IN THE SUPREME COURT

OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA,	)	
Plaintiff and Respondent,	)	Superior Court 062444 (Yolo County)
	)	C062694
v.	)	
AJAY KUMAR DEV,	)	
Defendant and Appellant.	)	

PETITION FOR REVIEW

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AJAY KUMAR DEV,	)	
Defendant and Appellant.	)	

TO: THE HONORABLE TANI CANTIL-SAKAUYE, CHIEF JUSTICE, AND TO THE HONORABLE ASSOCIATE JUSTICES OF THE CALIFORNIA SUPREME COURT:

Appellant and petitioner Ajay Dev seeks review in this Court following an unpublished decision of the Court of Appeal, Third Appellate District, filed on January 12, 2017, affirming his conviction. A copy of the appellate court's decision is attached to this Petition as Exhibit A.

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Defendant Ajay Dev and his wife Margaret (Peggy) Easley were married in 1997. Mr. Dev was a civil engineer who worked for the California Department of Water Resources. After a 1998 trip to Nepal with Mr. Dev's parents -- who themselves had sponsored four to five Nepali citizens in coming to the United States -- Ajay and Peggy decided to adopt Sapna Deo, one of their distant and Nepali relatives to come to America and become an American citizen. They promised Sapna's parents they would raise her with traditional Nepali values. As Sapna herself would later testify, she and her parents "thought it was a good opportunity to help [the] family." Sapna arrived in the United States in 1999, lived with the Devs, became a part of the family and as the years passed she attended high school, graduated and then enrolled in college.

At that point tensions began building in the relationship between Sapna and the Devs. According to the Devs, Sapna became sexually active with college boyfriends in violation of traditional Nepali culture. Shortly after the Devs tried to intercede, directly contacting one of Sapna's boyfriends, Sapna accused Ajay of sexual misconduct beginning years earlier -- only weeks after her January 1999 arrival in the United States -- and continuing for years. In fact, Sapna would later testify that Mr. Dev raped her two to three times a week for five straight years. Although Sapna ultimately asked police to drop

the charges, charges were not dropped, the case proceeded and the state obtained numerous convictions and a sentence of more than 378 years in prison.

For his part, Mr. Dev denied *any and all* improper conduct. But this left Mr. Dev with a significant practical problem, a problem common to many such cases: what motive would Sapna have to falsely accuse Mr. Dev of sexual misconduct? As the prosecutor argued in closing, for the jury to acquit "Sapna would have to be making all this up, and she'd have to have some motive to still be doing this." The prosecutor was entirely correct.

It is here that this case becomes more unusual than most. It turns out that not only did Sapna have such a motive, but the defense had definitive evidence of it, evidence which the jury was not allowed to hear. During the adoption process Sapna had substantially lied about her age in order to facilitate the adoption: absent Sapna's lie, she was too old to be adopted by the Devs and a life in America would not be possible. As tensions between Sapna and the Devs escalated during her college years, Sapna feared the Devs would seek to reverse the adoption because of the lie, and prevent her from staying in America.

But there was a way out for Sapna. If she was the victim of a crime, longstanding

federal law -- specifically Congress's Violence Against Women Act -- would permit her to seek legal permanent residence in America.

Of course, in order to establish this motive Mr. Dev needed to prove Sapna had indeed lied on her adoption paperwork and was therefore at risk for being sent back to Nepal. To prove this critical predicate fact, the defense sought to introduce certified records from Nepali courts showing that in 2005 Sapna had been charged in Nepal for falsifying the date of her birth on her passport and been convicted. More specifically, the defense offered (1) a copy of the 13-page opinion of the Nepali trial court finding Sapna guilty of the charges and (2) a copy of the six-page appellate court opinion affirming the conviction and sentence.

As more fully discussed below, defense counsel provided several certifications as to these official court documents. As to both the Nepali trial and appellate court opinions, defense counsel presented a signed stamp on each page of the two documents showing the English translation had been provided by the Shree Law Books Management Board. Counsel provided uncontradicted evidence that the Shree Law Books Management Board was an official department of the Government of Nepal under the Ministry of Law and the Nepali Government's "official translator of any official document from Nepali to English."

Counsel went further. As to the trial judge's opinion, counsel presented a signed declaration (with an appropriate seal) from the Nepal Ministry of Foreign Affairs, Deputy Chief of Protocol (a) certifying that the English version of the document was "the authorized translation of [the] Original Nepali Document" and (b) certifying the authenticity of both the trial court's seal and the trial judge's signature. As to the appellate court's opinion, counsel presented a signed declaration (again with an appropriate seal) from the Nepal Ministry of Foreign Affairs, Consular Officer (a) certifying that the English version of the Nepali appellate opinion had "been translated by the authorized body" and (b) certifying the authenticity of the appellate court's seal and the signatures of the appellate judges.

But counsel went even further. As to each of the two now-certified Nepali court opinions, defense counsel provided a declaration from the Honorable Harishchandra Ghimire, First Secretary of the Embassy of Nepal in Washington D.C.. Mr. Ghimire explicitly certified the authenticity of the signatures of the Nepal foreign affairs officials who signed the individual certifications as well as the seal of the Nepal Ministry of Foreign Affairs on each of the two authenticating certificates.

This was not good enough for the trial court and it refused to admit *any* of this evidence. And absent this evidence showing a motive for Sapna to lie, the prosecutor

then urged jurors to convict precisely because she had no motive to lie. On appeal, and relying on a provision of the Evidence Code the state itself had never even cited in its brief, the appellate court held the trial court's ruling violated neither state nor federal law.

As discussed below, review is proper. This court has recently made clear that when it is the state that seeks to introduce court documents from other jurisdictions, the rule is simple: those documents are presumed genuine where the state provides a certification that the document is a correct copy of what is on file with the originating court. (*People v. Skiles* (2011) 51 Cal.4th 1178, 1185-1186.) This rule is fair and sensible. Review is proper to ensure that this fair and sensible rule applies not only to the state but to criminal defendants as well.

This is especially true here. As also discussed below, at no point was there any genuine dispute about the authenticity of the published Nepali court opinions in this case. Thus, the trial court's exclusion of these opinions cannot be reconciled either with this Court's precedent or fundamental fairness. And in addition to this state-law basis for review, review is also appropriate to determine if Mr. Dev's federal constitutional rights to due process and present a defense were violated by the trial court's exclusion of this critical evidence.

Separate and apart from this question review is appropriate here to resolve several other important and recurring questions:

1) Whether the trial court's error in failing to give a corpus delicti instruction, an error conceded by the state, was prejudicial under the appropriate standard of prejudice?

2) Whether the trial court violated state or federal law in permitting jurors to consider the disputed portions of Mr. Dev's oral statements without caution?

3) Whether admission of evidence to prove the intent of Sapna's assailant was proper where identity was the only contested question and intent was never placed at issue?

4) Whether the trial court's exclusion of e-mail evidence offered by the defense to prove alibi constituted a disparate application of state law and violated Mr. Dev's rights to a fair trial, to present a defense and to equal protection?

5) Whether the prosecutor's comments on Mr. Dev's failure to testify constituted *Griffin* error and violated Mr. Dev's state and federal rights to a due process and a fair trial?

6) Whether the trial court violated Mr. Dev's rights to Due Process and an adequate appellate record when the trial court refused to hold an evidentiary hearing during record settlement proceedings to resolve a stark credibility issue?

7) Whether the errors in this case taken together violated Mr. Dev's federal or state rights to a fair trial?

STATEMENT OF THE CASE

On August 14, 2008, the Yolo County District Attorney's Office filed a 92 count information against appellant Ajay Kumar Dev. The information charged as follows:

1) Counts 1, 4, 6, 9, 11, 14, 16, 19, 21, 24, 26, 29, 31, 34, and 36 each charged Mr. Dev with lewd or lascivious acts upon a 14 or 15-year-old child in violation of Penal Code section 288, subdivision (c)(1). (1 CT 3-13.)

2) Counts 2, 7, 12, 17, 22, 27, 32, 37, 40, 43, 46, 49, 52, 55, 58, 61, 66, 68, 70, 72, 74, 76, 78, 80, 82, and 84 each charged Mr. Dev with forcible sexual penetration in violation of section 289, subdivision (a)(1). (1 CT 3-29.)

3) Counts 3, 8, 13, 18, 23, 28, and 33 each charged forcible sexual penetration in violation of section 289, subdivision (I). (1 CT 4-7, 9, 12)

4) Counts 5, 10, 15, 20, 25, 30, 35, 39, 42, 45, 48, 51, 54, 57, 60, 63, 67, 69, 71, 73, 75, 77, 79, 81, 83, 85, and 86 each charged rape in violation of section 261, subdivision (a)(2). (1 CT 3-33.) Counts 75 and 79 added allegations that the crimes were committed with the intent to inflict great bodily injury upon the victim within the meaning of section 12022.8. (1 CT 26-27.)

5) Counts 38, 41, 44, 47, 50, 53, 56, 59, and 62, felonies each charged forcible sexual penetration in violation of section 289, subdivision (h). (1 CT 13-21.)

6) Count 64 charged distribution or exhibition of lewd material to a minor, in violation of section 288.2, subdivision (a). (1 CT 22.)

7) Count 65 charged possession or distribution of matter depicting a

minor engaged in sexual conduct, in violation of section 311.2, subdivision.(d). (1 CT 22.)

8) Count 87 charged criminal threats in violation of section 422. (1 CT 29.)

9) Count 88 charged assault with intent to commit mayhem, rape, sodomy, or oral copulation in violation of section 220. (1 CT 29-30.)

10) Count 89 charged false imprisonment in violation of sections 236/237, subdivision (a). (12 CT 3273)

11) Count 90 and 91 each charged dissuading a witness in violation of section 136.1, subdivision (b)(2), felonies. (12 CT 3273.)

12) Count 92 charged dissuading a witness in violation of section 136.1, subdivision (a)(1). (12 CT 3273)

Mr. Dev pled not guilty. Trial began on April 23, 2009. (8 CT 2312-2314.) On June 25, 2009, the jury unanimously acquitted Mr. Dev of the count 6 lewd and lascivious charge, the sexual penetration charges in counts 2, 3, 7, 8, 12 and 13, the rape charges in counts 5, 10, 15 and 86, the charges of exhibiting improper materials in counts 64 and 65, and the count 89 charge of false imprisonment. (12 CT 3273.) The jury convicted on the remaining charges. (12 CT 3274-3366; 14 CT 3836-3842.)

On August 7, 2009, the trial court sentenced Mr. Dev to state prison for 378 years and 4 months. (14 CT 3836-3842.) Mr. Dev filed a Notice of Appeal. (14 CT 3829.) On January 12, 2017 the appellate court affirmed. (Exhibit A.)

STATEMENT OF FACTS

Predecessor counsel for Mr. Dev filed a 51-page Petition for Rehearing with the Court of Appeal to point out numerous areas in which the appellate court misapprehended or misstated the facts. In the interests of brevity, Mr. Dev adopts those corrections here and, with that caveat, accepts for purposes of this Petition for Review the statement of facts set forth in the appellate court's opinion.

ARGUMENT

I. REVIEW IS APPROPRIATE TO ENSURE THAT THE RULES GOVERNING ADMISSION OF FOREIGN CONVICTIONS IN STATE COURTS ARE CONSISTENTLY APPLIED TO BOTH THE STATE AND THE DEFENSE, AND TO DETERMINE IF MR. DEV'S FEDERAL CONSTITUTIONAL RIGHTS TO DUE PROCESS AND PRESENT A DEFENSE WERE VIOLATED BY THE EXCLUSION OF NEPALI COURT RECORDS CERTIFIED BY THE NEPALI FOREIGN MINISTRY.

As discussed above, the defense theory at trial was that Sapna was lying about the allegations. This is a very difficult defense to prove. As the prosecutor correctly recognized in closing argument, it could not be done without explaining why Sapna "would . . . be making this all up" and what her "motive [was] to still be doing this." (19 RT 5142.) But there *was* a motive: the criminal allegations Sapna brought would enable her to stay in America even though she had come to America under false pretenses, having lied in her adoption paperwork.

In this regard, under federal law, to qualify for adoption in the United States -- and potentially become an American citizen -- Sapna's adoption had to be completed before she turned 16 years old. (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.)

According to the date on the passport by which she gained entrance to the United States, Sapna was born on January 5, 1984. (7 CT 1878.) This meant that she was legally adopted at age 15 years, 11 months and was on her way to becoming an American citizen.

At trial, the defense offered to prove that Sapna had lied. In fact, her real date of birth was April 28, 1983 -- which meant she was *over* 16 at the time of the adoption and could *not* be legally adopted. To prove this, the defense offered a series of Nepali court documents including: (1) Exhibit 502, a 13-page opinion dated June 26, 2005 by Judge Guna Raj Dhungel finding Sapna guilty of using a false date of birth to obtain a passport, specifically using a false January 5, 1984 date of birth instead of April 28, 1983 (7 CT 1875-1900) and (2) Exhibit 500, a six-page opinion from the Nepal Court of Appeal affirming the conviction. (7 CT 1838-1858.)

Trial counsel recognized that he was providing copies of court documents from a court outside California. Thus, counsel offered substantial evidence to satisfy the requirements of Evidence Code section 1530. That section governs admission of out-of-state court documents and requires "the copy is attested as a correct copy of the writing or entry by a person having authority to make attestation."

Mr. Dev has already provided an overview of the documents defense counsel

offered to satisfy section 1530. For starters, every page of the two opinions contained a signed stamp showing that the English translation had been provided by the Shree Law Books Management Board. (7 CT 1840-1852, 1877-1887.) Defense counsel also provided a sworn declaration from Rudra Prasad Sharma Phual, a Nepali lawyer and editor of the international journal of law "Lex Nepali," explaining that the Law Books Management Board was an official department of the Government of Nepal under the Ministry of Law and the Nepali Government's "official translator of any official document from Nepali to English." (9 CT 2333-2334.) The state offered no contrary evidence.

But there was more. As to the trial judge's opinion, Mr. Jiban Shrestha -- Deputy Chief of Protocol from the Nepal Ministry of Foreign Affairs -- certified "the authorized translation of [the] Original Nepali Document to be true." (7 CT 1876.) Deputy Protocol Chief Shrestha went on to certify the authenticity of the trial judge's seal and signature. (*Ibid*.) Each page of the trial judge's opinion was stamped with the official seal of the Ministry of Foreign Affairs. (7 CT 1840-1852.)

There was still more. As to the appellate court's opinion, Mr. Bishnu Gautam, Consular Officer for the Nepal Ministry of Foreign Affairs certified the Nepali opinion had "been translated [into English] by the authorized body." (7 CT 1839.) Consular

Officer Gautam went on to certify the authenticity of the appellate court's seal as well as the signature of the appellate judges. (*Ibid.*) And yet again, each page of the appellate judge's opinion was also stamped with the official seal of the Ministry of Foreign Affairs. (7 CT 1877-1887.)

But there was even more. The Honorable Harishchandra Ghimire, First Secretary of the Embassy of Nepal in Washington D.C. certified as authentic the signatures of both Deputy Protocol Chief Shrestha and Consular Officer Gautam. (7 CT 1838, 1875.) Mr. Harishchandra went on to certify as authentic the seal of the Nepal Ministry of Foreign Affairs placed on every single page of the exhibits defense counsel was offering. (*Ibid.*)[1]

The trial court refused to introduce any of these documents. (2 RT 112-113, 137; 6 RT 1364-1367.) Although the defense was permitted to cross-examine Sapna about the prior conviction, the trial court explicitly instructed jurors that there was no evidence of a

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[1] In addition to Exhibits 500 and 502, the defense sought to introduce several other judicial records, including (1) Exhibit 504 (a declaration from Sapna's great uncle admitted at the Nepali trial declaring that she was born on April 28, 1983) and (2) Exhibit 512 (a date of birth attestation from the Nepal Central Government, Ministry of Education and Sports stating that Sapna's date of birth was April 28, 1983. (7 CT 1916-1933, 1973-1076.) As to these documents he offered the very same certifications of authenticity, from the Shree Law Books Management Board, Mr. Tirtha Arayal, Consular Officer of the Ministry of Foreign Affairs and Mr. Ghimire, First Secretary of the Embassy. (7 CT 1916-1927, 1973-1975.) The court excluded these documents too. (2 RT 112-113, 137; 6 RT 1364-1367.)

prior conviction to consider:

> But, one thing, ladies and gentlemen, the actual judgment 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 civil action. There's no evidence of whether there was a finding of fraud or mistake. There's no evidence of 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.

(7 RT 1727.) To make matters worse, the prosecutor took full advantage of the court's rulings and instructions, urging jurors to convicted because there was no reason for Sapna to make a false accusation. (19 RT 5142.)

Of course, the relevance of the excluded evidence was two-fold. First, it established that Sapna showed a willingness to lie under oath. More importantly, it explained exactly why Sapna would make a false allegation. The defense theory was that as tensions with the Dev's grew, Sapna -- who knew she had lied about her age in connection with the adoption -- believed the Devs might expose the lie and undo the adoption. This would prevent her from staying in America. But under federal law, specifically the Violence Against Women Act passed in 1994 and related legislation, Sapna could seek status as a lawful permanent resident in the United States as the victim

of a crime. (*See* 8 U.S.C. § 1101, subd. (a)(15)(u).) Significantly, even without this motive evidence the jury apparently had serious doubts about Sapna's credibility unanimously acquitting on 14 separate charges.

On appeal, Mr. Dev contended the trial court's exclusion of this evidence was improper under state law. In addition, citing a series of United States Supreme Court cases such as *Davis v. Alaska* (1974) 415 U.S. 308, *Washington v. Texas* (1967) 388 U.S. 14 and *Chambers v. Mississippi* (1973) 410 U.S. 284, he contended the trial court's ruling also violated his federal constitutional rights to due process and to present a defense. (Appellant's Opening Brief ("AOB") at 103-149.) Relying on Evidence Code section 1530, the appellate court held there was no error under state law; it said not a word about Mr. Dev's separate federal constitutional claim. argument. Review is proper.

The trial court's reliance on section 1530 was curious. In light of defense counsel's showing at trial, the state did not discuss -- *or even cite* -- section 1530 in defending the trial court's ruling on appeal. (Respondent's Brief 39-44.)

There was a sound tactical reason for the state's decision not to rely on section 1530. As applied to court documents from other jurisdictions, that section provides that a copy of a court record is "prima facie evidence of the existence and content of such

writing" if "the copy is attested as a correct copy of the writing or entry by a person having authority to make attestation." In *People v. Skiles*. *supra*, 51 Cal.4th at pp. 1185-1186, this Court held that where the state provides evidence showing the document is a correct copy of what is on file with the originating court, section 1530 is satisfied.

Of course, as discussed above, that is *exactly* what defense counsel provided here. Defense counsel offered into evidence English translations of two Nepali court decisions. Every page of the two court decisions defense counsel offered contained a signed stamp of authenticity from the "official translator" of the Nepali Government. The Nepal Ministry of Foreign Affairs (1) certified that the translation of each opinion was authentic, (2) certified the judicial seals and the judges' signatures were authentic and (3) placed its own seal of every page of the two opinions. Finally, the First Secretary of the Embassy of the Government of Nepal in Washington D.C. also certified as authentic not only the seal of the Nepal Ministry of Foreign Affairs placed on every single page of the exhibits defense counsel was offering, but the signatures of the Foreign Affairs officers who had signed the individual certifications for Exhibits 500 and 502. In short, in light of this Court's decision in *Skiles*, there was good reason the state elected not to rely on section 1530: there was no legitimate question as to the authenticity of the court documents offered in this case. Review is proper.

But review is also proper in connection with Mr. Dev's entirely separate claim that the trial court's ruling also violated his federal constitutional rights. When a trial court excludes reliable defense evidence supporting a critical defense the defendant's Fifth Amendment right to a fair trial and his Sixth Amendment right to confrontation have been violated. (*See*, *e.g.*, *Chambers v. Mississippi*, *supra*, 410 U.S. at p. 302; *Washington v. Texas*, *supra*, 388 U.S. at pp. 19, 23.) The Supreme Court has applied this rule in two distinct situations.

First, the Court has applied the rule when the state trial court's exclusion of defense evidence is based on a general rule of state law declaring inadmissible an entire class of evidence. (*See*, *e.g.*, *Chambers v. Mississippi*, *supra*, 410 U.S. at p. 302 [constitutional error where state statute precluded defendant from introducing evidence to impeach his own witness]; *Washington v. Texas*, *supra*, 388 U.S. at pp. 19, 23 [constitutional error where state statute precluded defendant from calling an accomplice to testify for the defense].) Second, the Court has applied this same rule when the state trial court's exclusion of evidence is *not* based on a general rule of state law, but instead is based on a trial court's individual exercise of discretion in ruling evidence inadmissible in a particular case. (*See*, *e.g.*, *Crane v. Kentucky* (1986) 476 U.S. 683, 687-691 [constitutional error where state trial court made discretionary ruling precluding defense from offering evidence regarding voluntariness of defendant's confession]; *Smith v.*

Illinois (1968) 390 U.S. 129, 130-133 [constitutional error where state trial court made discretionary ruling precluding defense from asking certain questions on cross-examination].)

In *People v. Cudjo* (1993) 6 Cal.4th 585 this Court departed from *Crane* and *Smith*, holding the federal constitution could *not* be violated by a trial court's exclusion of evidence pursuant to a discretionary rule of evidence. (*Id*. at p. 611 ["[T]he mere erroneous exercise of discretion [to exclude evidence] does not implicate the federal Constitution."].) Because the trial court's ruling here involved an exercise of discretion in applying a rule of evidence, the appellate court here apparently followed *Cudjo* and refused to address Mr. Dev's contention that the trial court's discretionary ruling under section 1530 violated the federal constitution.

If *Cudjo* is correct, there is no harm in the approach taken by the appellate court here. But review should be granted here to reconsider the *Cudjo* holding. *Cudjo* is flatly inconsistent with United States Supreme Court precedent: a state trial court's discretionary ruling excluding reliable and important evidence from a criminal defendant violates the constitution even where that ruling is *not* based on a "general rule of evidence" which creates a per se exclusion of the evidence at issue. (*See*, *e.g.*, *Crane v. Kentucky*, *supra*, 476 U.S. at pp. 687-691; *Smith v. Illinois*, *supra*, 390 U.S. at pp. 130-

133.)

Not surprisingly, every federal circuit to reach the issue has reached the identical result. A state trial court's discretionary decision to exclude reliable and critical defense evidence is unconstitutional even where that ruling is not based on a general rule of evidence creating a per se exclusion of the evidence at issue. (*See*, *e.g.*, *Howard v. Walker* (2nd Cir. 2005) 406 F.3d 114; *Lyons v. Johnson* (2nd Cir. 1996) 99 F.3d 499; *Kittleson v. Dretke* (5th Cir. 2005) 426 F.3d 306; *Ferensic v. Birkett* (6th Cir. 2007) 501 F.3d 469; *Vasquez v. Jones* (6th Cir. 2007) 496 F.3d 564; *Lunberg v. Hornbeak* (9th Cir. 2010) 605 F.3d 754; *Depetris v. Kuykendall* (9th Cir. 2001) 239 F.3d 1057; *Ellis v. Mullin* (10th Cir. 2002) 326 F.3d 1122. *Accord People v. Cudjo*, *supra*, 6 Cal.4th at p. 641 [Kennard, J., dissenting] [rejecting the argument that a trial court's erroneous exclusion of defense evidence violated the federal constitution only when the exclusion resulted from "a state statute or rule of evidence," as "an odd distortion of the nature and purpose of the constitutional guarantee" because "[w]hat the state and federal Constitutions secure for the accused is the right to present a defense, not merely the right to be free of unduly restrictive state laws of evidence and procedure."].) Review is proper in order to reconsider *Cudjo* and bring the rule applied in California into conformity with Supreme Court precedent.

II. REVIEW IS APPROPRIATE TO DETERMINE WHETHER THE TRIAL COURT'S FAILURE TO GIVE A CORPUS DELICTI INSTRUCTION WAS PREJUDICIAL UNDER THE APPROPRIATE STANDARD OF PREJUDICE.

During its case-in-chief, the state introduced evidence of a recorded telephone call -- a pretext call -- between Sapna and Mr. Dev. (5 RT 947; 9 CT 2453-2459.) Some parts of this call were in English, while other portions were in Nepali. (5 RT 947.) At trial, the parties had sharply divergent views as to a proper translation of some of the Nepali portions of the call. (*Compare*, *e.g.*, 15 CT 4176 *with* 14 RT 3866-3867. *See also* 15 CT 4174, 4176, 4182, 4184-4186, 4189, 4192; 5 RT 947-949, 960-964; 14 RT 3841, 3847-3848, 3858.)

Normally, of course, when the state relies on a defendant's out-of-court statements the trial court provides standard CALCRIM 359 telling jurors that they may not convict the defendant based on his out-of-court statements alone. But here, the trial court forgot to give this instruction. On appeal, Mr. Dev contended that because of the centrality of the pretext call to the state's case, the court's failure required reversal. (AOB 54-76.) The appellate court agreed that the instruction should have been given but -- applying a standard of prejudice designed to assess errors of state law -- the court found the error harmless. Review is proper.

To be sure, the appellate court was certainly correct that the trial court's error violated state law. But it also violated federal law.

In this regard, under the federal constitution, of course, a state is generally free to regulate the procedures under which its criminal laws are carried out. (*Medina v. California* (1992) 505 U.S. 437, 445.) However, such procedures are not immune from federal review; they violate Due Process whenever they "offend[] some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." (*Speiser v. Randall* (1958) 357 U.S. 513, 523. *Accord Montana v. Egelhoff* (1996) 518 U.S. 37, 58 [Ginsburg, J., concurring)]; *Leland v. Oregon* (1952) 343 U.S. 790, 798; *Snyder v. Massachusetts* (1934) 291 U.S. 97, 105.) In determining whether a particular principle is "fundamental" the Court looks to "historical practice," (*Herrera v. Collins* (1993) 506 U.S. 390, 407), and examines whether the practice has a "lengthy common-law tradition." (*Montana v. Egelhoff*, *supra*, 518 U.S. at p. 59; *In re Winship* (1970) 397 U.S. 358, 361-364; *Patterson v. New York* (1977) 432 U.S. 197, 202.)

Here both inquiries lead to the same result. As one scholar has noted, "most American jurisdictions adopted the corpus delicti rule during the nineteenth century" and "all American jurisdictions apparently still require" a defendant's extrajudicial statements to be corroborated to at least some extent. (Moran, In Defense of the Corpus Delicit

Rule, 64 Ohio State Law Review 817, 831 (2003).) As this Court itself has recognized:

> The rule requiring some independent proof of the corpus delicti has roots in the common law. . . . California decisions have applied it at least since the 1860's. . . . Virtually all American jurisdictions have some form of rule against convictions for criminal conduct not proven except by the uncorroborated extrajudicial statements of the accused.

(*People v. Alvarez* (2002) 27 Cal.3d 1161, 1169.)

In light of this common law tradition, permitting the jury to convict Mr. Dev based solely on out-of-court statements not only violated state law, but federal law as well. As such, the state was required to prove the error harmless beyond a reasonable doubt. Because the state did not attempt to do so in its briefing, and because the appellate court never made any such finding, review is required to redress this violation of Mr. Dev's federal constitutional rights.

III. REVIEW IS APPROPRIATE TO DETERMINE IF THE TRIAL COURT VIOLATED STATE OR FEDERAL LAW IN PROPERLY INSTRUCTING JURORS TO VIEW MR. DEV'S ORAL STATEMENTS WITH CAUTION, BUT IMPROPERLY LIMITING THIS CAUTIONARY LANGUAGE TO STATEMENTS THAT WERE NOT RECORDED.

As noted above, although there was no dispute that the pretext call was between Mr. Dev and Sapna, much of what was said was not in English but in Nepali, and the parties had very different interpretations of these portions of the call. Sapna offered her view on what Mr. Dev said during these parts of the call. (5 RT 947-949, 960-964.) The defense offered expert testimony which conflicted with Sapna's testimony. (14 RT 3841, 3847-3848, 3858.)

The trial court instructed the jury in accord with CALCRIM 358, telling jurors to "consider with caution" only those statements which were not recorded. (12 CT 3247.) Under this instruction, jurors would *not* view with caution those Nepali portions of the pretext call which not only were in dispute, but which formed a central part of the state's case.

And there should be little doubt that the prosecutor relied on these portions of the pretext call. For example, the prosecutor relied on Sapna's translation of the Nepali portion of the call where she claimed Mr. Dev told her "[b]ut you had sex with me when

you were 18." (18 RT 4986.) The prosecutor repeatedly relied on the Nepali portions of the tape to urge the jury to find Mr. Dev guilty:

> [Mr. Dev] went to the motel because he wanted to have sex with her. That's what he is talking about, not talking about kissing or anything else.

(18 RT 4988; *See also* 18 RT 4981-4982; 19 RT 5139, 5142.)

On appeal, and in light of the importance of the disputed portions of the pretext call to both the state and defense cases, Mr. Dev contended that the court's instruction violated both state and federal law. (AOB 87-102.) The appellate court held that under current law, there was no error because the disputed portions of the tape were recorded and -- as a result -- there was no need to view them with caution. Review is proper.

This case arises at the intersection of two distinct lines of authority in connection with this instruction. The admonition about viewing a defendant's oral statements with caution generally applies to oral statements where there are questions either as to whether defendant made the statements in the first place or, if he did, exactly what was said. (*People v. Carpenter* (1997) 15 Cal.4th 312, 392-393; *People v. Gardner* (1961) 195 Cal.App.2d 829, 832-833.) But this admonition does not apply to tape recorded

statements, precisely because there is generally no dispute as to either of these questions, that is, whether the defendant is speaking or what he said. (*See People v. Mayfield* (1997) 14 Cal.4th 668, 776 ["this cautionary instruction should not be given if the oral admission was tape-recorded and the tape recording was played for the jury"].)

This case arises right in between these two lines of authority. The state played a tape recording for the jury. This certainly supports the appellate court's view that no cautionary instruction need be given as to the statements on the tape. But because critical portions of the tape were in another language, and the parties offered very different translations of what was said, there was a fundamental dispute as to exactly what was said. This is precisely the situation where the cautionary language *should* be given.

Review should be granted to determine if, in fact, state law permits the cautionary language of CALCRIM 358 be mechanically limited to oral statements in a context like this case. Moreover, given the prosecutor's reliance on these oral statements to carry the state's burden of proof, the inference permitted by the version of CALCRIM 358 which the court did give -- suggesting jurors need *not* view the critical taped statements with caution -- undercut the state's burden of proof and the presumption of innocence in violation of Mr. Dev's federal and state constitutional rights to a fair trial. Review is required to redress these constitutional violations as well.

IV. REVIEW IS APPROPRIATE TO DECIDE IF THE ADMISSION OF EVIDENCE TO PROVE THE INTENT OF SAPNA'S ASSAILANT WAS PROPER WHERE INTENT WAS NEVER PLACED AT ISSUE.

In an attempt to show that Mr. Dev was interested in pornography, the state introduced Exhibit 44 over defense objection. (11 RT 2828-2831.) This exhibit contained a list of file names from a software application called Kazaa which had been downloaded to a laptop computer in the Dev household. (11 RT 2807-2808; 17 RT 4683, 4685.)

Kazaa is a file sharing software. (11 RT 2807-2808.) People who have the software can use it to share music, movies or books. (11 RT 2807.) In the Kazaa log on the laptop computer, prosecution expert Buehring agreed "there was a lot of music." (11 RT 2847.) Exhibit 44 consisted of file names to 122 files taken from the Kazaa log. (11 RT 2827-2831, 2846-2847.) The Kazaa log did not contain any content at all. (2 RT 293; 11 RT 2841-2842, 2847-2848, 2850, 2895, 2899-2890, 2934.) Nevertheless the names of those files -- like "a little young" -- suggested they contained pornography.

On appeal, Mr. Dev contended that admission of the file names in the Kazaa log violated both state and federal law. (AOB 170-187.) The state defended the trial court's ruling, explaining that the material "was relevant and admissible regarding the issue of

appellant's intent to commit a lewd act upon Sapna." (Respondent's Brief 57.) The appellate court agreed, holding that the evidence was admissible to show a "sexual interest in young girls and whether he intended to act upon that interest." Review is proper.

The Supreme Court has long held that "[a]n important element of a fair trial is that the jury consider only relevant and competent evidence bearing on the issue of guilt or innocence." (*Bruton v. United States* (1968) 391 U.S. 123, 131, n.6.) And while uncharged acts like the possession of pornography may certainly be admitted to prove intent, the law is clear that such evidence is not relevant and may *not* be admitted where -- if the jury believes the prosecutor's theory of events -- it must necessarily believe that the defendant acted with the requisite intent. (*People v. Balcom* (1994) 7 Cal.4th 414, 422.)

Balcom is illustrative. Defendant was charged with raping a woman at gunpoint. Defendant conceded he had sexual relations with the woman, but denied using a gun or raping her. The prosecutor introduced evidence of a prior offense in Michigan where the defendant had raped a woman at gunpoint. On appeal the People argued that the jury could properly consider the uncharged acts evidence in determining whether defendant had the requisite intent for rape. The Supreme Court rejected this argument because the "wholly divergent accounts [from defendant and the people] create no middle ground

from which the jury could conclude that defendant committed the proscribed act of engaging in sexual intercourse with the victim against her will by holding a gun to her head, but lacked criminal intent . . . ." (7 Cal.4th at p. 422.) Because defendant's intent was not genuinely at issue, the admission of prejudicial uncharged acts evidence to prove that intent was improper. (*Ibid*.)

That is exactly the case here as well. Here, as to every one of the charges of which Mr. Dev was convicted, the defense was the events never occurred. Just as in *Balcom*, there was "no middle ground from which the jury could conclude" that Mr. Dev committed the acts described but lacked criminal intent. Review is therefore proper to redress the lower courts' patent misapplication of state law as well as the violation of Mr. Dev's federal constitutional right to a fair trial caused by the introduction of evidence that was not relevant to any issue actually presented in the case.

V. REVIEW IS APPROPRIATE TO DECIDE IF THE TRIAL COURT'S EXCLUSION OF E-MAIL EVIDENCE OFFERED BY THE DEFENSE TO PROVE ALIBI CONSTITUTED A DISPARATE APPLICATION OF STATE LAW AND VIOLATED MR. DEV'S RIGHTS TO A FAIR TRIAL, TO PRESENT A DEFENSE AND TO EQUAL PROTECTION.

As noted above, the state introduced evidence of pornography found on a computer at the Dev home. The defense theory was that Mr. Dev had not downloaded or accessed this material -- instead, it had been downloaded by Sapna herself, or Sapna in conjunction with one of her boyfriends. (18 RT 5090-5093.)

The state's evidence showed that two pornographic videos were "last accessed" from 8:36 to 8:56 a.m. on the morning of September 26, 2003. (11 RT 2926; 10 CT 2866.) To prove that the person accessing these videos was not Mr. Dev, the defense sought to introduce an e-mail sent at 8:48 that same morning from Mr. Dev to his wife. (15 RT 4102-4111; 15 CT 4333-4334; Exhibit 813.) The purpose, of course, was to show the date and time of the e-mail (and thereby establish that someone else was accessing the pornography) -- the substance of the e-mail itself was beside the point. (16 RT 4262-4263.) The trial court sustained the prosecutor's hearsay objections to the evidence. (15 RT 4102-4108; 16 RT 4262-4265.)

On appeal Mr. Dev contended the trial court erred in excluding the e-mail. (AOB

187-200.) The appellate court recognized this Court's recent holding that "[c]omputer generated data is not a statement of a person and does not, therefore, constitute hearsay." (*People v. Goldsmith* (2014) 59 Cal.4th 258, 273-274.) The court nevertheless upheld the trial court's ruling that there was nothing in the record showing that it was the computer which generated the date and time of the e-mail. (Exhibit A at p. 45.) Review is proper.

At first blush, of course, it seems like this should have been a matter of common knowledge. E-mail is ubiquitous. We all send it and we all get it. It is common knowledge that the date and time which appears on the e-mail is generated by the computer itself. Who did the appellate court really think was generating the date and time?

But putting that aside, the fact of the matter is that the record contained ample evidence showing that the date and time of the e-mail were generated by the computer system at Mr. Dev's place of work. Michael Mullen, system administrator at the Department of Water Resources (where Mr. Dev worked), testified that the e-mail system had no remote access and was operated internally prior to April of 2006. (15 RT 4017-4020.) Thus, the e-mail had to be sent from work. And Jeffery Fischbach, a defense computer expert, testified to the accuracy of the computer clocks used to generate the time of an e-mail. (17 RT 4771.)

E-mails have become an increasingly common source of evidence in both civil and criminal cases. They are routinely admitted in sexual offense cases when it is the state that seeks to introduce them. (*See*, *e.g.*, *People v. Crabtree* (2009) 169 Cal.App.4th 1293.) Review is proper here because under the federal constitution, the same rule should apply to e-mails offered by the defense. (*See*, *e.g.*, *Green v. Georgia* (1979) 442 U.S. 95, 97 [finding unconstitutional the exclusion of hearsay evidence which the state was permitted to introduce in a separate trial]; *Washington v. Texas*, *supra*, 388 U.S. at p. 22 [finding unconstitutional a Texas rule permitting accomplices to testify for the state but not for the defendant].) Review is proper in order to redress both this disparate application of state law in the admission of e-mail, and the violation of Mr. Dev's federal and state constitutional rights to a fair trial and to present a defense caused by exclusion of the e-mail in this case.

VI. REVIEW IS APPROPRIATE TO DETERMINE IF THE PROSECUTOR COMMITTED PREJUDICIAL MISCONDUCT AND VIOLATED DUE PROCESS BY DRAWING THE JURY'S ATTENTION TO MR. DEV'S PRIVILEGED REFUSAL TO TESTIFY.

As discussed above, this case came down to whether the jury would believe Sapna. According to the state, she should be believed. According to the defense, she was not credible and was lying in order to ensure she would be able to remain in the United States.

There were a number of sharp inconsistencies in Sapna's testimony. For example, under cross-examination by defense counsel at the preliminary hearing Sapna first testified that Mr. Dev had never raped her outside of California. (2 CT 547.) Later, and still under cross-examination, she changed her testimony and said that she *had* been raped outside of California. (2 CT 556.) Defense counsel questioned her about these inconsistences at trial. (7 RT 1501-1512, 1699-1702.) Defense counsel relied on this, among many other inconsistencies, in his closing argument. (18 RT 5030.)

In an effort to minimize this inconsistency, during closing argument the prosecutor told jurors that (1) if Mr. Dev was guilty and had raped Sapna, he would know where those rapes occurred, (2) the only way defense counsel could have known that a rape had

occurred outside of California was through Mr. Dev but (3) Mr. Dev had not testified but had "sat there" at counsel table and told trial counsel how to effectively discredit Sapna. Specifically, the prosecutor argued:

> Now, why did [defense counsel] ask her that question [whether defendant assaulted her in a hotel room in Bangkok]? Why did he set her up like that? Because . . . he already knew the answers to the question. But what's important is how did he know the answer to the question? Because Ajay [Dev] told him. Ajay sat there and scribbled down, you can catch her, we had sex in this motel room in [Bangkok]. There's only one other person on the planet who knows that they had sex in the motel room in [Bangkok].

(20 RT 5124-5125.)

Defense counsel immediately objected, arguing that the prosecutor's statement that Mr. Dev "sat there" and directed trial counsel from counsel table was "*Griffin* error." (19 RT 5125.) The trial court overruled the objection. (19 RT 5125.) The jury convicted Dev of multiple counts of sexual assault. (12 CT 3274-3366; 14 CT 3836-3842.)

On appeal, Mr. Dev contended that reversal was required because the prosecutor's argument constituted *Griffin* error. The appellate court rejected this contention. Review is appropriate.

It is, of course, misconduct for a prosecutor to comment on a defendant's failure to testify at trial and to urge the jury to view that failure as evidence of guilt. (*See, e.g.*, *Griffin v. California* (1965) 380 U.S. 609; *People v. Avena* (1996) 13 Cal.4th 394, 443; *People v. Hardy* (1992) 2 Cal.4th 86, 153-154.) Not only are direct comments improper, but comments which indirectly focus the jury's attention on a defendant's refusal to testify are also forbidden. (*See, e.g., People v. Modesto* (1967) 66 Cal.2d 695, 710-11; *People v. Giovannini* (1968) 260 Cal.App.2d 597, 604-05.) Such errors impact a defendant's federal and state constitutional rights to confrontation and a fair trial. (*People v. Morales* (2001) 25 Cal.4th 34, 44.)

Here, the prosecutor told the jury that Mr. Dev "sat there" communicating with counsel and sharing information at counsel table that he would only know if he were guilty. (19 RT 5124-5125.) A reasonable juror would interpret this comment as a reference to Mr. Dev's refusal to testify. Review should also be granted to redress this constitutional violation.

VII. REVIEW IS APPROPRIATE TO DETERMINE IF THE TRIAL COURT'S REFUSAL TO HOLD AN EVIDENTIARY HEARING TO SETTLE THE RECORD DEPRIVED MR. DEV OF A SUFFICIENT RECORD ON APPEAL.

As discussed in some detail above, the state's case depended largely on Sapna's credibility. If even one juror found her not credible, conviction was impossible.

In addition to testifying at trial, Sapna had spoken with Detective Hermann during his investigation of the case. (10 CT 2737-2781.) That interview was videotaped, played for the jury during trial and introduced as Exhibit 36B. (10 CT 2737-2781.) During the first day of deliberations, the jury foreman sent the court a note stating "[w]e would like to watch Det. Hermann (sic) interview with Sapna." (12 CT 3258.) The foreman later explained that "when he watched the taped interview during trial, he found it somewhat difficult to believe Sapna. So he wanted to see it again during deliberations." (1 ACT 2/17/2012 at 240.) The question to be resolve in record settlement proceedings was whether -- in fact -- this exhibit was ever actually provided to the jury.

According to the foreman, the video was not provided and the jury never watched it during deliberations. (1 ACT 2/17/2012 at 240.) Specifically, the foreman recalled that despite the jury's request for the taped interview, "the jury was never given the video-taped interview to watch during deliberations." (1 ACT 2/17/2012 at 240.) Four other

jurors confirmed that during deliberations the jury did *not* watch the video taped interview between Hermann and Sapna. (1 ACT 2/17/2012 at 237, 247, 252, 260-261.) One juror thought that jurors had seen the video taped interview during deliberations. (1 ACT 2/17/2012 at 245.)

In short, the juror declarations presented during record settlement proceedings posed a stark conflict as to whether the court had provided a copy of the taped interview to the deliberating jury. Five jurors said the tape had *not* been provided. One juror said that it *had* been provided. Because of this conflicting nature of these declarations, appellate counsel asked the court to hold an evidentiary hearing to resolve this question. (AOB 214-230.) The trial court refused. On appeal, Mr. Dev contended the trial court's refusal deprived him of due process and a full appellate record. The appellate court recognized that "there were conflicting juror declarations." (Exhibit A at p. 58.) But the appellate court went on to cite this Court's decision in *People v. Gzikowski* (1982) 32 Cal.3d 580, 584 n.2 for the proposition that the trial court was free to reject those representations in the jurors declarations which supported the defense theory that the exhibit was not provided. (Exhibit A at p. 58.) Review is proper.

That is not what *Gzikowski* said. Instead, *Gzikowski* held that during record settlement proceedings "the court has broad discretion to accept or reject *counsel's*

representations in accordance with its assessment of their credibility." In other words, when counsel makes representations about the record during settlement proceedings, the court can resolve the matter based on assessing the credibility of counsel's statements. In that situation, of course, the trial court has actually seen the representations and so can make a credibility assessment.

But that is not what happened here. Nothing in the *Gzikowski* footnote supports the novel procedure employed here -- making credibility determinations as to which declarations to believe *without at least hearing from the declarants themselves.*

Put simply, as this Court knows, credibility determinations are *not* made on paper. To resolve a critical question about the record -- a question very much in dispute based on conflicting juror declarations -- without actually hearing from even a single one of the jurors was entirely improper and denied Mr. Dev his state and federal rights to a full and fair appellate record and Due Process. (*See People v. Barton* (1978) 21 Cal.3d 513, 518 [federal constitution requires an "appellate record that will permit a meaningful, effective presentation" of claims].) This is especially true here where (1) the state's case depended on Sapna's credibility and (2) the question to be resolved was whether the jury received an exhibit that at least one juror believed called Sapna's testimony into doubt. Review is proper to redress this violation of Mr. Dev's state and federal constitutional rights.

VIII. REVIEW IS APPROPRIATE TO DETERMINE IF THE COMBINATION OF ERRORS IN THIS CASE DENIED MR. DEV DUE PROCESS.

"[A] series of trial errors, though independently harmless, may in some circumstances rise by accretion to the level of reversible and prejudicial error." (*People v. Hill* (1998) 17 Cal.4th 800, 844.) On appeal, Mr. Dev contended that regardless of whether reversal was required in connection with any single claim of error, when considered cumulatively his right to a fair trial had been denied by the errors which occurred at trial. (AOB 231-232.) The appellate court rejected this claim.

Review is warranted. Cumulative errors may impact a defendant's federal constitutional rights to due process. (*See*, *e.g.*, *Thomas v. Hubbard* (9th Cir. 2001) 273 F.3d 1164, 1179 [cumulative effect of three significant trial errors "so infected the trial with unfairness as to make the resulting conviction a denial of due process . . . ."]; *Mak v. Blodgett* (9th Cir. 1992) 970 F.2d 614, 622 [collecting cases].) Here, even if there was insufficient prejudice from any error considered alone, when considered together these errors violate Mr. Dev's state and federal due process rights to a fair trial. Review is appropriate to redress this violation of Mr. Dev's federal and state rights.

CONCLUSION

For all these reasons review is appropriate in this case.

DATED: _____ Respectfully submitted,

_____
Cliff Gardner
Attorney for Ajay Dev

CERTIFICATE OF COMPLIANCE

I certify that the accompanying brief is double spaced, that a 13 point proportional font was used, and that there are 8,301 words in the brief.

Dated: _____ _____

Cliff Gardner

EXHIBIT A

CERTIFICATE OF SERVICE

I, the undersigned, declare as follows:

I am a citizen of the United States, over the age of 18 years and not a party to the within action. My business office is 1448 San Pablo Ave. Berkeley, California, 94702.

On February **, 2017, I served the within

PETITION FOR REVIEW

upon the parties named below by depositing a true copy in a United States mailbox in Berkeley, California, in a sealed envelope, postage prepaid, and addressed as follows:

Ajay Kumar Dev
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Ione, California 95640

Clerk of the Court,
Superior Court of Yolo County
1000 Main Street
Woodland, California 95695

Office of the District Attorney
301 2nd Street
Woodland, California 95695

AND upon the parties named below by submitting an electronic copy through TrueFiling:

Clerk of the Court,
Third District Court of Appeal

Office of the Attorney General
SacAWTTruefiling@doj.ca.gov

I declare under the penalty of perjury that the foregoing is true. Executed February **, 2017, in Berkeley, California.

_____

Declarant