnesses and subject to the same rules of competency and examination as are experts generally].) The trial court also told the jury that Exhibit 11D would go into the jury room during deliberations. (5 RT 959, 961)

Even though the trial court can appoint an uncertified interpreter at its discretion when a certified interpreter cannot be located, it cannot appoint a biased interpreter. (Cal. Rules of Court, rules, 2.890(c) & (f), 2.893; see also *Correa v. Superior Court* (2002) 27 Cal.4th 444, 453, 458, 466 [finding neighbor's interpretation of Spanish speaking victim at crime scene was not hearsay because neighbor acted as unbiased language conduit].) According to the California Rules of Court, "An interpreter must be impartial and unbiased and must refrain from conduct that may give an appearance of bias."[25] (Cal. Rules of Court, rule 2.890(c).)

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[25] In addition to being biased, it was unclear whether Sapna had the language skills necessary to qualify as an expert to translate the pretext call. At trial, Sapna testified her first language was not Nepali, but Maithali, which she spoke at home with her parents. (4 RT 702-703) Sapna also testified that she did not read Nepali well. (5 RT 1015, 1017, 1071; 7 RT

In the case at bar, there can be no doubt that Sapna was a biased interpreter. Not only was she the victim in the case and, thus, alleged the charges against Ajay, she was actually asked to interpret the pretext call which was made with the specific intention of trying to solicit an admission from Ajay. Therefore, given these circumstances, it is hard to imagine a person who could have had a greater bias than Sapna in this situation. By making Sapna an uncertified interpreter and allowing her to translate the pretext call, the trial court essentially gave Sapna the opportunity to fabricate what Ajay said during the call and cloak this testimony and Exhibit 11D with the authority of an expert. This decision was a clear abuse of discretion.

E. <u>This Error Was Highly Prejudicial Requiring Reversal</u>.

While there were many areas of disagreement in the translations provided by defense expert Aryal and Sapna, the most significant disagreement concerned whether Ajay admitted having sex with Sapna when she was 18 years old. Defense expert Aryal was certain that, with respect to this particular sentence, Sapna's translation was patently incorrect. (14 RT 3851)

Therefore, where Sapna interpreted the disputed sentence as "**But you had sex with me when you were 18,**" Aryal testified that "**sex with**" was an impossible translation. (5 RT 962; 14 RT 3850-3851; 9 CT 2480) Aryal testified that he listened to the tape more than 60 times, for over 70 hours, and was certain Ajay did not say "**sex with.**" (14 RT 3850-3851, 3865-3866) He testified that the sound of the word or phrase in dispute "starts with 'K'." (14 RT 3850) That is, a hard "K" or "Ca" sound. Aryal confirmed that the word for "sex" in Nepali starts with a "Ch" or "Cha"

1728) And, in closing, the prosecution conceded Sapna had poor English skills and that she was unable to understand many nuances in English. (19 RT 5127)

sound making it impossible for Ajay to have said "sex" in either Nepali or English. (14 RT 3850, 3861-3864, 3866, 3867) Given the hard "K" sound, Aryal suggested that it was possible Ajay could have said the word "kissed" in English rather than Nepali: "I think it is kiss or unintelligible" later explaining "there is no sound except the starting sound "K." (14 RT 3849-3850, 3867) Aryal did not hear the word "kissed." He heard a word that clearly started with a hard "K" sound and speculated it could be "kissed" spoken in English. However, since the rest of the sentence was spoken in Nepali, not English, this translation would be strained at best. Aryal conceded it was very difficult to hear this portion of the audiotape because there was a gap in the tape. (14 RT 3850) Therefore, for all intents and purposes the word was unintelligible.

On cross examination, the prosecution asked Aryal if he had considered alternative words often used to convey "sex" in Nepali or Sanskrit such as "fucked" or "slept with." (14 RT 3861-3864) Aryal ruled these possibilities out by explaining even these words do not start with a hard "K" sound. (14 RT 3850, 3861, 3864-3867) Specifically, Aryal testified "fucked" in Nepali is "Chicknu" or "Chickna;" the polite word for "sexual intercourse" in Sanskrit is "Sambhog;" the Nepali word for "to sleep" is "Sutnu;" and the Nepali word for "have slept" is "Sutekochha." (14 RT 3850, 3861, 3864-3867)

Therefore, allowing Sapna to interpret the pretext call was highly prejudicial because she was permitted to give <u>expert</u> testimony regarding the existence of a guilty admission and, as verified by the defense expert, likely exploited the opportunity to fabricate an admission from Ajay where the tape was otherwise inaudible. The prejudice stemming from Sapna's impermissible expert testimony was further exacerbated by the admission of prosecution's Exhibit 11D and defense Exhibit 799 both of which contained Sapna's translations. Not only did the jury request these exhibits

during deliberations, it relied solely on Exhibit 11D while the pretext call was played during the trial. (5 RT 959, 961; 7 RT 1761; 9 CT 2458-2499; 12 CT 3261, 3264-3265) Therefore, the elevation of Sapna to an expert and the distribution of her translation of the pretext call in writing to the jury severely prejudiced Ajay. Reversal is required under state law where the record demonstrates there was a reasonable probability that, but for the error, the defendant would have obtained a more favorable verdict. (*People v. Watson* (1956) 46 Cal.2d 818, 836.) A "reasonable probability" under the *Watson* standard of prejudice only requires a showing of a "reasonable chance" something "more than an abstract possibility." (See *College Hospital, Inc. v. Superior Court* (1994) 8 Cal.4th 704, 714, citing *People v. Watson, supra,* 46 Cal.2d 818, 837, and *Strickland v. Washington* (1984) 466 U.S. 688, 693-694, 697, 698 [104 S.Ct. 2052, 80 L.Ed.2d 674].) State evidentiary errors can rise to federal constitutional errors where they are "grossly unfair" and offended the most "fundamental conceptions of justice," thus, violating a defendant's federal constitutional right to a fair trial and due process, as guaranteed by the Fifth and Fourteenth Amendment rights to the United States Constitution. (*United States v. Lavasco* (1977) 431 U.S. 783, 790, 97 S.Ct. 2044, 2048; *People v. Turner* (1984) 37 Cal.3d 302, 313.)

In this regard, reversal is required since the case against Ajay was extremely weak, as discussed *supra* in Argument I, and an admission from the defendant undeniably goes to the heart of the case. Therefore, there is a reasonable probability that, but for this error, the outcome in the trial would have been more favorable. (*People v. Watson, supra,* 46 Cal.2d at p. 836.) And, for the same reasons, the State cannot show the error did not contribute to the verdict beyond a reasonable doubt requiring reversal under federal constitutional grounds. (*Chapman v. California* (1967) 386 U.S. 18, 87 S.Ct. 824 [17 L.Ed.2d 705]; *Crane v. Kentucky* (1986) 476 U.S. 683,

691 [106 S.Ct. 2142].) Given this undeniably prejudicial impact under state and federal law, reversal of all of appellant's convictions is required.

III. APPELLANT'S CONVICTION MUST BE REVERSED BECAUSE CALCRIM NO. 358 MISSTATES THE LAW BY ADVISING THE JURY TO VIEW AMBIGUOUS STATEMENTS MADE BY THE DEFENDANT ON A RECORDED PRETEXT CALL WITHOUT CAUTION.

A. Introduction

The trial court erroneously instructed the jury with CALCRIM No. 358 which incorrectly provides that any and all recorded statements of the defendant, regardless of their ambiguity, be viewed without caution. This is an incorrect statement of the law. Only unambiguous or undisputed recorded statements should be viewed without caution. Here, the prosecution introduced a recording of a telephone conversation between Ajay and Sapna, the "pretext call," which, because much of the conversation was held in Nepali, was highly disputed at trial. Therefore, since the recorded statements were both highly ambiguous and disputed, they should have been viewed with caution contrary to the CALCRIM No. 358 instruction actually given to the jury. Since one of the disputed statements contained in the recorded pretext call concerned whether Ajay may have admitted having sex with Sapna after she was 18 years old, the failure to instruct the jury to view this disputed statement with caution highly prejudiced Ajay at trial. This prejudicial effect and the fact that the prosecution's case was extremely weak warrants reversal.

B. Standard of Review

An appellate court reviews the wording of a jury instruction and assesses whether the instruction accurately states the law under *de novo* review. (*People v. O'Dell* (2007) 153 Cal.App.4th 1569, 1574; citing *People v. Poses* (2004) 32 Cal.4th 193, 218.)

C. CALCRIM No. 358 Provides That Any And All Out-Of-Court Statements Made By The Defendant Do Not Have To Be Viewed By The Jury With Caution If They Are Recorded.

CALCRIM No. 358 codifies the circumstances in which a juror must view a defendant's statement with caution. It states in relevant part: "You must consider evidence of a defendant's oral statement unless it was written or otherwise recorded." (CALCRIM No. 358 (Fall ed. 2006).) Consistent with CALCRIM No. 358, the trial court instructed the jury as follows:

> You have heard the evidence that the defendant made oral or written statements before the trial. You must decide whether the defendant made any of these statements, in whole or in part. If you decide that the defendant made such statements, consider the statements, along with all the other evidence, in reaching your verdict. It is up to you to decide how much importance to give to the statements.
>
> Consider with caution any statements made by the defendant tending to show his guilt unless the statement was written or otherwise recorded.

(12 CT 3247)

This is an overbroad statement of the law. The exemption for writings and recordings is not a blanket exemption. Rather, as explained in *People v. Gardner* (1961) 195 Cal.App.2d 829, 832-833 writings and recordings are examples of statements which may not have to be viewed with caution if they are unequivocal or undisputed reproductions of a defendant's out of court statements. However, if a writing is smudged or a recording is inaudible, a witness' interpretation of a defendant's statement is equally problematic and, thus, deserving of caution. In such circumstances, the same risks of imprecision and/or fabrication are present. Therefore, writings and recordings can only justify the elimination of the cautionary requirement where they embody faithful reproductions of a defendant's out of court statement. If, however, there is a legitimate dispute as to what a defendant wrote or said in a writing or recording and a

witness is permitted to interpret these otherwise ambiguous statements, then the identical concerns for imprecision and/or fabrication exist justifying caution. Therefore, the cautionary language of CALCRIM No. 358 misstates the law by allowing jurors to abandon caution in any and all cases where a defendant's statement is written or recorded. The instruction should provide that caution need not be exercised where a defendant's written or recorded admission is an undisputed or unambiguous reproduction of a prior out of court statement.

Notably, most writings and recordings introduced at trial are unmistakable reproductions of a defendant's statement and, therefore, the legal inaccuracies contained in CALCRIM No. 358 have been largely inconsequential. This case, however, presents an issue of first impression since the jury was permitted to abandon caution in evaluating Ajay's recorded statements made during the pretext call despite the fact that the statements at issue were the subject of great dispute and the victim was permitted to translate Ajay's statements, made in Nepali, based on her recollection of their original conversation.

D. Jury Instructions Must Correctly State The Law.

Jurors are not experts in legal principles. Therefore, to function effectively and justly, they must be accurately instructed in the law. (*Carter v. Kentucky* (1981) 450 U.S. 288, 302. [101 S. Ct. 1112, 67 L. Ed. 2d 241.]) For this reason, trial courts are endowed with the *sua sponte* duty to instruct on all applicable principles of the law. (*People v. Flood* (1998) 18 Cal.4th 470, 492-504; *People v. Woodward* (2004) 116 Cal.App.4th 821, 834.) No particular form of instruction is required as long as the instructions are complete and correctly state the law. (*People v. Andrade* (2000) 85 Cal.App.4th 579, 585, citing *People v. Ponce* (1996) 44 Cal.App.4th 1380, 1386.) Although pattern jury instructions are prepared by distinguished legal scholars and provide valuable service to the courts,

they are not the law and are not binding statements of the law. (*People v. Mojica* (2006) 139 Cal.App.4th 1197, 1204, n.4.) Consequently, the lack of adequate instruction, even a pattern instruction, prevents a jury from performing its function in conformity with the applicable law. (*People v. Sanchez* (1950) 35 Cal.2d 522, 528; see also *McDowell v. Calderon* (9th Cir. 1997) 130 F.3d 833, 836.)

E. By Instructing The Jury Pursuant To CALCRIM No. 358, The Trial Court Erroneously Instructed The Jury To View Appellant's Highly Ambiguous Statements Recorded On A Pretext Call Without Caution.

In deciding whether an instruction is erroneous, an appellate court must first ascertain, as a threshold matter, what the relevant law provides. (*People v. Woodward, supra*, 116 Cal.App.4th at p. 834.) Then, the appellate court must determine whether the instruction, so understood, states the applicable law correctly which is determined by asking "how would a reasonable juror understand the instruction." (*Ibid.* citing *People v. Warren* (1988) 45 Cal.3d 471, 487.)

1. The Law Provides That A Defendant's Out of Court Statement Must Be Viewed With Caution Unless A Writing or Recording Reproduces The Defendant's Statements Without Ambiguity.

A trial court has a *sua sponte* duty to instruct the jury to view a defendant's oral admissions with caution if the evidence warrants it. (*People v. Wilson* (2008) 43 Cal.4th 1, 19.) This cautionary instruction is designed to aid the jury in determining whether an admission or confession was actually made. (*People v. Bemis* (1949) 33 Cal.2d 395, 400.) That is, whether the defendant, in fact, "spoke the words" attributed to him by another. (*Ibid.*) California courts have long recognized the inherent dangers of introducing out of court statements attributed to the defendant. (*People v. Ford* (1964) 60 Cal.2d 772, 800.) Specifically, courts have recognized that:

> It is a familiar rule that verbal admission should be received with caution and subjected to careful scrutiny, as no class of evidence is more subject to error or abuse. Witnesses having the best motives are generally unable to state the exact language of an admission, and are liable, by the omission or the changing of words, to convey a false impression of the language used. No other class of testimony affords such temptation or opportunities for unscrupulous witnesses to torture the facts or commit open perjury, as it is often impossible to contradict their testimony at all, or at least by any other witness than the party himself.

(*Ibid.* emphasis added.) Given this serious potential for imprecision and fabrication, the cautionary instruction is applied broadly. (*People v. Carpenter* (1997) 15 Cal.4th 312, 393 superseded by statute on other grounds in *Verdin v. Superior Court* (2008) 43 Cal.4th 1096, 1106.)

However, where "there could be no mistake as to what [the] defendant said," there is no need to have the jury view the evidence with caution. (*People v. Gardner, supra,* 195 Cal.App.2d at p. 832.) Consequently, in *People v. Gardner*, the Court of Appeal held that the cautionary instruction was not necessary where there was no dispute as to what the defendant said because the defendant's statement had been recorded. (*Id.* at pp. 832-833.) In reaching this decision, the Court of Appeal emphasized that the Legislature never intended the jury to view statements recorded by a mechanical device with caution where "no contention is made . . . that the sound recording did not truly record the conversation with defendant, or that a proper foundation was not laid for its admission." (*Id.* at p. 833.) Therefore, a more precise reading of the law is that recorded statements that clearly duplicate a defendant's out-of-court statements should not be viewed with caution. However, recorded statements that fail to clearly duplicate a defendant's out-of-court statements or are highly disputed at trial must be viewed with caution.

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2. A Reasonable Juror Would Have Misunderstood and Misapplied The Cautionary Language of CALCRIM No. 358 In Appellant's Case Rendering The Trial Court's Instruction Error.

While the clearly recorded English portions of the pretext call did not require the jury to use caution, the portions of the audiotape that were either inaudible and/or spoken in Nepali did require the jury to exercise caution before relying on these statements as evidence. In large part, the defense and prosecution agreed on the majority of the interpretation and/or translation of the recorded pretext call. However, there were numerous instances where the defense and prosecution disputed whether the recording was inaudible; disputed what English words were being spoken; disputed whether English or Nepali was being spoken; and disputed what was being said in Nepali. Specifically, there were 17 sentences disputed in the written translation of the recorded pretext call. (15 CT 4174, 4176, 4182, 4184-4186, 4189, 4192) At trial, defense expert Aryal and Sapna focused on three to four of these disputed sentences during their testimony. (5 RT 947-949, 960-964; 14 RT 3841, 3847-3848, 3858)

All of these disputed statements should have been viewed by the jury with caution and, due to CALCRIM No. 358, were not because they were recorded. In this context, these disputed recorded statements are no different than out of court oral admissions wherein the jury is asked to determine what a defendant has said.

As argued *supra*, the most significant disputed statement concerned whether Ajay actually admitted having sex with Sapna when she was 18 years old or whether this portion of the tape was inaudible. (See Argument I, *supra*.) Because this disputed statement was recorded, the trial court erroneously instructed the jury pursuant to CALCRIM No. 358 which permitted the jury to abandon caution where, in fact, it was required by law.

In sum, a reasonable juror would have misunderstood and misapplied the cautionary language of CALCRIM No. 358 because these disputed statements were recorded. The blanket language in CALCRIM No. 358 fails to distinguish between recorded statements which clearly reproduce a defendant's out of court statement, which should not be viewed with caution by a jury, and those which fail to do so. Where a recording fails to clearly reproduce a defendant's out of court statement, the same cautionary language that applies to oral admissions should apply to recorded statements. Therefore, since a reasonable juror would have understood CALCRIM No. 358 in a manner inconsistent with the law, the cautionary language of the instruction constituted error.

F. Instructing The Jury With CALCRIM No. 358, Constituted Federal Constitutional Error Because The Error Rendered The Trial Fundamentally Unfair Violating Appellant's Fifth and Fourteenth Amendment Rights to Federal Due Process.

A defendant's federal constitutional right is implicated where there is a reasonable likelihood that the jury has applied an ambiguous instruction in a way that violates the constitution. (*People v. Prettyman* (1996) 14 Cal.4th 248, 272; *Estelle v. McGuire* (1991) 502 U.S. 62, 72, 112 S.Ct. 475, 482, 116 L.Ed.2d 385.) A defendant is denied federally guaranteed due process, as protected by the Fifth and Fourteenth Amendments to the United States Constitution, when an error infects the trial with unfairness or renders the trial fundamentally unfair. (*People v. Prettyman, supra*, 14 Cal.4th at pp. 272-273 citing *Estelle v. McGuire, supra,* 502 U.S. at p. 72, 112 S.Ct. 475, 482, 116 L.Ed.2d 385; *Darden v. Wainright* (1986) 477 U.S. 181; *Donnelly v. DeChristoforo* (1974) 416 U.S. 637, 643.)

Here, as discussed *infra* in the prejudice section of this claim, the failure to properly instruct the jury to exercise caution when determining whether Ajay made the alleged out-of-court statements on the pretext call

infected the entire trial rendering it fundamentally unfair. In this regard, Sapna was permitted to attribute admissions to Ajay in an otherwise extremely weak prosecution case. Thus, Sapna's testimony and her translations contained in prosecution Exhibit 11D and defense Exhibit 799 about Ajay's alleged statements made during the pretext call ended up being the lynchpin of the prosecution's case which ultimately persuaded the jury to find Ajay guilty. For this reason, this instructional error rises to the level of federal constitutional error.

G. <u>The Issue Is Preserved For Appellate Review</u>.

"A trial court has a *sua sponte* duty to instruct the jury to view a defendant's oral admissions with caution if the evidence warrants it." (*People v. Wilson, supra,* 43 Cal.4th 1, 19.) Where an instruction incorrectly states the law, the issue cannot be forfeited on appeal due to trial counsel's failure to object or request a clarifying instruction. (Pen. Code § 1259; *People v. Tillotson* (2007) 157 Cal.App.4th 517, 538; *People v. Ford, supra,* 60 Cal.2d at p. 799 overruled on other grounds in *People v. Satchell* (1971) 6 Cal.3d 28, 98 Cal.Rptr. 33 ("when called for by the evidence [the cautionary instruction] must be given without a request"); *People v. Slaughter* (2002) 27 Cal.4th 1187, 1199 (finding that "although defendant did not object in the trial court to this instruction, the propriety of the instruction nonetheless is reviewable on appeal to the extent it affects his substantial rights" even where defendant never questioned applicability of instruction to recorded statements); *People v. Ervine* (2009) 47 Cal.4th 745, 781 (issue reviewed on appeal, absent defense objection, where trial court declined to give jury cautionary instruction relating to defendant's recorded statements made to officers even though the recording was never introduced at trial).

Moreover, where, as here, nothing in the record shows that trial counsel made a "conscious, deliberate or tactical" decision to instruct the

jury not to use caution, the instructional error cannot be deemed invited, necessitating review. (*People v. Collins* (1992) 10 Cal.App.4th 690, 694-695, 12 Cal.Rptr.2d 768 citing *People v. Cooper* (1991) 53 Cal.3d 771, 830-831 (there was no invited error or forfeiture of instructional error where defendant's trial counsel and district attorney responded "yes" to court's statement that instructions and jury verdict form had been reviewed by both counsel and were acceptable to both sides; no conscious, deliberate, or tactical reason was stated for concurring in instructions); *People v. Barraza* (1979) 23 Cal.3d 675, 683 citing *People v. Graham* (1969) 71 Cal.2d 203, 319 ("in absence of a clear tactical purpose, the courts and commentators eschew a finding of 'invited error' that excuses a trial judge from rendering full and correct instructions on material questions of law. Accordingly, if defense counsel suggests or accedes to the erroneous instruction because of neglect or mistake we do not find 'invited error,' only if counsel expresses a deliberate tactical purpose in suggesting, resisting or acceding to an instruction, do we deem it to nullify the trial court's obligation."). Here, there was no tactical reason expressed by counsel for failing to request an instruction requiring the jury to use caution in assessing the veracity of Sapna's testimony and translation concerning Ajay's alleged incriminating out-of-court statements, made in Nepali, on the recorded pretext call. In fact, the record shows that there could be no tactical reason to support this omission as trial counsel vigorously objected to Sapna testifying about Ajay's ambiguous out-of-court statements made in Nepali during the pretext call, in particular, her translation regarding an alleged admission of "sex." (5 RT 950-958) And, in addition, defense counsel argued against the veracity of her testimony during closing argument by asking the jury to consider the following:

> You have two sets of transcripts on this. You have the one authenticated by Sapna, and we know about her credibility, and we have the one authenticated by Professor Aryal who

> works for the State Department who came here to testify that he created and he disagreed with her on four points, but the rest of it was his. She just made changes.

(18 RT 5073) Therefore, any failure to request an instruction requiring the jury to use caution in evaluating Sapna's testimony and translation on this point could not have been tactical nor invited and, therefore, requires review. Similarly, given the impossibility of any tactical reason justifying counsel's failure to request the proper cautionary instruction, this Court should reach the issue and find counsel's omission violated Ajay's Sixth Amendment right to effective assistance of counsel. (*See People v. Anzalone* (2006) 141 Cal.App.4th 380, 395 (finding ineffective assistance of counsel on direct appeal where counsel failed to object to prosecution's misstatement of law); *People v. Anderson* (2001) 25 Cal.4th 543, 569 ("the record does not show the reason for counsel's challenged actions or omissions, the conviction must be affirmed unless there could be no satisfactory explanation"); *People v. Mendoza Tello* (1997) 15 Cal.4th 266, 266-267 (finding ineffective assistance to object at trial excuses waiver where there could be no conceivable tactical purpose for counsel's alleged incompetence).

H. The Erroneous Instruction Harmed Appellant Under A State And Federal Standard of Prejudice Requiring Reversal and A New Trial.

The trial court's failure to properly instruct the jury on the caution required to view the recorded statements in the pretext call which were ambiguous and/or disputed violated Ajay's state and federal constitutional rights. Therefore, reversal is required under state law if it can be shown that, absent the erroneous cautionary language contained in CALCRIM No. 358, there was a reasonable probability the jury would have reached a more favorable outcome. (*People v. Watson* (1956) 46 Cal.2d 818, 837; *People v. Lopez* (2005) 129 Cal.App.4th 1508, 1529) Similarly, reversal is

required where the instructional error reached federal constitutional proportions if it can be shown that the error was not harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24, 87, S.Ct 824, 828, 17 L.Ed.2d 705; see also *People v. Prettyman, supra*, 14 Cal.4th at p. 272.)

1. **Sapna's Testimony and Translation of Appellant's Recorded Out-of-Court Statements Made During The Pretext Call Conflicted With Other Trial Evidence Demonstrating Sufficient Prejudice for Reversal.**

California courts have consistently held that "courts examining prejudice in failing to give the [cautionary] instruction examine the record to see if there was any conflict in the evidence about the exact words used, their meaning, or whether the admissions were repeated accurately." (*People v. Wilson* (2009) 43 Cal.4th 1, citing *People v. Dickey* (2005) 35 Cal.4th 884, 905; *People v. Lopez* (2005) 129 Cal.App.4th 1508, 1529.) Here, as discussed *supra*, there were a number of out of court statements in the pretext call which were highly disputed at trial and, one in particular, which Sapna, a hostile witness with a motive to falsely accuse Ajay, interpreted as an admission of sexual conduct. (14 RT 3847-3855) The dispute over this statement alone is sufficient to warrant reversal as it could have been the decisive factor that pushed the jury to find Ajay guilty making the failure to properly instruct the jury on how to view this out of court statement exceptionally prejudicial.

In *Ford*, the California Supreme Court reversed a defendant's conviction because the defendant's alleged out of court statement "bore directly" on whether the defendant was guilty of the charged crime. The defendant in *Ford* was convicted of murdering a Deputy Sheriff during a confrontation related to a long and embittered marital dispute. (*People v. Ford, supra*, 60 Cal.2d at p. 780.) At trial, his estranged wife and an acquaintance he allegedly robbed days earlier testified that, before shooting

the Sheriff, the defendant made several statements supporting the prosecution's theory with respect to premeditation. (*Id.* at pp. 799-800.) Finding "these statements bore directly on the issue of defendant's capacity to deliberate and premeditate sufficiently to commit first degree murder," the High Court reversed the defendant's conviction emphasizing that the absence of the cautionary instruction was particularly prejudicial because "each statement was reported by hostile witnesses whose testimony showed a number of obvious conflicts and apparent inconsistencies." (*Ibid.*)

Like the witnesses in *Ford*, Sapna was a very hostile witness and a considerable amount of the evidence presented at trial conflicted with her allegations. Notably, even statements made by Sapna within the pretext call provide conflicting evidence undermining her testimony. For example, even after this alleged "**sex with**" admission was made on the pretext call, Sapna chastised Ajay, in the pretext call, because, according to her, he had refused to admit anything. Specifically, Sapna told Ajay, "I just wanted to ask you about things, but you aren't. Definitely you are not telling me anything about this. I am gonna go." (15 CT 4184) Given this latter statement, which was never disputed at trial, it seems highly unlikely that Ajay had, minutes prior, admitted having sex with Sapna during the pretext call and/or that Sapna ever believed that Ajay ever made such an admission. That is, it is incomprehensible that Sapna's translation attributing an admission of sex to Ajay could be true when, according to her own words spoken at the time of the relevant conversation, she claimed Ajay refused to admit "anything" with respect to her allegations.

In addition to Sapna's own inconsistent statements, the pretext call depicts Ajay repeatedly denying Sapna's allegations of rape in English and Nepali. (15 CT 4155-4159, 4162-4167, 4169, 4172, 4176, 4183, 4191, 4193-4195) This conflicting evidence is also sufficient to show prejudice and warrants reversal.

Finally, Shakti Aryal, the defense interpreter and/or translator of the pretext call, emphatically testified that Sapna's translation was incorrect and that it was impossible to translate Ajay's statement as "**sex with**" as suggested by Sapna. (14 RT 3850-3851, 3861-3862, 3866-3867) Therefore, since an alleged admission of guilt goes to the heart of the case, the error resulted in enormous prejudice warranting reversal.

2. Sapna's Translation of "Sex" Was Highly Prejudicial Because It Was Likely Relied On By The Jury To Decipher The Meaning Of Appellant's Use Of The Word "Fucked" Also Spoken In The Pretext Call.

At one point during the pretext call, Ajay was interrupted by his parents who could overhear his conversation with Sapna. (16 RT 4355-4357; 15 CT 4173) They told him to hang up the phone or speak in Nepali because they didn't trust Sapna and feared that she was trying to frame him. (14 RT 4355-4356) Thus, Ajay responded to Sapna in Nepali and tried to explain to Sapna how humiliating it would be to have to explain her false accusations to his parents and how her threats to go public with her accusations would ruin not just his life, but her life too. In this regard Ajay pleaded with Sapna:

> **Listen very carefully, babu. My mommy/daddy is also now suspecting that there is something. [¶] Listen, because they think something is going on between you and me. My mommy/daddy is suspecting whether there is a sexual relationship or not. [¶] Why, babu, why can't you understand the matter, tell me what would you get from this, tell me, just tell me that much. I have been telling you from the very beginning that my life will be gone but how about your life, your life will be gone, how can you save your life, just tell me.**

(15 CT 4174)

In response, Sapna asked, "How is my life re .. ruining daddy?" (15 CT 4174) For Sapna, the decision to live independently and engage in pre-marital sex did not threaten to "ruin" her life or her reputation because she

was ready to be an "American girl" and wholeheartedly reject Nepali values.[26] (9 CT 2550) For Ajay, however, Sapna's decision to embrace sexual freedom at the age of 18 was a disgrace to himself and his family which, if known by the Nepali community, could ruin both of their lives.[27] (13 RT 3545; 14 RT 3757-3758, 3875; 15 RT 4061; 15 CT 4336) Consequently, Ajay angrily explained in Nepali that her life could be ruined "**Because you have fucked me after 18 years of your age.**" (15 CT 4174) In other words, it appears Ajay is telling Sapna that her unapologetic

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[26] After Sapna moved out of the Dev home, she wrote an e-mail to her Papa on January 1, 2004, explaining and justifying her decision to move out, which went against Nepali culture and could be seen as shameful. In the e-mail she adamantly declared:

> I know the way I act is not like a tipical [sic] Nepali girl. I figured that I live in America not in Nepal where girls are mistreated and they are never heard. America allows it's [sic] people to have a "freedom of speech." I choose to live this livestyle [sic]. And therefore I like to express myself and speak my mind. I never really tought [sic] of myself as a tipical [sic] Nepali girl even when I was in Nepal. I tought [sic] of myself as a "Be! Ta." ["son" in English] [¶] Right now I am very happy where I am and don't want to go back where I was. . . . I know it will be hard for you to understand me and where I am coming fr! om [sic]. But I just wanted to share my side of the story so that you could try to understand me. I am very disappointed that we could not talk in Nepal. [¶] I don't want to loose [sic] the family that I have here. But if they don't want this relationship I really can't do anything about it except to try and work things out with them. I have made my decision and I expect to stick with it.

(9 CT 2549-2554; see also 14 RT 3885, 15 RT 4061-4062, 4067-4068)

[27] In an e-mail, dated October 1, 2002, Peggy wrote to Sapna's Papa expressing her concerns about Sapna's misbehavior as follows: "**Ajay and I expect Sapna to follow our rule of not dating or having sex before marriage as I know this will bring shame on her, us and your family as well. I don't have confidence in her to live by these requests at this time.** I pray that you may give her and me guidance as how to deal with this situation before it becomes too late." (15 CT 4336, bold in original)

decision to start dating and have sex at age 18 against Nepali values and traditions and against the wishes of the Devs and her Papa threatened to "ruin" both their reputations in the Nepali community, thus, fucking him over. This interpretation is further supported by Ajay's e-mail to Sapna sent one month earlier in which he told her, "[w]e helped you to get your green card [at age 18]. Now, you want to shit on our face by wrongly accusing us of being abusive and disrespecting us." (14 CT 3907-3910)

Implied as subtext to this part of the conversation was the understanding that Ajay knew Sapna had pre-marital sex, because when Sapna was 18, he took her to the pregnancy clinic. Therefore, given Sapna's accusations of rape, Ajay legitimately feared that Sapna would attempt to use his presence at the pregnancy clinic to frame him. In this regard, it appears Ajay was telling Sapna she was screwing him over because they both knew he took her to the clinic to help her seek a solution to her pregnancy with her "consent" when she was 18. (15 CT 4174, 4180) Therefore, when Sapna defiantly declared, "Ok, so?" in response to Ajay's point that her false allegations would ruin both of their lives not just his, After a long pause (approximately 4 seconds), Ajay indignantly retorted, "**That means you have given me consent.**" (15 CT 4174) Meaning, that her attempt to use the fact that he accompanied her to the pregnancy clinic as proof of rape would be defeated because his presence at the clinic connotes "consent" rather than rape. Although Sapna subsequently denied giving Ajay consent, Ajay continued to persuade Sapna that her false allegations would be disproved because it was likely that Sapna already told her friends about her pregnancies and abortions and, therefore, others would know that her boyfriend(s), rather than Ajay, had impregnated her. In this regard, he reminded Sapna that the responsible boy's name would be in her medical records. (15 CT 4174, 4180)

This interpretation was supported by Ajay's repeated denials of the rape allegations during the pretext call and Sapna's own statements made 30 seconds after Ajay made this ambiguous statement wherein she expressly explained she was angry with Ajay "Because I want you to talk to me. I want you to say it." (15 CT 4174) Clearly, if Sapna believed Ajay's use of the word "**fucked**" was an admission of sex, she would have never excoriated him for refusing to admit the allegations.

Not surprisingly, what Ajay meant when he used the word "**fucked**" during the pretext call was highly disputed at trial. (5 RT 950; 18 RT 5076-5078; 19 CT 5139) In isolation, it was very likely that the jury would have determined that Ajay used the word "**fucked**" to express profanity consistent with the defense theory of the case especially given Sapna's own admission that Ajay would not admit the allegations. However, in the context of Sapna's later translation in which she claimed Ajay said, "**but you had sex with me when you were 18,**" (contrary to the experts translation), it is likely that the jury may have relied on the later translation of "sex" to determine whether Ajay's prior use of the word "**fucked**" was an admission of guilt or whether he simply used it as an expression of profanity. (15 CT 4176) In fact, this is exactly what the prosecution argued to the jury: "What is going on here? The context of this part of the conversation is talking about you had sex with me, '**But you had sex with me when you were 18,**' it is a mirror image of what he said earlier, '**You fucked me when you were 18.**'" (18 RT 4987)

Therefore, the failure to use caution with respect to Ajay's alleged use of the word "**sex**" as translated by Sapna also impacted the jury's determination of Ajay's use of the word "**fucked**" during the pretext call. In this regard, the failure to give a cautionary instruction as it related to Sapna's testimony and translation of the word "**sex**" spilled over to other

highly significant aspects of the pretext call severely prejudicing Ajay and warranting reversal.

IV. APPELLANT'S CONVICTIONS SHOULD BE REVERSED BECAUSE THE TRIAL COURT'S EXCLUSION OF SAPNA'S 2005 NEPALI RECORD OF CONVICTION PREJUDICED THE ENTIRE TRIAL AND VIOLATED APPELLANT'S CONSTITIONAL RIGHT TO PRESENT A DEFENSE.

A. Introduction

In an effort to present a defense to the charges alleged against Ajay and explain why Sapna would falsely accuse him of rape, trial counsel attempted, on numerous occasions, to admit evidence of a 2005 conviction against Sapna from Nepal for using a false date of birth to obtain her 1998 passport. This Nepali conviction was critical to Ajay's defense not only because it showed Sapna's propensity to lie, but because it expressly showed that Sapna knew the Devs could reverse her adoption which, in turn, would result in Sapna's deportation to Nepal.

To qualify for adoption in the United States, Sapna's adoption had to be completed before she turned 16. (11 RT 2722; 13 RT 3430-3431, 3456; 15 RT 4167; 16 RT 4400; 14 CT 3920) Sapna's adoption was completed on December 6, 1999. (7 RT 1707; 15 RT 4174; 14 CT 3918) Under her false date of birth (January 5, 1984), as evidenced by the Nepali record of conviction, she was approximately 15 years and 11 months at the time she was legally adopted. Under her real date of birth (April 28, 1983), found true by the Nepali court, she was approximately 16 years and seven months at the time of her adoption. Therefore, the Nepali record of conviction shows that Sapna's adoption was premised on a fraud and could be reversed. If reversed, she would not qualify for derivative citizenship under United States immigration laws and would be deported back to Nepal. (13 RT 3440-3441)

A month before Sapna accused Ajay of rape, she learned that the Devs were planning on disinheriting her. What never came out at trial, however, was the fact that disinheritance signaled a legitimate fear in Sapna that the Devs could and likely would reverse her adoption, which was based on a fraud, and send her back to Nepal. This fear came to a head the day before Sapna went to the police after Sapna severed all ties with the Devs over a heated argument she had with Ajay about her break-up with her boyfriend. Sapna insisted she wanted to be an "American girl" with American freedoms. However, Ajay and Peggy insisted on instilling traditional values of purity onto Sapna in an effort to honor Nepali culture and the promise they made to Sapna's Papa back in Nepal. Therefore, when Sapna decided to sever all ties with the Devs, she also understood that the Devs would feel deeply betrayed and would have no interest in continuing to sponsor her road to citizenship as originally planned. Essentially, she understood that the Devs would blame her for failing to keep up her end of the bargain and, in turn, would not want to keep up their end of the bargain. As a consequence, when Sapna was finally driven to sever all ties with the Devs, she must have also believed that the Devs would respond by sending her back to Nepal. (9 RT 2257) In addition, Sapna was also aware that her adoption was based on a fraudulent date of birth and must have feared that, once discovered, the Devs could reverse the adoption, thus eliminating any meaningful opportunity for her to become an American citizen. All Sapna wanted was to be an "American girl" and she now blamed the Devs for taking it away from her. This, in turn, gave her an overwhelming motive to falsely accuse Ajay. However, without the Nepali record of conviction, which was the linchpin to showing the Devs had the power to terminate Sapna's American citizenship, the defense could not expose Sapna's fears or her motive to retaliate against

Ajay. Stripped of this ability, Ajay was denied his Fifth, Sixth, and Fourteenth Amendment constitutional right to present a defense.

B. Standard of Review

The trial court's exclusion of the Nepali documents and the decision whether to take judicial notice of said documents is reviewed by an abuse of discretion standard. (*DePalma v. Westland Software House* (1990) 225 Cal.App.3d 1534, 1538.) Constitutional questions are reviewed *de novo*. (*People v. Cromer* (2000) 24 Cal.4th 889, 896.) Independent review is necessary to clarify and unify guiding constitutional principles. (*Miller v. Fenton* (1985) 474 U.S. 104, 114 [106 S.Ct. 445, 88 L.Ed.2d 405].)

C. The Nepali Court Documents[28]

The Nepali record of conviction and other related court documents were attached to two motions filed by the defense (5 CT 1162-1218, 1219-1374) and were separately marked for purposes of identification as Defense Exhibits 500 through 514.[29] (7 CT 1838-1987) For convenience purposes,

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[28] While the government in Nepal prosecuted Sapna and her Papa for passport fraud, counsel has only summarized the Nepali documents as they pertain to Sapna. Moreover, Sapna's Papa, Birendra Deo, was acquitted at the Nepali trial. (7 CT 1886)

[29] Exhibit 500 corresponds to Exhibit A attached to the Judicial Notice Motion and Exhibit A attached to the Motion for Foundational Facts; Exhibit 501 corresponds to Exhibit B attached to the Motion for Foundational Facts; Exhibit 502 corresponds to Exhibit B attached to the Motion for Judicial Notice and Exhibit C attached to the Motion for Foundational Facts; Exhibit 503 corresponds to Exhibit D attached to the Motion for Foundational Facts; Exhibit 504 corresponds to Exhibit E attached to the Motion for Foundational Facts; Exhibit 505 corresponds to Exhibit F attached to the Motion for Foundational Facts; Exhibit 506 corresponds to Exhibit G attached to the Motion for Foundational Facts; Exhibit 507 corresponds to Exhibit H attached to the Motion for Foundational Facts; Exhibit 508 corresponds to Exhibit I attached to the Motion for Foundational Facts; Exhibit 509 corresponds to Exhibit J attached to the Motion for Foundational Facts; Exhibit 510 corresponds to Exhibit K attached to the Motion for Foundational Facts; Exhibit 511 corresponds to Exhibit L attached to the Motion for Foundational Facts;

the Nepali documents in the appeal will be referred to by Exhibit numbers 500 through 514. The Nepali court documents consist of the following documents:

***Exhibit 500* (7 CT 1838-1858):** The appellate opinion issued on August 12, 2007 from the Nepal (Rajbiraj) Appellate Court affirms Sapna's conviction for obtaining a passport with a false date of birth and denies the prosecution's appeal.[30] The opinion further summarizes Sapna's understanding as to why Murali Deo would initiate criminal charges against her as follows: "Because of the fact that the said Ajay Kumar Dev did not adopt any family member of the informer but adopted her, the informer became angry. Because of such anger, the informer made a false information report stating that her date of birth is 2040.1.15 B.S. (1983.4.28 A.D.)" (7 CT 1842) Sapna did not appeal the judgment. (7 CT 1849-1852)

***Exhibit 501* (7 CT 1859-1874):** The appeal filed by the prosecution on October 26, 2005 wherein the prosecution argued Sapna should have received a greater fine; increased punishment/incarceration; and should have had her passport confiscated. The prosecution also argued that Sapna's Papa, Birendra Deo, should have been convicted.

***Exhibit 502* (7 CT 1875-1900):** The verdict issued on June 26, 2005 from the Nepali bench trial where Sapna was accused and convicted under Section 5 of the Passport Act for obtaining a passport on December 15, 1998 from the District Administration Office Saptari by preparing a false description wherein she wrote her date of birth as January 5, 1984, though she knew that her real date of birth was April 28, 1983. (7 CT 1878) The

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Exhibit 512 corresponds to Exhibit M attached to the Motion for Foundational Facts; Exhibit 513 corresponds to Exhibit N attached to the Motion for Foundational Facts; Exhibit 514 corresponds to Exhibit O attached to the Motion for Foundational Facts. (CT 95-96)

[30] In Nepal, the prosecution has the right to appeal in a criminal case. (5 CT 1166)

verdict includes a summary of the evidence; reasoning in support of the verdict against Sapna; and the sentence imposed against Sapna. (7 CT 1877-1902) The trial court relied on testimony from Sapna wherein she explained that she obtained the passport at issue so that "Ajay Kumar Dev and Margaret Mary Dev, uncle and unti from the distance relative, desired to take me to America as an adopted daughter with the consent of my parents and as I was minor at that time, I have obtained the passport ..." (7 CT 1879) The trial court also noted that Murali Deo initiated the criminal case against her out of jealousy because the Devs did not bring their children to America: "As the said Ajay Kumar did not adopted any member of the family of the Informer and adopted me, the Informer has given false information as to deprive me from going to America due to jealous." (7 CT 1879) In conclusion, the trial court specifically found that Sapna's real date of birth was April 28, 1983 and that she knowingly put a false date of birth on her 1998 passport used to travel to the United States. In so finding, the trial court concluded: "It has been found that the respondent Sapna Dev has accepted the said date of birth [April 28, 1983] til now. Even no claim has been made saying that there is ordinary mistake. On the mentioned basis there appears no condition to consider that the date of birth written in the passport was true." (7 CT 1886) Finding Sapna guilty of the charges, the trial court sentenced Sapna Dev to time served, 19 days, and 100 rupees. (7 CT 1887)

Exhibit 503 (7 CT 1903-1915): The examination and statement of Sapna Dev on July 20, 2004 which the trial court relied on to find Sapna Dev guilty of using a false date of birth on her passport application in violation of Section 5 of the Passport Act.[31] In her statement, Sapna denied

[31] As explained in Mr. Rudra Prasad Sharma's expert declaration, the trial court in Nepal takes a statement from the accused and from the witnesses or delegates this task to a "bench assistant." (6 CT 1553) In this regard, the court or the bench assistant asks the accused or witnesses

the allegations; testified her date of birth was January 5, 1984; testified she was born in Janakpur (not Boriya); denied the accuracy of a school record (Exhibit 512) from the central government, Sanothimi Bhaktapur, which showed her date of birth as April 28, 1983; denied that school records obtained directly from her school (Exhibits 510 and 511) had been altered to show a false date of birth of either April 27, 1984 or January 5, 1984; and claimed the accuser/informant, Murali Deo, was "not even a member of [her] family" and suggested "he has given false report with an intention to trap me." (7 CT 1903) Sapna affirmed her earlier statement given on July 8, 2004. (7 CT 1904) She also explained to the court that her grandmother and great uncle, both of whom provided statements to the trial court indicating Sapna Dev was born on April 28, 1983, gave false evidence and suggested that "the opponent might have pressed them in delusion to write that false statement." (7 CT 1904)

Exhibit 504 **(7 CT 1916-1933)**: The statement of Jitendra Narayan Dev, Sapna Dev's great uncle, which the trial court relied on to find Sapna Dev guilty of using a false date of birth on her passport application in violation of Section 5 of the Passport Act. Jitendra Narayan Dev is the brother of Sapna's biological father, Birendra Deo. (7 CT 1918) In his statement, Jitendra Narayan Dev attested he was certain Sapna Dev, his niece, was born on April 28, 1983 at her family home in Boriya Village, Saptari District. (7 CT 1919) Jitendra Narayan Dev stated that Sapna falsified her date of birth "to be adopted daughter, she was in need of her age to be less than she was, so she mentioned her age-less than as she was at that time." (7 CT 1920)

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questions and records the questions and answers in writing which is respectively signed by the accused or witness. (6 CT 1553) At a trial in open court, the accused or witness may be called to testify, be cross examined, and may be asked about this statement. (6 CT 1553)

Exhibit 505 (7 CT 1934-1946): The statement of Birendra Narayan Deo, Sapna Dev's father, which the trial court relied on to find Sapna Dev guilty of using a false date of birth on her passport application in violation of Section 5 of the Passport Act. In Birenda Narayan Deo's statement, he declared that his daughter, Sapna Dev, was born on January 5, 1984 in Janakpur (7 CT 1936-1937); that his family had been living in Janakpur since 1982 where his two youngest daughters were born – Sapna and Niku; and that Sapna obtained a passport in 1998 "to go to America" explaining "At that time her age was not sufficient to get a citizenship certificate. So, based on the evidence of her date of birth issued from the school and the recommendation letter about the verification of relationship of the Office of the Boria Village Development Committee, she got the passport from the District Administration Office, Saptari on [December 15, 1998]." (7 CT 1937)

Exhibit 506/507 (7 CT 1947-1953): Sapna's passport application signed on September 12, 2005 wherein she falsely indicated that she had never previously obtained a passport (7 CT 1950) and identified her date of birth as April 28, 1983 and her place of birth as Saptari/Boriya. (7 CT 1949) According to the Appellate Government Attorney Office (Exhibit 512), the fraud on this passport application provided grounds for further prosecution, but the agency could not prosecute the case because it was out of their jurisdiction. (7 CT 1985-1986)

Exhibit 508 (7 CT 1954-1957): Nepalese Citizenship Certificate issued on August 31, 2005 and used by Sapna to obtain her 2005 passport. The citizenship certificate identifies Sapna Dev's date of birth as April 28, 1983 and her birth place as Ward 4 of Boriya in the municipality of Saptari.

Exhibits 509 (7 CT 1958-1961): A letter from the Monastic Higher Secondary English Boarding School written in response to requests from the District Police Office of Dhanusha for school records relevant to prove

Sapna's date of birth. The letter indicates that it provided the police/prosecution two certified school records: (1) Sapna's registration form (Exhibit 510); and (2) Sapna's school admission form (Exhibit 511).

Exhibit 510 **(7 CT 1962-1966)**: Sapna's school registration form, No. 5620050010, provided to the police/prosecution directly from the Monastic Higher Secondary English Boarding School. (7 CT 1842, 1960, 1964,) The school registration form identified Sapna's date of birth as "2041/01/15" (7 CT 1964-1965) which translates into April 27, 1984 (7 CT 1881). However, the last digit of the year "2041" had white-out or tipex underneath it indicating a possible alteration of Sapna's date of birth. (6 CT 1545; 7 CT 1844, 1851, 1881-1882; 10 CT 2655) Ultimately, based on the other evidence introduced at the Nepali bench trial (especially Exhibit 512), the Nepali trial court found the date of birth placed on this school registration form to be altered and, thus, false. (7 CT 1841, 1851, 1881, 1885)

Exhibit 511 **(7 CT 1967–1972)**: Sapna's school admission form provided to the police/prosecution directly from the Monastic Higher Secondary English Boarding School identifying Sapna's date of birth as January 5, 1984 and her birth place as Boriya, Saptari. (7 CT 1960, 1842) Sapna's father, Birendra Deo, testified that Sapna relied on this school admission form to obtain her 1998 passport before going to America with the intention of getting adopted. (7 CT 1937)

Exhibit 512 **(7 CT 1973-1976)**: Sapna's date of birth provided by the Central Government (Sanothimi, Bhaktapur), Ministry of Education and Sports, based on their duplicate copy of Sapna's school registration form, No. 5620050010 (Exhibit 510) wherein it states Sapna's date of birth as April 28, 1983 (2040/01/15) as opposed to April 27, 1984 (2041/01/15). (7 CT 1844, 1851, 1879-1880)

Exhibit 513 (7 CT 1977-1982): Record obtained from District Election Office in Saptari identifying "Sapna Kumari Dev" as having a date of birth of December 23, 1980. Based on Sapna's testimony that her name was not "Sapna Kumari Dev," the Nepal trial court did not rely on this evidence as evidence of Sapna falsifying her date of birth.

Exhibit 514 (7 CT 1983-1987): Letter dated December 2, 2005 from the Appellate Government Attorney in Rajbiraj, Saptari, responding to Murali Deo's second accusation that Sapna fraudulently obtained a passport in 2005 after the verdict was rendered in the Nepal proceedings. The letter indicates that Sapna lied on her 2005 passport application by falsely indicating that she did not have a prior passport. (See also Exhibits 506/507). However, although "her new passport was found illegal at the very first glance," the Appellate Government Attorney advised Murali their office could not prosecute because "the said subject does not fall under the jurisdiction of this Office, now" and must be handled by the office in Dhanusha District. (7 CT 1985-1986)

D. The Trial Court Rejected Every Effort The Defense Made To Admit Sapna's Nepal Record of Conviction.

On March 20, 2009, before trial, the defense filed two motions to have the Nepali documents admitted as evidence. In the first motion, the defense asked the trial court to take judicial notice of two documents: (1) the June 26, 2005 Nepal bench verdict against Sapna Dev for obtaining a passport with a false date of birth (Exhibit 502); and (2) the Nepal appellate decision affirming the conviction and finding she had committed perjury; denying the prosecution's appeal to impose increased incarceration and a greater fine; and finding it unnecessary to confiscate Sapna's fraudulent passport, as requested by the prosecution, because the proper authorities had already been notified. (Exhibit 500). (5 CT 1162-1218) The second motion, a Motion for Determination of Foundational Facts, requested the

trial court admit all of the Nepali documents (Exhibits 500-514) as evidence for the jury's consideration. (5 CT 1219-1374)

Each Nepal court document submitted by the defense contained the following certification/attestation:

(1) A seal from the "Law ~~Shree~~ Books Management Board" signed by either the Technical Officer (Exhibits 500, 503, 504, 505, 506, 513), the Chief of Protocol (Exhibits 501 and 502), the Section Officer (Exhibits 508, 509, 510, 511, 514, or the Account Officer (Exhibit 512); and an attestation signed and dated by the Chief of Protocol for the Shree Law Books Management Board stating, "Attested the seal of Law Books Management Board and signature of its Production/Section Officer."

(2) With respect to Exhibit 500, a certification from Bishnu Prasad Gautam, Consular Officer of the Ministry of Foreign Affairs, Government of Nepal, stating, "I ... certify that the following Nepali Document has been translated by the authorized body and also certify the seal and signature to be true and the official position of the Section/Production/Account/Administration Officer there of."

With respect to Exhibits 501, 502, 503, 504, 505, 506, 507, 508, 509 and 514, a certification from Jiban P. Shrestha, Deputy Chief of Protocol, Ministry of Foreign Affairs, Government of Nepal stating, "I ... certify that the authorized translation of following Original Nepali Document to be true and the official position, seal and signature of the Section/Production/Account/Administration Officer there of."

With respect to Exhibit 510, 511, 512 and 513, a certification from Tirtha Arayal, Consular Officer, Ministry of Foreign Affairs, Government of Nepal, stating, "I ... certify that the following Nepali Document has been translated by the authority body and also certify the seal and

signature to be true and the official position of the Section/ Production/Accountant/Administration Officer there of."

(3) With respect to Exhibit 500, a certification from Harishchandra Ghimire, the First Secretary of the Embassy of Nepal, Washington D.C. stating "I ... certify that the Seal of the Ministry of Foreign Affairs, Government of Nepal and Signature of Mr. Bishnu Prasad Gautam, Consular Officer of the attached document with the following particulars to be true."

With respect to Exhibits 501, 502, 503, 504, 505, 506, 507, 508, 509 and 514, a certification from Harishchandra Ghimire, the First Secretary of the Embassy of Nepal, Washington D.C. stating "I ... certify that the Seal of the Ministry of Foreign Affairs, Government of Nepal and Signature of Mr. Jiban P. Shreshtha, Deputy Chief of Protocol of the attached document with the following particulars to be true."

With respect to Exhibits 510, 511, 512 and 513, a certification from Harishchandra Ghimire, the First Secretary of the Embassy of Nepal, Washington D.C. stating "I ... certify that the Seal of the Ministry of Foreign Affairs, Government of Nepal and Signature of Mr. Tirtha Arayal, Consular Officer of the attached document with the following particulars to be true."

On April 3, 2009, the defense filed supplemental points and authorities to the Motion for Judicial Notice and further moved the court to recognize Sapna's 2005 conviction from Nepal under the doctrine of *res judicata*. (6 CT 1532-1548) In support of this supplemental motion, the defense attached a declaration from Rudra Prasad Sharma Phual, an expert in Nepali jurisprudence. Mr. Sharma practiced law in Nepal and received an LL.M degree in commercial law at Tribhuvan University in Kathmandu,

Nepal, in 2007, and an LL.M degree in transactional business practices from McGeorge School of Law, in 2008. Mr. Sharma started practicing law in Nepal in 2003 and had appeared at all levels of the Nepal court system, including the Supreme Court. Among many professional accomplishments, Mr. Sharma was on a mediation panel facilitated by the Supreme Court in Nepal and has served as a consultant to the Supreme Court of Nepal with regard to the Mid-Term Review of Strategic Planning. (6 CT 1549, 1560-1562)

In his declaration, Mr. Sharma explained that "independence of the judiciary in Nepal is guaranteed by a modern constitution which is itself based upon centuries of traditional judicial practice" and that "there are three tiers of courts in Nepal" which operate, "free from political interference," much like the American judicial system. (6 CT 1551) Mr. Sharma also explained the meaning of the seal or stamp of the "Shree Law Books Management Board" which appears on all of the Nepali documents marked for identification as Exhibits 500-514. (6 CT 1552) According to Mr. Sharma, the Shree Law Books Management Board is "an affiliate of the Ministry of Law, Justice and Parliamentary Affairs in Nepal" and "is the official translator of all official documents from Nepali to English." (6 CT 1552)

The prosecution never filed a formal motion opposing the admission of the Nepali documents. (2 RT 87) Nevertheless, at the pre-trial hearing held on April 20, 2009, the prosecution verbally objected to the admission of the Nepali documents by arguing the defense failed to properly authenticate the documents pursuant to Evidence Code section 1530, subdivision (a), subsection (3), thereby making them inadmissible for purposes of judicial notice (Evid. Code § 452.5, subd. (b)) and foundational facts (Evid. Code § 403). (2 RT 91-92, 98-107)

The prosecution argued that the defense failed to properly authenticate the Nepali documents because there was no attestation from the Shree Law Books Management Board stating that the documents were a "true and correct" copy of the original Nepali court documents. (2 RT 102-103) The prosecution also argued that the final statement from the Nepal Embassy in Washington D.C. was insufficient because "Harishchandra Ghimire, he doesn't clearly state what his position is." (2 RT 91,101) When the trial court clarified that the final statement clearly identified Mr. Ghimire's position as "First Secretary of the Embassy of Nepal," the prosecution questioned whether a "First Secretary" meets the statutory definition of "consular official" arguing that Evidence Code section 1530, subdivision (a), subsection (3), required a narrow interpretation. The prosecution also argued that Mr. Ghimire failed to certify the official position of the Bishnu Gautam with respect to Exhibit 500. (2 RT 101)

Finally, the prosecution argued that, even if properly authenticated, the trial court should not take judicial notice of the underlying facts of the Nepali documents, in particular Sapna Dev's correct date of birth, because doing so would exceed the scope of the statute. (2 RT 104-105)

Despite the defense's rebuttal argument, pointing out the express "attestation" from the Shree Law Books Management Board (2 RT 108), the trial court denied the motions finding the defense failed to properly authenticate the documents because no declaration, stamp or seal rendered the word "correct" copy as part of its certification. (2 RT 112) As ruled by the trial court:

> Here we need somebody who is going to say these records, the copy I'm attesting right now, is a correct copy of the writing. Nobody said that. There's lots of stamps on it, there's lots of people's signature[s], but nobody said these are correct copies of the writings. [¶] We have a faulty declaration, and it does not meet Section 1530. So the 403 portion of the motion for

> determination of foundational fact, the Court cannot find that foundational fact has been met. The motion is denied.

(2 RT 112-113)

The trial court also denied the defense's motion for judicial notice finding it inappropriate to allow the defense to use the fact that Sapna lied about her date of birth to support its case-in-chief as opposed to simply impeaching her with a crime of moral turpitude. (2 RT 113) Specifically, the trial court ruled:

> The Court would not allow these in under judicial notice provisions because it is the truth of the matter asserted within the documents that the defense is trying to use. And so even if they met 1530, the idea that she's younger – or older than she says she is or once lied on her documentation about her age, those are inseparable from merely having a conviction for lying or having, essentially, what we would probably call a false document conviction of some sort. There's no way to take judicial notice of that under 452 or 452.5.

(2 RT 113) Given this ruling, the trial court found the issue of *res judicata* moot. (2 RT 114)

During the afternoon session of April 20, 2009, the defense asked the trial court to reconsider its earlier ruling because unlike Exhibit 500, which the prosecution and trial court relied on in determining the attestation was insufficient, Exhibits 501, 502, 503, 504, 505, 506, 507, 508, 509 and 514 (certified by Jiban P. Shrestha) have a slightly different declaration certifying the authenticity of the documents which more precisely indicates that the translation of the "original" document is "true." (2 RT 135-136) In an effort to clarify the defense's position, the trial court asked the defense, "[I]s it your position that the phrase 'the translation is true' is equal to 'the following is a correct copy of a document'?" (2 RT 137) After the defense

answered in the affirmative, the trial court held, "The Court does not find those phrases to be equal in substance, and the earlier ruling is confirmed." (2 RT 137)

On April 27, 2009, the defense filed a formal motion for reconsideration based on a supplemental declaration from Mr. Sharma which more thoroughly explained that "the red seal from 'Shree Law Books Management Board' constitutes a warranty that the documents in the Nepali language are in fact an official record of the Nepali court and that the English translation is both conducted by the official branch of the Ministry of Law, Justice and Parliamentary affairs in Nepal and is accurate." (8 CT 2328; 9 CT 2338) Specifically, Mr. Sharma's supplemental declaration, signed under penalty of perjury, stated:

> The "Stamp' or seal of the "Shree Law Books Management Board (SLBMB)" identifies it as an affiliate of the Ministry of Law, Justice and Parliamentary Affairs In Nepal. The SLBMB is one of the departments of the government of Nepal under the Ministry of Law and Justice. The SLBMB is the official translator of any official document from Nepali to English and vice versa. Nonetheless, the government for the last couple of years has introduced a new statute wherewith Nepali attorneys who have practiced at least seven years and certain employees of judicial service can appear at an examination to qualify themselves as an translator of the any document from English to Nepali and vice versa. Over 30 attorneys have obtained license as such translator after passing the examination. However, SLBMB still remains as the preeminent entity to translate any document from English to Nepali and vice versa. I frequently came across the seal of SLBMB when I was working as a law correspondent of the Kathmandu Post. While I was working as the Editor of the international journal of law "Lex Nepali," I frequently came across of the

seal and I continued to come across the seal in my law practice in Nepal.

When the seal of the SLBMB appears upon a page of any document that signifies the following:

(I) The SLBMB received an authentic official document.

(II) They translated it accurately into the said language (English).

Therefore, the SLBMB is an authentic body having authority to translate any document from Nepali to English and vice-versa and the seal of the SLBMB verifies the same. The seal of the SLBMB appears to be authentic to me.

(9 CT 2333-2334)

On April 29, 2009, the defense filed another supplemental declaration to support its motion for reconsideration. (6 CT 1665-1667) This declaration came from Harishchandra Ghimire, the First Secretary of the Embassy of Nepal in Washington D.C. and stated under penalty of perjury:

This is to certify that the Shree Law Books Management Board is a part of the Ministry of Law, Justice and Constituent Assembly (before it was called Ministry of Law, Justice and Parliamentary Affairs), Government of Nepal. When their red colored seal appears on a page that signifies two things:

1. They received an official document issued by a government office of Nepal or an agency constituted under the rules and regulations of the government of Nepal with an application and required charges.

2. They accurately translated it into English or requested language.

The Shree Law Books Management Board is the part of the Nepal Government having authority to translate official documents issued by the government offices and agencies running under the rules and regulations of the Government of Nepal. It is the proper government office to confirm, by placing its red colored seal upon the page of a document which is translated from Nepali language to English or any other languages as per the request of applicant.

(6 CT 1665-1667)

On May 5, 2009, the trial court heard the motion for reconsideration and the defense brought Mr. Sharma to court to testify. (6 RT 1356-1367) The prosecution objected to Mr. Sharma's testimony arguing "the defense is attempting to circumvent the strict requirements of 1530(a) by opinion testimony, and that's not what the statute requires. The statute allows under very narrow circumstances to have certain documents authenticated for use in trials." (6 RT 1358) The prosecution continued, "In this case (a)(3) requires that the attestation be made that the document is a true and correct copy. [¶¶] We would probably need somebody to do an attestation that the Nepalese original translation of the document – the original Nepalese version of this document is true and correct, then get another attestation saying that the translation was correct." (6 RT 1358-1359) Agreeing with the prosecution, the trial court reasoned as follows:

> We still haven't met the requirements in Section 1530. [¶¶] We have statutory exceptions, not common law exceptions, and the statutory exceptions need to be met, so the idea here that the Shree Law Books Management Board seal can be interpreted by someone else as telling us when they put the seal on this is what they mean, well, I agree with the People's argument.

> [¶¶] I'm not the legislature. If they want to come up with functional equivalents, they're certainly able to do so, and then we would use them; but here they say it's done a particular way, and it still hasn't been done; and we don't have somebody authorized to say here's a copy of something from the courts in Kathmandu; and whether there's a seal or signature or whatever that goes along with that is the next question, I suppose, but no one has said these are copies. All we have are people who say, well, I know how things work over there, and when they put the seal on it, what they mean to say is these are accurate copies.
>
> Well the legislature says somebody actually has to say that, and for us to start getting into, well, in one country this means that and in another country this other thing means that, in California what means that is somebody who swears out this is a correct copy, so in order to bring it into a California court we'd have to have that, so since this is a motion to reconsider, which has anywhere from one to two steps, I will go ahead and go through it in the appropriate order.
>
> The motion for the Court to reconsider the ruling is granted. Upon reconsideration, the ruling is confirmed, and the documents are still excluded.

(6 RT 1364-1367)

E. The Trial Court Erred By Refusing To Take Judicial Notice of the Nepali Court Verdict and Appellate Decision: Exhibits 502 and 500.

Evidence Code section 452.5, subdivision (b), states in relevant part:

> An official record of conviction certified in accordance with subdivision (a) of Section 1530 is admissible pursuant to Section 1280 to prove

> the commission, attempted commission, or solicitation of a criminal offense, prior conviction, service of a prison term, or other act, condition, or event recorded by the record.

Evidence Code section 1530, subdivision (a), subsection (3), addresses an official writing from a foreign country. It provides, in relevant part, as follows:

> (a) A purported copy of a writing in the custody of a public entity, or of an entry in such a writing, is prima facie evidence of the existence and content of such writing if:
>
> (3) The office in which the writing is kept is not within the United States or any other place described in paragraph (2) and the copy is attested as a correct copy of the writing or entry by a person having authority to make attestation. The attestation must be accompanied by a final statement certifying the genuineness of the signature and the official position of (i) the person who attested the copy as a correct copy or (ii) any foreign official who has certified either the genuineness of the signature and official position of the person attesting the copy or the genuineness of the signature and official position of another foreign official who has executed a similar certificate in a chain of such certificates beginning with a certificate of the genuineness of the signature and official position of the person attesting the copy. Except as provided in the next sentence, the final statement may be made only by a secretary of an embassy or legation, consul general, consul, vice consul, or consular agent of the United States, or a diplomatic or consular official of the foreign country assigned or accredited to the United States. . . . If reasonable opportunity has been given to all parties to investigate the authenticity and accuracy of the documents, the court may, for good cause shown, (i) admit an

attested copy without the final statement or (ii) permit the writing or entry in foreign custody to be evidenced by an attested summary with or without a final statement.

1. **The Trial Court Abused Its Discretion By Determining Appellant Failed To Provide A Proper "Chain of Certification" Pursuant to Evidence Code section 1530 subdivision (a), subsection (3).**

In the case at bar, the Nepali verdict (Exhibit 502) and the appellate decision (Exhibit 500) were both attested as correct copies of their original counterparts with a seal from the "Government of Nepal Ministry of Law, Justice and Parliamentary Affairs - Law Books Management Board" and a stamp stating: "Attested the seal of Law Books Management Board and signature of its Production/Section Officer." (7 CT 1840, 1877)

Evidence Code section 1452, subdivision (c) states that a "seal is presumed to be genuine and its use authorized if it purports to be the seal of ... a nation recognized by the executive power of the United States or a department, agency, or officer of such nation." A seal is also a form of attestation. "A seal is a particular sign, made to attest, in the most formal manner, the execution of an instrument." (Code of Civ. Pro. § 1930.) Therefore, since Nepal is a nation recognized by the United States,[32] the seal placed on the Nepali verdict and appellate decision shall be presumed to be genuine and authorized. And, as an attestation, the seal equally conveys that the verdict and appellate decision are correct copies of their original counterparts per Code of Civil Procedure section 1930.

Contrary to the trial court's analysis, there is no requirement that the attestation contain the word "correct" in order to comply with Evidence Code section 1530, subdivision (a), subsection (3), which requires "the copy is attested as a correct copy of the writing." Evidence Code section

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32 See http://www.state.gov/r/pa/ei/bgn/5283.htm#relations.

1531 expressly provides that "for purposes of evidence, whenever a copy of a writing is attested or certified, the attestation or certificate must state in substance that the copy is a correct copy of the original, or of a specified part thereof, as the case may be." (*emphasis added.*) In *People v. Brucker* (1983) 148Cal.App.3d 230, 241, the Court of Appeal clearly held that a certification stating the documents at issue to be "true copies" was sufficient to meet the requirements of Evidence Code section 1530. Similarly, in *People v. Flaxman* (1977) 74 Cal.App.3d Supp. 16, 18-19 a traffic survey "attested to by one J.J. Wrenn, traffic engineer" was sufficient to meet the requirements of Evidence Code section 1530 despite the fact that the traffic engineer's attestation never used the exacting phrase "correct copy" as part of the certification.

In *Ex parte Smith* (1949) 33 Cal.2d 797, 801, the California Supreme Court expressly held that the word "attest" is equivalent to the word "correct" or "verity." The document at issue in *Smith* concerned a handwritten certification which read, "Attest: Sept. 29, 1948. E.A. Burkart" with a rubber stamp impression reading, "Executive Secretary, Adult Authority, Department of Corrections." (*Ibid.*) The high Court found the document properly authenticated and emphasized that "No certain words are necessary to create a valid certificate attesting a purported copy as a certified copy." (*Ibid., citing Harting v. Cebrian* (1935) 10 Cal.App.2d 10, 17.) In this regard, the California Supreme Court noted:

> Generally recognized meanings of "attest" include "to certify to the verity of a copy of a public document formally by signature * * *; to affirm to be true or genuine * * *. It has been said that the word is appropriately used for the affirmation of persons in their official capacity to test the truth of a writing, and that it is the technical work by which, in the practice of many states, a certifying officer gives assurance to the verity of a copy. (7 C.J.S., Attest, p.

691.) Therefore, it appears that the copy of the minutes is acceptably certified.

(*Ibid.*) Similarly, in *Wickersham v. Johnson* (1894) 104 Cal. 407, the California Supreme Court explained that

> In section 1906 "attestation" is evidently used in its secondary or technical sense, -- the certification by the keeper of a record of the verity of a copy. In Anderson's Law Dictionary a definition of "attest" is as follows: "To certify to the verity of a copy of a public document." In Abbott's Law Dictionary it is said: "Attest is also the technical word by which, in the practice of many of the states, a certifying officer gives assurance to the verity of a copy." See also Black's Law Dictionary under "Attest."

(*Wickersham v. Johnson, supra,* 104 Cal. At p. 414.) Therefore, there can be no doubt that the seal, itself, and the seal along with the inscribed attestation convey that the Nepali verdict and appellate decision are "correct copies" of their original counterparts. California has long recognized that "attest" means "correct" or "true" and that "true" and "correct" are essentially interchangeable attestations.[33] In this regard, the seal and the inscribed attestation satisfy Evidence Code section 1530.

Nevertheless, to obtain the benefit of the presumption, a seal must also be signed. (*Jacobson v. Gourley* (2000) 83 Cal.App.4th 1331, 1335.) In *Jacobson v. Gourley*, the Department of Motor Vehicles (hereinafter "DMV") introduced a blood alcohol report at an administrative hearing to prove the driver's license should be suspended due to intoxication. (*Id.* at p. 1333.) The blood alcohol report contained "a rubber stamp at the end of

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[33] Interestingly, Evidence Code section 751 requires interpreters and translators to take an oath that "he or she will make a true interpretation" rather than a "correct" interpretation. Here, the Nepali documents were not simply duplicate copies of the original Nepali court documents. Instead, they were translated copies or the originals. Therefore, it may have been more accurate to attest to them as "true" copies rather than "correct" copies.

the four entries [with] the emblem of the San Bernardino County's Sheriff's Department together with the name and address of the department's scientific investigation division." (*Ibid.*) Finding "there can be no seal of a document that has not been subscribed," i.e. signed by an authorized person, the Court of Appeal held that the DMV failed to properly authenticate the report. (*Id.* at p. 1335.)

In contrast to *Jacobson*, the seal of the "Government of Nepal Ministry of Law, Justice and Parliamentary Affairs - Law Books Management Board" was subscribed. The seal placed on the verdict (Exhibit 502) was subscribed by the Production Officer (7 CT 1877) and the seal placed on the appellate decision (Exhibit 500) was subscribed by the Technical Officer, Bhumnand Khanal (7 CT 1840). Therefore, as valid seals, the verdict (Exhibit 502) and the appellate decision (Exhibit 500) should have been presumed to be genuine official documents containing a proper attestation of correctness or verity.

As for the next tier of certification in the necessary "chain of certifications," there appears to be two separate certifications both of which independently attest to the verity of the Ministry of Foreign Affair's seal. In the first instance, there is an attestation from the Deputy Chief of Protocol for the Law Books Management Board which, for both the verdict (Exhibit 502) and the appellate decision (Exhibit 500), reads: "Attested the seal of the Law Books management Board and signature of its Production/Section Officer." (7 CT 1840, 1877) Again, contrary to the trial court's determination, there is no requirement that the phrase "correct copy" appear on the attestation/certification for it to properly convey that the document is, in fact, a correct copy. Using the word "attest" is sufficient. (*Smith, supra,* 33 Cal.3d at p. 801.) Therefore, this "attestation," without more, is sufficient to meet the "correct copy" requirement of Evidence Code section 1530.

The attestation for the verdict (Exhibit 502) also includes a specific reference to the verity of the "Production Officer" who actually signed or subscribed the Ministry of Foreign Affair's seal. (7 CT 1877) In contrast, the express attestation placed on the appellate decision (Exhibit 500) is slightly different. While it also attests to verity of the "Production/Section" Officer's signature, the Ministry's seal is signed or subscribed by the Technical Officer rather than a Production Officer or Section Officer. (7 CT 1840) However, the Deputy Chief of Protocol attestation stamped on both the verdict (Exhibit 502) and the appellate decision (Exhibit 500) is not the only valid attestation of the Ministry's seal. Both these documents are independently attested to by other foreign officials.

With respect to the verdict (Exhibit 502), Deputy Chief of Protocol, Jiban P. Shrestha, provided an equal and independent attestation/certification as to the verity of the Ministry's seal. In this regard, a separate document was attached to the verdict (Exhibit 502) stating, "I, Jiban P. Shrestha, Deputy Chief of Protocol, Ministry of Foreign Affairs, Government of Nepal, Certify that the authorized translation of following Original Nepali Document to be true and the official position, seal and signature of the Section / Production / Account / Administration Officer thereof." (7 CT 1876) Therefore, even absent the stamped attestation from the Chief of Protocol (Sharma), the attestation/certification from the Deputy Chief of Protocol (Shrestha) also independently verified the subscription of the Ministry's seal attesting to the document's authenticity. The trial court found this certification to be inadequate because it found the phrase "translation is 'true'" is not equal in substance to "correct copy." (2 RT 137) However, as discussed *supra,* contrary to the trial court's conclusion, the Court of Appeal has found these exact phrases to be equivalent. (*People v. Brucker, supra,* 148 Cal.App.3d at p.

241 ["defendant's lack of certification argument is without merit [as] Exhibit No.1 represented the attached documents to be true copies"].)

Similarly, with respect to the appellate decision (Exhibit 500), the certification from Consular Officer Bishnu Prasad Gautam also certifies the signature and official position of the person who signed the Ministry's seal. (7 CT 1839-1840) In this regard, the certification states, "I, Bishnu Prasad Gautam, Consular Officer, Ministry of Foreign Affairs, Government of Nepal, Certify that the following Nepali Document has been translated by the authorized body and also certify the seal and signature to be true and the official position of the Section / Production / Account/ Administration Officer there of." (7 CT 1839)

Finally, as required by Evidence Code section 1530, subdivision (a), subsection (3), both the verdict (Exhibit 502) and the appellate decision (Exhibit 500) have a "final statement" attached to them from the First Secretary of the Embassy of Nepal located in Washington D.C. (7 CT 1838, 1875) As required by section 1530, the final statement must be made by a "secretary of an embassy or legation, consul general, consul, vice consul, or consular agent of the United States, or a diplomatic or consular official of the foreign country assigned or accredited to the United States." (Evid. Code § 1530, subd. (a)(3).) Therefore, since Harishchandra Ghimire is the "First Secretary" of the Embassy of Nepal, he is qualified to make the final statement under the statute. In addition, with respect to the verdict (Exhibit 502), Harishchandra Ghimire certified the genuineness and official position of Jiban P. Shreshtha (7 CT 1875) and, with respect to the appellate decision (Exhibit 500), Harishchandra Ghimire certified the genuineness and official position of the Bishnu Prasad Gautam.

Given this "chain of certification," it is clear that appellant met the statutory requirements of Evidence Code section 1530, subdivision (a), subsection (3) and that the Nepali verdict (Exhibit 502) and the appellate

decision (Exhibit 500) should have been considered *prima facie* evidence of the existence and content of those court documents. Therefore, the trial court abused its discretion by excluding the Nepali court documents constituting reversible error.

2. The Trial Court Abused Its Discretion By Refusing To Take Judicial Notice of Sapna's Entire Record of Conviction.

With proper authentication under Evidence Code section 1530, the trial court should have taken judicial notice of the verdict (Exhibit 502) and the appellate decision (Exhibit 500) under Evidence Code section 452.5. However, in addition to certification issues, the trial court also refused to take judicial notice of the Nepali record of conviction because it found there was no evidence the Nepali judgment resulted from a criminal versus civil proceeding. (7 RT 1727; 13 RT 3395; ART (5/11/2009) 140)

The Nepali court documents, however, make it very clear that the verdict came from a criminal proceeding. The appellate decision (Exhibit 500) explicitly identifies the case as criminal on the first page as it clearly states "Criminal appeal number 63/147 of the year 2062. Decision number 1." (7 CT 1840) Similarly, the verdict (Exhibit 502) also expressly identifies the case as criminal on the first page wherein it denotes, "Government Criminal Case No. 57 of the year 2061 BS Verdict No. 402." (7 CT 1877) In addition to these apparent markers, there were also many other evident factors clearly establishing the proceeding as criminal. First, Sapna was prosecuted by the Government rather than sued by an individual. In this regard, the Government initiated proceedings by filing a "First Information Report" which is equivalent to an indictment. (7 CT 1848, 1885) Second, Sapna had been arrested and placed in police custody for 19 days before she posted bail and, upon conviction, was sentenced to time served plus a fine of 100 Rupees. (7 CT 1841, 1846, 1878, 1887) The power of the Government to arrest and jail Sapna is representative of a

criminal proceeding. Third, Section 5 of the Passport Act, which is the statute Sapna was prosecuted under, provides for a punishment of imprisonment for a term not to exceed one year or with a fine not to exceed 500 rupees. Again, this type of liability, loss of liberty, is unique to criminal proceedings. (7 CT 1850-1851) Fourth, according to Mr. Sharma's expert opinion the proceeding was criminal in nature. (6 CT 1552) And, finally, when Luzz Dunn from the I.N.S. testified about the circumstances which justify issuing a police certificate waiver, as was done for Sapna in this case, the trial court itself asked clarifying questions of Dunn to which she explained she had only seen police certificate waivers issued in the context of "criminal convictions" from foreign countries. (13 RT 3451-3152) Therefore, since there was absolutely no reason to doubt that the Nepali judgment was the product of a criminal proceeding and, thus, was a criminal conviction deserving of judicial notice, the trial court abused its discretion by finding otherwise. Alternatively, the trial court should have held a hearing on the matter if it had doubts as to the criminal nature of the judgment. Failing to do so constituted an abuse of discretion.

Therefore, since the defense properly presented certified copies of Sapna's 2005 criminal conviction from Nepal, the trial court should have taken judicial notice of the conviction pursuant to Evidence Code section 452.5. Before a court can take judicial notice of a writing, however, the proponent of the evidence must establish that the writing is admissible under Evidence Code section 1280 which requires (1) The writing was made by and within the scope of a duty of a public employee; (2) The writing was made at or near the time of the act, condition, or event; and (3) The sources of information and method and time of preparation were such as to indicate its trustworthiness. The certification requirements met under section 1530 equally satisfy the criteria of section 1280. First, the judgment was made within the scope of the Nepali judicial system and certified by

the Nepali Ministry of Foreign Affairs; second, the judgment was written contemporaneous to the court's decision; and, third, the judgment is presumed to be correct and accurate making it trustworthy.

Evidence Code section 452.5 allows for admission of the entire record of conviction "to prove the commission ... of a criminal offense ... or other act, condition, or event recorded by the record." (See also *People v. Mathews* (1991) 229 Cal.App.3d 930, 936 ["[o]ur high court has declared that the trier of fact may 'look to the entire record of the conviction to determine the substance of a prior foreign conviction'" citing *People v. Guerrero* (1988) 44 Cal.3d 343, 355; *Ibid.* citing *People v. Castellanos* (1990) 219 Cal.App.3d 1163, 1172 ["[t]he entire record of conviction includes all relevant documents in the court file of the prior conviction"].) Therefore, the trial court should have taken judicial notice of the entire Nepali record of conviction which included Sapna's conviction for Obtaining A Passport By Furnishing Fake Details, to wit, that Sapna Dev obtained a passport on December 15, 1998 by falsely stating her date of birth as January 5, 1984 when her real date of birth, as found by the Nepali court, was actually April 28, 1983.

3. The Trial Court Abused Its Discretion By Refusing To Extend *Res Judicata* Effect To Sapna's 2005 Nepali Conviction.

Given this final judgment, the trial court should have also provided *res judicata* effect to the Nepali conviction and instructed the jury accordingly. Contrary to the trial court's decision, the issue was not moot. (2 RT 114) "A foreign judgment will be *res judicata* in an American court if it has that effect in its country of rendition and if it meets the American standard of a fair trial before a court of competent jurisdiction." (*TSMC North America v. Semiconductor Mfg. Intern Corp.* (2008) 161 Cal.App.4th581, 602 citing *Beroiz v. Wahl* (2000) 84 Cal.App.4th 485, 494.) In an effort to satisfy this legal condition, the defense filed lengthy

declarations from Nepali legal expert Rudra Prasad Sharma Phual and brought him to court to testify on the matter. (6 RT 1354-1367; 6 CT 1549-1558; 9 CT 2333-2336) However, the trial court refused to hear testimony on the issue and concluded, despite all the evidence to the contrary, that the issue was moot. (2 RT 114) This conclusion on the part of the trial court and its refusal to hold a hearing on the matter constituted an abuse of discretion.

F. The Nepali Court Documents Were Also Properly Authenticated By Other Circumstantial Evidence.

The trial court erroneously found that the legislature restricted appellant's ability to authenticate the Nepali documents by exclusively requiring compliance with Evidence Code section 1530, subdivision (a), subsection (3). (6 RT 1364-1367) Contrary to the trial court's assessment, however, appellant was not limited to authenticating the Nepali court documents through the precise requirements of Evidence Code section 1530. Evidence Code section 1410 expressly provides that "Nothing in this article shall be construed to limit the means by which a writing may be authenticated or proved." (See also *People v. Gibson* (2001) 90 Cal.App.4th 371, 382-383 [manuscripts found in defendant's hotel room concerning a prostitution ring and written in the first person were sufficient to authenticate defendant as author and were, therefore, significant to proving "pimping and pandering" charges]; *People v. Olguin* (1995) 31 Cal.App.4th 1355, 1372-1373 [rap lyrics found in defendant's room sufficiently authentic to prove gang affiliation for sentencing enhancement]; *People v. Cuevas* (1967) 250 Cal.App.2d 901, 908-909 [lack of seal in certification did not automatically render evidence of prior conviction inauthentic].) Therefore, the trial court's refusal to consider the information contained in Mr. Sharma and Mr. Ghimire's declarations constituted an abuse of discretion especially since both declarations

explicitly provide that the Ministry's seal from the Shree Law Books Management Board is a certification that the Management Board received an official document issued by the government and that the official document was accurately or correctly translated. (6 RT 1358, 1364-1367; 6 CT 1665-1667; 9 CT 2333-2334)

In *People v. Skiles* (2011) 51 Cal.4th 1178, 1182, 1186-1187, the California Supreme Court unanimously reconfirmed that there are no limitations on the methods by which a writing can be properly authenticated as long as there is sufficient evidence supporting a finding that the document is what it purports to be. In this regard, the High Court specifically held that a party is not limited to the stricter requirements of Evidence Code section 1530 when attempting to authenticate and introduce a prior conviction from a foreign state. (*Ibid.*) In *Skiles*, the prosecution attempted to introduce evidence that the defendant had previously been convicted of a serious felony in Alabama qualifying him for increased punishment under the Three Strikes law. (*Id.* at pp. 1182-1183.) While the prosecution had successfully obtained several certified court documents from Alabama which were properly authenticated under Evidence Code section 1530, these certified documents were insufficient to establish that the vehicular manslaughter conviction was a "serious felony" under California law because nothing in the certified documents established that the "defendant had personally inflicted great bodily injury on a person other than an accomplice." (*Id.* at p. 1183.) To meet this requirement, the prosecution introduced a missing page from the indictment which had been faxed over by the Alabama court clerk. (*Ibid.*) Acknowledging that this faxed copy did not meet the stricter requirements of Evidence Code section 1530, the California Supreme Court, nevertheless, held that the prosecution was not foreclosed from authenticating the missing page of the indictment

with other circumstantial evidence. (*Id.* at pp. 1186-1187.) Specifically, the High Court reasoned:

> Since a certified copy of an official writing "is prima facie evidence of the existence and content of such writing or entry" under section 1530, we may infer that a noncertified copy, by itself, is not reliable enough to constitute such prima facie evidence. However, nothing in section 1530 forbids authentication by another method. Other evidence may establish that a faxed copy of a certified copy of an official writing is authentic and reliable. When considered together, the evidence may suffice to prove a prior felony conviction.

(*Ibid.*)

In *Skiles*, the Court found the faxed copy to be authentic because it was consistent with the other certified copies; referred to the same court, county, and clerk as the other certified documents; identified the date of the crime as the same as the other certified documents; and had a number on the bottom left corner which was sequential to the certified documents corroborating that it was a missing page of the certified documents. (*People v. Skiles, supra,* 51 Cal.4th at p. 1187.) While appellant contends he met the stricter requirements of Evidence Code section 1530, the declarations he submitted from Mr. Sharma and Mr. Ghimire also provide sufficient circumstantial evidence under Evidence Code sections 1400-1410 that the Nepali court documents were authentic. That is, that the Ministry's seal signifies that the document is an official document from the Nepali government and its translation is correct.

In fact, it is not uncommon to simply rely on relevant declarations and/or testimony to authenticate a document. For example, in *Greenspan v. LADT* (2011) 191 Cal.App.4th 486, 523, the Court of Appeal found the trial court abused its discretion when it precluded counsel from relying on various declarations to authenticate many of the plaintiff's exhibits.

Similarly, in *Landale-Cameron Court Inc. v. Ahonen* (2007) 155 Cal.App.4th 1401, 1404-1405, 1409 the Court of Appeal found a letter, critical to resolving a statute of limitations issue, had been properly authenticated based on a declaration provided by counsel because counsel stated he received the letter from prior counsel and, therefore, could verify it was true and correct. (*Id.* at p. 1409.)

In *Jazayeri v. Mao* (2009) 174 Cal.App.4th 301, 306, the Court of Appeal reversed a judgment where the trial court found counsel failed to authenticate documents from the USDA simply because the custodian of record could not attest to the documents being a "true and correct" duplicate of the originals due to some unknown handwriting on the documents. (*Id.* at p. 314, 320.) *Jazayeri* involved a contract dispute and fraud wherein Mao Foods Inc. was alleged to have altered USDA reports to reduce its costs by falsifying the number of chickens it received as "dead on arrival" or "DOA". (*Ibid.*) Ultimately, the Second District, Division found the USDA documents had been authenticated by a plethora of circumstantial evidence including, but not limited to, testimony from the chicken supplier and an employee from the USDA regarding the process of obtaining copies from the USDA through a Freedom of Information Act ("FOIA") request.

Jazayeri, Landale-Camerson ,and *Greenspan* all demonstrate that the trial court had the authority to rely on the declarations and testimony of Mr. Sharma and Mr. Ghimire to authenticate the Nepali documents. Therefore, it was an abuse of discretion to ignore these declarations and to refuse to hear testimony from Mr. Sharma who was made available to testify on the matter on May 5, 2009. (6 RT 1354-1367)

California courts also have a long history of relying on declarations and testimony from learned experts to determine the law or legal practice of a foreign country where there is any question or ambiguity about the

authenticity or legal effect of a document from a foreign jurisdiction. For example, in *In re Estate of Chichernea v. California* (1967) 66 Cal.2d 83, 85 the deceased, a United States citizen who resided in California, named select family members as beneficiaries under her will. The beneficiaries were Romanian and living in Romania. Under California law, however, the named beneficiaries were not entitled to inherit the California estate unless it could be shown that Romanian law was reciprocal, i.e. that Romania would honor its citizens' testamentary rights in the event they left property to a Californian. (*Ibid.*) Absent such a showing, the deceased estate would escheat to California. (*Ibid.*) The trial court heard evidence from "eminent authorities on Rumanian law and had before it the reported decisions of the highest Rumanian courts." (*Id.* at p. 87.) While the trial court determined that the letter of Romanian law was not reciprocal, the California Supreme Court reversed finding that the "massive array of scholars, jurists, and practitioners" all agreed Romanian law in letter and practice provided reciprocity. (*Id.* at p. 92.) Like *Chichernea,* the trial court, here, should have relied on the expertise of Mr. Sharma and Mr. Ghimire to verify the law and legal practice in Nepal. Specifically, for determining whether the Nepali court documents were correct copies and translations of their original counterparts and whether the Nepali justice system comports with an American standard of a fair trial.

In *Pratt v. Pratt* (1919) 43 Cal.App. 261, 276-279, it was necessary to determine whether a power of attorney executed in England was legally enforceable under English law in order to resolve a probate dispute which arose in California. While the Court of Appeal acknowledged that the certification from the notary public in England may not meet the requirements of the California Evidence Code for "prima facie" authentication, other circumstances surrounding the execution of the power of attorney clearly rendered it authentic. (*Ibid.*)

Chichernea and *Pratt* make it clear that the trial court abused its discretion by refusing to consider the declarations and/or testimony of Mr. Sharma and Mr. Ghimire. (6 RT 1358, 1364-1367) Had the trial court considered the declarations, there would have been little to no doubt as to the accuracy of the Nepali documents or any question that the Ministry's seal signified that the documents were correct copies and correct translations. In fact, the prosecution not only failed to rebut the accuracy of the Nepali documents, it actually introduced a plethora of evidence establishing that Sapna, the INS, and Detective Hermann all knew about the Nepali judgment and, while they disagreed with the outcome, relied on it as authoritative. This reliance on the Nepali judgment also constitutes an independent basis for satisfying the requirement of authentication with other circumstantial evidence.

For example, in *Ambriz v. Kelegian* (2007) 146 Cal.App.4th 1519, 1524, a woman sued her apartment building because she had been raped. She blamed the owners for failing to properly secure the building despite several complaints from other tenants. The trial court granted the apartment owners' motion for summary judgment finding the victim could not establish causation. The trial court, however, refused to consider deposition testimony from the investigating officer who testified there was no evidence of forced entry at the apartment complex. The trial court erroneously found that the victim/plaintiff failed to authenticate the deposition transcript because the transcript lacked certification from the court reporter. (*Id.* at p. 1526.) The Court of Appeal reversed and held the deposition testimony to be authentic despite the lack of certification because the defendants independently relied on the deposition testimony as accurate when they had attached excerpts from the same deposition testimony to their summary judgment motion. (*Id.* at p. 1527.)

Similarly, in the case at bar, several prosecution witnesses relied on the Nepali judgment thereby conceding its authenticity. Specifically, Sapna testified that at the end of the Nepali trial the court determined her date of birth was April 28, 1983. (5 RT 986) She also told Detective Hermann that she accepted the verdict. (10 RT 2570) And, she repeatedly claimed that she did not appeal the Nepali judgment because Detective Hermann told her to "take the birthday that the Court is telling you to take and go ahead and get your passport." (5 RT 987-988) Later in the trial, Sapna again testified, "I meant Detective Hermann had told me that just accept – just take the date of birth that judge is saying, just make your passport and go to the US embassy." (5 RT 1083) And, upon clarifying this testimony, Sapna stated, "He told me to take the date of birth that the judge had said and make my passport. So that's exactly what I did." (5 RT 1084) Detective Hermann corroborated Sapna's testimony by explaining, "I told Sapna that she should abide by the Court's ruling and take her new issued date of birth and obtain a new passport to assist her to go back in the United States." (9 RT 2151)

Although Sapna publically maintained that her "real" date of birth was January 5, 1984 after the Nepali trial, she identified her date of birth as April 28, 1983 on all official documents she filled out thereafter in compliance with the Nepali judgment. (5 RT 994, 996) Therefore, when she applied for a new passport to return to the United States in 2005, she identified her date of birth as April 28, 1983 consistent with the Nepali judgment. (5 RT 988, 990-991; 9 CT 2503 (Exhibit 14), 2504 (Exhibit 15)) To obtain that 2005 passport, Sapna had to fill out a certificate of Nepalese citizenship. (9 CT 2513 (Exhibit 19)) When filling out this document, she also identified her date of birth as April 28, 1983 because "that's the birth date ... the Court" told her to put down. (5 RT 992-994; 13 RT 3412; 9 CT 2504 (Exhibit 15), 2513 (Exhibit 19)) Finally, Sapna also used the date of

birth of April 28, 1983 due to the Nepali judgment on her 2005 U.S. immigration visa and 2005 immigration forms. (5 RT 994; 9 CT 2505 (Exhibit 16), 2506, 2508 (Exhibit 17))

Prosecution witness, Luz Dunn, from the I.N.S. also testified she had seen the Nepal judgment and knew that Sapna had been convicted of falsely obtaining a passport. (11 RT 2782-2784) While, without foundation, Dunn asserted she believed Sapna's birthday was January 5, 1984,[34] she explained that Sapna identified her date of birth as April 28, 1983 after the Nepali trial because it was "the date of birth that her country told her to put." (11 RT 2782-2783) When directly asked whether "the April 28, 1983, is the one the Nepal courts said?" – Dunn affirmatively answered, "Correct."[35] (11 RT 2783) This prosecutorial evidence unequivocally shows that there was no real dispute as to the authenticity of the Nepali verdict and appellate decision.

Notably, in *Ambriz*, where opposing counsel relied on the disputed documents as authoritative, the Court of Appeal concluded that the defendants' objections regarding the documents authenticity were "disingenuous." (*Ambriz v. Kelegian, supra*, 146 Cal.App.4th at p. 1527.) Similarly, here, the prosecution's objections to the Nepali documents had nothing to do with its doubts about the documents' authenticity. Rather, the prosecution's objections were simply a disingenuous effort to have the Nepali documents excluded in order to dismantle the heart of the defense theory of the case: that Sapna knew her adoption was based on a false date of birth and, therefore, understood that the Devs could reverse the adoption

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[34] Notably, however, Dunn also testified that United States had not yet determined Sapna's accurate date of birth and was in the process of doing so. (13 RT 3421-3422)

[35] After this testimony, the trial court expressly instructed the jury that it could not conclude anything about the Nepali proceeding especially whether it was criminal or civil in nature. (7 RT 1727, 3395; ART (5/11/2009) 140)

and have her deported to Nepal – all of which motivated her to falsely accuse Ajay of rape once she decided to sever all ties from the Devs and knew the Devs had already planned to take her out of their will.

Therefore, even if there is a question as to whether the Nepali verdict and appellate decision were properly certified pursuant to Evidence Code section 1530, the documents should have been admitted pursuant to Evidence Code section 1400 through 1410 allowing for other circumstantial evidence to properly authenticate. Again, as argued *supra*, as properly authenticated documents, the verdict (Exhibit 502) and appellate decision (Exhibit 500) should have been judicially noticed under Evidence Code section 452.5 and been given *res judicata* effect.

G. All of the Nepali Court Documents, Exhibits 500 through 514, Should Have Been Admitted For the Jury's Consideration Pursuant to Evidence Code Section 403.

In addition to taking judicial notice of the verdict (Exhibit 502) and the appellate decision (Exhibit 500), the defense also asked that all of the Nepali documents, Exhibits 500 through 514, be admitted for the jury's consideration pursuant to Evidence Code section 403, subdivision (a), subsection (3). (5 CT 1219-1374) Because all the Nepali documents were properly authenticated pursuant to Evidence Code section 1530, subdivision (a), subsection (3) and were equally authenticated by other circumstantial evidence pursuant to Evidence Code section 1410 as argued, *supra*, they should have, at a minimum, been admitted for the jury's consideration even if they did not meet the stricter requirements of judicial notice.[36] As noted by the Court of Appeal in *McAllister v. George* (1977)

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[36] At trial, the defense argued that the foundational facts of all the Nepali documents (Exhibits 500-514) should be admitted for the jury's consideration. However, since all of the Nepali documents were part of the "record of conviction," they were all subject to judicial notice. (See *People v. Mathews* (1991) 229 Cal.App.3d 930, 936 ["[o]ur high court has declared that the trier of fact may 'look to the entire record of the conviction to

73 Cal.App.3d 258, 262, "If . . . there is sufficient evidence to sustain a finding that the writing is what the proponent claims, the authenticity of the document becomes a question of fact for the trier of fact." Therefore, like the trial court in *McAllister*, the trial court in appellant's case "confused the issue of admissibility with the weight to be accorded it." (*Ibid.*) For this reason, the trial court abused its discretion by refusing to admit the foundational facts of the Nepali documents for the jury's consideration pursuant to Evidence Code section 403, subdivision (a), subsection (3).

H. The Trial Court's Failure To Admit the Nepali Court Documents Prejudiced Appellant Warranting Reversal Under a State and Federal Standard of Prejudice.

Counts 23, 24, 26, 28, 29, 31, 33, 34, 36, 56, 59, and 62 would have automatically been dismissed had the trial court taken judicial notice of Sapna's 2005 Nepali record of conviction in Nepal because all of these counts required a showing that Sapna was a certain age at the time the alleged crimes were committed. Therefore, had the jury recognized that Sapna's date of birth was April 28, 1983, rather than January 5, 1984, there would be insufficient evidence to sustain guilty verdicts on these counts. Even without judicial notice, there is a reasonable probability the jury would have found appellant not guilty of these counts had evidence of the Nepali record of conviction been admitted for the jury's consideration.

In addition to these select counts, all of appellant's convictions should be reversed requiring a new trial because the prejudice resulting from the exclusion of the Nepali documents pervaded the entire trial. First, the nature and details of the Nepali conviction show that Sapna was capable of lying and, specifically, that she was capable of lying in order to reap the

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determine the substance of a prior foreign conviction'" citing *People v. Guerrero* (1988) 44 Cal.3d 343, 355; see also *Ibid.* citing *People v. Castellanos* (1990) 219 Cal.App.3d 1163, 1172 ["[t]he entire record of conviction includes all relevant documents in the court file of the prior conviction"].)

benefits of United States citizenship. In this regard, the Nepali conviction not only showed that Sapna was willing to lie to get into the United States, but also that she would be willing to lie or falsely accuse Ajay Dev to stay in the United States. The defense should have been allowed to impeach Sapna's credibility on this point. As argued at length in Argument I, *supra*, this was a very close case and Sapna's credibility was a focal point of the trial.

Moreover, the Nepali documents were integral to supporting the defense theory of the case. As explained by the defense at the preliminary hearing, "I think her concern might very well be that if her adoption is a fraud, her continued presence in the U.S. also might be a fraud, and she may be in big, sweet trouble." (3 CT 822) The defense made a similar argument during its opening statement:

> Then there's this interesting subplot about what's your birthday and what happened in Nepal, but I think that what we'll find what happened in Nepal came to light because some investigators working for Mr. Dev's previous lawyer, not me, started snooping around. Who is Sapna Dev? Who is this young woman? And they checked around and they found, wait a minute, wait a minute, her whole purpose in being here is a fraud because when she was adopted, Judge Warriner signed that adoption paper you saw in the pictures. She is 16 folks. She wasn't 15. So her whole – huge consequences flow from that, huge for her and her family.

(ART (04/27/2009) 137)[37]

However, without the Nepali documents, the defense was unable to present this defense at trial as exemplified by the fact that no such argument was made during closing argument. The only evidence supporting the fact that Sapna lied about her date of birth in order to be adopted by the Devs came from Peggy Dev's testimony who explained that Ajay's parents heard that Sapna's family may have lied about her age to facilitate the adoption.

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[37] "ART" shall refer to the Augmented Reporter's Transcripts.

(17 RT 4532; 14 CT 4087) While the trial court permitted the prosecution to reference the Nepali judgment to prove the dissuading counts (counts 90, 91, and 92), it expressly instructed the jury it could not rely on the Nepali judgment to determine Sapna's real date of birth and/or to determine whether she lied to get adopted by the Devs and gain U.S. citizenship. (7 RT 1727) Therefore, the jury was given a very one-sided view of the Nepali trial wherein Sapna was essentially permitted to re-present her Nepali defense to the Yolo County jury without any refutation. Consequently, the hearsay testimony from Peggy Dev about Sapna's date of birth was overshadowed by Sapna's continual insistence that the Nepali Court got it wrong and that her real date of birth was January 5, 1984 rather than April 28, 1983.

In fact, without any foundation or substantiation, Sapna was permitted to give an opinion that the Nepali judgment was "fraudulent" and that the "Nepal Court was corrupt and the Judge had been paid off." (10 RT 2568) She was also permitted to refute compelling evidence introduced against her at the Nepali trial which showed her date of birth to be April 28, 1983. (5 RT 1024-1026, 1028-1030, 1038, 1040) For instance, when asked about the Nepali trial, Sapna was allowed to dismiss testimony from her grandmother and great uncle, both of whom testified that her date of birth was April 28, 1983, even though the Nepali Court ultimately found their testimony to be credible. (5 RT 1028-1029, 1040)

Similarly, Sapna was permitted to comment on a school registration form, introduced against her at the Nepali trial, which had been filed with the Central Government of Nepal and conclusively showed her date of birth to be April 28, 1983. (5 RT 985, 1038-1040; 13 RT 3414) Specifically, Sapna testified to the following at Ajay's trial: "the form I filed – or my school, rather, filed for me to take the 10th grade exam, which is not even relevant because I didn't even take the exam, and there everyone who takes

that exam has to cross age 16; and school does whatever they can to – they decrease or increase your age, so this paperwork is not relevant until you take the exam." (5 RT 1038) The Nepali Court, however, which had considered Sapna's testimony in the context of other hard evidence, found Sapna's self-serving explanation to be unbelievable. (7 CT 1838-1858, 1875-1900) At Ajay's trial, however, the trial court allowed Sapna to provide the same explanation, but without competing evidence to expose her incredibility. In this regard, Sapna was given *carte blanche* to demonize the Nepali judgment leaving Ajay powerless to defend himself. (5 RT 985, 1038-1040; 13 RT 3414)

Had the Nepali documents been admitted, Sapna's testimony would have been impeached and the jury would have had a very different impression of the Nepali proceedings. The Nepali documents and judgment would have clarified that there were two duplicate school registration forms, Exhibits 510 and 512. Exhibit 510 was kept at Sapna's school in her village, a small insular community. In contrast, Exhibit 512 was a carbon copy of the original school registration form filed with the Central Government (Sanothimi, Bhaktapur), Ministry of Education and Sports. The date of birth on Exhibit 510 had clearly been altered by white-out and showed that someone inserted the date of birth of 2041/01/15 BS (April 27, 1984). In the Nepali trial, Sapna admitted she filled-out the form.[38] (7 CT 1847, 1881-1882, 1904-1905) In contrast, Exhibit 512, the

[38] This prejudice was further exacerbated at trial because the trial court permitted limited introduction of the Monastic School form (Exhibit 510). When asked whether she filled out the form and altered the date of birth with white-out, Sapna testified that she did not fill out the form and, therefore, was not the person who altered the date of birth. (5 RT 1038-1039) Had the trial court admitted the Nepali documents, the defense would have been able to impeach Sapna with extrinsic evidence of her statements made at the Nepali trial wherein she admitted she did, in fact, fill out the form. (7 CT 1847, 1881-1882, 1904-1905) Prohibited from using the Nepali documents to impeach Sapna, the defense and

untouched carbon copy filed with the Central Government, showed a date of birth of 2040/01/15 BS (April 28, 1983). (6 CT 1545; 7 CT 1973-1976, 1841-1842, 1844, 1851, 1879-1882, 1885, 1960, 1962-1965; 10 CT 2655) Therefore, had the jury heard this evidence and been permitted to consider it for the truth of the matter asserted, it is highly likely they would have concluded that Sapna lied about her date of birth.

Similarly, Exhibit 509 shows that Sapna affixed a photograph to her May 4, 1993 admission form for her Monastic School (Exhibit 511). (7 CT 1960, 1971) Sapna then used this identical 1993 photograph when applying for her 1998 passport and her 1999 U.S. visa in order to appear five years younger.[39] Had the jury heard this evidence, it is highly likely that would have concluded Sapna deliberately tried to hide her real age from the authorities in order to allow for adoption and, as a consequence, derivative American citizenship.

The Nepali documents would have also discredited Sapna's testimony regarding her understanding as to how and why the Nepali court proceedings were initiated against her. At trial, Sapna testified that she believed that Ajay had instigated the Nepali charges against her in order to prevent her from returning to the United States to testify against him. (9 RT 2141-2144, 2244-2245, 2247-2248) This testimony and the "poison letters" were used to support the dissuading charges against Ajay.

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prosecution introduced evidence from two handwriting experts who gave contradictory and somewhat inconclusive opinions about whether Sapna filled out the Nepali school form and, thus, knowingly altered her date of birth. (12 RT 3153; 17 RT 4589-4590) Equally problematic, was the prosecution's decision to elicit false testimony from Sapna. The prosecution had copies of all the Nepali documents before trial and knew that Sapna admitted to filling out the form and, thus, altering her date of birth at a prior proceeding.

[39] Notably, a passport photo and U.S. visa photo must be taken within six months of their respective applications. (5 RT 1180; 13 RT 3458)

However, Sapna's statements and testimony made at the Nepali trial clearly contradict this. That is, Sapna told the Nepali trial court that "As the said Ajay Kumar did not adopted any member of the family of the Informer [Murali Deo] and adopted me, the Informer has given false information as to deprive me from going to America due to jealous." (7 CT 1879) She reiterated this position by explaining her understanding as to why Murali Deo would initiate criminal charges against her: "Because of the fact that the said Ajay Kumar Dev did not adopt any family member of the informer but adopted her, the informer became angry. Because of such anger, the informer made a false information report stating that her date of birth is 2040.1.15 B.S. (1983.4.28 A.D.)" (7 CT 1842) This evidence was equally consistent with defense evidence explaining why Ajay's parents ended up not supporting the adoption and feared that perceived favoritism would create serious family divisions. (15 RT 4170-4172)

All of this prejudice was further exacerbated by testimony from Detective Hermann and Luz Dunn both of whom impermissibly vouched for Sapna's denouncement of the Nepali judgment and for her date of birth as January 5, 1984. For example, when the defense cross-examined Sapna about why she did not appeal the Nepali verdict if she believed it was wrong, Sapna simply stated that Detective Hermann advised her not to appeal explaining "I knew it was wrong. I did exactly what Detective Hermann told me to do. [¶] He told me to take the date of birth that the judge had said and make my passport. So that's exactly what I did." (5 RT 1083-1084) Likewise, Luz Dunn, from the I.N.S., impermissibly vouched for Sapna's position by opining:

> After reviewing the form and seeing that it was – that there was a contradiction, there was a – she contradicted herself because, yes, she's showing documents that she was convicted in a court of law in her country, yet when I looked at the document, she goes back and puts her, what I believe is her real date of birth. With that combined with the waiver

> that she was given at the embassy, I have doubts that she is – that she's lying.
>
> I think, in my view, and I cannot say that she lied, because as you can see, she put the date of birth that her country told her to put, and yet, you know, she crossed it out and then she put her real date of birth. And she went before an American consul or official, and she was given a waiver of a police report so she can travel.[40]

(11 RT 2782-2783) This vouching testimony continued to undermine the validity of the Nepali judgment further prejudicing Ajay who could not counter these unfounded claims without relying on the actual Nepali record of conviction.[41]

Finally, these distorted allusions to the Nepali judgment irreversible prejudiced Ajay because the trial court expressly instructed the jury that it could not rely on the Nepali judgment to determine whether Sapna lied about her date of birth. As instructed by the trial court:

> But, one thing, ladies and gentlemen, the actual judgment or decision the Nepal Court made, whether it would be characterized as finding one thing or another, is not before you, and you're not to speculate as to exactly what the Nepal Court did. There's no evidence of whether it was a criminal action or a civil action. There's no evidence of whether there was a finding of fraud or mistake. There's no evidence of

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[40] Although Luz Dunn testified that Sapna crossed-out 4/28/83 and wrote 1/5/84, when asked on cross examination if she crossed out 4/28/83 and wrote 1/5/84 Sapna testified that she did not. (5 RT 1003)

[41] In addition to the vouching, the prosecution also exploited the exclusion of the Nepali documents during closing argument. In this regard, the prosecution argued that "The proceedings in Nepal. The US Embassy didn't believe they had any basis." (19 RT 5136) This was not true. Consular Farquar, from the U.S. Embassy, drafted a memorandum indicating "I believe her family listed a date of birth showing her nine months younger than her actual date of birth in order to make her appear younger so she would be eligible for adoption." (13 RT 3427) This document, however, was excluded by the trial court over defense objection. (13 RT 3427)

> anything like that except there was a result from the Nepal Court that apparently identified one birth date over another. That's all you know, all you're allowed. I don't even know if you know that. That's what the evidence has been put on for. It's up to you to decide whether anything has actually been proved or not, but the evidence is not to be received for any of those other purposes that I just laid out.

(7 RT 1727) Therefore, even though the jury heard repeated testimony about the fact that the Nepal Court found Sapna's date of birth to be April 28, 1983, it was instructed to disregard this fact for purposes of actually determining her date of birth. As a result, the exclusion of the Nepali judgment and Nepali documents highly prejudiced Ajay despite the fact that the jury learned about the Nepali verdict.

Consequently, had the Nepali documents been properly admitted, they would have dispelled the notion that the judgment was a sham and exposed the lengths to which Sapna went to change her date of birth in order to qualify for an American adoption and, thus, American citizenship. This evidence was critical to showing Sapna's motive to falsely accuse appellant. That is, once she learned the Devs planned on removing her from their will, she legitimately feared that the Devs would also take steps to reverse the adoption and have her deported back to Nepal. Without the Nepali documents, the defense was essentially barred from presenting its primary defense to the jury because the Nepali documents demonstrably showed that Sapna knew the Devs could reverse the adoption as they explicitly establish that Sapna lied about her date of birth to go to America. In this regard, it is no coincidence that Sapna decided to accuse Ajay of rape approximately one month after she learned that the Devs were going to take her out of their will. Therefore, the trial court's refusal to admit the Nepali documents not only resulted in a prejudicial state evidentiary error, but also violated appellant's Fifth, Sixth and Fourteenth Amendment rights to due process and to present a meaningful defense as protected by the

United States constitution. (*Washington v. Texas* (1967) 388 U.S. 14, 18; *Chambers v. Mississippi* (1973) 410 U.S. 284, 302; *Davis v. Alaska* (1974) 415 U.S. 308, 318; *California v. Trombetta*, 467 U.S. 479, 485 (1984); *Crane v. Kentucky* (1986) 476 U.S. 683, 690; *Montana v. Egelhoff* (1996) 518 U.S. 37, 62.)

In sum, the improper exclusion of the Nepali documents prejudiced Ajay requiring reversal for the following reasons: (1) counts 23, 24, 26, 28, 29, 31, 33, 34, 36, 56, 59, and 62 were all age dependent and, therefore, had the trial court taken judicial notice of the Nepali record of conviction and Sapna's date of birth as April 28, 1983 those counts would have been dismissed; (2) the Nepali documents showed Sapna lied and, therefore, impeached her overall credibility in a very close case; (3) the Nepali documents would have showed that the Devs did not dissuade Sapna from testifying against Ajay, per counts 90, 91, and 92, as the Nepal prosecution was not a sham as described by Sapna, Detective Hermann and Luz Dunn, but rather a legitimate trial based on a real fraud perpetrated by Sapna; and (4) the defense would have been able to prove that Sapna had a motive to falsely accuse Ajay because the false date of birth was relevant to show that the Devs had the power to reverse the adoption and send Sapna back to Nepal. Therefore, it was no coincidence that Sapna accused Ajay of rape once she learned the Devs had decided to disinherit her and the family relationship had irreversibly deteriorated.

Given this depth of prejudice, appellant's convictions should be reversed because, but for the improper exclusion of the Nepali documents, there is a reasonable probability the jury would have reached a more favorable outcome. (*People v. Watson* (1956) 46 Cal.2d 818, 826, 836-837; Cal.Const., art. VI §13.) And, for this same reason, appellant's convictions should be reversed because this error reached constitutional magnitude by denying appellant his right to due process and right to present a defense.

Therefore, reversal is required since it cannot be shown that the error is not harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24, 87, S.Ct. 824, 828, 17 L.Ed.2d 705.) Consequently, appellant respectfully requests this Court to grant him a new trial on all counts.

V. THE TRIAL COURT ERRED BY ADMITTING EVIDENCE OF ADULT PORNOGRAPHY TO PROVE APPELLANT WAS ATTRACTED TO MINORS WHICH, AS COMPLETELY IRRELEVANT EVIDENCE, INFLAMED AND CONFUSED THE JURY CAUSING REVERSIBLE ERROR.

A. Introduction

Sapna testified that, from age 15 to 19, Ajay showed her five to six short pornographic videos (one to six minutes each) either on his Dell laptop computer or the Dell tower computer.[42] (3 RT 403; 4 RT 795-796, 798, 819-821, 824) Sapna testified she saw the videos a couple of times. (4 RT 819-821) She explained that all of the videos Ajay showed her depicted "extremely young looking girls" in them. (4 RT 798) At trial, Sapna identified three short pornographic videos she claimed Ajay had shown her before she was 18 years old. (4 RT 820; 5 RT 915-916, 1111-1112) These were shown to the jury and admitted as evidence. (5 RT 918; Exhibit 10 & 10A) Two videos were identified by an expert as child pornography and the third film, "18 & Confused," was identified as adult pornography. (8 RT 2046) All three videos were found on the Dell tower computer, no porn videos were found on the laptop. (11 RT 2822)

In addition to the three videos Sapna claimed Ajay showed her, forensic experts found a plethora of pornography on the Dev home computers. At a pre-trial hearing, the prosecution argued, over defense objection, that "all" the pornography, including the adult pornography, was

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[42] Both computers are Dell computers therefore they will be identified as the laptop or tower.

relevant to prove "intent to touch a minor" which was germane to counts 64 and 65 (the porn charges)[43] and counts 1, 4, 6, 9, 11, 14, 16, 19, 21, 24, 26, 29, 31, 34, and 36 (commission of lewd and lascivious acts against a minor).[44] (3 RT 391-394) The prosecution also argued that "all" of the pornography was relevant because it tended to give Sapna credibility by showing she could distinguish between the pornography Ajay allegedly showed her and the remaining pornography, i.e. that she was discriminating. (3 RT 392) Finally, the prosecution argued that all the pornography should come in "so they [the jury] can judge her credibility, whether they believe . . . she would be responsible for the type of pornography that's on those computers." (3 RT 392, 395-396)

The court admitted the three pornographic videos Sapna claimed Ajay showed her as a minor and further ruled that the remaining pornography, including the adult pornography, would be admitted by title, description and date. (3 RT 399-400) The court reasoned as follows:

> There is still some probative value to them, though. The possession of a cache of pornography on the computer does tend to go to the issues of intent and state of mind, ownership and possession. A large amount of that on the computer owned by a particular person may tend to show it was placed there by that person and that all of those that go to the issues in this case, such as something that may have been shown to a person while she was a minor, was done by that person who owned that computer.
>
> So for those videos and pictures, they will be allowed to be disclosed to the jury, but only by title and date, not the content themselves. And the jury can take the circumstantial evidence for what is worth. The probative value is not substantially outweighed by the other factors.

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[43] Count 64 alleges a violation of Penal Code section 288.2. Count 65 alleges a violation of Penal Code section 311.2, subdivision (d).

[44] Counts 1, 4, 6, 9, 11, 14, 16, 19, 21, 24, 26, 29, 31, 34, and 36 allege a violation of Penal Code section 288, subdivision (c)(1).

(3 RT 399-400)

With the exception of the "18 & Confused" movie, the adult pornography should have been excluded from trial because it had no bearing on whether Ajay was sexually attracted to minors. Moreover, even if the adult pornography could be attributed to Ajay, which is unclear from the evidence, it should have been excluded from the trial because it lacked a meaningful nexus to the crimes charged as required by the California Supreme Court and United States Supreme Court. Therefore, the admission of the adult pornography constituted reversible error because its admission unfairly inflamed the jury rendering Ajay's trial fundamentally unfair.

B. The Trial Court Admitted A Plethora Of Irrelevant Adult Pornography Found On The Dev Home Computers.

Exhibit 45. Prosecution expert Brent Buehring found a folder on Ajay's laptop computer entitled "Paidsite" which contained a list of file names relating to adult pornography.[45] (RT 2850-2851; CT 2858-2863) The file extension, "jpeg," indicates that each file was saved as still image. (11 RT 2800; 17 RT 4726) However, the images were not viewable on Ajay's laptop as they were found in the "lost file."[46] (11 RT 2850, 2935)

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[45] Buehring testified that the four folder titles contained in the "Paidsite" folder were Ashley, Barely Legal, Blow Jobs, and Interview. (11 RT 2851) However, with the exception of a folder called "Ashleylove," these titles do not appear on People's Exhibit 45: the list of titles found in the "Paidsite" folder. (10 CT 2858-2863)

On direct examination, prosecution expert Buehring testified that he had viewed files entitled "Ashley Love" in a prior case that contained images of young girls dressed in sexually provocative "costumes." (11 RT 2851-2852) However, on cross examination, Buehring clarified that he had no way of knowing whether the files entitled "Ashley Love," found on Ajay's laptop computer, contained remotely similar images. (11 RT 2935)

[46] Lost files are deleted files that are not viewable to the average user and often only detectable by forensic software. (17 RT 4758-4759)

While the actual images of this adult pornography were not shown to the jury, Detective Hermann testified extensively about the pornography and the jury was given a list of approximately 250 file names purporting to be adult pornography. (19 RT 5141; 10 CT 2858-2863)

Exhibit 49. Detective Hermann found viewable adult pornography on Ajay's laptop. One subdirectory, entitled "QcBar," had approximately 20 images in it which were approximately one inch by one inch in size. (11 RT 2982-2987; 10 CT 2881-2883) Defense expert Jeffrey Fischbach explained that these group of "icons" were most likely the product of a "porn storm" wherein unwanted and unsolicited porn advertising "pops-up" on the computer without prompting from the user. (17 RT 4728-4746) According to Fischbach, Kazaa software, which was on Ajay's laptop computer, surreptitiously installs a virus called "QcBar" which acts like adware spyware or malware (malicious spyware) and creates unwanted pop-up images related to pornography. (17 RT 4728-4746) Fischbach also testified that there was no evidence that a user ever clicked on the icon images (½ inch by ½ inch) to download them on Ajay's laptop computer. (17 RT 4727, 4730, 4732-4733) In addition to these icon images, Detective Hermann testified that the lost file folder contained seven "Girls Gone Wild" picture images which Fischbach described as advertisements. (11 RT 2992-2993; 17 RT 4729; 19 RT 5141)

Exhibit 46/ Exhibit 50. The Devs owned a Dell tower computer. It was kept in their home office and then moved to Sapna's bedroom in June 2003. (15 RT 4111-4112; ACT (8/10/2010) 9) Buehring found 60 adult pornographic videos on the "D" drive movie folder of the Dell tower computer.[47] (10 CT 2864-2867) All, but one video which was in the

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[47] The two child pornography movies shown to the jury Sapna claimed Ajay showed them to her were also found in this file. (11 RT 2865, 2925; 12 RT 3002; 10 CT 2866) While Buehring testified that seven of the file names were suggestive of child pornography, prosecution expert. Dr.

recycle bin, were placed on the tower computer on August 21, 2003 (within a week of a DVD/CD read-write drive being installed in the tower computer) around 1:00 a.m. suggesting that one person downloaded them on to the Dell tower computer from a disc in one sitting. (11 RT 2922-2923; 15 RT 4112)

Many of the adult pornography movie titles did not accurately describe the content of the pornography. (12 RT 3004-3005) Consequently, Detective Hermann was permitted to submit a list to the jury describing the content of the adult pornography in detail (*Exhibit No. 50*). He was also permitted to testify on the content of the pornography where the defense disputed his written summaries. (12 RT 3004-3005; 10 CT 2884-2888)

Exhibit 47/ Exhibit 48. Buehring also found a folder called "Rated R" containing eight viewable still images of adult pornography on the Dell tower computer. (11 RT 2869; 10 CT 2878) The "Rated R" folder was located in a directory labeled "Attached," which was located in a parent directory entitled "Ajay." (11 RT 2869) Four of these images were also found on one zip drive disk in the Dev home (*Exhibit No. 47*). (11 RT 2870; 10 CT 2868)

There was also a folder in the recycle bin of the Dell tower containing approximately 24 pornographic images of bestiality.[48] (11 RT 2997-2999; 10 CT 2867, 2879-2880,) Since the files were in the recycle bin, it was impossible to tell how they got on the Dell tower computer or whether they had been viewed. (17 RT 4727) Fischbach testified they

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Stewart, verified those movies were adult pornography. (11 RT 2854, 2865; 12 RT 3004-3006) The third movie Sapna claimed Ajay showed her, "18 & Confused" (also referred to as "Young Teen Lolita Rape Young Sex Whore Dick Pussy Anal Teen") was also found in this file. (5 RT 1112; 11 RT 2910; 10 CT 2867)

[48] There were 23 still images in Exhibit 48 and one "video" at the bottom of Exhibit 46. (10 CT 2867, 2879-2880)

could have come from an e-mail, a pop-up, or an internet search. (17 RT 4727) He further suggested that the files were most likely computer generated, rather than the result of human searching, because the file name assigned to the bestiality file was an extremely long numerical number. (17 RT 4774-4776)

C. Standard of Review

The erroneous admission of pornography evidence under Evidence Code sections 1101, 352 and 402 is reviewed for abuse of discretion. (*People v. Page* (2008) 44 Cal.4th 1, 44, 41.) However, as recognized in *Ziesmer v. Superior Court* (2003) 107 Cal.App.4th 360, 363, "the abuse of discretion standard is itself much abused." Therefore, the *de novo* standard of review may be more appropriately applied where, as here, the correctness of the trial court's order turns on the application of law to undisputed facts. (*Ziesmer v. Superior Court, supra,* 107 Cal.App.4th at p. 363; *People v. Jackson* (2005) 128 Cal.App.4th 1009, 1018-1019; *In re Jane Doe 8015 v. Superior Court* (2007) 148 Cal.App.4th 489, 493.)

D. The Trial Court Erred By Admitting The Adult Pornography Found On The Dev Home Computers To Prove Appellant Had An Attraction To Minors Impermissibly Allowing The Jury To Infer Ajay's Guilt Based On Irrelevant and Inflammatory Evidence.

1. A Narrow Nexus Must Be Established Between The Pornography And The Crime Before The Pornography Can Be Admitted As Relevant Evidence.

In general, character evidence, like possession of legal pornography, is inadmissible against a defendant when "offered to prove his or her conduct on a specified occasion." (Evid. Code § 1101, subd. (a); *see generally, People v. Page* (2008) 44 Cal.4th 1, 40.) In limited circumstances it can, however, be admitted to prove intent if there is a narrow nexus drawn between the pornography and the crime. (Evid. Code § 1101, subd. (b); *Ibid.*) Even where pornography is admissible to prove

intent under Evidence Code section 1101, subdivision (b), the pornography should not be admitted against the defendant "if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues or of misleading the jury." (Evid. Code § 352.) However, as repeatedly warned by the California Supreme Court, the admission of propensity evidence, by its nature, is highly inflammatory and prejudicial requiring that its admissibility be "scrutinized with great care" with "closely reasoned analysis." (*People v. Thompson* (1980) 27 Cal.3d 303, 315.)

In *People v. Page*, the defendant was convicted of sexually assaulting and murdering a young girl. (*People v. Page, supra*, 44 Cal.4th at p. 5.) The police found defendant's saliva on the girl's upper thigh. (*Ibid.*) They also found three adult pornography magazines in his home. (*Ibid.*) The prosecution argued the adult pornography should be admitted because one of the cover models looked "stunningly similar" to the victim and, therefore, showed the defendant had an attraction to the victim. (*Id.* at p. 39.) Expanding the prosecution's theory of admissibility, the trial court found all the pornography relevant because it depicted "pseudochild pornography" as the models were "staged to appear younger than their actual age" demonstrating "that the defendant had an interest in young girls."[49] (*Id.* at p. 39.) On review, the California Supreme Court criticized the trial court's analysis of the issue finding it failed to properly narrow the direct relationship between the pornography and the alleged crimes. (*Id.* at p. 40.) Specifically, the Court found that, contrary to the prosecution's opinion, the cover model "merely looked similar" to the victim which was insufficient to warrant admission of the cover model's photograph let alone

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[49] The trial court also admitted a bondage magazine to demonstrate the defendant was violent.

the hundreds of other images contained in the magazine. (*Ibid.*) Ultimately, the High Court did not reach the issue of error because it found that, regardless of error, the defendant suffered no prejudice in light of the other overwhelming evidence introduced against him. Nevertheless, based on the poor judgment exercised by the trial court in *Page*, the California Supreme Court admonished trial courts, in general, to exercise greater caution before admitting pornography at a criminal trial because such evidence can easily distract, inflame, and confuse a jury undermining the fairness due to a defendant. Specifically, the Court warned:

> [Pornography] evidence may threaten to distract jurors from potentially more probative evidence and to consume undue amounts of time, a risk that has multiplied since the time of [the defendant's] murder in 1993 due to the availability of pornography on the internet and the ease with which a defendant may view thousands of pornographic images on a computer. Therefore, we urge trial courts to exercise caution in weighing the probative value of individual examples of pornography possessed or accessed by a defendant.

(*Id.* at p. 41, fn. 17.)

The United States Supreme Court has also expressed similar concerns about the appropriate types of inferences that can be drawn from possessing legal pornography. In *Jacobson v. United States* (1992) 503 U.S. 540, 543-554, the defendant had legally purchased child pornography from a California Book Store (Bare Boys I and II) before Congress passed the Child Protection Act of 1984 which criminalized such conduct. (*Ibid.*) Due to this purchase, defendant was targeted for approximately two and half years as part of a federal government sting operation to arrest patrons of child pornography. (*Ibid.*) After years of intensive solicitation, defendant purchased "Boys Who Love Boys," a pornographic magazine depicting young boys engaged in various sexual activities. He was later arrested for the knowing receipt of child pornography in violation of 18 U.S.C. §2252(a)(2)(A). (*Id.* at p. 547.)

To rebut the defendant's entrapment defense, the prosecution was required to prove beyond a reasonable doubt that the defendant was predisposed to committing the crime. (*Jacobson v. United States, supra,* 503 U.S. at p. 554.) To prove predisposition, the prosecution introduced evidence of his 1984 legal purchase of child pornography (Bare Boys I and II) along with many responses he provided government officials throughout the two year sting operation. (*Id.* at 551-522.) For example, during the course of the sting operation, the defendant was asked to fill out a sexual interest questionnaire wherein he indicated he "enjoyed ... pre-teen sex." (*Id.* at p. 544.) He also told undercover officers, in writing, "Please feel free to send me more information, I am interested in teenage sexuality. Please keep my name confidential." (*Id.* at p. 544.) In a second survey sent to defendant, defendant indicated that "his interest in 'preteen sex-homosexual' material was above average, but not high." (*Ibid.*) The United States Supreme Court found all of this evidence insufficient to show the defendant had a predisposition for receiving child pornography. (*Id.* at p. 554.)

The Supreme Court surmised that the defendant's prior purchase of legal child pornography was not evidence of a predisposition to purchase illegal child pornography. As held by the High Court,

> Evidence of predisposition to do what once was lawful is not, by itself, sufficient to show predisposition to do what is now illegal, for there is a common understanding that most people obey the law when they disapprove of it. ... Hence, the fact that petitioner legally ordered and received the Bare Boys magazines does little to further the Government's burden of proving that petitioner was predisposed to commit a criminal act. This is particularly true given petitioner's unchallenged testimony that he did not know until they arrived that the magazines would depict minors.

(*Jacobson v. United States, supra,* 503 U.S. at p. 551.) With respect to the communications the defendant made during the sting operation, the Supreme Court concluded:

> Petitioner's responses to the many communications prior to the ultimate criminal act were at most indicative of certain personal inclinations, including a predisposition to view photographs of preteen sex and a willingness to promote a given agenda by supporting lobbying organizations. Even so, petitioner's responses hardly support an inference that he would commit the crime of receiving child pornography through the mails. Furthermore, a person's inclinations and 'fantasies ... are his own and beyond the reach of government.' [Citation.]

(*Id.* at pp. 551-552.) Concerned about the appropriate nexus required before illicit thoughts legitimately become evidence of a predisposition to commit a criminal act, the Supreme Court noted:

> [Possession of legally obtained child pornography] may indicate a predisposition to view sexually oriented photographs that are responsive to his sexual tastes; but evidence that merely indicates a generic inclination to act within a broad range, not all of which is criminal, is of <u>little probative value in establishing predisposition</u>.

(*Id.* at p. 550, emphasis added.)

While neither *Page* nor *Jacobson* articulate a precise test to determine when legally obtained pornography legitimately evidences a criminal state of mind, both the California Supreme Court and the United States Supreme Court have held that it is improper to draw broad generalizations about a defendant's *mens rea* based on the possession of pornography. In this regard, a narrow nexus must be established before pornography can be used to prove a defendant's criminal state of mind.

Relying on the dictates of *Jacobson*, the Second Circuit expressly found that adult pornography cannot be used to prove a predisposition to receive child pornography. (*United States v. Harvey* (2nd Cir. 1993) 991

F.2d 981, 996.) In *United States v. Harvey*, the defendant was prosecuted for receiving child pornography under a federal sting operation. (*Id.* at pp. 983-984.) Pursuant to a search, the government found a plethora of pornography in the defendant's home including child pornography, adult pornography simulating young girls, adult pornography depicting bestiality, and adult pornography sexualizing excrement. (*Id.* at pp. 994-996.) All of this evidence was introduced at the defendant's trial to show his predisposition to receive child pornography. While the Second Circuit ultimately held that the child pornography and simulated child pornography were relevant to show the defendant's predisposition to receive child pornography, it found the bestiality and excrement pornography to be completely irrelevant and irreparably prejudicial. (*Id.* at p. 996.) Like *Harvey*, the prosecution in this case only introduced the titles and descriptions of the bestiality pornography. (*Ibid.*) Nevertheless, the Second Circuit concluded, "We have little difficulty in concluding that the likely effect of this evidence was to create disgust and antagonism toward Harvey, and resulted in overwhelming prejudice against him." (*Ibid.*) Since the defendant in *Harvey* was never charged with the unlawful receipt of obscene material, the Second Circuit held that the bestiality and excrement pornography had "no probativeness against which to weigh its overwhelming prejudicial effect" and reversed the judgment. (*Id.* at pp. 995-996.)

Similarly, in *People v. Earle* (2009) 172 Cal.App.4th 372, 392, 412 the Court of Appeal reversed the defendant's convictions because the trial court allowed the prosecution to rely on evidence of generalized sexual deviant behavior to prove the requisite mental state for assault with intent to commit rape. In *Earle*, there was uncontroverted evidence that the defendant had, on a prior occasion, exposed himself to a young woman and was, thereafter, charged with committing indecent exposure. (*Id.* at p. 384.)

The trial court allowed the prosecution to rely on this evidence to prove that the defendant committed assault with the "specific intent" to rape a separate victim. (*Id.* at p. 392.)

In reversing the convictions, the Court of Appeal reprimanded the trial court for condemning the defendant based on generalized sexually offensive behavior finding the "evidence of indecent exposure had no tendency at all to show that he had a motive to commit *sexual assault*." (*Id.* at pp. 392-400, emphasis in original.) With respect to identity, the Court of Appeal concluded the defendant's indecent conduct was insufficiently distinctive to constitute a "unique signature" and, therefore, inadmissible to prove identity. (*Id.* at p. 394.) Hammering the point home, the Court of Appeal held that mental state evidence relevant to prove one type of sexual offense is often irrelevant to prove the requisite mental state of different type of sexual offense.

> But a propensity to commit one kind of sex act cannot be supposed, without further evidentiary foundation, to demonstrate a propensity to commit a *different act.* The psychological manuals are full of paraphilias, from clothing fetishes to self-mutilation, some of which are criminal, some of which are not. No lawperson can do more than guess at the extent, if any, to which a person predisposed to one kind of deviant sexual conduct may be predisposed to *another* kind of deviant sexual conduct, criminal or otherwise. Is one who commits an act of necrophilia (Health & Saf. Code, § 7052) more likely than a randomly selected person to commit an act of rape? Child molestation? Indecent exposure? Is a pedophile more likely than a rapist or a member of the public to commit necrophilia? Without some *evidence* on the subject, a jury cannot answer these questions.

(*Id.* at p. 399.)

In *Holley v. Yarborough* (9th Cir. 2009) 568 F.3d 1091, 1097, a California case collaterally reviewed by the Ninth Circuit, the defendant was charged with multiple counts of committing lewd acts on a minor. The minor accused the defendant of touching her breasts and other private parts

while he baby-sat her and her brother. (*Id.* at p. 1096.) After the defendant's arrest, the police found a "lewd matchbook" and "several sexually explicit magazines" in the defendant's bedroom. (*Id.* at p. 1096.) This evidence was introduced to prove the defendant acted "with the intent of arousing, appealing to, or gratifying the lust, passions, or sexual desires of himself or the child." (Pen. Code § 288, subd. (c)(1).) In analyzing the issue, the Ninth Circuit found prejudicial error, but did not reverse the conviction because it found there were no Supreme Court cases which "clearly established" a constitutional violation as required by the Anti-Terrorism and Death Penalty Act. Nevertheless, the Ninth Circuit stressed that:

> The trial court in this case admitted evidence of sexually explicit materials taken from Holley's bedroom over Holley's objection, including a matchbook cover titled "When I was a Year Old," which depicted a baby boy with unnaturally large genitals, and three pornographic magazines entitled "Barely Legal," "Baby Face," and "Barely 18." The magazines contained only images of adult women, no children. The jury could have drawn no permissible inferences from either the matchbook or the magazines. The matchbook, far from reflecting a sexual interest in prepubescent girls, reflects, if anything, an off-color sense of humor, as it "at best expressed a joke about a man's endowment." The magazines are similarly irrelevant, as they depict adult women, not prepubescent girls. The only inference to be made from these magazines is that Holley had sexual interest in young-looking adult women.
>
> Particularly in the absence of a limiting instruction, the likely influence of this evidence on the jurors was to persuade them that Holley had a dirty mind because he engaged in off-color humor and bought pornographic, and likely offensive, magazines. Holley was denied a fair trial as a result, because the evidence presented was both irrelevant and highly likely to be prejudicial, with substantial and injurious effect on the jury's verdict.

(*Id.* at p. 1101, fn. 2.)

In the case at bar, the trial court abused its discretion by erroneously admitting a plethora of pornography evidence that had no bearing on the charges alleged against Ajay. This erroneous introduction of evidence allowed the jury to improperly infer that Ajay was a pervert or sexually deviant which the jury was permitted to rely on, generally, to determine whether he was guilty of rape and lewd and lasciviously acts against a minor. Given Sapna's utterly unreliable testimony and the ambiguity of the pretext call evidence, this error allowed the prosecution to unfairly bolster its weak case to gain a conviction based on stigma rather than evidence. For this reason, Ajay's convictions must be reversed.

2. The Adult Pornography Found On the Dev Computers, Even If It Could Be Attributed To Appellant, Had No Bearing On The Charges And, Therefore, Should Have Been Excluded As Irrelevant Evidence.

The only adult pornography relevant to the charges in this case was the film "Eighteen and Confused" because Sapna expressly accused Ajay of showing it to her when she was a minor. The remaining adult pornography, including the bestiality, had no bearing on the charges and no effort was made by the trial court to form the requisite nexus between the pornography and the crime for purposes of admissibility. (See generally, *Jacobson v. United States, supra,* 503 U.S. at pp. 550-552; *People v. Page, supra,* 44 Cal.4th at p. 41, fn. 17.) At the hearing on the motion to sever the pornography charges (counts 64 and 65) from the case, the prosecution argued the evidence supporting the pornography charges was cross-admissible as it equally supported the lewd and lascivious charges (counts 1, 4, 6, 9, 11, 14, 16, 19, 21, 24, 26, 29, 31, 34, and 36) because they shared an identical element: that the defendant acted with the intent of arousing, appealing to or gratifying the lust, passions, or sexual desires of himself or the Child. (Pen. Code §§ 288.2, 288, subd. (c)(1).) (3 RT 391-396) While this may have justified joinder, it does not change the fact that the adult

pornography had no relevance to proving either charge or element.[50] There is nothing about adult pornography (adult females and bestiality) that suggests an individual would be attracted to a minor. As highly cautioned in *Page*, *Jacobson*, and *Earle*, this kind of generalized analysis has little to no probative value and is meant to unjustly stigmatize the defendant as having a "dirty mind" which the jury speciously translates into meeting the criminal *mens rea* requirement for an unrelated sex-crime. As held by the United States Supreme Court, "evidence that merely indicates a generic inclination to act within a broad range, not all of which is criminal, is of little probative value in establishing predisposition." (*Jacobson v. United States, supra,* 503 U.S. at p. 550.) For this reason, the adult pornography (including the bestiality) was completely irrelevant to the crimes charged and should have never been introduced against Ajay at trial.

3. The Probative Value Of The Adult Pornography Was Not Substantially Outweighed By Its Prejudice

Admission of the adult pornography evidence was especially objectionable under Evidence Code section 352 since its probative value was not substantially outweighed by its prejudice. In addition to being completely irrelevant, the probative value of the adult pornography evidence was especially thin because it was unclear whether it belonged to Ajay and, therefore, could be attributed to his mental state.

The only adult pornography indisputably belonging to Ajay was Exhibit 45 which Peggy Dev testified he purchased to assist him in providing sperm samples for infertility treatments. (15 RT 4096) Otherwise, the genesis of the computer pornography was extremely unclear at trial. Both the prosecution and defense experts agreed that it was virtually impossible to determine who viewed the pornography on the

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[50] Arguably the child pornography introduced to support the pornography counts was cross-admissible to support the lewd and lascivious charges justifying joinder.

computer and whether it was placed on the computer inadvertently by unsolicited internet sources or whether it was intentionally downloaded by a person. (11 RT 2931, 2936-2938, 2940)

With respect to Exhibit 49, the defense introduced uncontested evidence from forensic expert, Jeffrey Fischbach, who explained that the pornography found on Ajay's laptop in the subdirectory entitled "QcBar" was most likely the result of a virus which created unwanted and unsolicited pornography related pop-ups he termed a "porn storm." (11 RT 2982-2987; 17 RT 4728-4746) Fischbach's opinion was further corroborated by the fact that the images found on the computer were icons, approximately ½ inch by ½ inch, which was endemic to QcBar viruses and inconsistent with viewing. (17 RT 4727, 4730, 4733) Finally, Fischbach testified that there was no forensic evidence on the computer to verify that a user ever clicked on the images to view or download them. (17 RT 4727, 4730, 4732-4733)

Similarly, with respect to Exhibits 46 and 50, there was no conclusive evidence that the pornography belonged to Ajay. In fact, there was evidence suggesting Sapna may have been the person who transferred the pornography from the laptop, via disc, to the Tower on August 21, 2003. First, the pornography was placed on the Tower computer on August 21, 2003 about one month after the Tower computer was moved to Sapna's bedroom. (11 RT 2923; 15 RT 4111-4112) Therefore, since the computer was in Sapna's bedroom it is just as likely that she or one of her boyfriends placed the pornography on the computer. In addition, more than half of the pornography video files on the Dell Tower movie folder (Exhibit 46) appear to be originally from the Kazaa folder (Exhibit 44) on the laptop including the H-Bomb file. (11 RT 2883-2884; 17 RT 4789-4791; 10 CT 2864) The H-Bomb file is significant because the evidence at trial indisputably established that Sapna relied on an internet source entitled

"Effect of A-Bombs" when drafting a term paper for school on technology. (6 RT 1215; 11 RT 2884-2885, 2895; 17 RT 4705-4707, 4790-4791; 11 CT 3184-3203, Exhibit 44) Although the term paper was due in May 2003, the forensic evidence from the Tower computer also shows that the H-Bomb file was opened or "accessed" on October 15, 2003 consistent with the time frame in which the pornography files were accessed on the Tower computer. (17 RT 4790; 10 CT 2864-2867) Therefore, since only Sapna was interested in the H-Bomb, it follows that she was more likely accessing the pornography files. In addition to Sapna's May 2003 research on H-Bombs and the October 2003 "access" of the H-Bomb file, there is also evidence that Sapna's interest in atomic explosions extended to December 31, 2003 as, when house sitting for the Devs, she accessed a document in her personal file on the Tower called "Dropping of an Atomic bomb," (17 RT 4704-4705; 15 CT 4377) Since the H-Bomb file was downloaded on the laptop and the Tower contiguous with the pornography and only Sapna was interested in the H-Bomb, it is more likely that Sapna (and perhaps a boyfriend), rather than Ajay, was/were viewing the pornography.[51]

Exhibit 48 suffered from the same unreliability. Because the bestiality images were found in the recycle bin, it was impossible to determine how the images got on the computer and whether they were ever viewed. (17 RT 4727) Fischbach testified that the files could have come from an unsolicited e-mail, a pop-up virus, or an internet search, none of which could be attributed to Ajay's state of mind. (17 RT 4727) Fischbach, nevertheless, surmised that the files were most likely computer generated, rather than the result of human searching, because the file name

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[51] In addition, had the defense been able to introduce Exhibit 813, an e-mail placing Ajay at work on September 26, 2003 at 8:30am, it would have been able to prove that Ajay was at work while pornography was being viewed at the Dev home. (See Argument VII)

assigned to the bestiality file was an extremely long numerical number. (17 RT 4774-4776)

All of this evidence further diminishes the probative value of the adult pornography since it shows that the pornography cannot conclusively be attributed to Ajay. In contrast, the prejudicial effects of this evidence were extremely significant. There is no doubt that the bestiality was the most prejudicial and most irrelevant pornography introduced against Ajay at his trial. The prosecution introduced this evidence in an attempt to prove what the other evidence could not prove – that Ajay was a sick pervert capable of raping and molesting his adopted daughter. This invitation to unfairly stigmatize and criminally condemn a person based on an unrelated sexual interest is the exact scenario *Page*, *Jacobson*, and *Earle* all denounce.

4. The Failure To Give A Limiting Instruction On The Relevance of the Adult Pornography Further Prejudiced Appellant and Constituted Independent Error.

At the hearing to sever the pornography charges from the remaining charges, held before trial, the trial court indicated it would give a limiting instruction because "the Courts of Appeal tell us they do work and that they're appropriate to give." (2 RT 66) Specifically, the trial court stated:

> There could be limiting instructions, if necessary, about the use of the [pornography] evidence for particular charges. Typically, the attorney who is opposing the evidence argues that limiting instructions don't work. I've heard that from prosecutors and I've heard that from defense side as well. But the Courts of Appeal tell us they do work and that they're appropriate to give.

(2 RT 66) The defense never objected to such an instruction.

Without any limiting instruction, the jury was permitted to draw whatever inference it wanted with regard to Ajay's guilt. Even the trial court ultimately held that, with respect to the adult pornography, "the jury

can take the circumstantial evidence for what it's worth." (3 RT 400) In this regard, the jury had no restraints placed on it and was free to rely on the adult pornography to find Ajay guilty of the rape charges, the lewd and lascivious charges, and to discern his credibility in all contexts of the case. As argued above, the adult pornography evidence was irrelevant to all of the charges. However, even the prosecution acknowledged that the adult pornography had no relevance to the rape charges because, unlike the lewd and lascivious charges, there was no specific intent requirement. (2 RT 60-63; 3 RT 391-394) Therefore, without a limiting instruction the jury was impermissibly allowed to find Ajay guilty of the rapes based on an unfounded belief that he had the propensity to rape because he was a sexually deviant person as demonstrated by the adult pornography – especially the bestiality.

While a trial court ordinarily has no duty to furnish a limiting instruction, the *sua sponte* obligation to give a limiting instruction may arise in an "extraordinary case in which the unprotected evidence of past offenses is a dominant part of the evidence against the accused, and is both highly prejudicial and minimally relevant to any legitimate purpose. (*People v. Rogers* (2006) 39 Cal.4th 826, 853-854, citing *People v. Collie* (1981) 30 Cal.3d 43, 64.) Here, the inadmissible pornography evidence was a dominant part of the evidence both because of its inflammatory nature and because it consumed about 10% of the trial evidence despite the fact that only two of 92 charges pertained to pornography. (4 RT 819-837, 860; 5 RT 905-923, 1101-1121, 1157-1159; 6 RT 1285-1328, 1438, 1471; 7 RT 1532-1534, 1691-1692; 8 RT 2020-2023, 2048-2063; 9 RT 2120-3043; 11 RT 2795-2951, 2826-2831, 2859-2864; 17 RT 4554-4560, 4649-4756, 4758-4802) As described above, the inadmissible adult pornography evidence (including the bestiality) had no relevance to proving Ajay was attracted to minors and had minimal evidentiary value as demonstrated by

the jury's unequivocal decision to acquit Ajay of both the pornography counts. For this reason, the trial court should have given the jury a limited instruction on the adult pornography evidence to ensure, at a minimum, it was not used to support the rape allegations.

E. The Erroneous Introduction of Adult Pornography Found On the Dev Home Computers Prejudiced Appellant Requiring Reversal.

Reversal is required under state law where the record demonstrates there was a reasonable probability that, but for the error, the defendant would have obtained a more favorable verdict. (*People v. Watson* (1956) 46 Cal.2d 818, 836.) A "reasonable probability" under the *Watson* standard of prejudice only requires a showing of a "reasonable chance" something "more than an abstract possibility." (See *College Hospital, Inc. v. Superior Court* (1994) 8 Cal.4th 704, 714, citing *People v. Watson, supra,* 46 Cal.2d 818, 837, and *Strickland v. Washington* (1984) 466 U.S. 688, 693-694, 697, 698 [104 S.Ct. 2052, 80 L.Ed.2d 674].) Here, the erroneous admission of the adult pornography (including the bestiality evidence) warrants reversal because the remaining evidence introduced against Ajay at trial was extremely weak. (*See prejudice section of Argument I, supra.*) Knowing that Sapna's testimony was replete with inconsistencies, the prosecution attempted to convict Ajay by trying to corroborate her allegations with the other evidence -- primarily the pornography evidence which impermissibly evoked images of sexual deviance. Not only is this type of evidence, by its nature, inflammatory and highly prejudicial, in this case, many of the jurors expressed their distaste and prejudice against pornography. (6 CT 1711, 1718-1732, 7 CT 1748-1762, 1763-1767) Juror Nos. 2, 11 and 12 all indicated it would be difficult for them to decide the case if it involved the viewing of sexually explicit videos or motion pictures. (6 CT 1711; 7 CT 1801; 8 CT 2034) Juror No. 4 indicated that the introduction of pornography might affect her ability to decide the case depending on "how

explicit and whether they include violence as well." (6 CT 1726) Juror No. 11 wrote, "I am very uncomfortable with sexual materials due to being a marital rape victim." (8 CT 2034)

In addition, the improper admission of the pornography evidence (including the bestiality) was so grossly unfair it offended the most "fundamental conceptions of justice" violating appellant's federal constitutional right to a fair trial and due process, as guaranteed by the Fifth and Fourteenth Amendment rights to the United States Constitution. (*United States v. Lavasco* (1977) 431 U.S. 783, 790, 97 S.Ct. 2044, 2048; *People v. Turner* (1984) 37 Cal.3d 302, 313.) Moreover, because adult pornography is protected by the First Amendment of the United States Constitution and cannot constitute a crime, the improper introduction of this evidence also violated appellant's First Amendment right to free speech. (*Ashcroft v. Free Speech* Coalition (2002) 535 U.S. 234, 122 S.Ct. 1389.)

In this regard, the inadmissible pornography evidence was particularly invidious as it was used to paint an illegitimate picture of Ajay as a sexually deviant person to prove Ajay was capable of raping a minor and/or committing lewd and lascivious acts against a minor. In turn, it is reasonably probable that the jury relied on this prohibited inference to credit otherwise suspect evidence especially as it related to Sapna's testimony and the pretext call both of which revolved around state of mind evidence. (*People v. Watson, supra,* 46 Cal.2d at p. 836.) For the same reasons, the State cannot show the error did not contribute to the verdict beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 87 S.Ct. 824 [17 L.Ed.2d 705]; *Crane v. Kentucky* (1986) 476 U.S. 683, 691 [106 S.Ct. 2142].) Given this undeniably prejudicial impact under state and federal law, reversal of all of appellant's convictions is required.

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VI. APPELLANT'S CONVICTIONS SHOULD BE REVERSED BECAUSE THE TRIAL COURT IMPROPERLY ADMITTED A KAZAA COMPUTER LOG OF TITLES CLAIMING TO BE CHILD PORNOGRAPHY BASED ON THE PROSECUTION'S KNOWINGLY FALSE OFFER OF PROOF THAT THE FORENSICS SHOWED APPELLANT DELIBERATELY SEARCHED FOR THE TITLES ON HIS LAPTOP COMPUTER.

A. Introduction

In the middle of trial, with almost no notice to the defense, the prosecution introduced Exhibit 44 over defense objection. (11 RT 2828-2831) Exhibit 44 consists of three over-sized charts (referred to as 44A, 44B, and 44C) which reflect select file names with accompanying descriptions from Kazaa's download log found on Ajay's laptop. (2 RT 293; 11 RT 2841-2842, 2846-2848, 2850, 2895, 2899-2900, 2934) The Kazaa log, however, did not contain any actual content. (2 RT 293; 11 RT 2841-2842, 2847-2848, 2850, 2895, 2899-2900, 2934)

Kazaa was a computer software program used in the early 2000s which had been downloaded on to Ajay's laptop.[52] (11 RT 2807-2808; 17 RT 4683-4685) As prosecution expert Brent Buehring testified, "most people used it for music. You can get music on it, you can get movies, you can get books." (11 RT 2807) Kazaa operated as a file transfer protocol (FTP) or a peer-to-peer (P2P). (11 RT 2808) Therefore, to share music, movies, or books each participant (of which there were millions spread over the world) had to have something on their computer to share before he or she could get music, movies or books for free. (11 RT 2809, 2844, 2890) The Kazaa software allowed the participants to search each others' computers for files and share them. (11 RT 2809, 2844, 17 RT 4683-4685)

Brent Buehring, the prosecution's computer expert, explained that in the Kazaa log "there was a lot of music, which would be like an MP3

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[52] Kazaa was created in March 2001. (17 RT 4685)

extension, music files. There was a lot of music." (11 RT 2847) Buehring even agreed that there were more "innocent" titles in the Kazaa log than there were pornographic titles. (11 RT 2897-2898) In fact, of the 5,199 files deleted on the laptop only 122 (approximately 3.5%) were even suggestive of pornography. (11 RT 2933-2934) Exhibit 44 represented this 3.5% and was created by Buehring who simply selected those file names he believed sounded like adult or child pornography.[53] Names like "Underage teen flashing her ass in a subway resturaunt," "incest porn qwerty hairless virgin sex xxx ass," and "young girl fucked in ass." (11 RT 2842-2843, 2846-2847, 2897) This list was admitted into evidence as Exhibit 44. (11 RT 2793; 18 RT 4870)

B. Standard of Review

The erroneous admission of pornography evidence under Evidence Code sections 1101, 352 and 402 is reviewed for abuse of discretion. (*People v. Page* (2008) 44 Cal.4th 1, 44, 41.) However, as recognized in *Ziesmer v. Superior Court* (2003) 107 Cal.App.4th 360, 363, "the abuse of discretion standard is itself much abused." Therefore, the *de novo* standard of review may be more appropriately applied where, as here, the correctness of the trial court's order turns on the application of law to

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[53] The evidence showed that the majority of the Kazaa titles were most likely adult pornography with the exception of two which were child pornography. Therefore, while Buehring testified that he did not know whether the files in the Kazaa log (Exhibit 44) were, in fact, child pornography because the content of the files were not on the computer and because the titles of pornography files in Kazaa were often inaccurate (11 RT 2892, 2934-2935, 2945), Exhibit 46 shows that the Kazaa log most likely included pornography. That is, 35 of the titles found in the Kazaa folder on Ajay's laptop were also found on the Dell Tower computer. (2 RT 293; 11 RT 2829-2830, 2887; 10 CT 2864-2867 [Exhibit 46]) However, unlike the Kazaa log which had no content, many of the Dell Tower files had content. Therefore, the evidence suggests that most of the files in the Kazaa log were adult rather than child pornography. (2 RT 293; 11 RT 2829-2830; 10 CT 2864-2867 [Exhibit 46])

undisputed facts. (*Ziesmer v. Superior Court, supra,* 107 Cal.App.4th at p. 363; *People v. Jackson* (2005) 128 Cal.App.4th 1009, 1018-1019; *In re Jane Doe 8015 v. Superior Court* (2007) 148 Cal.App.4th 489, 493.)

C. The Prosecution Knowingly Made A False Offer Of Proof To Have Exhibit 44 Admitted.

The Kazaa log (Exhibit 44) was admitted to show that Ajay was attracted to minors. (11 RT 2830) The prosecution argued this evidence was relevant to show the specific intent element of the lewd and lascivious charges (counts 1, 4, 6, 9, 11, 14, 16, 19, 21, 24, 26, 29, 31, 34 and 36), i.e. that "the defendant committed the act with the intent of arousing, appealing to, or gratifying the lust, passions, or sexual desires of himself or the child." (12 CT 3251) In arguing relevance to the trial court, the prosecution suggested the files "show the intent of the person who was downloading them" thereby "expos[ing] the state of mind or what the person downloading this information was looking for." (11 RT 2830) To show that the Kazaa log reflected a person deliberately looking for child pornography, the prosecution made the following offer of proof:

> The purpose of this information is to show the intent of the person who is downloading this information from Kazaa because that's how you find it. It's – so it's **not** like I typed in White House President, 1600 Pennsylvania Avenue, and, oh, my gosh, look, I got "Nine-Year-Old Gets Raped."

(11 RT 2830, bold added for emphasis)

This argument was not only false, it was knowingly false and, thus, constituted prosecutorial misconduct. The prosecution's argument assumes that a person using Kazaa cannot inadvertently and/or unknowingly obtain child pornography titles while searching for music or any other type of legitimate material. However, as repeatedly explained by the prosecution's computer expert, Brent Buehring, who compiled the Kazaa log -- child

pornography titles could have easily been amassed inadvertently without Ajay's intent or knowledge.

According to prosecution expert, Brent Buehring, a Kazaa user searches for material by typing keywords into Kazaa to find music, movies, or books. (11 RT 2807, 2841, 2845) However, even if the Kazaa user was looking for innocent material, pornographic material could be gathered inadvertently if one of the keywords entered by the Kazaa user matches a keyword attached to a file with a pornographic name. (11 RT 2845, 2891, 2893) Therefore, if a Kazaa user wanted to find a song title with the word "sex" in it, like "Sex Machine" by James Brown, he or she could inadvertently pull up a pornography file which had "sex" inputted as a keyword. (11 RT 2893) Similarly, even if a Kazaa user was interested in finding adult pornography, the search words could inadvertently pull up child pornography. (11 RT 2893) Given Kazaa's overbroad and inexact method for searching and finding titles, the Kazaa log alone says nothing about the user's state of mind.

Equally significant, the keywords and titles inputted into the Kazaa program are done by individual users without any oversight from Kazaa. (11 RT 2890) Therefore, it is not uncommon for the titles and keywords attached to a file to inaccurately describe the contents of the file. (11 RT 2890) This also undermines any ability to infer a specific intent from the user because nefarious materials can be unintentionally pulled up with an innocent search especially if innocent keywords are attached to pornography file by a Kazaa user. (11 RT 2890) As defense expert Jeffrey Fischbach testified,

> Kazaa allows for sharing any sort of file, but, of course, the community just followed from Napster's ashes and started sharing music on Kazaa, and anything else that's not easily facilitated on the Web or anything that a service provider wouldn't allow you to store on the Web tends to be something that people would put onto a [peer-to-peer] program.

(17 RT 4685) Therefore, given the pornography industry's interest in exploiting Kazaa, any legitimate Kazaa user risked downloading pornography unintentionally. Contrary to the prosecution's argument, the titles in the Kazaa folder, which were suggestive of child pornography, did not tend to prove Ajay's state of mind because there was no evidence to show Ajay deliberately searched for those titles.

The prosecution knew or should have known that the Kazaa log, Exhibit 44, did not reflect Ajay's state of mind. Officer Brent Buehring was a police officer for the Davis Police Department for 25 years and, at the time of Ajay's prosecution, went back to work for the department part time as a retired annuitant. (11 RT 2795) As a consequence, Buehring's knowledge about the Kazaa program was imputed to the prosecution. (*See Kyles v. Whitley* (1995) 514 U.S. 419, 437-438 [115 S.Ct. 1555] ["the individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police"]; *People v. Zambrano* (2007) 41 Cal.4th 1082, 1132 [*Brady* duty concerns evidence possessed by the "prosecution team" which includes both investigative and prosecutorial personnel].) Therefore, the prosecution's representation that the Kazaa files necessarily showed that Ajay searched for child pornography which, in turn, tended to show he had a sexual attraction to minors was knowingly false.

As is well established by the Supreme Court, a conviction obtained by false evidence cannot stand. (*Miller v. Pate* (1967) 386 U.S. 1, 7 [87 S.Ct. 785, 788] citing, *Mooney v. Holohan* (1935) 294 U.S. 103 [55 S.Ct. 340]; *Naupe v. People of State of Illinois* (1959) 360 U.S. 264 [79 S.Ct. 1173]; *Pyle v. State of Kansas* (1942) 317 U.S. 213 [63 S.Ct. 177].) Reversal is also required where false and/or deceptive evidence impacts the fairness of a trial and there is a reasonable likelihood that the jury's judgment was affected. (*Smith v. Philips* (1982) 455 U.S. 209, 219 [102

S.Ct. 940, 947]; *Giglio v. United States* (1972) 405 U.S. 150, 153-154 [92 S.Ct. 763, 766] citing, *Mooney v. Holohan* (1935) 294 U.S. 103 [55 S.Ct. 340].) Here, the prosecution's knowingly false offer of proof induced the trial court to admit the Kazaa log, Exhibit 44, to prove Ajay's state of mind. This error was compounded by the prosecution's misleading examination of Buehring and his closing argument to the jury.

During its examination of computer expert Brent Buehring, the prosecution misled and inflamed the jury by repeatedly suggesting that Ajay had to have entered keywords like "anal, porn, Lolita, rape" in order to pull up the files listed in the Kazaa log. (11 RT 2945-2946) In addition, the prosecution presented a knowingly false argument to the jury during closing wherein he persuaded the jury:

> It was Mr. Dev who was interested in having sex with younger girls – younger looking girls. And these lovely Kazaa charts, which you can tape up all over the walls of the jury room. The most important thing about those is how you get that information. You have to ask for – you search for certain search terms. You search for the title. You search for the description. Read the descriptions on there. They're all about abuse of children. Nine-year-old gets raped while crying, things like that. That's just replete with those titles. That's what he downloaded. Just like Dr. O'Donohue told you, that's a male thing. Girls don't do that.

(18 RT 5013-5014)

Since the prosecution knew the Kazaa log evidence could not prove Ajay's state of mind, it was error to argue to the contrary during closing argument; mislead the jury during Buehring's testimony; and present a false offer of proof to the trial court in order to secure its admission. Given these errors, the admission of the Kazaa log evidence rendered Ajay's trial fundamentally unfair requiring reversal.

D. The Trial Court Should Have Excluded The Kazaa Log, Exhibit 44, Because It's Probative Value Did Not Substantially Outweigh Its Prejudicial Effect.

Even absent prosecutorial misconduct, the Kazaa log evidence should have been excluded. At trial, the court admitted the Kazaa log evidence to show identity because it found that the defense opened the door to the issue on cross examination. As held by the trial court:

> All right. As far as this goes, I think the defense has opened the door through the cross-examination of Ms. Dev, as well as questions to other witnesses about her access to porn and her suggested desire to view it through where she worked and other things, and so the likelihood that she would use these types of search terms is relevant to the jury considering that issue that the defense has already raised, so I'm going to let the diagrams be used as they're presently created.

(11 RT 2831) The trial court did not weigh the probative value of the evidence against its prejudicial effect.

In general, character evidence, like interest in child pornography, is inadmissible against a defendant when "offered to prove his or her conduct on a specified occasion." (Evid. Code § 1101, subd. (a).)[54]

> The inherent danger in regard to the use of other-crimes evidence to prove a fact in the charged offense is that

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[54] Evidence Code section 1108 actually allows uncharged sex crime evidence to be admitted for purposes of propensity. However, here, the Kazaa log evidence does not constitute the crime of possessing child pornography (§ 311.11) because there was insufficient evidence to establish that the files were, in fact, child pornography. (*See People v. Cottone* (2011) 123 Cal.Rptr.3d 892, 900 review granted Aug. 17, 2011, No. S194107 [review granted on whether trial court or jury should determine whether defendant's prior conduct was "criminal" for purposes of admission under Evidence Code section 1108, but leaving intact the premise that "Evidence Code section 1108's plain language requires prior sexual misconduct evidence to be a "crime"]; *People v. Gerber* (2011) 196 Cal.App.4th 368, review denied on Aug. 17, 2011, No. S195160 [finding insufficient evidence of crime for possessing child pornography where there was no evidence child depicted was "real"].)

> "[i]nevitably, it tempts 'the tribunal . . . to give excessive weight to the vicious record of crime thus exhibited, and either to allow it to bear too strongly on the present charge, or to take the proof of it as justifying a condemnation irrespective of guilt of the present charge.'" [Citations.]

(*People v. Nottingham* (1985) 172 Cal.App.3d 484, 495.)

Nevertheless, prior bad act evidence can be admitted in limited circumstances. (Evid. Code § 1101, subd. (b)) Specifically, Evidence Code section 1101, subsection (b), provides:

> Nothing in this section prohibits the admission of evidence that a person committed a crime, civil wrong, or other act when relevant to prove some fact (such as motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident, or whether a defendant in a prosecution for unlawful sexual act or attempted unlawful sexual act did not reasonably believe and in good faith believe that the victim consented) other than his or her disposition to commit such an act.

As repeatedly warned by the California Supreme Court, the admission of propensity evidence, by its nature, is highly inflammatory and prejudicial requiring that its admissibility be "scrutinized with great care" with "closely reasoned analysis." (*People v. Thompson* (1980) 27 Cal.3d 303, 315.)

"The admissibility of other crimes evidence depends on (1) the materiality of the facts sought to be proved, (2) the tendency of the uncharged crimes to prove those facts, and (3) the existence of any rule or policy requiring exclusion of the evidence. [Citation.]" (*People v. Carpenter* (1997) 15 Cal. 4th 312, 378-379.) "Evidence of uncharged offenses is so prejudicial that its admission requires extremely careful analysis. Since substantial prejudicial effect is inherent in such evidence, uncharged offenses are admissible only if they have *substantial* probative value." (*People v. Ewoldt* (1994) 7 Cal.4th 380, 404, original italics;

citations, internal quotations and brackets omitted.) "Because this type of evidence can be so damaging, '[i]f the connection between the uncharged offense and the ultimate fact in dispute is not clear, the evidence should be excluded.' [Citation.]" (*People v. Daniels* (1991) 52 Cal.3d 815, 856; *People v. Butler* (2005) 127 Cal.App.4th 49, 60.)

In the case at bar, the prosecution argued the Kazaa log evidence was relevant to show Ajay's intent to commit lewd and lascivious acts against Sapna and the trial court admitted the evidence to assist the jury to determine whether Ajay possessed child pornography and, therefore, perpetrated the charged crimes. While intent and identity are legitimate grounds for admission, admission is not proper unless the proponent of the evidence, in this case the prosecution, can establish that "the evidence has substantial probative value that clearly outweighs its inherent prejudicial effect. (*People v. Bean* (1988) 46 Cal.3d 919, 938; *see also,* Evid. Code § 352.)

1. **The Kazaa Log Evidence Lacked Substantial Probative Value.**

Since the prosecution introduced the Kazaa log evidence, it bore the burden of proving the evidence was substantially probative by a preponderance of the evidence. (*People v. Bean, supra,* 46 Cal.3d at p. 938.) Preponderance of the evidence requires a showing that the evidence is "more probable than not." (*People v. Donnell* (1975) 52 Cal.App.3d 762, 777.) "The proof must be sufficient to arouse more than a mere suspicion." (*Ibid.*) Probative value of proffered evidence "depends upon the extent to which it tends to prove an issue by logic and reasonable inference (degree of relevancy), the importance of the issue to the case (degree of materiality), and the necessity of proving the issue by means of this particular piece of evidence (degree of necessity)." (*People v. Thompson, supra,* 27 Cal.3d 303, 318, fn.20.)

As a preliminary matter, the court must determine that "the act occurred and the defendant was the actor" before it can be admitted under Evidence Code section 1101, subdivision (b), for a non-propensity purpose (*Dowling v. United* States (1990) 493 U.S. 342, 348 [110 S.Ct. 342]; *see also People v. Donnell, supra*, 52 Cal.App.3d at p. 777 [there must be "'substantial evidence' that the prior offense was in fact committed by the defendant"]; *People v. Pulin* (1972) 27 Cal.App.3d 54, 66 ["the collateral offense cannot be put in evidence without proof that the accused was involved in its commission"].) Here, as argued *supra*, the evidence lacked any relevance or probative value because it failed to show that Ajay used his Kazaa program to search for child pornography. At best, the evidence was highly ambiguous because it could not rule out the possibility that Ajay may have searched for child pornography on his laptop computer within the Kazaa program. However, this level of ambiguity is insufficient to justify admission as it fails to meet even the preponderance burden of proof: more probable than not.

In *People v. Leon* (2001) 91 Cal.App.4th 812, 815, the defendant was accused of raping a young girl. During trial, the defendant's interpreter saw the defendant place his hands over his penis while the victim testified. (*Id.* at p. 816.) Overhearing comments the interpreter made to the bailiff, the prosecution called the interpreter as a witness and argued during closing that, "he's so turned on by the mere sight of her in court that he's masturbating." (*Ibid.*) Finding reversible error, the Court of Appeal held "the evidence was so ambiguous it likely confused the jury." (*Ibid.*) Specifically, the evidence lacked probative value because the interpreter did not know whether the defendant actually touched his penis in open court or whether his penis was erect. (*Ibid.*) As concluded by the Court of Appeal:

> Compelling [the interpreter] to testify to conduct that may have been innocuous or at best, could possible lead to an inference of criminality lightened the prosecution's burden to

> establish Leon's intent at the time he entered the premises. The prejudicial impact of testimony is increased where it confuses the issue or inflames the jury. [Citation.] The admission of this testimony did both.

(*Id.* at pp. 816-817.)

Leon is very similar to Ajay's case. Like the "masturbating" evidence in *Leon*, the Kazaa evidence did not prove what the prosecutor purported it proved. That is, the Kazaa log evidence did not prove Ajay was searching for child pornography. Therefore, as required by Evidence Code section 1101, subdivision (b), the Kazaa log evidence should not have been admitted because it did not "logically, naturally, and by reasonable inference" establish Ajay's mental state. (*People v. Thompson, supra,* 27 Cal.3d at p. 316.) As a result, the evidence simply confused the jury rather than assisted it with probative information. (*People v. Leon, supra,* 91 Cal.App.4th at p. 817.)

The Kazaa log evidence was not only ambiguous because the computer forensics failed to show that the user deliberately searched for child pornography, it was equally ambiguous in that it failed to show that Ajay was the person using the Kazaa program when the pornography downloaded. In fact, Brent Buehring clearly testified he had no idea who was using the computer at the time pornography downloaded or was being viewed. (11 RT 2936) In addition, the defense introduced evidence suggesting that Sapna may have either deliberately or inadvertently searched for the files in the Kazaa log because one of the Kazaa files entitled "H-Bomb," which Buehring surmised was an actual video of an atomic bomb explosion, was referenced in a term paper Sapna prepared for a community college class in May 2003 which relied exclusively on internet citations including one entitled "Effect of A-Bombs." (6 RT 1215; 11 RT 2884-2885, 2895; 17 RT 4705-4707, 4790-4791; 11 CT 3184-3203, Exhibit 44) Therefore, given the ambiguity and uncertainty surrounding

the identity of the Kazaa user who either deliberately or inadvertently amassed the Kazaa log files, the evidence should have never been admitted under Evidence Code section 1101, subdivision (b).

For example, in *People v. Carter* (1975) 46 Cal.App.3d 260, 263, the defendant was charged with robbery. The prosecution introduced evidence of an uncharged robbery to prove identity. (*Ibid.*) The charged robbery was committed at knife point whereas the uncharged robbery was committed at gun point. (*Ibid.*)

The Court of Appeal reversed the conviction in *Carter* because there was insufficient evidence to establish that the defendant, in fact, committed the uncharged robbery. While the victim from the uncharged robbery was shown a six-pack of photographs, he was unable to sufficiently identify Carter. As explained by the victim, he "recognized the black turtleneck sweater on one of the depicted persons, but did not recognize the face." (*People v. Carter, supra,* 46 Cal.App.3d at p. 264.) The robber from the charged robbery, which took place the day before the uncharged robbery, also wore a black turtleneck. (*Id.* at p. 263, fn. 2.) Finding that the victim "never identified defendant; he identified a turtleneck sweater" the Court of Appeal concluded:

> While the facts of the Freeland robbery were admitted to establish the identity of the Swislow robber, no identification of the perpetrator of the Freeland crime resulted. Certainly, the facts of uncharged offenses cannot be admitted unless the identity of the perpetrator is clearly established.

(*Id.* at p. 265.) Similarly, in this case, the Kazaa log evidence was introduced to show intent and identity yet failed to establish these facts.

In *People v. Long* (1970) 7 Cal.App.3d 586, 589, the defendant was convicted of passing a forged check. At trial, he denied the crime. (*Ibid.*) The prosecution introduced a prior uncharged conduct, for the purpose of identifying Long as the perpetrator of the charged crime, wherein Long had

allegedly aided and abetted the passing of three forged checks. (*Id.* at p. 591.) The Court of Appeal reversed Long's conviction finding "the vice of the prosecution's tactic lay in its failure to produce substantial evidence of defendant's complicity in the other three forgeries." (*Ibid.*) Long admitted that he was present when the principal passed the forged checks, but testified he did not participate in the crime. (*Id.* at p. 589.) Finding Long's identity as an aider and abetter of the uncharged crime to be "not clearly perceived" the Court of Appeal reversed and warned against the dangers of using specious evidence of a collateral offense to support a conviction. (*Id.* at p. 590.)

> Circumstantial proof of a crime charged cannot be intermingled with circumstantial proof of suspicious prior occurrences in such manner that it reacts as a psychological factor with the result that the proof of the crime charged is used to bolster up the theory or foster suspicion in the mind that the defendant must have committed the prior act, and the conclusion that he must have committed the prior act is then used in turn to strengthen the theory and induce the conclusion that he must also have committed the crime charged. This is but a vicious circle. Here the evidence of suspicious prior occurrences affords no substantial proof whatsoever connecting defendant in any way with the charge on which he was tried.

(*Id.* at p. 592.) Like *Long*, the prosecution in this case introduced suspicious evidence to unfairly associate Ajay with child pornography and bootstrapped this nefarious evidence into its case-in-chief which suffered serious weaknesses. (*Id.* at pp. 591-592 ["by a bootstrap process, the charged forgery was imputed to the defendant by tenuous evidence of another forgery whose proof was so shaky that the prosecutor had dismissed it for lack of evidence"].)

Finally, the Kazaa log evidence lacked any probative value because the issue of intent and identity were not disputed issues at Ajay's trial. The only disputed issue at trial was whether the crimes happened or whether

Sapna falsely accused Ajay of rape because she believed he was going to send her back to Nepal. Similarly, in *People v. Ewoldt* (1994) 7 Cal.4th 380, 387-388, the defendant was charged with committing lewd and lascivious acts against his step-daughter on a weekly or biweekly basis starting when she was six or seven until she was 14. He was also charged with molestation. (*Id.* at p. 388.) Because the lewd and lascivious charges required a showing of specific intent, the prosecution was permitted to introduce evidence under Evidence Code section 1101, subdivision (b), from the victim's older sister, who testified that the defendant had touched her breasts and genitals on three occasions when she was approximately 10 years old. (*Id.* at pp. 389, 391.) The California Supreme Court reversed Ewoldt's conviction finding that the uncharged sex crime lacked probative value because the defendant's intent with respect to the lewd and lascivious charges was not in dispute. (*Id.* at p. 406.) Specifically, the High Court held:

> The evidence of defendant's uncharged misconduct in the present case is inadmissible for the purpose of proving defendant's intent as the charges of committing lewd acts. Evidence of intent is relevant to establish that, assuming the defendant committed the alleged conduct, he or she harbored the requisite intent. In testifying regarding the charges of lewd conduct, [the victim] stated that defendant repeatedly molested her, fondling her breasts and genitals and forcing her to touch his penis. If defendant engaged in this conduct, his intent in doing so could not reasonably be disputed. As to these charges, the prejudicial effect of the admitting evidence of similar uncharged acts, therefore, would outweigh the probative value of such evidence.

(*Id.* at p. 406.) Ajay's case is almost indistinguishable from *Ewoldt*. Like the victim in *Ewoldt*, Sapna also testified that Ajay touched her breasts and genitals; that he pressed his penis against her while clothed; that he digitally penetrated her; and forced her to have oral sex with him. (4 RT 757-758,

803, 813; 5 RT 1158-1163) Therefore, if the jury believed Ajay committed these acts, Ajay's intent would not be in dispute because the nature of the alleged touching established the requisite intent necessary to prove lewd and lascivious acts. Consequently, since specific sexual intent was an undisputed issue in Ajay's case, the Kazaa log evidence should have been excluded because it lacked any probative value.

In sum, there was simply insufficient evidence to establish that Ajay searched for child pornography on his laptop. As a result, the Kazaa log evidence was not probative to prove intent and/or identity of the sex crimes Ajay was charged with. As California Supreme Court made clear in *Thompson*, "if the connection between the uncharged offense and the ultimate fact in dispute is not clear, the evidence should be excluded." (*People v. Thompson, supra,* 27 Cal.3d at p. 316.) Therefore, given the extraordinarily questionable value of the Kazaa log evidence it should have been excluded.

2. Even If The Kazaa Log Evidence Had Some Probative Value, It Should Have Been Excluded Because It's Probative Value Did Not Substantially Outweigh Its Prejudicial Effect.

There can be no doubt that allowing the jury to improperly infer that Ajay searched for 122 files with child pornography titles prejudiced Ajay especially since the case involved approximately 65 sex-related charges against a minor. As noted by the California Supreme Court, "evidence of other crimes always involves the risk of serious prejudice." (*People v. Thompson, supra,* 27 Cal.3d at p. 318.) Here, however, it was even more prejudicial since the "bad act" evidence concerned child pornography which, by its nature, is extraordinarily inflammatory and prejudicial. (*People v. Page, supra,* 44 Cal.4th at 41, fn. 17.) As concluded by the Court of Appeal in *Leon*, the more serious the charges the more prejudicial impact nefarious evidence will have on the charged offenses. (*People v.*

Leon, supra, 91 Cal.App.4th at p. 817 ["The trial court reasoned that the interpreter's testimony was not unduly prejudicial because the offenses were so serious. This rationale for admitting the testimony was the very reason for not admitting it."].) "As Wigmore notes, admission of this evidence produces an 'over-strong tendency to believe the defendant guilty of the charges merely because he is a likely person to do such acts' and it breeds a 'tendency to condemn, not because he is believed guilty of the present charge, but because he has escaped unpunished from other offenses.'" (*People v. Thompson, supra,* 27 Cal.3d at p. 317, citing 1 Wigmore, Evidence, § 194, p. 650.) This was certainly the case here as Sapna's testimony was highly questionable allowing the jury to condemn Ajay based on an unfounded belief that he enjoyed child pornography. And, as cautioned by the California Supreme Court, this could have widespread effect on the trial as the "jury might be unable to identify with a defendant of offensive character, and hence tend to disbelieve the evidence in his favor." (*Ibid.*) Given all these factors, the probative value of the Kazaa log evidence, if any, did not substantially outweigh its prejudicial effect and should have been excluded.

3. The Admission of the Kazaa Log Evidence, Exhibit 44, Was Not Harmless Requiring Reversal.

Reversal is required under state law where the record demonstrates there was a reasonable probability that, but for the error, the defendant would have obtained a more favorable verdict. (*People v. Watson* (1956) 46 Cal.2d 818, 836.) A "reasonable probability" under the *Watson* standard of prejudice only requires a showing of a "reasonable chance" something "more than an abstract possibility." (See *College Hospital, Inc. v. Superior Court* (1994) 8 Cal.4th 704, 714, citing *People v. Watson, supra,* 46 Cal.2d 818, 837, and *Strickland v. Washington* (1984) 466 U.S. 688, 693-694, 697, 698 [104 S.Ct. 2052, 80 L.Ed.2d 674].) Here, the improper admission of

the Kazaa log evidence was so grossly unfair it offended the most "fundamental conceptions of justice" violating appellant's state and federal constitutional right to a fair trial and due process, as guaranteed by the Fifth and Fourteenth Amendment rights to the United States Constitution. (*United States v. Lavasco* (1977) 431 U.S. 783, 790, 97 S.Ct. 2044, 2048; *People v. Turner* (1984) 37 Cal.3d 302, 313.) In addition, the prosecutorial misconduct which induced the trial court to admit the Kazaa log evidence equally denied appellant his federal constitutional right to due process and a fair trial, protected by the Fifth and Fourteenth Amendments of the United States Constitution, because it rendered the trial "fundamentally unfair." (*Darden v. Wainwright* (1986) 477 U.S. 168, 180-182.)

The erroneous admission of the Kazaa log evidence warrants reversal because impermissible introduction of child pornography evidence is especially inflammatory and weighed against the remaining evidence introduced by the prosecution rendered appellant's trial "fundamentally unfair." As thoroughly argued, *supra,* in Argument I, the prosecution's case against appellant was extremely weak and wrought with inconsistent and implausible testimony. In addition to the endemic weaknesses in the prosecution's case, this error was also made especially prejudicial by the prosecution's closing argument wherein, as noted *supra*, he expressly relied on the Kazaa log evidence to prove Ajay had perverse sexual interest in minors and, therefore, must have molested and raped Sapna. (RT 5013-5014) No doubt the prosecutor knew this would impact the entire jury, but in particular, Juror No.11 who indicated in her juror questionnaire that "like most people, I find sexual exploitation of children to be extremely heinous and it would be challenging for me to be objective." (8 CT 2034) This is precisely the type of prejudice which requires reversal. Given the overarching impact on Ajay's credibility and the lack of any specific instruction limiting the Kazaa log evidence to the lewd and lascivious

charges, reversal is required on all counts.

VII. THE TRIAL COURT VIOLATED APPELLANT'S CONSTITUTIONAL RIGHT TO PRESENT A DEFENSE BY EXCLUDING AN E-MAIL WHICH SHOWED APPELLANT WAS AT WORK WHILE SOMEONE ELSE VIEWED CHILD PORNOGRAPHY AT HIS HOME.

A. Introduction

Computer expert Brent Buehring found two child pornography videos on the Dell Tower computer confiscated from the Dev home. (8 RT 2046; 11 RT 2853, 2928; 10 CT 2866 (Exhibit 46)) At trial, the prosecution introduced them to prove that: (1) Ajay showed Sapna child pornography when she was a minor (count 65); and (2) Ajay harbored the intent to touch a minor which was germane to counts 64 and 65 (the porn charges) and counts 1, 4, 6, 9, 11, 14, 16, 19, 21, 24, 26, 29, 31, 34, and 36 (commission of lewd and lascivious acts against a minor). (3 RT 391-394, 399-400; 10 CT 2864-2867 (Exhibit 46)) Buehring conceded that, based on his analysis of the computer forensic evidence, he could not determine who possessed or viewed the pornography found on the computer and made no effort to make this determination.[55] (11 RT 2936-2938, 2940)

Buehring testified that a plethora of pornography on the Dell Tower computer was "last accessed" on September 26, 2003 from 8:36 a.m. to 8:56 a.m. including two child pornography videos Sapna claimed Ajay showed her which were "last accessed" at 8:55 a.m. and 8:56 a.m. respectively. (11 RT 2926; 10 CT 2866) A "last accessed" date is

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[55] At trial, the defense emphasized that the person viewing the pornography in May 2003 also downloaded a H-bomb video. The evidence also indisputably showed that Sapna, wrote a school paper in May 2003 concerning technology and, as evidenced by the bibliography, cited only to internet sources including one source entitled "Effect of A-Bombs." (6 RT 1215; 11 RT 2884-2885, 2895; 17 RT 4705-4707, 4790-4791; 11 CT 3184-3203, Exhibit 44)

consistent with a user viewing a file although it can also reflect a virus scanning a file. (11 RT 2825-2826) At trial, the defense computer expert explained that where "there are an abundance of common dates" for "one particular time" the last access dates more likely reflect a virus scan, over actual human viewing, especially where this cluster of dates correspond with a virus scan. (17 RT 4671-4672) After cross checking the last access dates examined by the Encase program against the virus scan log in the Dell Tower, defense expert Jeffrey Fischbach concluded, "I didn't find any indication that they were done by a computer." (17 RT 4671-4672) Therefore, the evidence appeared to indicate that a person was viewing child pornography at the Dev home on September 26, 2003 from 8:36 a.m. to 8:56 a.m.

To rebut the prosecution's claim that Ajay possessed and/or viewed the child pornography, the defense attempted to introduce an e-mail Ajay sent to Peggy from his work on September 26, 2003 at 8:48 a.m. which demonstrated that Ajay was not home when the pornography, in particular child pornography, was being viewed.[56] (15 RT 4102-4111; 15 CT 4333-4334 (Exhibit 813))

At trial, defense counsel tried to introduce the e-mail (Exhibit 813) through Peggy Dev's testimony. However, each time Peggy Dev attempted to testify about the e-mail, the trial court sustained the prosecution's objections based on hearsay. (15 RT 4102- 4104, 4106; 16 RT 4262-4265;

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[56] While the "last access" dates were equally consistent with a virus scan, the jury should have been given the opportunity to rule out that Ajay was the possessor of the incriminating pornography found on the Dev computers – especially the child pornography. If the jury believed the September 26, 2003 last access dates were the result of a virus scan, then such a conclusion would exculpate Ajay. Similarly, if the jury believed Ajay was at work while someone else was viewing pornography on the computer (likely Sapna and/or her boyfriend), this would further exculpate Ajay. The defense should have had the opportunity to prove either interpretation of the computer evidence supported Ajay's innocence.

18 RT 4878) At the end of the trial, the prosecution objected to the admission of the e-mail (Exhibit 813) based on relevance grounds although the basis of the objection was highly ambiguous. As argued by the prosecution:

> Okay. This is an e-mail that supposedly came from Mr. Dev to Mrs. Dev having nothing to do with this case and was attempted to be used by counsel to establish who sent it, what time it was sent and where it was sent from, and for that reason I object.

(18 RT 4879) The trial court excluded the e-mail finding it was "too ancillary to make it really relevant to what we're dealing with here. She talked about all that from the stand, so we don't need the e-mail itself. The objection's sustained." (18 RT 4880) In response to clarifying questions from defense counsel, the trial court explained the defense could not "argue what's in it. You can argue her testimony about the e-mail." (18 RT 4880) "You don't get to say now she mentioned this e-mail, in summary I'm going to read it to you word for word." (18 RT 4880)

During closing argument, defense counsel was very careful not to reference any information contained in the e-mail – specifically the time and date in which Ajay sent the e-mail to Peggy from his work. (18 RT 5090-5091) In this regard, defense counsel relied solely on testimony from Peggy Dev and Michael Mullen, the information technology administrator at Ajay's work.[57] (18 RT 5090)

On rebuttal, the prosecution specifically referred to the e-mail in contravention of the court's order and incorrectly stated that Ajay sent the e-mail from work at 10:04 a.m. – when, in fact, the excluded e-mail clearly showed Ajay sent the e-mail to Peggy from his work at 8:48 a.m. (19 RT 5141) This error was significant because the computer log showed that

[57] Although Peggy testified that she spoke with Ajay at work around 9:00 a.m. on September 26, 2003 (15 RT 4108), defense counsel argued it was between 8:00 a.m. and 8:30 a.m. (18 RT 5090).

someone was likely viewing pornography at the Dev home on the Dell Tower in Sapna's bedroom from 8:36 a.m. to 8:56 a.m. (including two child pornography films which were "last accessed" at 8:55 a.m. and 8:56 a.m.) while Ajay was at work. As argued by the prosecution, placing Ajay at work at 10:04 a.m. did not exclude him as a possible viewer of the pornography. (19 RT 5141)

In the motion for a new trial, the defense reasserted its objection to the exclusion of the e-mail (Exhibit 813) arguing it had been properly authenticated requiring admission under Evidence Code section 1552(a). (13 CT 3550-3551) The defense also argued a new trial was necessary because the prosecution relied on the excluded e-mail in its closing and falsely argued that Ajay sent the e-mail at 10:04 a.m. rather than 8:48 a.m.: the time period in which pornography was likely being viewed on the Dell Tower at the Dev home. (13 CT 3551)

The trial court denied the defense's motion for a new trial and found that counsel failed to provide a sufficient foundation. (19 RT 5232) Specifically, the trial court ruled:

> Section 1552 of the Evidence Code allows a printed representation of computer information to be admitted. That is a very limited admission though. It is to be admitted as being a proper representation of what is actually on the computer. It is not to be taken as, therefore, what is on the computer is accurate, and that's where the foundation still needed to be laid for the printout, Exhibit 813.
>
> While it may have accurately represented what was on the computer, there was insufficient foundation that what was on the computer was accurate.

(19 RT 5232)

B. Standard of Review

A trial court's decision to exclude evidence is reviewed for abuse of discretion. (*People v. Brady* (2010) 50 Cal.4th 547, 558 citing *People v. Avila* (2006) 38 Cal.4th 491, 577-578.)

C. The Trial Court Erred By Excluding Exhibit 813 As Hearsay.

The e-mail Ajay Dev sent to his wife from his work on September 26, 2003 at 8:48 a.m. was not hearsay because the defense only intended to introduce it to show the time and date in which Ajay was at work. Since the time and date of the e-mail, along with the information showing who sent and received the e-mail, were computer generated, the e-mail was not subject to exclusion based on hearsay.

Hearsay is an out of court statement offered for the truth of the matter asserted. (*People v. Hawkins* (2002) 98 Cal.App.4th 1428, 1449.) In this regard, it requires that a person or declarant author the statement. (*Ibid.*) "The Evidence Code does not contemplate that a machine can make a statement." (*Ibid.*) Therefore, a computer generated time and date stamp placed on an e-mail by a computer's internal operating system is not a statement and is not subject to hearsay rules and exceptions. (*Id.* at p. 1449-1450.) As explained by the Sixth District Court of Appeal in *People v. Hawkins*:

> The printout of the results of the computer's internal operations is not hearsay evidence. It does not represent the output of statements placed into the computer by out of court declarants. Nor can we say that this printout itself is a "statement" constituting hearsay evidence. The underlying rationale of the hearsay rule is that such statements are made without an oath and their truth cannot be tested by cross-examination. [Citations.] Of concern is the possibility that a witness may consciously or unconsciously misrepresent what the declarant told him or that the declarant may consciously or unconsciously misrepresent a fact or occurrence. [Citation.] With a machine, however, there is no possibility of a conscious misrepresentation, and the possibility of

> inaccurate or misleading data only materializes if the machine is not functioning properly.

(*Id.* at p. 1449 citing *State v. Armstead* (La. 1983) 432 So.2d 837, 840.) Consequently, the test for admitting a computer printout for purposes of showing evidence of its internal operations, like a time/date stamp, is "whether the computer was operating properly at the time of the printout." (*Id.* at pp. 1449-1450.)

D. Exhibit 813 Should Have Been Admitted Into Evidence Because The Record Sufficiently Shows That The Computer That Time Stamped Exhibit 813 Was Operating Properly.

In *People v. Hawkins*, the prosecution introduced a computer printout with "last access dates" on it to show the defendant stole source code from his prior employer. (*People v. Hawkins, supra,* 98 Cal.App.4th at p. 1446.) The defendant in *Hawkins* objected to the computer printout's admission claiming that the date and time of the last access date was hearsay. (*Id.* at p. 1446-1447.) The trial court ruled the time/date stamp was not hearsay because it was produced by the internal operating system of a computer rather than a statement made by a person. (*Id.* at p. 1447.) The trial court admitted the evidence after it found that the computer's clock had not been tampered with. (*Ibid.*)

As noted by the Court of Appeal in *Hawkins*, "the trial judge did not have much information on the topic of reliability at the time he ruled the printouts admissible." (*People v. Hawkins, supra,* 98 Cal.App.4th at p. 1446.) The prosecution's expert testified that the defendant's computer clock appeared to be "functioning properly" although he conceded that "a systems administrator could change the time on a computer clock." (*Id.* at pp. 1437, 1448.) Based on this information, the trial court found the prosecution laid a proper and sufficient foundation to admit the evidence. (*Id.* at p. 1447.) On appeal, the Sixth District upheld the decision. (*Id.* at pp. 1449-1450.)

In analyzing the issue, the Sixth District relied on Evidence Code section 1552 which states in relevant part:

> A printed representation of computer information or a computer program is presumed to be an accurate representation of the computer information or computer program that it purports to represent. This presumption is a presumption affecting the burden of producing evidence. If a party to an action introduces evidence that a printed representation of computer information or computer program is inaccurate or unreliable, the party introducing the printed representation into evidence has the burden of proving, by a preponderance, that the printed representation is an accurate representation of the existence and content of the computer information or computer program that it purports to represent.

(*People v. Hawkins, supra,* 98 Cal.App.4th at p. 1450.)

The Sixth District went on to explain that:

> The presumption operates to establish only that a computer's print function has worked properly. The presumption does not operate to establish the accuracy or reliability of the printed information. On that threshold issue, upon objection, the proponent of the evidence must offer foundational evidence that the computer was operating properly.

(*Ibid.*)

Here, the date and time of the e-mail (Exhibit 813) was produced by the server at Ajay's work rather than the individual computer Ajay used at work. As testified to by Michael Mullen, the system administrator at the Department of Water Resources, the e-mail system at Ajay's work had no remote access and was operated internally at the office prior to April 2006. (15 RT 4017-4020) Thus, the office e-mail was run internally by the office server. Jeffery Fischbach, the defense computer expert, testified that clocks for servers supporting e-mail and the web are generally presumed to be correct. (17 RT 4771) As explained by Fischbach, "Well, actually in e-mail there's even more information we can look at. They have information that's given by the servers that run through them, so we don't generally

assume that Yahoo or Hotmail or somebody is going to change their date to facilitate [] what somebody else wants." (17 RT 4771)

This evidence was sufficient to lay a foundation to admit the date, time, sender and receiver of the e-mail especially since the prosecution never suggested that the server at Ajay's work was not functioning properly and only objected to the admission of the evidence on hearsay and relevance grounds. (15 RT 4102-4106; 18 RT 4879-4880) As *Hawkins* and Evidence Code section 1552 provide, very little is required to lay a foundation to show a computer or server is operating properly especially where, as here, there is no evidence rebutting the basic functionality of a computer. (*People v. Hawkins, supra,* 98 Cal.App.4th at p. 1450; *People v. Lugashi* (1988) 205 Cal.App.3d 632, 642-643; Evid. Code § 1552.)[58] Even

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[58] In *Lugashi*, the Second District Court of Appeal noted that:

> The bulk of other jurisdictions addressing this issue adopted similar analyses and upheld admission of computer records with similar or less extensive foundational showings over similar objections. (*United States v. De Georgia* (9th Cir. 1969) 420 F.2d 889, 893-894 (rental car company record admitted despite no evidence regarding hardware, software, maintenance, or internal accuracy tests); *Merrick v. United States Rubber Co.* (1968) 7 Ariz.App. 433 [440 P.2d 314, 316-317] (plaintiff's records of defendant's debts admitted despite no evidence regarding computer operation); *State v. Veres* (1968) 7 Ariz.App. 117 [436 P.2d 629, 637-638] (bank records admitted despite assistant cashier's testimony that records were prepared by "automatic machine" whose operations he did not understand, and he only had access to the records and did not produce them); *Smith v. Bank of the South* (1977) 141 Ga.App. 114 [232 S.E.2d 629, 630] (bank records); *Hill v. State* (Miss. 1983) 432 So.2d 427, 440 (shipping company record admitted although manager knew nothing about its preparation, but it was a business record with which he had daily contact and upon which he and his company relied); *State* v. *Watson* (1974) 192 Neb. 44 [218 N.W.2d 904, 905-907] (bank records admitted without testimony regarding reliability and accuracy of system as bank not party to litigation and had no claim against

where there are some questions regarding a computer's functionality, these questions are best resolved by a jury and should go to the weight of the evidence rather than its admissibility. (*Hawkins, supra,* 98 Cal.App.4th at p. 1451; *People v. Lugashi, supra,* 205 Cal.App.3d at pp. 641-642.)

In *Lugashi* the prosecution introduced a computer printout from Wells Fargo Bank to prosecute a credit card fraud case. (*People v. Lugashi, supra,* 205 Cal.App.3d at p. 636.) The defense objected to it on hearsay ground and the evidence was admitted pursuant to the business records exception. (*Id.* at p. 638.) While the computer printout in this case is not subject to business records exception because it is not hearsay, the trustworthiness requirement of the business records exception, as applied to computer printouts, is still instructive in determining whether a sufficient

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> defendant); *State* v. *Passmore*(1978) 37 N.C.App. 5 [245 S.E.2d 107, 109] (bank records); *State v. Stapleton* (1976) 29 N.C.App. 363 [224 S.E.2d 204, 204-205] (airline reservation record admitted although passenger service supervisor not computer expert and offered no testimony regarding system, but was familiar with and knew business relied on it, entries made as business records at time of event, and could interpret printout); *Endicott Johnson Corporation v. Golde* (N.D. 1971) 190 N.W.2d 752, 756-757(account records admitted although local company representative who did not prepare records produced out of state was unfamiliar with computer operation but familiar with records); *Hutchinson v. State* (Tex.App. 1982) 642 S.W.2d 537, 538 (record of gasoline pumping admitted despite no evidence whether computer functioning properly);*Westinghouse Elec. Supply Co. v. B.L. Allen* (1980) 138 Vt. 84 [413 A.2d 122, 132-133] (lack of evidence regarding computer operation and other alleged foundational shortfalls go to weight, not admissibility, where witness generally familiar with accounting procedures and particular account); *State v. Kane* (1979) 23 Wn.App. 107 [594 P.2d 1357, 1360-1361] (bank records admitted despite no evidence regarding hardware, software, or program reliability, although normally required, where bank large and well known and no challenge to records' accuracy.)

(*People v. Lugashi, supra,* 205 Cal.App.3d at pp. 643-644.)

foundation was laid in this case. (See Evid. Code §§ 1270, 1271, subd. (d).) That is, in the context of computer generated documents, the trustworthiness requirement of the business records exception requires a similar analysis to whether a computer is functioning properly. In this regard, the defendant in *Lugashi* contested the sufficiency of the foundation laid to introduce computer generated documents from Wells Fargo because "no evidence was offered regarding the computer hardware or software, its maintenance or reliability, or any system of internal checks." (*Id.* at p. 636.) Rather than offer testimony from a computer expert, the prosecution introduced testimony from a Wells Fargo employee who downloaded the computer generated information and was familiar with using the system on the computer. (*Ibid.*) In finding this foundational evidence sufficient to admit the computer generated documents, the Court of Appeal held that having a computer expert testify as to the reliability and maintenance of the hardware and/or software of the computer "would not have a bearing on the basic trustworthiness of the records. While mistakes are often made in the entries on bank statements, such matters may be developed on cross-examination and should not affect the admissibility of the statement itself." (*Id.* at p. 642.) Here, however, there were no risks of mistakes from human input. Rather the time/date stamp came only from a computer generated source which, according to computer expert Fischbach, is so accurate it is used to substantiate the accuracy of a BIOS date in an individual computer.[59] (17 RT 4771) As concluded in the landmark case on this topic, "it would be extremely difficult to alter or forge the computer's output, without such an action being apparent...." (*State v. Armstead* (La. 1983) 432 So.2d 837, 841; see also *People v. Hawkins, supra,* 98

[59] BIOS is an acronym for Basic Input Output System. One of its functions is to maintain the internal clock of the computer and is powered by a 10 year watch battery enabling it do so independently of the computer being powered on or off. (17 RT 4672-4673)

Cal.App.4th at p. 1449 [referring to *Armstead* as the "leading case" in this area].) For this reason, Exhibit 813 should have been admitted into evidence to show Ajay was at work at 8:48 a.m. on September 26, 2003.

E. The Exclusion of Exhibit 813 Prejudiced Appellant Requiring Reversal.

Reversal is required under state law where the record demonstrates there was a reasonable probability that, but for the error, the defendant would have obtained a more favorable verdict. (*People v. Watson* (1956) 46 Cal.2d 818, 836.) A "reasonable probability" under the *Watson* standard of prejudice only requires a showing of a "reasonable chance" something "more than an abstract possibility." (See *College Hospital, Inc. v. Superior Court* (1994) 8 Cal.4th 704, 714, citing *People v. Watson, supra,* 46 Cal.2d 818, 837, and *Strickland v. Washington* (1984) 466 U.S. 688, 693-694, 697, 698 [104 S.Ct. 2052, 80 L.Ed.2d 674].) Here, the error was highly prejudicial because it prevented Ajay from showing that he was not at home when child pornography was being viewed.[60] Had Ajay been able to prove that someone else was independently viewing child pornography in his home while he was not there, he would have rebutted the prosecution's effort to show he had the requisite mental state to commit lewd and lascivious acts against a minor and/or that he was sexually attracted to minors. This specifically implicated counts 1, 4, 6, 9, 11, 14, 16, 19, 21, 24, 26, 29, 31, 34, and 36 wherein Ajay was convicted of committing lewd and lascivious acts against a minor in violation of Penal Code section 288(c)(1).

In addition, since the trial court failed to instruct the jury that the adult and child pornography was only relevant to proving the lewd and

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[60] In fact, the prosecution argued and the trial court agreed that much of the pornography should be admitted, over defense objection, in order to disprove the anticipated defense that the pornography belonged to Sapna (and/or her boyfriends) and not Ajay. (3 RT 392, 395-396, 399-400)

lascivious counts (Argument V), the erroneous exclusion of Exhibit 813 also implicated the rape counts (counts 9, 14, 19, 24, 29, 33, 36, 39, 42, 45, 48, 51, 54, 57, 61, 63, 65, 67, 69, 71, 73, 75, 77, 79, 81) as the jury likely relied on the child pornography in finding Ajay guilty of raping Sapna.

No doubt, rebutting the child pornography evidence and showing that Ajay did not possess nor view child pornography was critical to Ajay's overall defense because child pornography, by its very nature, is highly inflammatory and prejudicial. (*People v. Page* (2008) 44 Cal.4th 1, 41, fn. 17; *Jacobson v. United States* (1992) 503 U.S. 540, 550.) In addition, the prosecution elicited testimony from expert William O'Donohue that it is "very very rare" for a female to want to watch child pornography and argued during closing that, with respect to the child pornography evidence, "Just like Dr. O'Donohue told you, that's a male thing. Girls don't do that." (12 RT 3280; 18 RT 5013-5014) This evidence and argument was extremely prejudicial to Ajay who was the only male that lived at the Dev home.[61] Therefore, although the jury could also conclude it was one of Sapna's boyfriends, it was critical to be able to rule out Ajay as the possessor of the child pornography.[62] Consequently, the admission of Exhibit 813 would have been a very effective way of proving this because scientific evidence is often viewed as more objective and persuasive. This scientific evidence would have also given Peggy Dev's testimony much more credibility not only with respect to her testimony about Ajay being at

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[61] While not objected to by the defense, the prosecution's elicitation of this expert testimony was arguably impermissible profile evidence as it allowed the jury to conclude Ajay was guilty based on his gender. (See *People v. Robbie* (2002) 92 Cal.App.4th 1075, 1084.)

[62] In fact, unlike Ajay who had a full time job, the record shows that Sapna did not have class (Physics) on September 26, 2003 until 10:00 a.m. and that, during that period in her life, she was taking Physics with her boyfriend Araz, who testified they were having sex once a week. (4 RT 875; 9 RT 2220, 2222, 2288-2289, 2324-2325; 16 RT 4215, 4457-4458; 14 CT 3951-394)

work on September 26, 2003, but all of her testimony which the prosecution consistently discredited.

Finally, the error highly prejudiced Ajay because the prosecution inaccurately relied on the e-mail in its closing argument to suggest Ajay was not at work when child pornography was likely being viewed at his home. (19 RT 5141) As argued by the prosecution, "The last accessed date on 9-26-03 when he was supposedly at work. One, that e-mail was at 10:04 a.m. in the morning. The last accessed dates, those are between 8:37 and 8:56 in the morning."[63] (19 RT 5141) However, had the e-mail been properly admitted, the jury would have been able to establish that Ajay was at work at 8:48 a.m. – exactly when the child pornography was being viewed at the Dev home.

Given the undeniable effect child pornography has on a jury, there can be no dispute that the failure to admit this evidence prejudiced Ajay "more than an abstract possibility" thereby requiring reversal under California state law. In addition, the failure to allow Ajay to use the e-mail to prove he was not viewing child pornography in a child rape case with multiple allegations of lewd and lascivious acts is so egregious it rises to a constitutional violation of Ajay's Sixth and Fourteenth Amendment right to due process and right to present a defense. (*Chambers v. Mississippi* (1973) 410 U.S. 284, 302 93 S.Ct. 1038.) In this regard, reversal is required because the error was not harmless beyond a reasonable doubt.

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63 "Friday, September 26, 2003 10:04 AM" appears on the top of Exhibit 813. However, this time and date stamp reflects when Peggy Dev forwarded the e-mail from her work e-mail account at Peggy.Dev@gpspool.com to her personal e-mail account at peggy_dev@sbcglobal.net. (CT 4333; RT 4102) The defense intended to rely on the e-mail to show when Ajay was at work. This is reflected in the second set of headings. In this regard, the e-mail reflects that Ajay sent his wife the e-mail from his work on "Friday, September 26, 2003 at 8:48 AM." (CT 4333)

(*Chapman v. California* (1967) 386 U.S. 18, 87 S.Ct. 824 [17 L.Ed.2d 705]; *Crane v. Kentucky* (1986) 476 U.S. 683, 691 [106 S.Ct. 2142].)

VIII APPELLANT'S CONVICTIONS MUST BE REVERSED BECAUSE THE TRIAL COURT SANCTIONED PROSECUTORIAL MISCONDUCT DURING CLOSING ARGUMENT BY ALLOWING THE PROSECUTION TO ATTRIBUTE AN ADMISSION OF RAPE TO APPELLANT THAT DID NOT EXIST.

A. The Prosecution Committed Misconduct By Telling The Jury During Closing Argument That Appellant Admitted Raping Sapna In Bangkok In A Note Passed To His Lawyer During The Preliminary Hearing: A Fact Neither In Evidence Nor Supported By Any Facts Outside The Record.

During the preliminary hearing, defense counsel questioned Sapna about the details of the rapes in an effort to expose her allegations were fabricated. As part of this cross examination, he asked her whether she had ever been raped outside the State of California. (2 CT 547) After questioning Sapna as to where all the rapes occurred, defense counsel summarized her responses and verified, "Okay. Am I correct then that all times Ajay Dev has ever had sexual contact with you was within the State of California ever?" (2 CT 547) Sapna definitively answered, "yes." (2 CT 547) Later in the questioning, defense counsel asked her about a trip she took to Nepal with Ajay in May 2003 during the time period in which she claimed Ajay was raping her two to three times a week. (2 CT 556) Sapna verified that she had to share a hotel room with Ajay in Bangkok during a layover in Thailand. (2 CT 556; 3 CT 557) With these facts fresh in her mind, defense counsel asked her whether there had been any inappropriate sexual touching while she was forced to share a hotel room with Ajay miles and miles away from home. (2 CT 556) With this prompting, Sapna clarified that, in fact, there had been inappropriate sexual touching in Bangkok, but she had just previously forgotten about it. (2 CT

256) Since there was no physical evidence of the alleged rapes nor any witnesses, the defense took great pains to show that Sapna's testimony was either inconsistent or implausible. Here, the point of the cross examination was to expose the incredulity of Sapna's story both with respect to her willingness to travel to Nepal with Ajay knowing they would have to share a hotel room together and forgetting that this alleged rape ever occurred.

At trial, defense counsel cross examined Sapna with the inconsistencies about the alleged Bangkok rape elicited during the preliminary hearing. (7 RT 1501-1512, 1699-1702) During closing argument, the defense highlighted the inconsistency to the jury as a reason to disbelieve Sapna's testimony: "Where did it occur? Is the story consistent? At the preliminary hearing she was asked, did he ever rape you outside the state of California? Answer, no. Later she changes her testimony. Well, it happened in Bangkok." (18 RT 5030)

In an effort to minimize this inconsistency, the prosecution told the jury that the only reason defense counsel knew about this inconsistency was because his client, Ajay Dev, admitted raping Sapna in Bangkok during the preliminary hearing on a handwritten note. Specifically, the prosecution argued as follows:

> Sex in Bangkok. This is one of my favorites. I read to you the preliminary hearing testimony, and you could see how he set her up. He's talking to her. He examines her. He says so you had sex on Concord Street, J Street, Chico and Monterey. Anywhere else? No, don't think so. Okay. So nowhere outside of the State of California, Sapna? No. He goes on to a different line of questioning, questions her for a while, comes back. Because you'll see, if you have the reporter read it back, there is two different sections of the transcript. He comes back to her and says, now, Sapna you remember going to Nepal in 2000 --- May of 2003 with Ajay. Right? Yes. And you had a layover in Bangkok. Right? Yes. And you had to stay in a hotel. Right? Yes. Didn't he assault you in that hotel when you were all alone with him? Oh, yeah, you're right, he did. He got her.

> Now, why did he ask her that question? Why did he set her up like that? Because just like he told you, Terry Easley, and with Peggy, he already knew the answers to the question. But what's important is how did he know the answer to the question? Because Ajay told him. Ajay sat there and scribbled down, you can catch her, we had sex in this motel room in Nepal. There's only one other person on the planet who knows that they had sex in the motel room in Nepal.

(19 RT 5124-5125) Interjecting, defense counsel objected stating "I object to this line, your Honor. I would rather not state in front of the jury. It is *Griffin* error."[64] (19 RT 5125) Claiming not to hear a legal basis for the objection, the trial court overruled defense counsel. (19 RT 5125) As a consequence, the prosecution continued: "He asked that question -- the only one reason he would know to ask that question is because Ajay told him. The only other person in that motel room. The other only person he would know had asked that question." (19 RT 5126) Then, the prosecution further castigated the defense by arguing, "Watching that cross-examination of her by Mr. Rothschild is like watching a baby seal being questioned." (19 RT 5126)

This argument, sanctioned by the trial court, constituted gross prosecutorial misconduct and violated appellant's Fifth Amendment right against self incrimination, Fifth Amendment right to due process, Sixth Amendment right to present a defense, Sixth Amendment right to confront witnesses, Sixth Amendment right to counsel, and Fifth Amendment right

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[64] Notably, during the trial when defense counsel objected based on prosecutorial misconduct, the trial court excused the jury from the courtroom and excoriated defense counsel stating, "First off, asserting in front of the jury that the prosecutor has engaged in misconduct and using the word "misconduct" has clearly been held by the courts of appeal to be improper and itself misconduct." (14 RT 3635) After apologizing, the trial court admonished defense counsel "it shall not happen again." (14 RT 3635)

to have the State prove its case beyond a reasonable doubt all incorporated to the States through the Fourteenth Amendment. Whether the prosecution committed misconduct during closing argument and violated appellant's state and constitutional rights is a pure question of law and, thus, requires *de novo* review by this Court. (*People v. Cromer* (2001) 24 Cal.4th 889, 894, n.1; *People v. Lawler* (1973) 9 Cal.3d 156, 160; *People v. Teroganesian* (1995) 31 Cal.App.4th 1534.)

In *Griffin v. California* (1965) 380 U.S. 609, 615, the Supreme Court held that the Fifth Amendment of the United States constitution, incorporated to the States through the Fourteenth Amendment, "forbids either comment by the prosecution on the accused's silence or instruction by the court that such silence is evidence of guilt." In this regard, the High Court warned that prosecutorial misconduct includes reference to "facts peculiarly within the accused's knowledge" (*Id.* at p. 614) or argument concerning facts which the defendant would be "the only person able to dispute the testimony." (*United States v. Hasting* (1983) 461 U.S. 499, 503.) In fact, like the argument by the prosecution in this case, the constitutionally defective argument in *Griffin* included reference to "He would know that. He would know how she got down the alley. He would know how the blood got on the bottom of the concrete steps. He would know how long he was with her in that box. He would know how her wig got off." (*Griffin v. California, supra,* 380 U.S. at p. 611.) These arguments are eerily similar to the arguments made by the prosecution in this case: "There's only one other person on the planet who knows that they had sex in the motel room in Nepal." (19 RT 5125) The California Court of Appeal found an almost identical argument made in *People v. Giovianini* (1968) 260 Cal.App.2d 597, 605 to constitute *Griffin* error because it implied that only the defendant could know the truth: "Now, as far as how the bottle was broken ... there would be two people, possibly,

who could answer that, and one of them, of course, is dead."

However, unlike *Griffin* and *Giovianini*, the prosecution in this case took it a step further and manufactured an admission by the defendant by telling the jury appellant actually wrote his lawyer a note during the preliminary hearing which specifically read, "you can catch her, we had sex in this motel room in Nepal." (19 RT 5125) However, the prosecution had no knowledge of such a note and no such note was introduced to the jury as evidence.

As recognized by the Supreme Court in *United States v. Young* (1985) 470 U.S. 1, 18, improper argument by the prosecution has two fundamental dangers: "such comments can convey the impression that evidence not presented to the jury, but known to the prosecutor, supports the charges against the defendant and can thus jeopardize the defendant's rights to be tried solely on the basis of the evidence presented to the jury; and the prosecutor's opinion carries with it the imprimatur of the Government and may induce the jury to trust the Government's judgment rather than its own view of the evidence."

To implicate federal constitutional due process, "the relevant question is whether the prosecutor's comments so infected the trial with unfairness as to make the resulting conviction a denial of due process." (*Darden v. Wainwrighti* (1986) 477 U.S. 168, 181) In *Darden*, the High Court denied relief because "the prosecutors' argument did not manipulate or misstate the evidence, nor did it implicate other specific rights of the accused such as the right to counsel or the right to remain silent." (*Id.* at pp. 181-182.) In contrast to *Darden*, here, the prosecution trampled on almost all of appellant's fundamental constitutional rights.

While showing a federal constitutional violation of due process under the Fifth Amendment, incorporated to the States through the Fourteenth Amendment, requires misconduct that fundamentally infects the

trial with unfairness, state law error only requires a showing the prosecution "use deceptive or reprehensible methods to attempt to persuade either the court or the jury." (*People v. Hill* (1998) 17 Cal.4th 800, 819; see also *People v Martinez* (2010) 47 Cal.4th 911, 955.) In this regard, counsel may not state or assume facts in argument that are not in evidence and may not engage in "forbidden tactics" such as "accusing defense counsel of fabricating a defense or factually deceiving the jury." (*People v. Bordelon* (2008) 162 Cal.App.4th 1311, 1323; *People v. Friend* (2009) 47 Cal.4th 1, 31.) "The effect of such remarks is to lead the jury to believe that the district attorney, a sworn officer of the court, had information which the defendant insists on withholding; or that they may consider matters which could not properly be introduced in evidence." (*People v. Johnson* (1981) 121 Cal.App.3d 94,103.)

In *People v. Johnson* (1981) 121 Cal.App.3d 94, 97-99, the victim and defendant had sex on a first date and, thereafter, the victim claimed it was rape and the defendant claimed she falsely accused him of rape to extort money from him. (*People v. Johnson, supra,* 121 Cal.App.3d at pp. 97-99.) To prove its theory of the case, the defense called Terry Osborne to the stand who testified that the victim called him to deliver a message to the defendant that she would drop the charges if the defendant would "turn over his car and his bank account." (*Id.* at p. 100.) Neither the defense nor prosecution asked the victim whether she called Osborne to extort the defendant. During closing argument, however, the prosecution argued that had the victim been asked, she would have denied making any such statement. (*Id.* at p. 102.) Specifically, the prosecution in *Johnson* argued, "I'm not going to bring Mrs. (J) all the way here just to say did you say that, and have her say no." (*Ibid.*) Finding prosecutorial misconduct and reversing the defendant's conviction, this Court held that "while in some circumstances it is proper for a prosecutor to comment upon a defendant's

failure to ask certain questions of a witness, it is not permissible for a prosecutor to state what the answer to a question would be if it had been asked." (*Ibid.*) This type of argument is not only a mischaracterization of the evidence or a misstatement of the facts, it is a complete fabrication of evidence and, thus, is the "grossest sort" of prosecutorial misconduct that can be perpetrated. (*People v. Brophy* (1954) 122 Cal.App.2d 638, 652.)

In large part, this case is no different than *People v. Brophy* where this Court reversed the defendant's conviction because a prosecutor pulled out a bullet during closing argument, which had never been introduced as evidence at trial, and claimed it was the missing bullet found at the crime scene. (*People v. Brophy, supra,* 122 Cal.App.2d 638, 652.) Like the case at bar, the prosecution was desperately trying to cover-up the weaknesses in its case. In *Brophy*, the prosecution charged the defendant with two counts of assault with a deadly weapon, to wit, a pistol. With respect to the first assault, the prosecution introduced bullet casings to prove the pistol had been fired at the victims. (*Id.* at pp. 650-651) However, no casings were introduced to prove the second assault even though the victim stated he found the fired bullet at the crime scene. (*Ibid.*) In an effort to expose this weakness in the prosecution's case, the defense argued the following to the jury during closing: "Now, they talk about some bullets – pardon me. Mr. Shirley, I believe, said down here was where he picked up a bullet somewhere. He said down here somewhere. Now, where is the bullet? I fully expected him, after he got that, to come up here with it." (*Id.* at p. 651.) In response, to this argument, the prosecution brought a bullet to the rebuttal argument, showed it to the jury, and declared that it was the bullet fired in the second assault. (*Ibid.*) As argued by the prosecution in *Brophy*, "Now quite a bit has been said about the testimony of Mr. Shirley, who found the bullets. Where is that bullet? There is the bullet (Showing to jury) Mr. Edwards [appellant's counsel] knows it as well as I do. That

bullet's so flattened ----." (*Ibid.*) At this juncture, the defense objected to the improper argument and the trial court sustained the objection. (*Ibid.*) Finding the misconduct to be of the "grossest sort," this Court reversed the defendant's conviction despite the fact that the trial court instructed the jury to disregard the improper argument. (*Id.* at pp. 651-652.) Like *Brophy*, the prosecution essentially manufactured a new piece of evidence during closing argument in an effort to win its case at any cost rendering the truth finding function of the trial completely irrelevant. However, "it is as much [the prosecution's] duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one." (*Id.* at p. 653.)

The California Supreme Court reiterated the egregiousness of this type of prosecutorial misconduct in its seminal case *People v. Hill* (1998) 17 Cal.4th 800. As emphasized by the High Court, a prosecutor's reference to facts not in evidence is clear misconduct "because such statements tend to make the prosecutor his own witness – offering unsworn testimony not subject to cross-examination. It has been recognized that such testimony, although worthless as a matter of law, can be dynamite to the jury because of the special regard the jury has for the prosecutor, thereby effectively circumventing the rules of evidence." (*Id.* at p. 828.) Like *Johnson* and *Brophy*, the California Supreme Court, in *Hill*, reversed the defendant's convictions where the prosecution relied on facts never introduced into evidence during closing argument. Specifically, the prosecutor told the jury that no drugs had been sold at the crime scene since the defendant's arrest; that an expert could have testified about the blood on the knife, but the prosecution had no obligation to introduce such evidence; and that one of the key defense witnesses was biased because, having the same last name as the defendant, she must have been related to him. (*Id.* at pp. 828-829.) The prosecution also told the jury that the defendant had gone to prison for

killing, stabbing, and robbing where there was no evidence to support such an assertion. (*Id.* at p. 837.) All of these incidents of prosecutorial misconduct were deemed to be errors by the California Supreme Court. (*Id.* at p. 839.)

In addition to the Fifth Amendment due process violations prohibited under *Darden* and *Griffin*, appellant was equally denied his Sixth Amendment right against confrontation because he was unable to cross examine the prosecution, who decidedly acted as a witness, and expose the fact that the prosecution's "testimony" was false as there was no evidence that appellant wrote a note to his lawyer at the preliminary hearing admitting he raped Sapna in Bangkok. (See generally *Pointer v. Texas* (1965) 380 U.S. 400 [recognizing Sixth Amendment right to confront and cross-examine witnesses applies to the States through the Fourteenth Amendment]; *Miller v. Pate* (1967) 416 U.S. 1 [prosecution's knowing misrepresentation that a pair of shorts found near the crime scene and introduced into evidence had blood stains on them when, in fact, the prosecution knew the stains were from paint constituted reversible error violating defendant's Fifth and Fourteenth Amendment rights to due process].)

Like the error in *People v. Gaines* (1997) 54 Cal.App.4th 821 reversed on Sixth Amendment Confrontation Clause grounds, error in this case is undeniable. In *Gaines,* the victim was physically attacked on the street by two men who stole his bicycle. (*Id.* at pp. 822-823.) The victim was able to report the crime to the police within five minutes. (*Id.* at p. 823.) Heeding the radio broadcast, two separate officers stopped two different men in two distinct locations riding bikes in the neighborhood. The victim identified the first male as one of the attackers and identified the bicycle he was riding as his own. (*Ibid.*) The victim identified the second person (the defendant), with 80% certainty, as the second attacker. (*Ibid.*)

At trial, the defendant in *Gaines* testified that he was initially riding his bike home with Ray Hicks on the night of the crime and expected Hicks to testify to this at his trial. (*People v. Gaines, supra*, 54 Cal.App.4th at pp. 823-824.) However, Hicks never ended up testifying at the defendant's trial. To explain this omission, the prosecution argued during closing argument that, "Mr. Hicks didn't testify. That decision was made after the defendant testified because the defendant slipped and he told some untruths. And Mr. Hicks was going to testify to the contrary. Mr. Hicks would have impeached the defendant, and it was the defense that got Mr. Hicks out of here before he could damage them. It was the People that were trying to find Mr. Hicks at that point." (*Id.* at p. 825.) In finding misconduct, the First District Court of Appeal held "the prosecutor was in plain effect presenting a condensed version of what he was telling the jury would have been Mr. Hicks's testimony. When this tactic is achieved in the guise of closing argument, the defendant is denied Sixth Amendment rights of confrontation and cross examination." (*Id.* at p. 825; *see also People v. Hall* (2000) 82 Cal.App.4th 813, 817-818; *People v. Bolton* (1979) 23 Cal.3d 208.)

The misconduct in this case was much more egregious than that in *Gaines* because, unlike *Gaines*, the "testimony" fabricated by the prosecution involved the defendant, rather than a third party defense witness, and involved a fabrication of a full admission by the defendant of a rape in a rape case. Therefore, like *Gaines*, the prosecution's remarks were an undeniable "head-on assault at the defense" made with the unmistakable intention of trying to convince the jury the defense was lying. (*Id.* at p. 826.)

In addition to violating appellant's due process rights under *Griffin* and *Darden* and his Sixth Amendment right to cross examination under *Pointer* and *Pate*, the prosecution's remarks also violated appellant's Sixth

Amendment right to counsel by violating the Attorney Client privilege and his Fifth Amendment due process rights by casting aspersions on the defense. That is, the prosecution did not simply produce a bullet during closing argument that was not otherwise part of the evidence, like *Brophy*, nor did it simply put words into the mouth of a testifying or non-testifying witness, like *Gaines, Hill,* and *Johnson*. Instead, the prosecution's remarks infringed upon almost every one of the defendant's fundamental constitutional rights bearing on a fair trial. In this regard, appellant's Fifth Amendment right to remain silent was implicated because the prosecution fabricated statements made by appellant rather than simply attributing fabricated statements to a third party witness. Moreover, further exacerbating the error, the fabricated statements the prosecution attributed to the appellant were not simply alleged statements made out of court, but, rather, they were statements appellant allegedly made to his attorney during a critical stage of the proceedings, the preliminary hearing, which were clearly protected by the Attorney/Client privilege and the Sixth Amendment.

Finally, by implicating defense counsel in a scheme to essentially defraud the jury of the truth, as according to the prosecution's remarks defense counsel must have known his client was guilty, the prosecution further denied appellant due process. The California Supreme Court has made it very clear that the prosecution cannot "attack the integrity of defense counsel, or casts aspersions on defense counsel." (*People v. Hill, supra,* 17 Cal.4th at p. 832.) As stated in *People v. Belton* (2009) 168 Cal.App.4th 432, 441, "It is generally improper for the prosecutor to accuse defense counsel of fabricating a defense or to imply that counsel is free to deceive the jury." (See also *People v. Bain* (1971) 5 Cal.3d 839, 847 ["the unsupported implication by the prosecution that defense counsel fabricated a defense constitutes misconduct"].) In turn, all of these fundamental

constitutional violations worked together to lessen the prosecution's duty to prove its case beyond a reasonable doubt. Therefore, the prosecution's improper remarks were especially egregious insofar as they implicated almost every right protected by the Bill of Rights. As noted by the United States Supreme Court, "When specific guarantees of the Bill of Rights are involved, this Court has taken special care to assure that prosecutorial conduct in no way impermissibly infringes them." (*Donnelly v. DeChristoforo* (1974) 416 U.S. 637, 643.)

In sum, the prosecution's fabrication of a handwritten note from Ajay to his lawyer written during the preliminary hearing allegedly indicating that Ajay had admitted raping Sapna in Bangkok fundamentally infected the fairness of the trial constituting federal constitutional error. Not only did the fabrication, made during closing arguments, implicate almost every right protected by the Bill of Rights, it concerned a fabricated admission to a rape in a rape case and, therefore, went to the heart of the case. Given the sheer deceptiveness of this misconduct, the remarks also constituted state law error.

B. The Prosecution's Misconduct Warrants Reversal Under a State and Federal Standard of Prejudice.

Where the prosecution's misconduct renders a trial fundamentally unfair under *Darden* and/or *Griffin*, due process requires reversal where, under *Chapman v. California* (1967) 386 U.S. 18, the error is not harmless beyond a reasonable doubt. (*United States v. Hasting* (1983) 461 U.S. 499, 510.) However, if prosecutorial misconduct only rises to the level of state law error by use of deceptive and reprehensible methods that may not render a trial fundamentally unfair, reversal is required where "it is reasonably probable that a result more favorable to the defendant would have been reached without the misconduct." (*People v. Martinez, supra,* 47 Cal.4th at p. 955.) More specifically, when a state claim of misconduct is

based on the prosecution's comments made directly to the jury, reversal is required where "there is a reasonable likelihood that the jury construed or applied any of the complained-of remarks in an objectionable fashion." (*People v. Friend* (2009) 47 Cal.4th 1, 29.)

Here, there can be no doubt that the prosecution's comments prejudiced appellant according to both state and federal standards of prejudice. The improper comment made by the prosecution during closing arguments attributed an admission of rape to Ajay in a rape case. While Ajay was accused of raping Sapna two to three times a week over a five year period, there was no physical evidence of the rapes nor witnesses to these alleged rapes. Therefore, an admission of one rape would lead the jury to believe Sapna's testimony over the defense thereby condemning Ajay for all the rapes alleged by Sapna. The power and weight of the prosecution's comments to the jury cannot be understated.

As recognized by the United States Supreme Court over fifty years ago, the jury heavily relies on representations by the prosecution because the prosecution does not represent "an ordinary party to a controversy, but a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done." (*Berger v. United States* (1935) 295 U.S. 78, 88.) Therefore, for justice to prevail, a prosecutor "may strike hard blows, [but] he is not at liberty to strike foul ones." (*Ibid.*) Given this unique role of the prosecutor, "improper suggestions, insinuations, and, especially, assertions of personal knowledge are apt to carry such weight against the accused when they should properly carry none." (*Ibid.*) This is especially true in rape cases where the case often comes down to the word of the defendant against the word of the alleged victim. As noted in *Johnson*, "In most sex offense cases the alleged perpetrator and the alleged victim are the sole or principal

witnesses and in such cases there is grave danger that prosecutorial misconduct may tip the scales of justice." (*People v. Johnson, supra*, 121 Cal.App.3d at p. 105.)

Similarly, the California Supreme Court has emphasized that "Statements of supposed facts not in evidence ... are a highly prejudicial form of misconduct, and a frequent basis for reversal." (*People v. Hill, supra,* 17 Cal.4th at p. 828.) Here, the misconduct was even more prejudicial than most cases involving a misstatement of fact during closing argument because there was no way for the jury to verify whether the prosecution's comments were accurate by asking for a read back of the targeted testimony or evidence. Therefore, unlike a more typical prosecutorial misconduct case involving the misstatement of facts, the jury had absolutely no reason to doubt the fabricated evidence presented by the prosecution. In fact, since the trial court overruled the defense objection, the prosecutorial misconduct was sanctioned by the authority of the trial court. As recognized by the United States Supreme Court in *Griffin*, "the prosecutor's comment and the court's acquiescence are the equivalent of an offer of evidence and its acceptance." (*Griffin v. California, supra,* 380 U.S. at p. 613.)

Given the severe weaknesses in the prosecution's case, it cannot be said that the prosecution's comments were harmless beyond a reasonable doubt especially where the prosecution fabricated an admission of rape and presented it during closing argument so that Ajay could not refute it. Given the highly incriminating and inflammatory nature of these comments, there is a reasonable likelihood that the jury construed or applied these deceptive and reprehensible tactics, sanctioned by the trial court, in an objectionable fashion. For these reasons, this Court must reverse appellant's convictions and grant him a new trial.

IX. APPELLANT'S CONSTITUTIONAL RIGHT TO A MEANINGFUL APPEAL WAS DENIED WHERE THE TRIAL COURT REFUSED TO HOLD AN EVIDENTIARY HEARING TO RESOLVE MATERIAL UNSETTLED PORTIONS OF THE RECORD

A. Introduction

On or about October 7, 2010, the trial court granted appellant's application to settle the record which included, but was not limited to, settlement on whether the jury received the video-taped police interview between Sapna and Detective Hermann, Exhibit 36B, in response to the first jury note; and whether there was a missing jury note from June 24, 2009. (ACT (2/17/2012) 1, 3) During the course of settlement, the prosecution identified an additional omission in the record: whether the jury received the evidence admitted during the first morning of deliberations resulting from a re-opening of the case. (ACT (9/30/11) 49-52.)

In an effort to settle these omissions in the record, the trial court held a meet and confer with the prosecution and defense counsel present; a hearing was held to interview court clerk Marcelena Leon; the defense presented declarations and hearsay declarations from eight jurors and the bailiff; and the prosecution presented one declaration from a juror. The facts from the judge, lawyers, clerk, bailiff, and jurors presented some significant inconsistencies. To resolve these inconsistencies and settle the record in accordance with appellant's federal constitutional right to a meaningful appeal secured by the right to a sufficient record on appeal, the defense requested an evidentiary hearing. An evidentiary hearing would both resolve the inconsistencies in the emerging record and allow the defense to subpoena those persons, primarily jurors, who either could not be located or were unwilling to be interviewed voluntarily.

On September 30, 2011, the trial court denied the defense motion for an evidentiary hearing finding it unnecessary because, based on a reading of the facts "in the light most favorable to the defense," the facts showed that the jury received Exhibit 36 and there was no missing jury note from June 24, 2009. (ART (1/31/2012) 41, 47) It also ruled that whether the jury received the second batch of newly admitted evidence after the first morning of jury deliberations was an "unsettleable" issue. (ART (1/31/2012) 51-52)

B. Standard of Review

Whether the trial court erred by denying the defense's request for an evidentiary hearing during settlement proceedings and whether, the facts viewed in the light most favorable to the defense, supported the certified settled statement are issues of pure law and, thus, require *de novo* review. (*People v. Cromer* (2001) 24 Cal.4th 889, 894, n. 1; *People v. Lawler* (1973) 9 Cal.3d 156, 160; *People v. Teroganesian* (1995) 31 Cal.App.4th 1534.)

C. The Trial Court Erred By Denying Appellant An Evidentiary Hearing During Settlement Proceedings Implicating Appellant's Constitutional Right To A Meaningful Appeal and A Sufficient Record on Appeal.

In *Draper v. Washington* (1963) 372 U.S. 487, 499, the United States Supreme Court held that, where a state provides for appellate review, equal protection considerations demand a sufficient record of completeness in order to guarantee a proper consideration of a defendant's claims on appeal. (See also, *Williams v. Oklahoma* (1969) 395 U.S. 458, 458-459.) Whether an incomplete record denies a state appellant due process depends on the evaluation of two criteria: (1) the value of the transcript to the defendant in connection with the appeal or trial for which it is sought; and (2) the availability of alternative devices that would fulfill the same functions as a transcript. (See, *Britt v. North Carolina* (1974) 404 U.S.

226, 227 & n.2, 92 S.Ct. 431 (1971); *Mardera v. Risely* (9th Cir. 1989) 885 F.2d 646, 648.)

In the case at bar, the record on appeal was missing several jury notes and responses - most of which occurred during jury deliberations. Therefore, the subject and contents of the missing record meets the first criteria as jury notes, especially substantive notes submitted during jury deliberations, are an undeniable value to the appeal.

In *Mayer v. Chicago* (1971) 404 U.S. 189, 195, 92 S.Ct. 410, 415, the United States Supreme Court discussed suitable alternatives to a verbatim transcript. Specifically, the High Court noted,

> Alternative methods of reporting trial proceedings are permissible if they place before the appellate court an equivalent report of the events at trial from which the appellant's contentions arise. A statement of facts agreed to by both sides, a full narrative statement based perhaps on the trial judge's minutes taken during trial or on the court reporter's untranscribed notes, or a bystander's bill of exceptions might all be adequate substitutes, equally as good as a transcript.

(*Ibid.*)

Consistent with Supreme Court precedent, California law equally acknowledges that a record of sufficient completeness does not automatically translate into a complete verbatim transcript. (*People v. Scott* (1972) 23 Cal.App.3d 80, 85.) Rather, it is incumbent upon the appellant to attempt to reconstruct the missing parts of the record before his or her federal due process rights are implicated. (*People v. Malabag* (1997) 51 Cal.App.4th 1419, 1422-1423.)

In *People v. Malabag*, the California Court of Appeal found that the appellant waived his state and federal due process right to a sufficient record on appeal because he failed to pursue settlement proceedings after

his attempts to augment the record failed. (*People v. Malabag, supra,* 51 Cal.App.4th at p. 1425.) As held by the court in *Malabag,*

> Having failed to obtain a more complete record or to explain any inability to do so, defendant must rely on the record at hand which is, in fact, sufficient to support the order from which the appeal is taken. To hold otherwise would be to allow an appellant to reply upon gaps in a record of his own devising.

(*Id.* at p. 1425.)

Similarly, in *People v. Jones,* the California Court of Appeal held that,

> Where other methods of reconstructing the record are available, the defendant must proceed with those alternatives in order to obtain review. It must be shown that it is impossible to secure an adequate substitute for the missing transcript testimony and that there are substantial issues requiring the transcript.

(*People v. Jones* (1981) 125 Cal. App.3d 298, 300.)

The purpose of a settled statement is to provide the appellate court with a record of trial court proceedings for which there is no formal contemporary record. (*People v. Anderson* (2006) 141 Cal.App.4th 430, 440.) In this regard,

> the settlement is used for filing in 'gaps in the appellate record.' [Citation.] Consistent with this limited purpose, the settled statement is 'intended to ensure that the record transmitted to the reviewing court preserves and conforms to the proceedings actually undertaken in the trial court,' not to 'allow parties to create proceedings, make records, or litigate issues which they neglected to pursue earlier.' [Citations.]

(*Ibid.*) Nevertheless, as noted by the California Supreme Court, there is "scant decisional authority construing settlement procedures." (*Marks v. Superior Court* (2002) 27 Cal.4th 176, 195.)

People v. Hardy (1989) 1989 Cal. LEXIS 1363 expressly authorizes the trial court to hold an evidentiary hearing to settle the record on appeal. In addition to *Hardy*, the Evidence Code also provides for such authority in similar post-verdict proceedings. (See Evid. Code §§ 704, 1150.)

In *People v. Garcia* (2005) 36 Cal.4th 777, 794-796, a record settlement case, defense counsel submitted a declaration from his investigator concerning the statements of several jurors regarding potential misconduct. "The Court of Appeal majority held that the declaration of the defense investigator relied upon by defendant in support of this point was inadmissible hearsay that could not be used to impeach the jury verdict." (*Id.* at p. 796.) On review, however, the California Supreme Court relied on the information contained in the "hearsay declaration" concerning improper experimentation and segregated deliberations at the crime scene re-visited during deliberations and reversed the Court of Appeal's opinion. (*Id.* at p. 796, 807-808.) Although the California Supreme Court reversed the Court of Appeal decision, it never overtly discussed whether an investigator's hearsay declaration is competent evidence to settle the record. (*Ibid.*) Given the uncertainty regarding the competency of a hearsay declaration to resolve record settlement issues, it is critical to hold an evidentiary hearing to perfect an appellant's right to a meaningful appeal.

However, where Evidence Code section 1150 is invoked by defense counsel, California law consistently permits defendants to rely on jury affidavits and declarations to prove jury misconduct to impeach a verdict. (See *In re Hamilton* (1999) 20 Cal.4th 273, 280 (a juror is competent to testify or furnish a declaration about any overt event or circumstance open to corroboration by sight, hearing, or the other senses); *People v. Vomaska* (1997) 55 Cal.App.4th 905, 907 ("Juror affidavits may be used to impeach a verdict if they refer to objectively ascertainable statements, conduct,

conditions, or events, but not subjective reasoning processes of jurors . . ."); *People v. Duran* (1996) 50 Cal.App.4th 103, 112 ("Declarations of jurors may be used to show that a juror concealed bias or other disqualifications by providing false answers during voir dire"); and *People v. Hord* (1993) 15 Cal.App.4th 711, 719 ("Juror affidavits may be used to prove that one or more of the jurors concealed his bias or prejudice on voir dire. Affidavits can be used when the bias was revealed by false answers on voir dire).) The use of affidavits and declarations, however, does not exclude the use of testimony. Where jury misconduct is raised on collateral review it is common to hold an evidentiary hearing requiring the testimony of jurors. (See *In re Hamilton, supra,* 20 Cal.4th at p. 284-285.)

In general, California law affords trial courts great latitude and authority to settle the record. "The rules confer full power over such a record in the trial judge. As long as the trial judge does not act in an arbitrary fashion he has full and complete power over such a record." (*Marks v. Superior Court, supra,* 27 Cal.4th at p. 196.) The California Supreme Court has repeatedly emphasized that the trial court must "resort to all available aids, including the judge's own memory and those of the participants" before it can determine the record is not amenable to settlement. (*Ibid.*, (emphasis added); see also, *People v. Gzikowski* (1982) 32 Cal.3d 580, 585, n. 2.) In *Gzikowski*, the California Supreme Court stated that:

> When a settled statement of *unreported* matters is requested, the memories and notes of the participants are the only sources from which it can be derived. Therefore, counsel may fairly be required to draw on those sources to demonstrate how a particular unreported matter may be useful on appeal.

(*People v. Gzikowski, supra*, 32 Cal.3d at p. 585, n. 2.) Consistent with *Marks* and *Gzikowski*, the Court of Appeal in *Jones* found that, "Where

other methods of reconstructing the record are available, the defendant must proceed with those alternatives in order to obtain review. It must be shown that it is impossible to secure an adequate substitute for the missing transcript testimony and that there are substantial issues requiring the transcript. (*People v. Jones, supra,* 125 Cal. App.3d at p. 300.)

Given the broad power allocated to trial courts to settle the record and the necessity to use all available methods to reconstruct missing portions of the record, it was error to deny appellant's request for an evidentiary hearing especially where the facts presented by the defense and prosecution were in conflict and, without subpoena power, the defense had no power to obtain the information necessary to resolve the omissions in the record. That is, the critical issues requiring settlement involved jury notes and the receipt of select admitted evidence. However, jurors, by law, are given the "absolute right" not to discuss the case with any interested party. (Code Civ. Proc., § 206.) Therefore, it was necessary to subpoena the jurors and the bailiff, at a minimum, to resolve the omissions in the record. Consequently, the failure to hold an evidentiary hearing violated appellant's Fifth and Fourteenth Amendment rights to due process and equal protection which, in turn, secure his federal constitutional right to a sufficient record on appeal and a meaningful right to appeal.

D. Viewed in the Light Most Favorable to the Defense, the Record Omitted an Unanswered Jury Note Submitted on June 24, 2009 Requesting Guidance on Whether it Was Proper to View Testimony from One of Sapna's Friends as the Truth.

The minute order for June 24, 2009 indicates:

> The Court was in receipt of (1) question from the jury. Court asked the clerk to call counsel and read them the question, verbatim. The Court then contacted both counsel by conference call.

> The Court to send a written response to the jury in the morning, as the jury has left for the day to return tomorrow at 9:00 am to resume deliberations.

(12 CT 3272)

The minute order for June 25, 2009 confirms that a written response to the June 24, 2009 jury note was provided to the jury: "Court has sent in a written response to question submitted by the jury late yesterday." (12 CT 3274) There is no jury note in the clerk's transcript for June 24, 2009 or any response.

Pursuant to the settlement investigation, Juror No. 1 recalled that the jury submitted a note during deliberations regarding the testimony of one of the victim's friends. Specifically, whether the jury could take the testimony for the truth. (1 ACT (2/17/2012) 237) There is no jury note in the record concerning the testimony of one of the victim's friends. Juror No. 1 reviewed the jury notes in the record (12 CT 3258-3259, 3264, 3270, 3372; ACT (5/14/2010) 13) and stated, in a declaration signed under penalty of perjury, that he did not see that note among that group of jury notes submitted during deliberations.[65] (ACT (2/17/2012) 257)

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[65] During the Meet and Confer, Tracee Grimes (the clerk) found three additional jury notes submitted during deliberations and file stamped June 25, 2009. None of these jury notes were included in the record on appeal despite several augment requests for missing jury notes. (ART (12/6/2010) 2, 3, 4, 71-75) The three additional jury notes concerned questions about reaching a verdict and/or being deadlocked. None of the additional jury notes concerned a question about the testimony of one of Sapna's friends. It is equally clear from the record that the undated note submitted by Juror No. 12 (ACT (5/14/2010) 13) could not have been submitted on June 24, 2009 because the reporter's transcript unequivocally shows it was submitted on June 11, 2009 before deliberations. (19 RT 5101-5104) As indicated by the reporter's transcript, this Court read the note word for word on the record and verbally responded to it on the record. (19 RT 5104-5105) Therefore, this undated note (ACT (5/14/2010) 13) could not be the omitted jury note from June 24, 2009.

Given this unmistakable omission in the record and Juror No. 1's specific recollection about an unanswered jury note in the record, the trial court clearly erred in finding that, as viewed in the light most favorable to the defense, there was no omitted note from the record.

E. Viewed in the Light Most Favorable to the Defense, the Record Shows That The Jury Never Received Exhibit 36B, The Video-Taped Police Interview Between Sapna and Detective Hermann, In Response To Its First Jury Note.

1. Exhibit 36B Was Missing From The Evidence Provided To The Jury.

Juror No. 2, the foreman of the jury, submitted the first jury note on June 11, 2009 which read: "We would like to watch Det. Hermann interview with Sapna. #2." (12 CT 3258) In an interview with Juror No. 2, he clarified that the note was intended to be a request for Exhibit 36B.

> [Juror No. 2] did remember submitting a jury note regarding the video-taped interview between Sapna and Detective Hermann [Juror No. 2] said that, when he watched the video-taped interview during trial, he found it somewhat difficult to believe Sapna. So, he wanted to see it again during deliberations. To the best of his recollection, the jury was never given the video-taped interview to watch during deliberations.

(1 ACT (2/17/2012) 240)

The prosecution agreed that the first jury note, submitted on June 11, 2009 (12 CT 3258), reflected a request for Exhibit 36B: the video-taped interview between Detective Hermann and Sapna. (1 ACT (2/17/2012) 152, 155) It argued, however, that the jury received the requested piece of evidence once the bailiff brought the jury all of the evidence in the case. Relying on a declaration from Juror No. 3, the prosecution surmised:

> Juror #2's note was the first note sent by the jury and was sent before ANY of the evidence was sent to the jury. The

> court, therefore, needed to do nothing other than send the copy of the interview along with ALL THE REST OF THE EVIDENCE into the jury deliberation room. Just as there is no requirement for a special note from the Court notating that ANY OTHER piece of evidence was going to the jury, there was no special need to note that the copy of the interview that was requested was being sent to the jury as it was all sent together AFTER the request about the interview from Juror # 2.

(1 ACT 2/17/2012)

Both the record and the juror declarations establish, by clear and convincing evidence, that the jury did not submit its first note before receiving all the evidence from the bailiff. First, contrary to the prosecution's position, the clerk's transcript provided a clear notation as to when the bailiff delivered evidence to the jury. For example, the minute order from June 11, 2009 clearly states, "Verdict forms and admitted exhibits were delivered to the jury room." (12 CT 3238) According to the minute order, the admitted evidence was delivered to the jury around 10:35 a.m. (12 CT 3238) The first jury note, however, was not submitted until after 1:45p.m. (12 CT 3239) There are no other notations in the June 11, 2009 minute order indicating that the bailiff provided the jury any other evidence. (12 CT 3238-3239) Therefore, the jury had "all" of the evidence when it asked to see Exhibit 36 which, in turn, establishes that Exhibit 36B was missing from the evidence.

In addition, the trial court expressly told the jury there would be a slight delay in the bailiff getting the evidence to the deliberation room due to the inexperience of the clerk on duty. As explained to the jury by the trial court:

> It will take us a moment to make sure that the exhibits are properly logged and organized to be sent in with you. You probably won't see them until either the end of this morning or see them this afternoon. Deliberate as best you can

> without having the exhibits in front of you, but you will get them as soon as the clerk has finished logging them. My regular clerk who has been here through the whole trial is out of court today, actually off today, and so it is going to take a little extra time because we have someone who is not quite as familiar with how we've been doing things in here.

(19 RT 5158) Therefore, the record clearly shows that the jury would not have asked for a piece of evidence, in direct contrast to the trial court's order, before it received all the evidence from the bailiff.

In fact, Juror No. 8 "specifically recalls that the jury did not ask for any evidence before the bailiff brought it all in because the jury was told it was coming. She also recalls the judge instructing the jury that it would be provided all the evidence and how to go about everything." (1 ACT (2/17/2012) 260) Therefore, the request for Exhibit 36B must have been made after the jury received all the evidence establishing that it was missing from the evidence given to the jury.

The record also establishes by clear and convincing evidence that the jury was not asking for equipment to view Exhibit 36B. On June 11, 2009, immediately after the bailiff was sworn to take charge of the jury, the trial court asked the bailiff, "Which jury room are you going to use?" (19 RT 5155) In response, the bailiff indicated, "Department 5, your Honor." (19 RT 5155) Department 5 houses a television set containing a VCR/DVD player, therefore, the jury could not have been asking for equipment to view Exhibit 36B since it already had access to such equipment.

During trial, the prosecution informed the court of this fact explaining: "I

> know the Court has down in Department 5 a TV with a DVD/VCR player. If the jury wishes to view that, they don't have to have a laptop computer to do so. I just want to let the Court know and counsel, in case there's any issues." (18 RT 4837) The bailiff also confirmed this fact in his conversations with counsel's investigator,

Anthony H. Gane. According to Mr. Gane, "Mr. Schmidt was certain the jury deliberation room had the equipment necessary to watch a DVD or VHS. The DVD/VHS equipment was in the room where the jury deliberated and remained there until they completed their deliberations." (1 ACT (2/17/2012) 269) Similarly, Juror No. 5 specifically remembered there was a television set in the deliberation room because "it was an obstacle in the way. We shoved it into a corner to get it out of the way." (1 ACT (2/17/2012) 250) Therefore, the record and the settlement investigation clearly establish that the first jury note, submitted on June 11, 2009, was not a request for equipment, but rather, a request for Exhibit 36B. Consequently, Exhibit 36B was missing from the set of evidence the bailiff initially provided to the jury and this fact should be reflected in the certified settled statement.

2. The Jury Was Never Given Exhibit 36B Pursuant To Its Request In The First Jury Note Submitted To The Trial Court.

While the record shows the trial court decided to grant the jury's request to obtain Exhibit 36B (12 CT 3239), the record equally establishes that the jury was never given Exhibit 36B in accordance with the trial court's ruling. Therefore, while the law may presume that a court acts in accordance with its duty, this presumption is rebuttable and has been rebutted in this case. (*See People v. Garris* (1953) 120 Cal. App.2d 617, 618 ("In the absence of a showing in the record to the contrary an appellate court will indulge all reasonable presumptions in favor of the judgment and rulings of the trial court, and will presume that the proceedings were regular and free from error.") Consequently, the minute order's indication that the trial court granted the jury's request does not end the inquiry. Given the plethora of evidence establishing that the jury never received Exhibit 36B, this issue remained ripe for settlement.

The clerks' transcript established that, on June 11, 2009, the bailiff delivered the evidence to the jury on one occasion at approximately 10:35 a.m. (12 CT 3238) This delivery took place before the defense re-opened the case to admit a plethora of other exhibits into evidence. Thereafter, the jury asked for Exhibit 36B establishing that Exhibit 36B was missing from the evidence which had been delivered to the jury. The trial court acknowledged that only the bailiff would deliver evidence to the jury. At the May 27, 2011 hearing, the trial court explained, "The bailiff either comes into the courtroom, gets it [the evidence] from the clerk, or the clerk walks it to the bailiff and hands it over, or I take it from the clerk and walk it to the bailiff because the clerk is doing something at that point so important that I need to let her continue doing it." (ART (1/31/2012) 27)

The bailiff, Deputy Derek Schmidt, was certain he never delivered a DVD, VHS tape, or CD disc to the jury during deliberations after he initially brought the jury all the admitted evidence. (1 ACT (2/17/2012) 269) Therefore, in the light most favorable to the defense and by clear and convincing evidence the facts establish that the jury was never provided Exhibit 36B per its request.

With the exception of Juror No. 3, who erroneously recalled that the first jury note was submitted against court orders (before the bailiff delivered the evidence), all other jurors who spoke to the defense indicated either that they never watched Exhibit 36B during deliberations and/or that there were no DVDs, CD-roms, or VHS tapes in the evidence.[66] (1 ACT

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66 Note that the bailiff, Deputy Derek Schmidt, recalls that there were approximately two to five compact discs in the box of evidence he initially brought to the jury. (1 ACT (2/17/2012) 268-269)) However, Deputy Schmidt stated that "he didn't examine them so he did not know if they contained audio, photos, or video" and "did not specifically recall seeing a DVD among the evidence he brought in, but he could not say there was not a DVD as he did not look at everything closely." (1 ACT (2/17/2012) 269) Since the pornography exhibits and family videos were also on DVD/CD-

(2/17/2012) 236-241, 247-252, 256-261) These declarations, therefore, corroborate the fact that the bailiff never provided the jury with Exhibit 36B - not with the original batch of all evidence nor, subsequently, pursuant to the jury's request.

During the November 19, 2010 Meet and Confer and the May 27, 2011 hearing to interview clerk Marcelina Leon, the trial court maintained that the omission of any documentation showing that the jury received what it requested (and what the court granted) is immaterial because "logistical" matters, like giving the jury an admitted piece of evidence it requested, are not regularly recorded in writing in the clerk's transcript. (ART (1/31/2012) 21-22, 29; ACT (12/6/2010) 27). For example, the trial court explained,

> Logistical requests from the jury such as, can we have a play-back device, or can we have witness Smith's testimony read to us, or we know you said we have to deliberate till 4:30, can we leave at 4:15, somebody has softball this afternoon with their kids? I don't bother typing up an answer to those.

(ART (1/31/ 2012) 21)

Similarly, the trial court explained at the Meet and Confer:

> Yeah, we don't send in an answer. We just say, okay, here's the equipment, watch the video. [] So, that's – your settled statement on appeal is [] we gave them what they asked for. We do not call them into the courtroom and then give them further instruction. We do not send in a written instruction that says you asked us for a videotape; you may have noticed the bailiff just walked in with a big piece of equipment. We just send in the big piece of equipment.

(ACT (12/06/2010) 27)

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roms, the jury's first note still conclusively shows that Exhibit 36B was missing from the evidence.

However, the record on appeal squarely contradicts this assessment. First and foremost, the clerk's transcript clearly states that "written answers will go to jurors." (12 CT 3239) This clear directive does not provide for logistical exceptions. In addition, this Court explained its policy to the jury before deliberations:

> I'll answer your questions either by returning something to you in writing or it will be back here in the courtroom and you'll be brought in, and I'll give you oral instructions. Either way, whether it is back here in the courtroom and I answer your question orally or you are in the jury room and I send in a written response, you are to take that as further jury instructions just like the ones I've been reading to your now.

(19 RT 5148) Consistent with the trial court's policy articulated at trial, the record reflects that all answers were provided to the jury in writing and documented in writing in corresponding minute orders. For example, with respect to the other jury request for evidence, the trial court provided an independent written answer to the jury and a separate written notation was made in the corresponding minute order. Specifically, the jury submitted a note asking, "May we please [have] 12 copies of the pretext call translation/transcript." (12 CT 3264) In response, the trial court typed up the following written response and gave it to the jury:

> Question 2: "May we please [sic] 12 copies of the pretext call translation/transcript?"
>
> Answer: Yes. Please return Exhibits 11 C, 11D and 799 to the bailiff for copying.
>
> June 12, 2009 /s/ Timothy Fall

(12 CT 3264)

The corresponding minute order documented the event in writing noting, "Court answers the jury in writing, granting their request and providing them with 12 copies of exhibits 11C, 11D, and 799." (12 CT 3261)

No such answer or minute order entry exists to indicate that the jury was given Exhibit 36B per its request. This omission and the declarations provided by counsel show by clear and convincing evidence, independently, and as viewed in the light most favorable to the defense, that the jury did not receive Exhibit 36B despite its request and despite the trial court's decision to grant the jury's request.

F. The Record Was "Unsettleable" With Respect To Whether The Jury Was Given Newly Admitted Evidence After Jury Deliberations Started.

The jury started deliberating on June 11, 2009 at 10:35 a.m. (12 CT 3238) Several hours later, the trial court re-opened the case at the defense request. (12 CT 3240) At this hearing, approximately 50 exhibits were admitted into evidence. (12 CT 3239) Nothing in the record shows that the jury was provided this additional evidence and the bailiff indicated in a post-verdict interview that he never provided the jury with a second batch of evidence incident to this hearing. (12 CT 3239; 1 ACT (2/17/2012) 269-270)

At the settlement hearing held on September 30, 2011, the trial court ruled this omission in the record was "unsettleable." (ART (1/31/2012) 51-52) Similarly, the certified settled statement provides, "Nothing in the record indicates whether the bailiff actually followed the court's order to deliver any part of the admitted evidence to the jury." (2 ACT (2/17/12) 308) This unresolved omission in the record violated appellant's constitutional right to a meaningful appeal and a sufficient record on appeal as protected by the Fifth and Fourteenth Amendment rights to due process and equal protection.

G. These Errors Prejudiced Appellant Warranting Reversal.

The trial court's failure to hold an evidentiary hearing to settle the record on appeal and to certify the settled statement in contrast to the facts obtained in the settlement investigation denied appellant his right to a meaningful appeal and a sufficient record on appeal as guaranteed by the Fifth and Fourteenth Amendment rights to equal protection and due process. Therefore, as a federal constitutional issue reversal is required unless the State can show the errors were harmless beyond a reasonable doubt. (*Chapman v. California, supra,* 386 U.S. at p. 24.) As a state law error, reversal is required if it can be shown there is a reasonable probability that the omissions in the record would provide a basis for reversal on appeal. (*People v. Watson, supra,* 46 Cal.2d at p. 836.)

It is hard to construe any jury note issue as being harmless since jury notes indicate what is significant to jurors during deliberations. Here, a missing jury note about testimony from one of Sapna's friends had to have been significant as the trial court instructed the jury that much of the testimony could not be viewed for the truth, but only for state of mind evidence. It seems highly probable that any testimony from Sapna's friend would have been used to evaluate her credibility as a witness and, therefore, was critical to the case. Similarly, the omission of Exhibit 36B from the evidence was of critical importance as demonstrated by the defense's closing which repeatedly implored the jury to view Exhibit 36B to highlight the inconsistencies and lies in Sapna's testimony. (18 RT 5022, 5027, 5029, 5030, 5032) Finally, the fact that it is unclear whether the jury ever received approximately 50 admitted exhibits during deliberations in a very close case cannot be deemed harmless beyond a reasonable doubt. For these reasons, reversal and a new trial are required as the omissions in the record denied appellant his fundamental right to a meaningful appeal.

X. DUE PROCESS DEMANDS THAT APPELLANT'S CONVICTIONS BE REVERSED AND HE BE GRANTED A NEW TRIAL BASED ON THE CUMULATIVE EFFECT OF ALL THE ERRORS IN HIS CASE.

The Supreme Court has clearly established that the combined effect of multiple trial court errors violates due process where it renders the resulting criminal trial fundamentally unfair. (*Chambers v. Mississippi* (1973) 410 U.S. 284, 298, 302-303 [combined effect of individual errors "denied [Chambers] a trial in accord with traditional and fundamental standards of due process" and "deprived Chambers of a fair trial"].) The cumulative effect of multiple errors can violate due process even where no single error rises to the level of a constitutional violation or would independently warrant reversal. (*Id.* at p. 290, n. 3; see also *Montana v. Egelhoff* (1996) 518 U.S. 37, 53 [stating that *Chambers* held that "erroneous evidentiary rulings can, in combination, rise to the level of a [federal] due process violation"]; *Taylor v. Kentucky* (1978) 436 U.S. 478, 487 n. 15 ["[T]he cumulative effect of the potentially damaging circumstances of this case violated the due process guarantee of fundamental fairness..."].) Moreover, where there are a combination of both federal constitutional and state law errors in a trial, they are cumulatively viewed using the *Chapman* standard of prejudice. (*Cooper v. Sowders* (6th Cir. 1988) 837 F.2d 284, 285-288; *Menzies v. Procunier* (5th Cir. 1984) 743 F.2d 281, 288-289; *Lincoln v. Sunn* (9th Cir. 1987) 807 F.2d 805, 814, n. 6.)

It is hard to imagine a case more ripe for reversal based on cumulative error. Although each claim justifies reversal independently, the cumulative impact to the collective errors cannot be ignored. The face of the trial would have been dramatically different: the jury would have understood why Sapna had a motive to falsely accuse Ajay as, at the time

she went to the police, she feared that Ajay and Peggy were planning to reverse her adoption and have her deported back to Nepal due to a complete breakdown in the family relationship; the jury would have never heard incompetent evidence attributing two admissions of rape to Ajay that had absolutely no foundation -- one based on biased "expert" testimony from Sapna and the second fabricated by the prosecution during closing argument; the jury would not have been unfairly inflamed and confused by the overwhelming amount of pornography evidence introduced by the prosecution in an attempt to mischaracterize Ajay as a sexual deviant - this was especially true of the Kaaza child pornography evidence which was unknowingly downloaded onto Ajay's laptop as a result of innocent searches for music; the jury would have been able to affirmatively rule out Ajay as the person interested in child pornography as the e-mail proving he was at work when child pornography was being viewed at the Dev home would have been introduced as evidence at the trial; and the jury would have been able to view the video-taped police interview between Sapna and Detective Hermann, Exhibit 36B, during deliberations as implored by defense counsel during closing arguments to highlight the inconsistencies and lies in Sapna's testimony.

In sum, absent these errors, the jury would have decided Ajay's fate based almost entirely on Sapna's inconsistent and implausible testimony. Ajay deserved to have that trial. Instead, his convictions and 378 year sentence were based on an egregiously compromised trial which completely failed to perform its truth seeking function. Even with the admission of highly prejudicial incompetent evidence and the exclusion of extremely exculpatory evidence, the case was a close one. Therefore, it is impossible to find that the cumulative errors could have been harmless beyond a reasonable doubt. (*Chapman v. California, supra,* 386 U.S. at p. 24.) For this reason, the cumulative errors in appellant's case warrant

reversal of his convictions and a new trial.

CONCLUSION

For the foregoing reasons, Appellant respectfully asks this Court to reverse his convictions and grant him a new trial.

DATE: August \, 2012

Respectfully submitted,

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Ajay Kumar Dev

Word Count Certificate

I certify that the attached Appellant's Opening Brief, in 13 point font, is 75,346 words and, thus, exceeds the 25,500 word limit. This Court granted Appellant's request to file an oversized brief in an order dated July 23, 2012.

DATE: August 1, 2012

Respectfully submitted,

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PROOF OF SERVICE

I, the undersigned, declare that I am a resident of Los Angeles County, California; that my business address is the Law Office of Lauren E. Eskenazi-Ihrig, 321 N. Pass Avenue, Suite #100, Burbank, California 91505; that I am over the age of eighteen years; that I am not a party to the above-entitled action; and that I served by mail the documents described herein to the following:

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A copy of: **REDACTED APPELLANT'S OPENING BRIEF**

This proof of service is executed on August 2, 2012 at Los Angeles, California. I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

LAUREN E. ESKENAZI-IHRIG