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

APPEAL FROM THE SUPERIOR COURT OF

YOLO **COUNTY**

Honorable Timothy L. Fall, Judge

PETITION FOR REHEARING

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INTRODUCTION

California Rules of Court, rule 8.268 sets forth the authority for filing a petition for rehearing. Rule 8.500(c) imposes limitations on review and, in relevant part, states that "the Supreme Court normally will accept the Court of Appeal opinion's statement of . . . facts unless the party has

called the Court of Appeal's attention to any alleged omission or misstatement of . . . fact in a petition for rehearing."

Respectfully, defendant expressly notes that essentially all the exculpatory facts presented in the opening and reply brief were omitted from the opinion and should have been summarized in the opinion to both give a fair and accurate account of the trial evidence and in order to properly conduct state and federal harmless error analysis. However, understanding the Petition for Rehearing is not meant to be a vehicle to re-litigate the issues presented in the opening and reply briefs nor repeat all the exculpatory facts presented in these briefs and is meant to be more selective, defendant respectfully has only presented the most glaring misstatements and/or omissions of facts and arguments in this Petition for Rehearing. Nevertheless, to avoid any future determination that defendant failed to clarify an omission, misstatement or misconstruing of facts or arguments in this Petition for Rehearing, defendant incorporates by reference all the facts and arguments made in the opening and reply briefs into this Petition for Rehearing to best preserve the widespread omissions, misstatements, and misconstruing of facts and arguments in the opinion. Therefore, any fact or argument not addressed in the Petition for Rehearing shall not be construed as waived if it has been properly raised in the opening and reply briefs submitted by defendant.

ARGUMENT

I. THE OPINION RELIES ON MATERIAL MISSTATEMENTS AND OMISSIONS OF FACT

A. *The Opinion Omits "O.K., So?" From The Colloquy Between Ajay and S. Regarding How S.'s Life Could Be Ruined If She Accused Ajay Of Rape.*

One of the most critical facts at trial concerned a comment the defendant, Ajay Dev, made to S. during a recorded pretext call. In response to a question from S. asking how her life could be ruined if she accused Ajay of rape, even falsely accused him of rape, Ajay explained, "Because you have fucked me after 18 years of your age." (15 CT 4174) The opinion omits S.'s immediate response wherein she replied, "Ok, so?." (15 CT 4174; see also Opin., at pp. 2, 8,21-22.) This response is material to assessing what Ajay meant when he uttered this statement: whether it was a reflection of utter frustration and use of profanity or whether it was an admission of sex. Omitting this response and juxtaposing it against Ajay's response, "that means you have given me consent" (15 CT 4174) materially misrepresents the conversation by making it seem as though Ajay made one uninterrupted comment rather than what the pretext reflects which is that the "consent" comment is a direct response to S.'s direct dismissal of Ajay's prior comment. The record is much more complex and ambiguous than the

opinion reflects and it is one of the most important issues raised at trial and on appeal.

In this regard, defendant respectfully asks that the "Ok, so?" response be included in the opinion any time there is a reference to this conversation (see Opin., at pp. 2, 8,21-22) and that the opinion be reheard in light of material omission per the arguments made in the opening brief and reply as applied to relevant individual claims and to the assessment of prejudice throughout the appeal. (AOB, pp. 99-103; Reply, pp. 18-21.)

B. The Opinion Misstates An Alleged Admission In The Pretext Call

In the summary of facts of the Background section, the opinion states "Defendant later said, 'you had sex with me when you were 18.'" (Opin., p. 8.) This is inaccurate. Rather, S. translated a portion of the pretext call which the defense expert found to be inaudible to say, "you had sex with me when you were 18." (14 RT3865-3866.) This is qualitatively different than an unambiguous admission by the defendant. In this regard, defendant respectfully asks that the opinion more accurately reflect this fact and rehear the case in light of this showing.

C. The Opinion Omits S.'s Comments In The Pretext Call Showing S. Never Believed Ajay Admitted Having Sex With Her.

The opinion relies on two statements in the pretext call as admissions that Ajay had sex with S. after she was 18. (Opin. at pp. 2, 8,

21,22, 24.) However, there are statements made by S. during the pretext call which belie this conclusion which were omitted in the opinion. Specifically, after Ajay stated, "because you have fucked me after 18 years of your age," S., within minutes, exclaimed and asked him, “Because I want you to talk to me. I want you to say it.” (15 CT 4174) S.'s statement shows she did not believe Ajay "said it" or "admitted it."

Secondly, after S. translated the inaudible portion of the pretext call as “But you had sex with me when you were 18.” (15 CT 4176), S. asked Ajay, “Why don’t you admit?” (15 CT 4180) And, again asked 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) Again, these omitted facts from the opinion show that S. did not believe Ajay made an admission of any kind during the pretext call regarding her allegations of rape.

While the jury had a right to determine the facts of the case, these are material facts of the case which defendant respectfully asks to be included in the opinion. In addition, defendant respectfully requests the appeal be reheard in light of these omitted facts especially as they relate to the overall statement of facts and the assessment of prejudice. (*See also,* Section IV, *infra*.)

D. The Opinion Misstates The Fact That Defendant Never Denied Accusations That He Fathered The Babies She Aborted And Omits The Repeated Instances Where Ajay Expressly Denied The Allegations.

In the summary of facts of the Background section, the opinion states, "Defendant did not deny S.'s accusations that he fathered the babies she aborted." (Opin., p. 9.) This is inaccurate. Defendant expressly denied these specific allegations on repeated occasions throughout the pretext call. The pretext call started out with an allegation from S. that she went to her school counselor and admitted she had three abortions, but refused to tell the school counselor who the father was. Then, she 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)

Contrary to the opinion, after expressing his disbelief, Ajay told S., "S., it's wrongly accused." (15 CT 4155)

SD: (S.): 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.

* * *

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]

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: S. 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 S. 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: S. 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 S.? 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: S.

SD: What?

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

(CT 4155-4159)

Moreover, throughout the call, Ajay implored S. 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 S.'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) Specifically, towards the very end of the call with S. Ajay said again, outright, "The reason you called was to frame me." (15 CT 4193.)

In addition, at one point during the pretext colloquy, Ajay told S. that the abortion records would reveal the real father as the boyfriend who impregnated her. Specifically, Ajay told S., "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) More notable than Ajay's denial that he impregnated S., is S. refusal to deny that her boyfriend impregnated her. S. simply stated that "But the boy's name is not there**.**" (15 CT 4180) S. 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 S. spoke in Nepali which effectively prevented Detective Hermann from understanding her concern.

Finally, the jury acquitted and hung, respectively, on Counts 75a and 79a, the two pregnancy related enhancements which were directly related to the abortion allegations spoken of in the pretext call. (19 RT 5177-5183, 5185-5206; 12 CT 3275, 3277-3366.) Therefore, the jury never believed

defendant fathered the babies S. aborted as stated in the opinion as the evidence presented at trial tended to show that there as to one pregnancy scare it appeared S. probably miscarried naturally without knowing it and as to a second pregnancy scare she took an abortion pill to prevent the possibility of pregnancy. (AOB 16-20; 4 RT 827; 5 RT 1138; 9 CT 2389, 2393 10 RT 2613-2615, 2618, 2621-2623; 13 RT 3309-3311; 14 RT 3757; 9 CT 2350, 2358, 2362, 2379, 2382, 2385.)

These are all examples where Ajay denied S.'s accusations made at the beginning of the pretext call regarding the "pretext" of the call: that Ajay impregnated S. three times resulting in three abortions. Therefore, defendant respectfully requests that the sentence in the opinion denoting that the defendant did not deny S.'s accusations that he fathered the babies she aborted be deleted; that the denials in the pretext call and the pregnancy evidence, which were omitted from the opinion, be added to the opinion both to the statement of facts and the assessment of prejudice; and that the appeal be reheard in light of this showing.

E. The Opinion Omits Testimony From Expert Shakti Aryal's Testimony Regarding An Inaudible Portion of the Pretext Call.

The opinion states that defense expert Shakti Aryal translated a portion of the pretext call as Ajay stating: "But you kissed me when you were 18." (Opin., at p. 21.) According to defense exhibit 799, this is

accurate. (15 CT 4176.) However, this is not what defense expert Aryal testified to at trial. At trial, Aryal not only ruled out the possibility that S.'s translation was correct (5 RT 962; 14 RT 3850-3851; 3861-3867; 9 CT 2480), he further 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. 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. In addition, with respect to Claim II regarding the impropriety of S. testifying as an expert translator of the pretext call, the opinion concludes that, with the exception of the interpretation of the "fucked" statement made by defendant, "Defendant does not specify another portion of the People's translation with which he disagrees." (Opin. at p. 22.) However, this is inaccurate. As discussed, *supra*, defendant disagrees with the interpretation of the pretext call alleging defendant said, ""But you kissed me when you were 18" (15 CT 4176) as it is contradicted by Aryal's testimony. And, further, defendant disagrees with S.'s testimony

as to what defendant said during this inaudible portion of the pretext call wherein she claimed defendant said, “But you had sex with me when you were 18.” (15 CT 4176) Defendant's position is that no nefarious admission was made during this portion of the pretext call.

Given the materiality surrounding the proper translation of this portion of the pretext call, it is important for the opinion to accurately reflect Aryal's testimony and the great uncertainty around his translation of this part of the pretext call. For this reason, the defendant respectfully asks this court to include Aryal's trial testimony regarding the translation of this portion of the pretext call into the opinion to accurately reflect the facts presented by the defense; to incorporate these omitted facts into the opinion's prejudice analysis; and to rehear the appeal in light of this showing as Aryal's testimony leaves open the real possibility that nothing nefarious was said by defendant.

F. *The Opinion Relies On The Alleged Motel 6 Rape As A Fact Of The Case, But The Jury Acquitted Defendant Of This Charge.*

In the summary of fact of the Background section, the opinion states that:

> S. testified that defendant raped her again after she moved out of the Dev home. According to S., defendant asked S. to meet him so they could talk, but he took her to a Motel 6 and raped her. Motel 6 records showed defendant checked into the motel on December 10, 2003, and on January 2004. S.

> said the Motel 6 incident was the last time defendant had sex with her.

(Opin., pp. 6-7.) However, the jury hung on the Motel 6 rape allegation, Count 86. (19 RT 5177-5183; 12 CT 3275) Therefore, consistent with the defense, the jury did not find true that a rape occurred at the Motel 6, but rather, defendant and S. negotiated concrete terms to continue their familial ties as corroborated by the contract defendant, S., and Peggy signed to ensure S.'s success as a respectful member of the family who would continue her studies and live independently with continued, but renegotiated, financial assistance from the Devs. (16 RT 4306-4308; 11 CT 3025-3026.) In this regard, the reference to the Motel 6 encounter as incriminating evidence should be omitted from the opinion both as part of the statement of facts and as any assessment of harmless error and, further, facts surrounding the contract that was signed by defendant, S., and Peggy should be added to the opinion. And, with said showing defendant respectfully asks that the appeal be reheard.

G. *The Opinion Relies On The Allegation That Ajay Showed S. Pornography When She Was 15 to 18 Years Old.*

The opinion states that "S. testified that defendant also showed her pornography from the time she was 15 until she was 18 or 19. Defendant showed S. five to six pornographic movies on his Dell laptop and on a Dell

desktop computer. All of the movies featured extremely young looking girls." (Opin., at p. 5.) However, the jury acquitted Ajay of these very specific charges in Counts 64 and 65. (19 RT 5185-5206; 12 CT 3277-3366.) Therefore, defendant respectfully requests that this portion of the opinion be deleted along with any other references to pornography shown to. S. as a minor; that any reliance on these facts to assess prejudice be reevaluated absent these facts; and that the appeal be reheard accordingly.

H. *The Opinion Misstates Facts Regarding The Trial Court's Refusal To Hear Testimony From Defense Expert Rudra Prasad Sharma Phual.*

In addressing the Nepali document claim, the opinion states: "The record also does not support defendant's suggestion that the trial court refused to consider the declarations defendant submitted or that the trial court refused to hear testimony from Mr. Phual." (Opin., at p. 31.) However, as presented in the opening brief, the record shows the prosecution objected to Mr. Phual Sharma's testimony and the trial court denied the defense's motion and expressly agreeing with the prosecution. As stated in Appellant's opening brief:

> 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.

(AOB at p. 119-120; 6 RT 1364-1367)

In addition the opinion fails to address the federal constitutional claim regarding the violation of defendant's right to present a defense as guaranteed by Fifth, Sixth, and Fourteenth Amendments to the federal constitutional. The exclusion of the Nepali documents made it impossible to persuasively explain why S. had a motive to falsely accuse defendant of rape as the Nepali court ruling established S. lied about her date of birth to be adopted by the Devs opening up the possibility that the adoption could

be reversed and the Devs could send S. back to Nepal. Therefore, it is only, then, that S. goes to the police to falsely accuse Ajay of rape.

II. THE OPINION MISSTATES MATERIAL FACTS AND ARGUMENTS UNDERLYING THE KAZAA CLAIM

The opinion states that, "On appeal, defendant argues a user could unintentionally find pornography when searching for innocuous material. While that may be true, the jury could reasonably find that the Kazaa log does not show such inadvertent file retrieval occurred here. Recurring keywords included 'teen,' preteen,' 'pre-teen,' 'nude,' 'sex', 'porn,' 'incest,' and 'kiddie' or 'kiddy.' The jury could reasonably conclude from the titles, descriptions, and recurring keywords on the Kazaa log and the presence of child pornography on defendant's computer tower that the Kazaa files were the result of an intentional search of child pornography. '" (Opin., at pp. 38-39.) Respectfully, this is inaccurate and misrepresents the Kazaa evidence. The entire record and specifically the Kazaa logs present absolutely no evidence as to what search terms the user entered to obtain the results in the Kazaa log. Moreover, every keyword column of the Kazaa log has innocent words and salacious words contained it. Therefore, without specific search terms, it is <u>impossible</u> to determine anything about the users intent. Consequently, it was completely <u>unreasonable</u> for the jury to draw

the conclusion, as suggested by the opinion, that defendant searched for child pornography indicating a lascivious intent to be attracted to minors. Further, unlike *Tecklenburg* and *Garelick*, cases cited by the opinion (Opin., p. 39), the Kazaa log contained no images. The log only listed titles which even the Buehring, a prosecution witness, conceded frequently did not match content. (2 RT 293; 11 RT 2841-2842, 2847-2848, 2850, 2892, 2895, 2899-2900, 2934-2935, 2945.) Furthermore, unlike *Tecklenburg* and *Garelick*, in so far as large amounts of alleged child pornography may be used to prove identity or intent, here, only 3.5% of the Kazaa log material had pornographic sounding names (11 RT 2933-2934) and, therefore, even less child pornographic names.[1] This is not only a material fact omitted from the opinion, but also distinguishes this case from *Tecklenburg* and *Garelick.* Therefore, unlike other cases relying on the volume of child pornography to prove intent and/or identity, here, the volume on Ajay's computer was miniscule taken in context of the entire Kazaa log which had

[1] 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 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. These material facts were also omitted from the opinion.

over 5,000 titles (mostly music) which is perfectly consistent with a Kazaa user exclusively searching for music and inadvertently and unknowingly downloading salacious material. These facts were omitted from the opinion and defendant respectfully asks that the Kazaa claim be reheard considering these omitted facts and revaluated under the balancing tests necessary to determine the admission of evidence under Evidence Code sections 1101, 352 and 402.

As for the prosecutorial misconduct claim deemed forfeited by the opinion, respectfully, defendant could not find any place in the record where the prosecution conceded that "sometimes the results of a search on Kazaa does not match the keywords used to conduct a search" or where "the prosecution's argument about Kazaa was consistent with the trial testimony of the People's forensic expert." (Opin. at pp. 37, 38.) The record reflects that the prosecution misrepresented this evidence to the trial court and jury by insisting the results on the Kazaa log absolutely showed intent to search for child pornography. This is patently false and belied by testimony from prosecution witness Buehring.

Finally, the opinion notes that "the claim that intent and identity were undisputed is meritless in any case. Defendant's not guilty plea put in issue all of the elements of the charged offenses, including the defendant's intent." (Opin. at p. 40.) In this regard, the opinion ignores defendant's

reliance on *People v. Ewolt* (1994) 7 Cal.4th 380 which reaches an expressly different conclusion and, like *People v. Thompson* (1980) 27 Cal.3d 303, 315, analyzes the risk of unfairly swaying the jury with highly inflammatory evidence which has very little probative value violating not only state evidentiary statutes but also violating the Fifth and Fourteenth Amendments of the United States Constitution, thus, rendering the trial "fundamentally unfair." (*United States v. Lavasco* (1977) 431 U.S. 783, 790, 97 S.Ct. 2044, 2048; *People v. Turner* (1984) 37 Cal.3d 302, 313; *Darden v. Wainwright* (1986) 477 U.S. 168, 180-182.)

III. GRIFFIN V. CALIFORNIA IS DIRECTLY ON POINT REQUIRING REVERSAL

A. *The Opinion Relies on a Material Misstatement of Law*

In Section VIII of the opinion, the holding of *Griffin v. California* (1965) 380 U.S. 609 [14 L.Ed.2nd 106] is stated as follows:

> Griffin prohibits any comment by the prosecution on a defendant's failure to testify at trial, and it prohibits argument urging the jury to view that failure as evidence of guilt. (*People v. Avena* (1996) 13 Cal.4th 394, 443; *People v. Hardy* (1992) 2 Cal.4th 86, 153-154.)

(Opin., p. 48.) The citations relied upon in the opinion to support this holding are California state cases and not citations directly from *Griffin v. California* (1965) 380 U.S. 609. (See Opin., p. 48.) While the defendant's

right to testify is discussed in *Griffin v. California, Griffin's* express holding is broader. As stated by the Supreme Court in *Griffin*:

> We said in *Malloy v. Hogan, supra,* p. 378 U.S. 11, that "the same standards must determine whether an accused's silence in either a federal or state proceeding is justified." We take that in its literal sense, and hold that the Fifth Amendment, in its direct application to the Federal Government and in its bearding on the States by reason of the Fourteenth Amendment, forbids either comment by the prosecution on the accused's silence or instructions by the court that such silence is evidence of guilt.

(*Griffin, supra,* at p. 615.) In this regard, *Griffin* is based on the Fifth Amendment right to remain silent as incorporated to the states through the Fourteenth Amendment, and is not limited, as suggested by the opinion, to express comments on the defendant's decision not to testify. Therefore, as noted by the Court of Appeal opinion, while the prosecution in *Griffin* made two comments expressly related to the defendant's decision not to testify (Opin., p. 49 citing *Griffin,* 380 U.S. at p. 615), the Supreme Court, in *Griffin*, also found other comments made by the prosecution during closing argument to be violations of the Fifth/Fourteenth Amendment rights to remain silent even though they did not expressly pertain to the defendant's right not to testify. For example, the *Griffin* Court held the following prosecution statements made during closing argument to be

violations of the defendant's Fifth Amendment right to remain silent as incorporated to the States through the Fourteenth Amendment:

> -- The defendant certainly knows whether Essie Mae had this beat up appearance at the time he left her apartment and went down the alley with her.
>
> -- What kind of a man is it that would want to have sex with a woman that beat up is she was beat up at the time he left? [*sic*]
>
> -- 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. He would know whether he beat her or mistreated her. He would know whether he walked away from that place cool as a cucumber when he saw Mr. Villasenor because he was conscious of his own guilt and wanted to get away from that damaged or injured woman.
>
> -- And, in the whole world, if anybody would know, this defendant would know.

(*Griffin, supra,* 380 U.S. at 610-611.) The Court of Appeal opinion ignores these other examples of prosecution comments found by the Supreme Court in *Griffin* to be violations of the Fifth Amendment right to remain silent, as incorporated to the states by the Fourteenth Amendment, and, more specifically, examples of comments on the defendant's decision not to testify, albeit implied comments rather than express ones. These comments, as unaddressed by the opinion, are indistinguishable from the

prosecution's comments in the case at bar. For example, the prosecution in the case at bar argued:

> 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) 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) These comments are indistinguishable from the comments in *Griffin* omitted by the opinion.

In addition, the Court of Appeal opinion distinguishes *Griffin* on the basis that:

> [I]n *Griffin* the trial court instructed the jury that if the defendant did not testify as to any evidence or facts against him which he can reasonably be expected to deny or explain because of facts within his knowledge, the jury may consider the defendant's failure to testify "as tending to indicate the truth of such evidence and as indicating that among the inferences that may be reasonably drawn therefrom those unfavorable to the defendant are the more probable." (*Id.* at pp. 609-610 [14 L.Ed.2d. at p. 107].)

(Opin., p. 49.) However, this summary of the instruction given to the *Girffin* jury omits an advisement wherein the trial court admonished the

jury it did not matter whether the defendant testified or not, it could still, essentially, hold his silence against him. The full instruction provided in *Griffin*, and omitted by the opinion, is as follows:

> As to any evidence of facts against him which the defendant can reasonably be expected to deny or explain because of facts within his knowledge, if he does not testify, or if, though he does testify, he fails to deny or explain such evidence, the jury may take that failure into consideration as tending to indicate the truth of such evidence and as indicating that among the inferences that may be reasonably drawn therefrom those unfavorable to the defendant are the more probable.

(*Griffin,* 380 U.S. at p. 610.) This full instruction makes clear that Fifth/Fourteen Amendment violation found in *Griffin* was not narrowly construed to only include direct comments on the defendants right not to testify as suggested by the Court of Appeal opinion. Rather, the holding turns on the prosecution's comments which implicate the defendant by suggesting, or aggressively arguing, he should be explaining himself and any failure to do is evidence of guilt. Here, there can be no doubt the defendant had a right to remain silent during his preliminary hearing. Therefore, whether *Griffin's* holding is broader because it implicates the Fifth/Fourteen Amendment right to remain silent (whether or not a defendant testifies) or because it expressly defines prosecution comments such as the defendant was the only one who knew or could have known some aspect of the crime as unconstitutional comments violating the

Fifth/Fourteen Amendment right not to testify, the holding is directly on point with this case requiring reversal and the opinion's application of *Griffin* is unreasonable.

For these reasons, defendant respectfully requests this Court to rehear his appeal in light of these points.

IV. THE OPINION ESSENTIALLY IGNORES OR OMITS ALMOST ALL EXCULPATORY FACTS PRESENTED IN DEFENDANT'S BRIEFING

The introduction of the opinion states:

> Based on our review of the entire record, we are confident defendant received a fair trial. The testimony of a single witness can support a conviction if that testimony is believed by the jury. Defendant claims the victim lied, but it was the responsibility of the jury to review all the evidence, including the witness testimony, and determine which evidence it found credible and dispositive.
>
> Our review of the record establishes that defendant's conviction are supported by substantial evidence. In addition to the victim's testimony regarding the sexual offenses, there is evidence of a recorded phone conversation between the victim and defendant in which defendant made statements that he deserved to be put in prison, that he threatened to kill the victim and himself, that the victim's life would be ruined because she had sex with defendant after she turned 18 and thus had consented, that they met together at a motel, and that nothing would happen because the victim had no proof. There is also evidence regarding pornorgraphic materials found on a laptop and computer tower in defendant's house, including movies depicting young girls involved in sex acts with titles such a 'Kiddie Blow Job, 'Real Homemade Incest -- Me With My Daughter," and "Young Teen Lolita." In addition, the victim testified that after she reported the sexual

> offenses to the police, defendant offered to pay her to stay outside the United States.

(Opin. at p.2.)

This is a very telling overview of the opinion's approach and analysis of the case. Therefore, while the "entire record" was reviewed, the totality of the evidence or the totality of the record was not weighed as, is evident in every claim analyzed by the opinion, there is essentially no analysis of the exculpatory facts presented in the opening brief and reply brief. Instead, the entire opinion relies on incriminating facts which support the convictions. As emphasized by the opinion's introduction, "Our review of the record establishes that defendant's convictions are supported substantial evidence." (Opin. at p.2.) And, repeated throughout the opinion as with respect to Claim II wherein the opinion reiterates, "But the jury was not required to accept defendant's interpretation of the evidence." (Opin. at p. 22.) In assessing the sufficiency of the evidence, a court assesses the evidence in the light most favorable to the judgment, accepting all logical inferences the jury could draw in favor of the judgment. (*People v. Eliot* (2005) 37 Cal.4th 453, 466.) That is exactly what the opinion has done here. However, since defendant never presented a sufficiency of the evidence claim, the "substantial evidence" test for review is not applicable and renders the analysis throughout the opinion unreasonable.

However, harmless error review is very different from sufficiency review. Harmless error review requires the reviewing court to make a straightforward assessment of the consequences of an error based on an objective review of all the evidence presented, not simply evidence and inferences which support the verdict which the state is defending.

With the exception of the first claim, all other claims raised by defendant on appeal required both a state and federal harmless error analysis as clearly preserved and presented in the opening and reply briefs. With respect to both state and federal errors, a weighing of the totality of evidence is required and missing from the opinion. Under *People v. Watson* (1956) 46 Cal.2d 818, 836, 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. 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].) Similarly, under federal constitutional error, reversal is required where respondent cannot prove beyond a reasonable doubt that the error was harmless. (*Chapman v. California* (1967) 386 U.S.

18, 87 S.Ct. 824 [17 L.Ed.2d 705].) Under both tests, a Court of Appeal must weigh the exculpatory evidence and incriminating evidence together to determine whether the outcome of the trial would have been different. Even the California Supreme Court has recognized that proper harmless error review requires the reviewing court to consider the entire record, not just bits and pieces of evidence which favor the state's position. (*See People v. Mil* (2012) 53 Cal.4th 400, 417-418; *People v. Rodriguez* (1986) 42 Cal.3d 1005, 1013; *People v. Taylor* (1982) 31 Cal.3d 488, 499-500.) Similarly, the United States Supreme Court has long made clear that proper harmless error review requires "the whole record be reviewed in assessing the significance of the errors." (*Yates v. Evatt* (1991) 500 U.S. 391, 409. *Accord Rose v. Clark* (1986) 478 U.S. 570, 583; *Delaware v. Van Arsdall* (1986) 475 U.S. 673, 681; *United States v. Hasting* (1983) 461 U.S. 499, 509.) Here, however, the opinion only relies on incriminating evidence to demonstrate the jury was justified in convicting defendant of most of the crimes he was charged with and absent from the opinion's analysis is any discussion of the record as a whole.

Since defendant is respectfully arguing that the opinion omits essentially all exculpatory facts from its Background summary of facts and omits these same exculpatory facts from its harmless error analysis relating to all but the first claim raised on appeal, it is impossible to simply itemize

or even summarize every exculpatory fact and argument omitted from the opinion in this Petition for Rehearing. Therefore, defendant incorporates by reference all the facts and arguments made in the opening brief and reply brief and asks that these exculpatory facts and arguments be meaningfully addressed in the opinion both in the presentation of the statement of facts (Background) and/or the harmless error analysis for each claim.

Nevertheless, to best exemplify the omission of exculpatory facts and arguments in the opinion, defendant will simply address the facts and analysis addressed and highlighted in the introduction of the opinion in an effort to provide some more precise arguments.

With respect to S.'s testimony, the opinion notes:

> The testimony of a single witness can support a conviction if that testimony is believed by the jury. Defendant claims the victim lied, but it was the responsibility of the jury to review all the evidence, including the witness testimony, and determine which evidence it found credible and dispositive.

(Opin. at p. 2.) Again, this is only true when reviewing a sufficiency of the evidence claim. It is not applicable where there is error and a determination must be made regarding the impact of the error, i.e. whether it was harmless under *Watson* or *Chapman.* Therefore, contrary to the opinion, it was the court's responsibility to review and analyze all of the implausibilities and contradictions in the victim's testimony to determine whether, if the error did not occur, the jury may have disbelieved the victim. This most cursory

analysis is missing from the opinion. Again, because the implausibilites and contradictions of the victims testimony are voluminous and expressly and clearly presented in the opening and reply brief, defendant incorporates them by reference rather than repeat them in this Petition for Review.

The opinion's summary also notes that, "there is evidence of a recorded phone conversation between the victim and defendant in which defendant made statements that he deserved to be put in prison." (Opin. at p.2.) This also misrepresents the facts. It did not appear the defendant ever said he deserved to be in prison in the pretext call. In the beginning of the pretext call, defendant said:

> S., 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 the prison. It's ok, because that's exactly what you wanted in this life anyway.

(15 CT 4154.) This is not an admission that defendant felt he deserved to be in prison. Defendant never said S. should to go to the police because he believed he deserved to be in prison - inferring guilt. The statements are made in utter frustration and reflect defendant being exasperated by S.'s false accusations. This exculpatory explanation is ignored by the opinion.

The opinion continues, "that he threatened to kill the victim and himself." (Opin. at p. 2.) However, defendant was charged in Count 87 with threats to commit crime resulting in death or great bodily harm by

making this statement and the jury hung on this count. Therefore, the evidence was not as compelling as the opinion suggests.

Taking the most disputed aspect of the entire trial, the opinion oversimplifies, ignores, and misconstrues the comments made in the pretext call by concluding, "that the victim's life would be ruined because she had sex with defendant after she turned 18 and thus had consented." (Opin. at p.2.) While the jury could have come to this conclusion based on the evidence, the evidence was much more ambiguous and complex than the opinion states. First, the pretext translation very clearly uses the word "fucked" not "sex." Therefore, the opinion misstates this evidence. Specifically, the pretext call states, “Because you have fucked me after 18 years of your age**.**” (15 CT 4174) As argued at length in the opening and reply briefs and completely ignored in the opinion, the use of the word "fucked" leaves open the probability that Ajay was using profanity and not referring to sex. In addition, the sentence states that S. "fucked" Ajay, not the other way around. This further corroborates the defendant's position that her sexual activity with her peers would ruin her reputation in the Nepali community. And, most importantly, the comment about consent does not fluidly flow after the "fucked" comment is made. Rather, Ajay states, “Because you have fucked me after 18 years of your age**.**” (15 CT 4174.) To which, S. replies "Okay, so?." (15 CT 4174.) "Okay, so?" is not

an appropriate response to someone if they have just admitted having sex or raping you especially where, as here, the call is being recorded in order to elicit that very type of admission. "Okay, so" or "So what!" suggests S. felt she had every right to have sex with her peers and that such activity should not "ruin" her life as suggested by Ajay. Therefore, the omission of S.'s response in the opinion misconstrues the ambiguity and complexity of the conversation which is equally, if not far more, consistent with defendant's position. Finally, only after a long pause and after S. states "Okay, so?," does Ajay state, “That means you have given me consent." (15 CT 4174.) The "consent" comment is an explanation as to how exposing S.'s independent sexual conduct, as proved by the clinic visit Ajay accompanied S. to, would undermine any false allegations of rape. In this regard, Ajay explains that it would not look like rape because it would look like there was consent given by his presence at the clinic. i.e. "That means you have given me consent." (9 CT 2478.) Moreover, as stated *supra*, what was not in dispute, however, was S.'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 pretext conversation, S. asked Ajay, "Why don't you admit?" (15 CT 4180.) And, towards the end of the call, S. 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.) Again, these material exculpatory fact, which go to the heart of the case as they negate what could otherwise be interpreted as a partial admission by defendant, are omitted from the opinion in their entirety and are missing from any and all harmless error analysis throughout the opinion.

Next, the opinion introduction highlights, "that they met together at a motel." (Opin. at 2.) Assuming this statement refers to the Motel 6 meeting, the jury hung on this rape count, Count 86. (19 RT 5177-5183; 12 CT 3275) Therefore, it is unclear whether this is a fact the jury relied on in supporting its verdicts and was incriminating as suggested by the opinion. Additionally, since there were very few rapes actually described by S., the fact that the jury hung on one of the few rapes she described, demonstrates how precarious the jury found S.'s testimony and that their verdicts may have changed as a result of a trial error or combination of errors. Again, this analysis is missing from the opinion.

The opinion also notes that defendant told S. "that nothing would happen because the victim had no proof." (Opin. at p.2.) This fact is

completely consistent with innocence. There is no proof because it never happened. In fact, defendant went out of his way to S. that her allegations would be disproved because the "boy" she was having sex with and got her pregnant would be in the abortion medical records, thus, proving defendants innocence. (15 CT 4180) Again, this exculpatory interpretation was ignored by the opinion.

With respect to the pornography, the opinion noted, "There is also evidence regarding pornographic materials found on a laptop and computer tower in defendant's house, including movies depicting young girls involved in sex acts with titles such as 'Kiddie Blow Job,' 'Real Homemade Incest -- Me With My Daughter,' and 'Young Teen Lolita.'" (Opin. at p.2.) These three movies highlighted in the opinion are the three movies the prosecution showed the jury and argued defendant showed S. when she was a minor to support Counts 64 and 65. (RT 786, 836-837, 917-918.) However, the jury acquitted defendant of these charges. (19 RT 5185-5206; 12 CT 3277-3366) Moreover, despite S.'s allegations that defendant showed her these three movies in 1999 when she was 15 years old, the evidence, omitted in the opinion, showed otherwise. (4 RT 792-795, 819; 5 RT 1112, 1159; 6 RT 1322.) For example, "Young Teen Lolita" also known as "18 & Confused" was not produced until 2000 disproving S. testimony that she was shown the movie on his laptop in 1999. (4 RT 792-

795, 819; 5 RT 1112, 1159; 6 RT 1322; 10 CT 2810-2820.) Evidence also showed S. lied about the pornography because she insisted that defendant showed her "18 & Confused" when the Dev family lived at the Concord house (4 RT 792-795, 819; 5 RT 1112, 1159; 6 RT 1322.) However, the Dev family moved to their J Street home in November of 1999. (10 CT 2810-2820.) Therefore, it was equally implausible that defendant showed S. "18 & Confused" after 2000 because the family no longer lived in the house S. claimed the pornography was being watched. In addition, S. testified defendant showed her pornography on his laptop computer when she was 15 years old. However, the Devs did not purchase defendant's laptop until November 2001 when S. was 17 years old. (4 RT 792-795, 819; 5 RT 1112, 1159; 6 RT 1322.) Finally, the forensic evidence showed that 18 & Confused and the other porn videos did not appear on the Devs' computers before 2003 until after S. was an adult.[2] (11 RT 2915.)

Therefore, these incriminating facts supporting Counts 64 and 65 should be omitted from the opinion all together because the jury acquitted defendant on these counts. Alternatively, the opinion should delete these

[2] Additionally, per Claim VII, there was an email which this Court has found lacked foundation to be admitted as evidence, which showed defendant was at work during a time period the prosecution alleged the child pornography movies were being watched at the Dev home as evidenced by a computer log -- although the evidence was also consistent with a virus scan.

facts with respect to any alleged activity while S. was a minor; and/or the opinion should mitigate these incriminating facts by acknowledging the jury did not place the weight on these facts as contemplated by the prosecution and include all the exculpatory facts introduced by the defense, as outlined above, which rebut this evidence. These adjustments should be made both to the statement of facts in the opinion and the assessment of prejudice related to every claim, but the first claim raised in the appeal.

Finally, the opinion's introduction summarizing how and why defendant received a fair trial states, "In addition the victim testified that after she reported the sexual offenses to the police, defendant offered to pay her to stay outside the United States." (Opin. at p. 2.) However, omitted from the opinion is the evidence which shows serious veracity issues with this testimony. S. testified that defendant called her from Kathmandu and asked her to either stay in Nepal or go to Canada. (9 RT 970-977) According to S. defendant offered to pay her expenses and promised to bring her back to the United States in a few years. S. claimed to refuse. (5 RT 975-976) S. gave Detective 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) This very significant exculpatory fact was omitted from the opinion. In addition, all of S.'s testimony must be evaluated in light of all of the voluminous

implausibilities and contradictions contained in S.'s testimony which were also omitted in the opinion and fully presented in the opening and reply briefs.

The most glaring exculpatory facts and arguments omitted from the opinion concern the defense facts which show S.'s motive to falsely accuse defendant of rape. There is almost no mention of the facts that the relationship between S., defendant and his wife Peggy devolved to the point of dissolution and that it was reasonable for S. to believe that defendant and Peggy were considering sending her back to Nepal by reversing her adoption based on a false date of birth which would have been absolutely devastating to S. That is, in an email Peggy wrote to S.'s biological father, Birendra, on December 11, 2003, cc'ing S., she told Birendra the adoption was a mistake. (16 RT 4275-4280; 10 CT 2728-2729.) During this same time, S. found out the Dev's were in the process of disinheriting her. (15 RT 3985-3987; 17 RT 4513; 18 RT 4884; 15 CT 3921-3922, 3985-3986.) The facts surrounding the breakdown of the Dev family relationship and the cultural tensions that undermined this devolution are complex and lengthy and the basis to understanding the pretext call in an exculpatory fashion and the motive S. had for falsely accusing defendant of rape. Therefore, these material facts should not have been omitted from the opinion both respect to the statement of facts and as part of any harmless error analysis.

Secondly, the most egregious omission of exculpatory facts in the opinion is that despite allegations that defendant raped S. two to three times a week for five years, without any use birth control and while S. was fertile, S. only became pregnant three times in the year after she turned 18 and made every effort to cover-up her consensual sexual relations with her peers which was expressly exposed by Araz Taifehesmatian who testified that he and S. were having sex at his mother's house once a week during the Fall semester of 2003. (9 RT 2220, 2252, 2324)

In sum, since the opinion omits almost all the exculpatory facts presented in the opening and rely briefs, it is impossible to present each and every one of these omitted exculpatory facts in this Petition for Rehearing. Consequently, defendant has focused on the facts and evidence selected in the opinion as the most persuasively incriminating as expressly summarized in the introduction of the opinion. (Opin. at p. 2.) And, as shown above, in every instance, the opinion either omits, misstates and/or misconstrues the itemized list of the most incriminating evidence supporting the convictions. As a result, the opinion relies on an unreasonable determination of the facts and in other instances, especially with respect to the harmless error analysis, unreasonably applies Supreme Court precedent most specifically *Chapman v. California* (1967) 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705.

For these reasons, defendant respectfully requests this Court to rehear his appeal in light of these points.

V. THE OPINION OMITS, IGNORES, FAILS TO MEANINGFULLY RECONCILE THE MOST INCOMPREHENSIBLE ASPECTS OF THE PROSECUTION'S CASE

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

From the outset S. 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 S.'s story as did testimony from Officer Briesenick.

As a starting point, Officer Briesenick testified that the police department does not close making S.'s account of the events questionable. (8 RT 2082) Similarly, Megan testified that she and S. only went to the police station on one occasion and, on that occasion, S. 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 S. 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 S. 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, S.'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.

B. *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 S. 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 S. and Ajay travel to Nepal together, then, have Ajay return July 1, 2003 and have S. 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 S. to share a hotel room.

At trial, S. 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, S. 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) S., 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)

S.'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 S. into Nepali culture for the summer, S. 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 S. 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, S. testified that she was looking forward to returning to the United States. (4 RT 857) Therefore, S.'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.

C. *S.'s Overt Lies About Oral Copulation Suggest She Was Also Lying About the Rape Allegations.*

On February 3 2004, S. 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, S. 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)[3]

However, at the preliminary hearing and at trial, S.'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, S. 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 she was doing ….to put his thing in my mouth." (4 RT 799) At trial, S. estimated that she was forced

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

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, S. 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) S. claimed that these repeated instances of oral sex were so traumatic she would "always remember that was done to me." (5 RT 1160) S. expressly testified, "All I remember is resisting him and feeling disgusted." (5 RT 1161; see also 4 RT 799-801) S. proclaimed she would never forget these episodes as long as she lived. (5 RT 1166)

These glaringly inconsistent statements do not simply show that S.'s memory was unreliable; they strongly suggest that S. 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) S.'s claim that she was forced to orally copulate Ajay is wildly inconsistent and, like so many instances in this case, S.'s underlying truthfulness was highly

questionable further supporting the defense theory that her allegations were, in fact, false.

D. *The Timing Of S.'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, S. 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, S. 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, S.'s boyfriend, Araz, exposed her lies when he testified, at trial, that he and S. 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 S. 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.

S. 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) S.'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.

S.'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 S. 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 S.'s allegations against Ajay for rape were patently false.

Moreover, as a general matter, S. 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, S. 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 S. 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 S. never got pregnant between ages 15 and 18 nor why she only got pregnant or had serious pregnancy scares three times, within a one year 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 S. 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 S. allegations were patently false.

The opinion's omission of these facts and failure to address and make sense of these incomprehensible aspects of the case both in the statement of facts and in any prejudice analysis is highly problematic especially since there were only few occasions S. actually gave detailed description of the rapes allowing the defendant to rebut her allegations. However, all the persuasive defense evidence introduced at trial to rebut these allegations was omitted by the opinion.

CONCLUSION

For the foregoing reasons, defendant respectfully asks this Court to rehear the appeal.

Dated: January 26, 2017

Respectfully submitted,

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CERTIFICATION OF WORD COUNT

I, Lauren Eskenazi-Ihrig, hereby certify in accordance with California Rules of Court, rule 8.360(b)(1), that this brief contains 12,829 words as calculated by the Microsoft Word software in which it was written.

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

Dated: January 26, 2017

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 Ave #100, Burbank, CA 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 a copy of PETITION FOR REHEARING to the following:

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