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SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF LOS ANGELES – CENTRAL DISTRICT

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff, v. DAYSTAR PETERSON, Defendant.	Case No.: BA490599 **NOTICE OF MOTION AND MOTION FOR NEW TRIAL** **[PC § 1181 & Cal. Const., Art. VI, § 13]** Judge: Hon. David Herriford, Judge Department: 132 Date: April 10, 2023 Time: 8:30am

TO THE HONORABLE DAVID HERRIFORD, SUPERIOR COURT JUDGE, AND ALEXANDER BOTT, DEPUTY DISTRICT ATTORNEY, FOR THE PEOPLE OF THE STATE OF CALIFORNIA:

PLEASE TAKE NOTICE that, on **April 10, 2023 at 10:30 AM**, or as soon thereafter as counsel may be heard, in Department 132 of the Superior Court of the State of California for the County of Los Angeles, Central Judicial District, located within the Clara Shortridge Foltz Criminal Justice Center, 210 West Temple Street, Los Angeles, California 90012 and before the

Honorable David Herriford, Superior Court Judge, the Defendant in the above-captioned matter, Daystar Peterson, by and through his attorneys of record, Jose A. Baez of The Baez Law Firm and Matthew Barhoma (State Bar No. 319339) of Barhoma Law, P.C., will move this Honorable Court for a new trial pursuant to Penal Code section 1181 and Article VI, Section 13 of the California Constitution.

MOTION FOR NEW TRIAL

The Defendant, Daystar Peterson, by and through his attorneys of record, Jose A. Baez of The Baez Law Firm and Matthew Barhoma (State Bar No. 319339) of Barhoma Law, P.C., hereby moves this Honorable Court for a new trial. This motion is made pursuant to Penal Code section 1181 and Article VI, Section 13 to the California Constitution.

This Motion for New Trial is supported by this instant Notice and Motion, and oral motion for such relief, as well as the accompanying Memorandum of Points and Authorities submitted herewith and all attachments thereto, the other pleadings and matters on file or to be filed with the court in this action, matters of which the court can take judicial notice, and upon such oral and documentary evidence which may be presented at the hearing on this motion, if any.

Respectfully submitted,

Dated: March 29, 2023

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SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF LOS ANGELES – CENTRAL DISTRICT

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff, v. DAYSTAR PETERSON, Defendant.	Case No.: BA490599 **DEFENDANT'S MEMORANDUM OF POINTS & AUTHORITIES IN SUPPORT OF HIS MOTION FOR NEW TRIAL** **[PC § 1181 & Cal. Const., Art. VI, § 13]**

Defendant Daystar Peterson, by and through his attorneys of record, Jose A. Baez of The Baez Law Firm and Matthew Barhoma (State Bar No. 319339) of Barhoma Law, P.C., hereby respectfully submits the present Memorandum of Points and Authorities in support of his Motion for New Trial, made pursuant to Penal Code section 1181 and Article VI, Section 13 to the California Constitution.

I. Introduction.

In the early morning hours of July 12, 2020, Defendant allegedly used an unregistered, concealed firearm to perpetrate a shooting causing one individual, Megan Pete ("Pete"), to sustain injuries to her feet. Following an investigation, the State filed felony charges against Defendant on October 8, 2020, in the Superior Court of California for the County of Los Angeles, Central Judicial District, under case number BA490599. The matter proceeded to a jury trial. On December 23, 2022, the jury returned its verdict. The jury found Defendant guilty of Count 1, assault with a semiautomatic firearm in violation of Penal Code[1] § 245, subd. (b), finding the assault had been committed through use of a firearm, causing great bodily injury to Pete, per Penal Code §§ 12022.5, subds. (a) and (d) and 12022.7, subd. (a), respectively. The jury also found Defendant guilty of Count 2, carrying a concealed firearm within a vehicle in violation of Penal Code § 25400, subd. (a)(1), and of Count 3, discharging a firearm with gross negligence in violation of Penal Code § 246.3, subd. (a), causing great bodily injury within the meaning of Penal Code § 12022.7, subd. (a).

Defendant now moves this court for a new trial based on the numerous errors committed at trial and the individual and cumulative impact of said errors including, but not limited to: the improper admission of an Instagram post and statements pertinent to alleged prior bad acts purportedly made by the Defendant, a violation of Defendant's right to counsel of his choice, the admission of DNA evidence falling far short of comporting with industry-accepted reliability standards, the use of radicalized character evidence through admission of evidence of Defendant's

[1] All further statutory references are to the California Penal Code unless otherwise specified.

tattoos and rap lyrics, and the violation of the Confrontation Clause as to a critical witness' testimony. In support thereof, Defendant states the following:

II. Background.

A. Summary of Factual Allegations.

On July 12, 2020, at approximately 4:30 AM, Defendant, his security guard, Jauquan Smith ("Smith"), and two women, Kelsey Harris ("Harris") and Megan Pete ("Pete"), left a party at Kylie Jenner's Hollywood Hills home. The group left in Defendant's black Cadillac sport utility vehicle ("SUV"), (Dec. 12, 2022 Tr. at 71, 130; Dec. 13, 2022 Tr. at 5-10; Dec. 20, 2022 Tr. at 84.) Defendant had a romantic history with both Pete and Harris. (Dec. 13, 2022 Tr. at 4, 58.) While inside of the vehicle, a verbal argument reportedly ensued between Defendant, Harris, and Pete. Pete asked to exit the vehicle. Smith stopped the SUV in a residential neighborhood on the 1800 block of Nichols Canyon Road. Pete exited the SUV and walked away from the vehicle with her back to the SUV and its occupants, intending to call another ride. (Dec. 12, 2022 Tr. at 58; Dec. 13, 2022 Tr. at 11-14, 88-89.)

As Pete was walking away, yelling from inside the SUV continued. Pete turned back around. As she did so, a firearm was discharged from the SUV in her direction and aimed at her feet. (Dec. 13, 2022 Tr. at 15, 17-18.) Defendant and Harris ran to Pete's aid attempting to provide her medical assistance before helping her back into the SUV. (Dec. 13, 2022 Tr. at 19-23.) The SUV headed in the direction of Pete's home. Pete was bleeding from at least one foot and expressed that she was in pain. (Dec. 13, 2022 Tr. at 20, 22-23.)

Residents in the neighborhood called 911 to report a shooting. Officers from the Los Angeles Police Department Hollywood Division ("LAPD") responded to the calls. (Dec. 12, 2022 Tr. at 57-66; Dec. 13, 2022 Tr. at 25.) Officers on route to the scene noticed a vehicle matching

the 911 call description (Dec. 12, 2022 Tr. at 67-69, 71-75; Dec. 20, 2022 Tr. at 83-84) approximately one mile from the scene of the shooting. They initiated a felony detention stop of Defendant's vehicle. (Dec. 12, 2022 Tr. at 96-98.) All passengers were commanded to exit the vehicle and police searched the SUV. They discovered an "olive green" nine-millimeters semiautomatic handgun on the floorboard of the front passenger seat. It was later determined to be an unregistered firearm. (Dec. 12, 2022 Tr. at 99-103.) The owner of the gun was never determined.

When officers observed Pete to be bleeding from her right foot, they questioned her about the source of her injuries. Pete stated she had not been shot. Instead, Pete told officers that she sustained the injuries from stepping on broken glass. (Dec. 13, 2022 Tr. at 98-99.) Pete was transported to Cedar Sinai Medical Center, where she received medical treatment for bilateral injuries to her feet, which included surgery to remove "bullet fragments" from her feet. (Dec. 12, 2022 Tr. at 100; Dec. 13, 2022 Tr. at 32; Dec. 15-16, 2022 Tr. at 4-18.)

At the conclusion of the stop, Smith, Harris, and Defendant were taken into police custody. Among the two males and one female arrested, Defendant was the only one arrested on suspicion of carrying a concealed firearm within a vehicle in contravention of Penal Code § 25400, subd. (a)(1), and later charged in connection with these allegations.

As part of an ongoing investigation, Pete was interviewed several times, including on July 16, 2020 and November 12, 2020. (Dec. 13, 2022 Tr. at 55-57.) In these later interviews, Pete changed her original story and told LAPD Detective Ryan Stogner that she had been shot and Defendant was responsible for firing the weapon. Pete claimed she had conveyed a different story on the morning of the shooting because she was scared, traumatized, and embarrassed. On November 12, 2020, Pete identified Defendant through a single photo identification procedure. (Dec. 13, 2022 Tr. at 98-102, 146; Dec. 20, 2022 Tr. at 103-105, 114-115.)

Not only had the statement of the primary complainant, Pete, changed, but as the investigation into the shooting continued, further questions were raised. Several other witnesses were interviewed and provided differing versions of events. (Dec. 20, 2022 Tr. at 31). No one, except Pete, could identify who discharged the gun. The gunfire came from the side of the vehicle that Harris had occupied. (Dec. 13, 2022 Tr. at 10, 14-16.) After the incident, Harris and Pete nearly immediately discontinued their long-term friendship and employer-employee relationship. (Dec. 13, 2022 Tr. at 4-5, 50-51.)

Forensic testing did not resolve any of these questions. Both Harris and Defendant had gunshot residue ("GSR") on their hands. (Dec. 12, 2022 Tr. at 110-111; Dec. 15-16, 2022 Tr. at 54.) Inexplicably, considering these GSR results and the wildly conflicting testimonial versions of events, the only DNA sample collected for analysis and comparison to the firearm and magazine was a sample belonging to Defendant. The test results ruled Defendant out as a contributor to the DNA recovered from the magazine and were "inconclusive" as to the gun. (Dec. 15-16, 2022 Tr. at 107-109.)

B. Procedural History.

On October 8, 2020, Defendant was formally charged via a two-count Criminal Complaint filed in the Los Angeles County Superior Court, Case No. BA490599. Specifically, he was charged in Count 1 with assault with a semiautomatic firearm in violation of Penal Code § 245, subd. (b), and in Count 2, with carrying a concealed firearm within a vehicle in contravention of Penal Code § 25400, subd. (a)(1). As to Count 1, the People alleged that, during the commission of the offense, Defendant personally used a firearm, to wit, a semiautomatic handgun, within the meaning of Penal Code § 12022.5, subds. (a) and (d), and that he likewise personally inflicted great bodily injury on

the complainant, within the meaning of Penal Code § 12022.7, subd. (a). He was arraigned on October 13, 2020. He pled not guilty to all charges and denied all allegations against him.

Following a preliminary hearing at which Defendant was bound over on all charges and sufficient cause was found as to all allegations (Dec. 14, 2021 Tr. at 60), on January 13, 2022, Defendant was arraigned on an Information that contained the same charges and allegations as the earlier charging document at Counts 1 and 2. He entered the same pleas and denials.

The cause was set to proceed to a jury trial in December 2022. Despite the prosecution's otherwise zealous prosecution of the case in the more than two years leading up to trial, on the eve of trial, December 5, 2022, the People sought to make a last-minute amendment the Information to add Count 3, discharge of a firearm with gross negligence in violation of Penal Code § 246.3, subd. (a), alleging to have resulted in the infliction of great bodily injury within the meaning of Penal Code § 12022.7, subd. (a). (Dec. 5, 2022 Tr. at 19-20.) Though requesting leave to amend the charging document at that juncture was permitted under the law, the court's discretion to grant such leave was nonetheless subject to defendant's statutory and due process rights to notice of the charges. *People v. Graff* (2009) 170 Cal.App.4th 345, 360, 362; Pen. Code § 1009. A request for leave to amend should also be denied if it is "unfair" or "harassing" in nature. *People v. Flowers* (1971) 14 Cal.App.3d 1017, 1021. Over the defense's objection, the court here granted the People's request without properly inquiring into the questionable rationale for the late amendment, instead only discussing its impact on the defense. (Dec. 5, 2022 Tr. at 20-23.) Had the court considered such factors, it would have discovered that the late hour amendment was both "unfair" and "harassing," as it was only one part of a much larger pattern of ambush-style tactics by the State. The People's modus operandi of late notice and pressing the bounds of morality and the law

permeated the entirety of the proceedings and only continued in the jury's presence once the trial was underway, summarized as follows, and expanded upon below:

In the final months leading up to trial, the prosecution instigated a meritless personal attack on Defendant's primary attorney, Shawn Holley, accusing her of involvement of the alleged bribery of a witness in the case. The prosecutor later assured counsel that it disbelieved she was involved, but the damage had already been done.

In advance of trial, the People only partially disclosed evidence related to DNA testing, despite the exculpatory and material nature of the evidence contained in additional reports, belatedly turning the more complete version of the evidence over only on the request of the defense expert. (Dec. 5, 2022 Tr. at 54-55.)

Then on December 12, 2022, the People sought to introduce a shirtless image of Defendant, which depicted a tattoo of a firearm on his chest (Exhibit 18), claiming its purposes for admission of the same were pure – i.e., exclusively for identity purposes regarding gunshot residue swabbing procedures – even offering a feigned token of good faith by offering to introduce similar images of Harris and Smith. (Dec. 12, 2022 Tr. at 107-109.) A few days later, on December 19, 2022, they flipped the switch, again ambushing the court and defense with their true motive for introducing the picture, when they inflammatorily and without cause asked a witness if he had "see[n] the big gun that Tory has tattooed on the center of his chest." (Dec. 19, 2022 Tr. at 118.)

Once the trial had begun, on December 13, 2022, the People again sought another last-minute amendment, this time moving the court to permit the introduction of a highly inculpatory evidence via an Instagram post, which had been in existence since September 2020. The court again granted their request despite the violation of the reciprocal discovery rule raised by its late presentation. Pen. Code §§ 1050, *et seq.* (Dec. 15, 2022 Tr. at 78-80.) This improper tactic

prevented the defense from adequately countering the claims within the late submitted evidence, something it could have easily done had it been afforded proper notice, as evidenced by the submission of the affidavit of out-of-state affiant, Joshua Farias, submitted herewith as Exhibit A, which unequivocally states he was responsible for the contents of the post the State attributed to Defendant. *See* Mar. 14, 2023 Aff. of J. Farias at ¶ 7. Depriving Defendant of the opportunity to obtain this information and mount a defense allowed the State to achieve its objective of presenting it to the jury in the exact manner they wished, claiming it to be definitive evidence that Defendant, himself, stated Harris was not the shooter. (Dec. 21, 2022 Tr. at 38-39.) The same day, their witness, in the jury's presence, testified to Defendant making a rap video depicting violence. (Dec. 13, 2022 Tr. at 154.) A few days later, on December 20, 2022, the People threatened to introduce this very video and/or lyrics, as well as other rap lyrics by Tory Lanez, Defendant's stage persona, if Defendant testified. (Dec. 20, 2022 Tr. at 125.)

On December 14, 2022, despite the State's prior assurances that it did not suspect Defendant's team of involvement with their bribery claims, it nonetheless reignited its accusations against Attorney Holley, springing its restored suspicions on the defense team.

Moreover, throughout the trial, the State heavily overstated the value of the Instagram post, as well as the "inconclusive" DNA evidence on the gun, hammering to the jury that Defendant's own account posted that Harris was not the shooter and that the DNA evidence meant Defendant "could not be excluded" as a contributor to the profile collected from the gun. (Dec. 21, 2022 Tr. at 36-39.) The People similarly presented evidence of a history of criminality attributable to Defendant which they knew to be false based upon their own investigation, using it to inflame the jury against him. (Dec. 20, 2022 Tr. at 102, 119-120, 122-125, 128-129, 137-138.)

Additionally, one defense witness, Kelsey Harris, invoked her Fifth Amendment privilege against self-incrimination when called to testify at trial, but was then extended an offer of immunity in exchange for her testimony. Despite this immunity, she nonetheless faltered, pleaded lack of recollection, and otherwise avoided testifying. (Dec. 14-15, 2022 Tr. at 82, 112-116, 128-135, 139-140, 178, 181, 208.) This allowed the People to request that the entirety of Harris' 80-minute September 2022 interview with the prosecution be played for the jury, though she contested the truth of many of the statements made therein and the defense had never received a copy of the transcribed interview prior to trial. (Dec. 14-15, 2022 Tr. at 53-54; Dec. 15-16, 2022 Tr. at 71.)

Despite the numerous issues which cropped up throughout the trial, the matter nonetheless proceeded onward, and the court submitted the case to the jury on December 22, 2022. On December 23, 2022, the jury returned its verdict, finding Defendant guilty as charged on Counts 1, 2, and 3, and finding true the great bodily injury allegations as to Counts 1 and 3 and the firearm allegation applied to Count 1.

Defendant's sentencing hearing is scheduled to be held at 8:30 AM on April 10, 2023, in Department 132 before this Honorable Court.

C. The Instant Motion for New Trial.

Defendant now brings this instant Motion for New Trial pursuant to Penal Code section 1181 and Article VI, Section 13 to the California Constitution on the bases discussed below.

III. Summary of Applicable Law.

"[A] motion for new trial is a statutory right" which may be invoked by any convicted defendant before judgment is pronounced. *People v. Cardenas* (1981) 114 Cal.App.3d 643, 647, citing *People v. Sainz* (1967) 253 Cal.App.2d 496, 500; *People v. Sarazzawski* (1945) 27 Cal.2d

7, 17;[2] Evi. Code § 1182. "While it is in the exclusive province of the jury to find the facts, it is the duty of the trial court to see that this function is intelligently and justly performed." *People v. Robarge* (1953) 41 Cal.2d 628, 633. The court exercises this necessary function by ruling upon a defendant's motion for new trial.

A motion for new trial "may be made [ordinarily] only on the grounds enumerated in Penal Code section 1181." *Cardenas*, 114 Cal.App.3d at p. 647. The statutory grounds listed include errors of law made at trial and prosecutorial misconduct before the jury. Pen. Code § 1181(5). Despite the limiting language found in Section 1181, courts may also grant a new trial on non-statutory grounds if the error complained of affected the defendant's right to a fair trial. *People v. Sherrod* (1997) 59 Cal.App.4th 1168, 1174; *People v. Whittington* (1977) 74 Cal.App.3d 806, 821, fn. 7 (citations omitted); *see also People v. Cardenas* (1981) 114 Cal.App.3d 643, 647 (an "exception to the rule occurs where strict adherence to the rule would deny the accused due process of law"). A new trial is warranted when, on "examination of the entire cause, including the evidence" the court concludes that "the error complained of has resulted in a miscarriage of justice." Cal. Const., art. VI, § 13; *see also Whittington*, 74 Cal.App.3d at p. 821, fn. 7. In determining whether a state law error amounts to a miscarriage of justice, California courts apply the *Watson* standard of prejudicial error. Under the *Watson* test, a miscarriage of justice occurs if "it is reasonably probable that a result more favorable to the [defendant] would have been reached in the absence of the error." *People v. Watson* (1956) 46 Cal.2d 818, 836; *People v. Williams* (1975) 13 Cal.3d 559, 563 (Citations omitted.) Such standard is applicable to claims of prosecutorial misconduct, with the key consideration being whether the complained of misconduct

[2] Overruled on other grounds in *People v. Braxton* (2004) 34 Cal.4th 798, 817.

could have "contributed materially to the verdict." *People v. Wagner* (1975) 13 Cal.3d 612, 621 (Citations.) If such prejudice is demonstrated, "[the] verdict should … be set aside and a new trial granted…[.]" *People v. Muhlner* (1896) 115 Cal. 303, 306, citing Pen. Code § 1404.

On the other hand, certain constitutional violations are deemed *per se* a miscarriage of justice. As emphasized by the California Supreme Court in *People v. Fosselman* (1983) 33 Cal.3d 572, a trial judge has a duty to ensure that an accused is afforded due process of law. Consequently, to expedite justice by avoiding appellate review, if the court can determine a violation of due process upon a motion for a new trial, "it should do so." *Id.* at pp. 582-583 (Internal citations omitted.) Similarly, a trial court's duty "to afford every defendant in a criminal case a fair and impartial trial is of constitutional dimension." *People v. Oliver* (1975) 46 Cal.App.3d 747, 751, citing *People v. Davis* (1973) 31 Cal.App.3d 106, 110; *see also* Cal. Const., art. I, § 15; U.S. Const., amend. XIV. Thus, when a motion is brought based on a court's erroneous ruling, it is the "denial of a fair trial, in and of itself, [that] results in a miscarriage of justice" and thus requires a new trial. *Sherrod*, 59 Cal.App.4th at p. 1174.

If the court grants a defendant's motion for a new trial on any or some of these bases, the parties must be "place[d] … in the same position as if no trial had been." Evi. Code § 1180. They are afforded a "re-examination of the issues in the same court, before another jury[.]" Evi. Code § 1179.

IV. Improper Admission of Exhibit 40A: "theshaderoom" Instagram Post.

At the thirteenth hour, on December 13, 2022, the People sought to introduce a screenshot of an Instagram post from September 25, 2020. (Dec. 15, 2022 Tr. at 78.) "[T]heshaderoom," an entity unrelated to any party, published the post, which contained a screenshot of a comment

published by another non-party, "liljumadedabeat." The latter account is reportedly run by Pete's producer. The comment stated:

> This goofy a** n***a say he ain't shoot her and they literally have matched the bullets from his gun to the ones in her foot

The caption to the image, which was purportedly authored by "theshaderoom," read as follows:

> #MeganTheeStallion's producer alleges that authorities have matched the bullets from #ToryLanez's gun to the ones found in her foot (See earlier posts)

See Exhibit 40A (the redactions above reflect those made to the exhibit).

In the comments to the post, a user going by "spliffkaay_" wrote, "People saying Kelsey shot her" to which the account "torylanez," which the People alleged was authored by Defendant although numerous staff members had access to the account as well, reportedly replied "that's not true[.]" *See* Exhibit 40A; *see also* Exhibit 40B (a screenshot of the "torylanez" Instagram account).

However, this post was not authored by Defendant. Rather, beginning in December 2019, well before the post or the comment thereon were published, Joshua Farias ("Farias") "became the manager of [Defendant's] Instagram account…, @torylanez." In this role, he "manag[ed] posts on his feed and engag[ed] in ideation of engagement with comments and messages the account … receive[d]." *See* Mar. 14, 2023 Aff. of J. Farias, Exhibit A, at ¶ 5. Specifically, regarding the post admitted as Exhibit 40A, he states under oath that, on September 25, 2020, he "accessed the account in [his] customary practice." In doing so, he "reviewed a post that published by an account @theshaderoom," the post at issue herein. He "proceeded to review the caption associated with the published post." *Id.* at ¶ 6. He "further reviewed comments associate with the September 25, 2020 post by @theshaderoom, and … found [the] comment posted by an account @spliffkaay_,"

described above. Without consulting with Defendant, Farias affirms that, "[t]o that comment, [he] replied '@spliffkaay_ that's not true.'" *Id.* at ¶¶ 7-8.

A. The Court Erroneously Granted the People's Motion to Admit the Instagram Post.

On December 15, 2022, the court ruled on the People's motion to introduce the Instagram post, relying on the case law cited by the People in their motion, as well as another case. (Dec. 15, 2022 Tr. at 78-79.) It held that, it the People "establish … that th[e] account is linked to a certain individual," the contents of the post from that account will be admitted as it "goes more to the weight of the evidence than the admissibility [of the evidence]." (Dec. 15, 2022 Tr. at 79.)

The same day, the post was admitted into evidence through the testimony of the State's expert, Detective Warren Eberhardt. (Dec. 15-16, 2022 Tr. at 25; Dec. 15, 2022 Tr. at 79-80.) As discussed below, the court erred on numerous questions of law in allowing the People to introduce this post, depriving Defendant of his right to a fair trial. Pen. Code § 1181(5); *Sherrod*, 59 Cal.App.4th at p. 1174.

i. The Post was Admitted in Violation of Statutory Notice Requirements.

"Section 1054, et seq. 'governs the scope and process of criminal discovery' in this state." *People v. Superior Court (Meraz)* (2008) 163 Cal.App.4th 28, 46, quoting *People v. Tillis* (1998) 18 Cal.4th 284, 289. This statutory duty is "wholly independent" of the duty imposed on prosecutors to under *Brady v. Maryland* (1963) 373 U.S. 83, which requires prosecutors to disclose *exculpatory* material evidence to criminal defendants. *Izazaga v. Superior Court* (1991) 54 Cal.3d 356, 378. This statutory "right to discovery is an outgrowth of … [the defendant's] right to a fair trial, including the right to prepare and present an intelligent defense in light of all relevant and

accessible information...," not just *exculpatory* information. *People v. Luttenberger* (1990) 50 Cal.3d 1, 17.

Section 1054.1 requires the prosecution to timely disclose certain categories of evidence to the defense before trial. *Meraz,* 163 Cal.App.4th at p. 47; *see also People v. Verdugo* (2010) 50 Cal.4th 263, 279-280, quoting *People v. Zambrano* (2007) 41 Cal.4th 1082, 1133; *People v. Hughes* (2020) 50 Cal.Appl.5th 257, 278. By its very terms, Section 1054.1 demands parties disclose evidence well in excess of that required under *Brady*, as "exculpatory evidence" is only one of the six separate categories of mandatory discovery enumerated in the section. As pertinent to this case, this section requires pretrial disclosure of statements made by the defendant and "[a]ll relevant real evidence seized or obtained as a part of the investigation of the offenses charged." Pen. Code § 1054.1, subds. (b), (c). This discovery obligation requires disclosure of information within the prosecution's "possession or control" as well as that which is "reasonably accessible" to the State. *In re Littlefield* (1993) 5 Cal.4th 122, 135, quoting *Hill v. Superior Court* (1974) 10 Cal.3d 812, 816 and *Pitchess v. Superior Court* (1974) 11 Cal.3d 531, 535; *see also Engstrom v. Superior Court* (1971) 20 Cal.App.3d 240, 243-244) ("materials discoverable by the defense include information in the possession of all agencies ... that are part of the criminal justice system, and not solely information 'in the hands of the prosecutor'").[3]

Section 1054.7 defines timeliness, requiring such disclosure occur "at least *30 days before trial.*" (Italics added.) However, if the prosecution learns of the information, or comes into its possession *within 30 days of trial,* then *immediate* disclosure is required. *Id.; see also Zambrano,* 41 Cal.4th at p. 1133.

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[3] *Engstrom v. Superior Court,* 20 Cal.App.3d 240 was disapproved on other grounds in *Hill v. Superior Court,* 10 Cal.3d at p. 820.

The post in question herein was an Instagram post explicitly defined by the People in their motion as a "statement made by the defendant" which they sought to introduce into evidence. Further, Detective Warren Eberhardt testified that the Instagram post by "theshaderoom" was obtained while investigators "look[ed] at Instagram as an investigative tool in the case of *People v. Daystar Peterson*...[.]" (Dec. 15-16, 2022 Tr. at 24-25.) The prosecution was required to disclose this material under Pen. Code § 1054.1, subds. (b) and (c) as a "[s]tatement[] of [a] defendant[]" as well as "relevant real evidence seized or obtained as a part of the investigation of the offenses charged." *See also Hughes*, 50 Cal.Appl.5th at p. 278; *Verdugo,* 50 Cal.4th at pp. 279-280.

Under California Supreme Court precedent, when ruling on a motion seeking to admit evidence that falls within Section 1054.1, the court is required to determine whether the "acquisition" of such evidence has been "unreasonably delayed" and whether the evidence is of the type that "the prosecutor knew or *should have known*" of sooner. *People v. DePriest* (2007) 42 Cal.4th 1, 39; *People v. Whalen* (2013) 56 Cal.4th 1, 66-68. Yet, the court made no such finding here.

The People never indicated when they had obtained the evidence in their motion. In ruling on the motion, the court never asked the State when the post was obtained. Detective Eberhardt testified that the Instagram post was brought to his attention on December 13, 2022, at which time he "personally viewed [the] post and researched it." (Dec. 15-16, 2022 Tr. at 25, 30.) However, he also testified that he learned of the post's existence from the prosecution, when they asked him to research the statement and determine which Instagram username it came from. (Dec. 15-16, 2022 Tr. at 38-39.) No other information was offered regarding when the State learned of the post's existence.

However, throughout the multi-year-long pretrial proceedings, social media platforms were routinely scoured by the People and investigators and introduced by the People as evidence at various pretrial proceedings. For example, the People were aware of social media's impact on this case as early as February 23, 2022, if not earlier, when the People alleged that Defendant violated the protective order by allegedly leaking DNA evidence. (Dec. 14, 2021 Tr. at 5.) These allegations surrounded the People's near immediate discovery of a Twitter post by another non-party, DJ Akademiks. (Dec. 14, 2021 Tr. at 12–14.) The State's instant knowledge of DJ Akademiks's post provides strong evidence to support a finding that, at a minimum, the State *should have known* of the Instagram post in question prior to December 13, 2022. *Whalen*, 56 Cal.4th at pp. 66-68. Further, when Pete was asked, "Have you ever turned over to the District Attorney stuff that [Defendant] posted" online, she testified, "Every time a blog that's his friend post something, I send it, yes, to them." Specifically, she referenced turning over posts from July 12 to 16, 2020. (Dec. 13, 2022 Tr. at 123, 129.) When defense counsel pressed, "I want to know what discovery was turned over by her to the D.A.," the prosecution admitted, "She gave me some links. […] It's [coming from] her team." (Dec. 13, 2022 Tr. at 130-132.) Notably, Pete's "team," specifically her producer, was also the source of post at issue herein. If they were submitting posts dating back to July 2020 to the prosecution, it is unreasonable to believe they would not have also submitted a comment to their own post from two months later in September 2020.

In addition, Detective Eberhardt testified that he and his fellow investigators, routinely use "social media," including Instagram, "as an investigative tool." (Dec. 15-16, 2022 Tr. at 24, 30-31.) This only further indicates there is ample reason to believe that the People failed to move with the required degree of haste in investigating this more-than-two-year-old post.

The State's reported "acquisition" of the Instagram post, which was the subject of their December 13, 2022 motion was undoubtedly "unreasonably delayed" as it involved evidence that they unquestionably "knew or should have known" about sooner. *DePriest*, 42 Cal.4th at p. 38; *Whalen*, 56 Cal.4th at pp. 66-68. Whether the People feigned ignorance of the post's existence and delayed its disclosure to the defense, or they conducted a lackluster investigation, they violated their duties under the reciprocal discovery rule. Pen. Code §§ 1054.1, 1054.7.

Moreover, the court's ruling that such post was admissible because the evidence was "not exculpatory" (Dec. 13, 2022 Tr. at 131) amounted to an erroneous interpretation of the State's discovery obligations, which are not only constitutional in nature, but also statutory, per Section 1054.1. To hold otherwise amounted to an error of law.

ii. This Discovery Violation Amounted to a Miscarriage of Justice.

The instant case is analogous to *People v. Hughes,* 50 Cal.App.5th 257, 280. In *Hughes,* the Fourth Appellate District found irreparable prejudice existed where evidence that went to the "heart of the prosecution's own theory of guilt" and was pertinent to and presented as dispositive on the State's "most important issue presented in the case" was introduced mid-trial. The Court of Appeal found it "difficult to overstate the seriousness of holding back required discovery information, classifying the late disclosure as "an error of great magnitude." It was so substantial that it deprived Defendant of a fair trial, requiring a new trial be ordered. *Id.* at pp. 280, 285. The same result is required here. *See also Sherrod,* 59 Cal.App.4th at p. 1174 (deprivation of a fair trial is a *per se* "miscarriage of justice" requiring a new trial). Even if it did not amount to a violation of a constitutional magnitude, it was nonetheless sufficiently prejudicial to warrant a new trial under the standard described in *Watson,* altering the outcome of the proceedings in Defendant's favor. 46 Cal.2d at p. 836.

The two central issues pertained to identity: (1) the identity of the owner of the firearm; and (2) the identity of the shooter. The statements admitted via the Instagram post spoke to both issues.

Regarding ownership, the author and re-poster claimed that the firearm used in Pete's shooting belonged to Defendant. "[L]iljumadedabeat" identified Defendant as the owner of the firearm by stating that investigators matched the "bullets from *his* gun" to the bullets on Megan's feet. Additionally, "theshaderoom" explicitly said the firearm was "#ToryLanez's gun." *See* Exhibit 40A. The People offered no other evidence on the issue of gun ownership. Thus, the Instagram post was crucial to the People in securing a conviction, at minimum, for carrying a concealed firearm within a vehicle in violation of Penal Code § 25400, subd. (a)(1). As the *only* evidence the State presented on this issue, its erroneous admission unquestionably improperly impacted the outcome of the proceedings to Defendant's detriment. *Hughes,* 50 Cal.App.5th at pp. 280, 282.

As to the shooter's identity, the comment purportedly published by the "torylanez" account (*see*, e.g., Dec. 15-16, 2022 Tr. at 32-36) stated it was "not true" that the primary alternative suspect, Harris, was the shooter. The People identified this portion of the post as being "important" to their position and used it to argue that it was "[un]reasonable [to conclude] that Kelsey [was] the shooter when Defendant's own verified account says she wasn't." (Dec. 21, 2022 Tr. at 38-39.) This argument was pertinent to the issue of the shooter's identity as to both the assault with a semiautomatic firearm and negligent discharge of a firearm charges, as well as the personal use of a firearm and great bodily injury allegations related thereto. Indeed, Defendant's purported admission, which negated his third-party culpability defense, amounts to evidence which, if disclosed sooner, reasonably could have changed the result of the proceedings. *People v. Mora*

and Rangel (2018) 5 Cal.5th 442, 467, citing *Zambrano*, 41 Cal.4th at p. 1132; *see also Hughes*, 50 Cal.App.5th at p. 282 (finding that evidence which was devastating to the defendant's defense was prejudicial).

Further, as to both components of the post, the People's late disclosure and introduction of the post at trial deprived Defendant of an opportunity to amend his defense in light of such evidence, to cross-examine several witnesses on the issue, or to gather and "present evidence to the contrary." *Hughes,* 50 Cal.App.5th at pp. 280, 282. Had Defendant been properly afforded this opportunity, he would have been able to obtain the testimony of Joshua Farias, which is contained in his attached affidavit at Exhibit A. This testimony undermines the People's entire theory that Defendant was responsible for the post. *See* Mar. 14, 2023 Aff. of J. Farias at ¶ 7. Like in *Hughes,* given the highly prejudicial nature of the late disclosed evidence, the court was required to order an adequate remedy to cure the discovery violation and salvage the trial. 50 Cal.App.5th at pp. 281, 283, 285, quoting *People v. Ayala* (2000) 23 Cal.4th 225, 299; *Verdugo*, 50 Cal.4th at p. 280.[4] To do so, the court could have denied the State's motion, delayed proceedings to allow Defendant to prepare, or issued remedial jury instructions. *Id.* (noting that lesser remedies, including curative instructions, may be inadequate in situations like this). Instead, the court failed to cure the discovery violation and allowed the People to admit the Instagram post at trial, depriving Defendant of the chance to obtain, e.g., Farias' testimony. "Whether the prosecutor acted

[4] Nor are any factors in mitigation of this prejudicial impact present here. *See,* e.g., *Verdugo,* 50 Cal.4th at pp. 280-281 (defense timely provided with an informal warning of the evidence's existence but did not timely receive evidence itself; court also took steps to grant the defense a continuance as well as the opportunity to recall any witnesses necessary for cross-examination following the People's untimely introduction of evidence); *DePriest*, 42 Cal.4th at p. 38 (where the untimely introduced evidence was brought before the defense and court prior to opening arguments and the presentation of witnesses and such further investigation was only undertaken in response to the People newly learning of the defense's theory of the case); *Whalen*, 56 Cal.4th at pp. 66-68 (the delayed discovery was wholly unintentional, surprised all parties, and occurred in the court's own presence allowing it to weigh the State's prior knowledge).

intentionally or not, the effect was the same: the prosecution surprised defense counsel with new … evidence on the most critical factual question relating to [Defendant's] guilt" because the evidence went to the most important facts at issue – ownership, and identity. *Id.* at p. 283.

The introduction of this evidence "undermined the fundamental fairness of the trial" and "irreparably damaged" Defendant's changes of a fair trial. *Hughes,* 50 Cal.App.5th at pp. 283-284, citing *Ayala,* 23 Cal.4th at p. 282. The only acceptable remedy for this "miscarriage of justice" is a new trial. *Id.* at p. 285 (once the untimely evidence was admitted, "the only effective remedy at that point was to declare a mistrial and allow [the defendant] to face trial again, [this time] prepared to respond to [the contents of the new evidence] on the merits"); *see also Sherrod,* 59 Cal.App.4th at p. 1174; Pen. Code § 1181(5). Because the evidence in question also directly placed the gun in Defendant's hands as its shooter and owner, a reasonable probability exists that the proceedings would have resulted differently but for the court's failure to remedy its prejudicial impact. *Id.* at pp. 280, 285; *see also Mora and Rangel*, 5 Cal.5th at p. 467, citing *Zambrano*, 41 Cal.4th at p. 1132. Under either standard, this discovery violation requires a new trial be ordered.

iii. The Post Amounts to Inadmissible and Inherently Unreliable Hearsay Not Subject to Any Exception.

California Evidence Code § 1200, subd. (a) defines hearsay as "a statement that was made other than by a witness while testifying at the hearing and that is offered to prove the truth of the matter stated." "Except as provided by law, hearsay evidence is inadmissible." Evi. Code § 1200, subd. (b). "Hearsay is generally excluded because the out-of-court declarant is not under oath and cannot be cross-examined to test perception, memory, clarity of expression, and veracity, and because the jury (or other trier of fact) is unable to observe the declarant's demeanor." *People v. Seumanu* (2015) 61 Cal.4th 1293, 1307-1308, citing *People v. Cudjo* (1993) 6 Cal.4th 585, 608.

Pursuant to the Sixth Amendment, hearsay exceptions are applied more narrowly in criminal trials. *See* Evid. Code § 1204; *Crawford v. Washington* (2004) 541 U.S. 36, 51-52.

In this case, the layered Instagram post admitted as Exhibit 40A contained multiple levels of hearsay. The post initially authored by "liljumadedabeat" and re-published by "theshaderoom," as well as the comment section containing a response purported to have been made by "torylanez," undoubtedly constitute out-of-court statements within the meaning of Evidence Code § 1200, subd. (a). Further, the statement by "liljumadedabeat" stating it was "his gun" that was used in the shooting was offered for the truth of the matter asserted. The statement by "theshaderoom" that it was "#ToryLanez's gun" was also offered for its truth. Similarly, the responsive statement, "that's not true," by an unknown user under the "torylanez" account which was responsive to the comment "People saying Kelsey shot her" was also admitted for its truth. Accordingly, these statements were presumptively "inadmissible" as hearsay. Evi. Code § 1200, subds. (a), (b).

The People relied on *Taylor v. Sullivan* (Apr. 29, 2019, 2:18-CV-0637) 2019 U.S. Dist. LEXIS 73008 (E.D. Cal.), *People v. Valdez* (2011) 201 Cal.App.4th 1429, and *In re K.B.* (2015) 238 Cal.App.4th 989 in support of their December 13, 2022 Motion to Admit Statement on Instagram. Further, the court, in conducting its own research on the issue, relied on an unpublished portion of *People v. Lee* (2022) 81 Cal.App.5th 232 to instruct it on the issue. However, each of these cases is plainly distinguishable from the facts of the present case. Further, none of the People's cited opinions involved the admission of hearsay evidence, and the court's cited case involved an exception inapplicable herein. The Court's reliance on each of these cases in admitting the Instagram post was erroneous.

In its unpublished opinion in *Taylor,* the United States District Court for the Eastern District of California (notably, a federal district court opinion) found a series of unauthenticated

private Instagram direct messages between two non-verified users personally known to each other to be admissible on the issue of motive. In *Taylor*, not only were the parties permitted to fully brief and argue the matter in advance of trial – a privilege that Defendant was deprived of, as discussed above – but, in fact, "the trial court excluded evidence of rumors … based on relevancy and hearsay, but concluded the Instagram exchange was relevant to show some type of argument and relationship, and therefore possibly motive." *See* No. 2:18-CV-0637, at *4, 14-23. Thus, unlike the issue herein, the information was *not* admitted for the truth of the matter asserted. Consequently, the court's decision in *Taylor* is inapplicable to the issue presented by this case.

Similarly, in *Valdez* is distinguishable and non-persuasive in consideration of the instant facts. Strikingly, *Valdez* was decided in 2011, making it significantly outdated regarding the Instagram post in this case. Critically, the *Valdez* court admitted "MySpace printouts" containing reference to the defendant's gang moniker,[5] a photograph of him making a gang hand signal, and written gang-related notations. The court admitted the Myspace evidence "for specified [and limited] purposes and *not* for the truth of any express or implied assertions. In particular, the court instructed the jury to consider the Myspace evidence for the limited purposes (1) of corroborating a victim's statement to investigators … that the victim recognized [the defendant] from the MySpace site, and (2) as foundation for … [the gang] expert testimony … [that] Valdez was an active … gang member." *Valdez*, 201 Cal.App.4th at pp. 1434, 1437 (emphasizing "the trial court did not admit the MySpace material for the truth of any assertion on the page"). Further, the adequacy of the authentication of the single-user Myspace account was at the crux of the court's determination that "the evidence strongly suggested the page was [the defendant's] personal site

[5] "Monikers are the names gang members use among their peers; as such, they become symbols of acceptance by the gang." *See* FBI Law Enforcement Bulletin Volume, *What's in a Name?*, May 1997, https://www.ojp.gov/ncjrs/virtual-library/abstracts/whats-name-gang-monikers.

... and that the page was password protected for posting and deleting content, which tended to suggest ... the owner of the page controlled the posted material." *Valdez,* 201 Cal.App.4th at p. 1436. Plainly, not only is the *Valdez* case inapplicable as it does not pertain to the admission of social media for hearsay purposes, but the authentication-based factors relied upon by the *Valdez* court are also wholly inapplicable to the account here: a "verified" brand, business, or celebrity account that is operated by an entire social media team, not a solitary individual. (Dec. 15-16, 2022 Tr. at 33-35, describing persons other than Defendant as having exclusive access to the "torylanez" account.) *See also* Mar. 14, 2023 Aff. of J. Farias, Exhibit A, at ¶¶ 5-7.

Glaringly, the posts admitted in *In re K.B.*, 238 Cal.App.4th 989, contained photographs only, making the facts and conclusions of the case equally distinct. In that case, the court expressly distinguished between the text of the posts and the image, "order[ing] that the captions associated with the photographs be redacted as hearsay." *Id.* at p. 998, fn. 6. Moreover, the post in *In re K.B.* was subject to additional verification because when the police arrested the defendant, he wore the same clothing and was in the exact location and with the exact same people as depicted in the image in question. Furthermore, the picture depicted actual criminal activity and confirmatory metadata was found on his cohort's cell phone. *In re K.B.*, 238 Cal.App.4th at pp. 992-998.

Here, the additional authenticating factors are absent and the People merely attempted to turn multiple written statements into an image by taking a screenshot to demand that it receive the same treatment as the actual photograph in *In re K.B.* However, photographs are "demonstrative evidence, depicting what the camera sees," meaning they are "testimonial and ... not hearsay." *People v. Cooper* (2007) 148 Cal.App.4th 731, 746. To permit parties to turn an out-of-court statement into demonstrative evidence by taking a picture or screenshot of it, having it deemed non-testimonial and non-hearsay evidence, would obliterate the essence of the hearsay rule and

gut its core purpose – avoidance of confrontation issues (*Seumanu*, 61 Cal.4th at pp. 1307-1308) – entirely. Thus, the court erred by allowing the State to take this very action.

Finally, "an opinion of a California Court of Appeal … that is not certified for publication or ordered published must not be cited or relied upon by a court[.]" Cal. R. 8.1115(a). The court's noted reliance on the unpublished portions of the partially published opinion in *People v. Lee* (2022) 81 Cal.App.5th 232 was, therefore, erroneous. Even if it were not, the facts of *Lee* are distinguishable from those in the present case, contrary to the court's position that it contained a "very similar factual scenario." (Dec. 15, 2022 Tr. at 79.) In *Lee*, the People sought to introduce "evidence of photographs…, [direct] messages…[,] [and video footage] appearing on Facebook and Instagram accounts held by [the defendants]" under the business records exception to the hearsay rule. *Lee*, Nos. B300756 & B305493, at p. 51. The court initially held the evidence was admissible, "[s]ubject to the prosecutor's ability to authenticate each piece of evidence." *Id.* In *Lee*, the State then presented evidence that the social media evidence was obtained via subpoena and supported by "certificates of authenticity, which had been obtained by an investigation officer" and were "signed by the records custodian" for Facebook and Instagram. *Id.* at pp. 51-53. It was further supported by the investigating detective's testimony that he had confirmed the accounts to be "password-protected" as well as "associated with [the] []defendant's name, email address, and phone number." *Id.* at pp. 53-54. The *Lee* court concluded that, because the "evidence tended to show that the []defendant[] created and maintained [his] own social media accounts…," the prosecution had sufficiently authenticated the photographs, videos and direct messages, meaning they were admissible, and any challenges to authenticity pertained only to "the weight of the evidence, not its admissibility. [Citation.]" Nos. B300756 & B305493, at pp. 51, 54.

As with the above cases, the media in question in *Lee* different from that in Defendant's case, with the former being photographs, videos and direct messages and the instant evidence being screenshots upon screenshots and a comment to a post. However, the difference extends well beyond this obvious distinction. The evidence in Defendant's case was not obtained via subpoena, authenticated by Instagram, and not be introduced under the business records exception (Evi. Code § 1271). No authentication whatsoever was provided for "theshaderoom" post, nor for the comment originally authored by "liljumadedabeat." As expanded upon below, the extent of the authentication regarding the comment purported to be from Defendant's account was Detective Eberhardt's statement that the account appeared to belong to Defendant based on the images published thereto. There was no further testimony that he had reviewed the password protection status of the account, nor the further confirmatory identifying information linking the account exclusively to Defendant. (Dec. 15-16, 2022 Tr. at 27-28, 32-37.) While in *Lee* the authentication process showed that the defendant had "created and maintained [his] own social media accounts," the opposite conclusion was indicated here. As shown by testimony, other persons had access to Defendant's account (Dec. 15-16, 2022 Tr. at 33-35), and as confirmed by Farias' recent affidavit, Defendant did not, in fact, maintain his own accounts. Farias did. (Mar. 14, 2023 Aff. of J. Farias, Exhibit A, at ¶¶ 5-7).

Furthermore, the Instagram post was erroneously introduced for identity purposes because it related to a single comment from a multi-user celebrity account[6] which was publicly published on another Instagram page entirely. There was no clarity regarding the identity of the individual posting, thus making the post inherently untrustworthy and unreliable for identity purposes. *See*

[6] *See* Dec. 15-16, 2022 Tr. at 33-35 (describing persons other than Defendant as having exclusive access to the "torylanez" account).

People v. O'Connell (2003) 107 Cal.App.4th 1062, 1066 (requiring hearsay statements have "sufficient indicia or reliability" to be deemed trustworthy). More recent cases "reflect a common judicial skepticism of evidence found on the Internet: 'While some look to the Internet as an innovative vehicle for communication,' the courts continue to view it 'warily and wearily' as a catalyst for 'rumor, innuendo, and misinformation.'" *People v. Stamps* (2016) 3 Cal.App.5th 988, 996-997, quoting *St. Clair v. Johnny's Oyster & Shrimp, Inc.* (S.D. Tex. 1999) 76 F.Supp.2d 773, 774. As the Supreme Court recently stated, just prior to the beginning of Defendant's trial, "[s]ocial media is not a bedside diary; it is a platform for expression aimed at a particular audience. [Citation.] Like any other form of public expression, social media posting may include an element of performance [or bravado]" and, therefore, must be addressed with "caution." *People v. Ware* (Dec. 1, 2022) 14 Cal.5th 151, 174. "The Internet 'provides no way of verifying the authenticity' of its contents and 'is inherently untrustworthy. Anyone can put anything on the Internet. No website is monitored for accuracy and *nothing* contained therein is under oath or even subject to independent verification absent underlying documentation'" (*Stamps,* 3 Cal.App.5th at p. 996, quoting *St. Clair,* 76 F.Supp.2d at pp. 774–775). There are plain concerns with the "adulterat[ion] of the content on *any* website" meaning, "'any evidence procured off the Internet is adequate for almost nothing, even under the most liberal interpretation of the hearsay exception rules…[.]'" *Id.* at pp. 996-997, quoting *St. Clair* at p. 775; *see also, generally, Crispin v. Christian Audigier, Inc.* (C.D. Cal. 2010) 717 F.Supp.2d 965, 976, fn. 19; *Southco, Inc. v. Fivetech Tech. Inc.* (E.D. Pa. 2013) 982 F.Supp.2d 507, 515 (Websites are "typically inadmissible as hearsay," and "even website evidence admissible under a hearsay exception requires authentication"); *Hernandez v. Smith* (E.D. Cal., July 13, 2015, No. 1:09-CV-00828) 2015 U.S.

Dist. LEXIS 90740, p. *12 (striking "printouts of Internet websites as inadmissible hearsay and as unauthenticated").

Moreover, as to the comment attributed to the "torylanez" account, the recently acquired affidavit of Joshua Farias make apparent that the evidence that went to the jury was not a party admission (Evi. Code § 1220), as represented by the State. Rather, it was an out-of-court statement by a non-party, who was not called to testify at trial, nonetheless offered against Defendant at trial. Mar. 14, 2022 Aff. of J. Farias, Exhibit A, at ¶ 7. To be admissible under Evidence Code § 1222, the People would have been required to show Defendant "directed" Farias to make the comment. *People v. Selivanov* (2016) 5 Cal.App.5th 726, 776. As confirmed by Farias, he "never consulted with [Defendant] in posting the comment." Mar. 14, 2022 Aff. of J. Farias, Exhibit A, at ¶ 8. Therefore, the comment also would not have been admissible under either of these exceptions, nor any other.

However, even if the comment to the post does fall within an exception, it should have been admitted on its own, without the attached post from "theshaderoom" republishing and expanding on the comments of "liljumadedabeat," as unquestionably neither of these statements fell within any exception to the hearsay rule. "'[T]he trial court must exercise its discretion pursuant to Evidence Code section 352 in order to limit … evidence to its proper uses.'" *People v. Stanley* (1995) 10 Cal.4th 764, 833-834, quoting *People v. Coleman* (1985) 38 Cal.3d 69, 92.[7] This requires the "exclusion of portions of inadmissible hearsay evidence which [are] not related to [the admissible evidence]." *Coleman*, 38 Cal.3d at p. 92, citing *People v. Brown* (1958) 49 Cal.2d 577,

[7] *People v. Coleman*, 38 Cal.3d 69 was disapproved on other grounds by *People v. Sanchez* (2016) 63 Cal.4th 665, 686.

587.[8] Where evidence is "admissib[le] … for one purpose…, [but] the danger exists that it may be improperly considered by the jury for another purpose which it is not admissible…," the court must exercise this Evidence Code § 352 discretion. If "'there is good reason for believing that the real object for which the evidence is offered is not to prove the point for which it is ostensibly offered and is competent, but is to get before the jury declarations as to other points, to prove which the evidence is incompetent…,'" the court must exercise this discretion to limit the evidence to allow its introduction only those purposes which are proper. *People v. Sweeney* (1960) 55 Cal.2d 27, 42-43, quoting *Adkins v. Brett* (1920) 184 Cal. 252, 258-259. Here, the People did not need the entirety of the post to make their point that they believed Defendant to have commented it was untrue that Harris shot Pete. The comment alone would have sufficed. The admission of the entire post despite its non-necessity permitted the People to improperly present incompetent evidence on the issue of gun ownership to the jury. In fact, it was the only evidence of ownership. The court was, therefore, obligated to order the admission of the post limited only to evidence it found to fall within an exception to the hearsay rule. *Sweeney,* 55 Cal.2d at pp. 42-43; *Coleman,* 38 Cal.3d at p. 92.

The value and admissibility of the contents of the social media activity in this case were *vastly* overstated by the People in their reliance on these cited cases. The court's reliance on the same, as well as on *People v. Lee,* 81 Cal.App.5th 232, to conclude that the post presented issues pertinent to the "weight of the evidence" not its "admissibility" (Dec. 15, 2022 Tr. at 79), was erroneous, as the proper authentication procedures which would have allowed for such conclusion were not present here. No other hearsay exception applied. The erroneous admission of the post,

[8] *People v. Brown,* 49 Cal.2d 577 was superseded by statute on other grounds as stated in *People v. Burns* (1984) 157 Cal.App.3d 185.

therefore, had the effect of allowing the People to introduce a social media image comprised entirely of hearsay not subject to any exception at trial.

iv. The Hearsay Evidence Was Improperly Introduced Through Expert Testimony.

In this case, not only was the information presented in the Instagram post inadmissible hearsay, but its admission through Detective Eberhardt's testimony violated established case law. In *People v. Sanchez* (2016) 63 Cal.4th 665, the Supreme Court held that when expert testimony incorporates hearsay as the basis for the expert's opinion, an additional inquiry is required to determine its admissibility. *Stamps*, 3 Cal.App.5th at pp. 995-996, quoting *People v. Sanchez* (2016) 63 Cal.4th 665, 678. "After *Sanchez*, reliability is no longer the sole touchstone of admissibility where expert testimony to hearsay is at issue. Admissibility – at least where 'case-specific hearsay' is concerned – is now more cut-and-dried: If it is a case-specific fact and the witness has no personal knowledge of it, if no hearsay exception applies, and if the expert treats the fact as true, the expert simply may not testify about it. [...] The underlying fact also may not be included in a hypothetical question posed to the expert unless it has been proven by independent[ly] admissible evidence." *Stamps*, 3 Cal.App.5th at p. 996, citing *Sanchez*, 63 Cal.4th at pp. 684-686. "Case-specific facts are those relating to the particular events and participants alleged to have been involved in the case being tried. [...] The expert is generally not permitted ... to supply case-specific facts about which he has no personal knowledge. [Citation.]" Rather, the parties must establish such facts by "calling witnesses with personal knowledge of those case-specific facts...," and the expert may then "testify about more generalized information to help jurors understand the significance of those case-specific facts...," and/or "give an opinion about what those facts may mean." *Sanchez*, 63 Cal.4th at p. 676.

Here, Detective Eberhardt was called to testify and presented his credentials to the jury as a 22 years' experienced officer and 14 years' experienced "detective supervisor with the Los Angeles Police Department" who, "in [his] investigations … look[s] to social media [including Instagram] as an investigative tool." (Dec. 15-16, 2022 Tr. at 24-25, 29-31.) "Based on [his] experience as a robbery … detective…," he testified that "the blue check" present on an Instagram page is a "verification badge," meaning that Instagram has "verified that it's an authentic account that belongs to, say, a public figure, a celebrity or an athlete … [or] a particular brand." (Dec. 15-16, 2022 Tr. at 27-28.)

The People then asked Detective Eberhardt to read the hearsay statements in open court. Detective Eberhardt testified that in response to the hearsay statement, "People saying Kelsey shot her" the "torylanez" account responded, "That's not true." (Dec. 15-16, 2022 Tr. at 27.) Based on the presence of the "blue check," the contents of the "torylanez" Instagram account (Exhibit 40B), and "the totality of the circumstances in [his] investigation," Detective Eberhardt opined it was "very likely … that th[e] account belong[ed] to Tory Lanez or Mr. Peterson, the defendant…," whom he identified in open court. (Dec. 15-16, 2022 Tr. at 26-28, 31, 44.)

By testifying to his credentials and experience as a law enforcement officer with specialized knowledge in using social media in investigations and being permitted to offer an opinion based on this experience, Detective Eberhardt was an "expert" witness. *People v. Cruz* (1968) 260 Cal.App.2d 55, 59; *People v. Carter* (1997) 55 Cal.App.4th 1376, 1378. The information he supplied was "case-specific" because it related to Defendant and the shooting in question, i.e., "the particular events and participants alleged to have been involved in the case being tried." *Sanchez*, 63 Cal.4th at p. 676. Furthermore, he implicated Defendant as the author of the hearsay statement, "that's not true," without having any personal regarding whether Defendant

was the actual author. (Dec. 15-16, 2022 Tr. at 33-37.) The People did not call any lay witness with personal knowledge of these "case-specific facts" on which its theory of the case depended, i.e., that Defendant owned the firearm and Harris was not the shooter. *Sanchez,* 63 Cal.4th at p. 676. The State's expert witness, Detective Eberhardt, was permitted to exceed the bounds set under *Sanchez,* testifying not only to "more generalized information to help jurors understand the significance" of a verified account in the context of these "case-specific facts…" and/or offering his "opinion about what those facts may mean…," but also *supplying* such "case-specific facts about which he ha[d] no personal knowledge." *Id.; see also Stamps,* 3 Cal.App.5th at p. 996. By permitting the detective to testify in this manner, the court failed to uphold its obligation to act "as a gatekeeper to exclude expert opinion testimony" which is not permitted under the law (*Sargon Enterprises, Inc. v. University of Southern California* (2012) 55 Cal.4th 747, 771) ensuring "unfounded [expert] opinions [are kept] from the jury" (*People v. Azcona* (2020) 58 Cal.App.5th 504, 513), and erred as a matter of law.

v. These Errors of Law Pertaining to the Evidence Introduced Through the Instagram Post Resulted in a Miscarriage of Justice.

As with the erroneous ruling on the People's discovery violation, the court's improper rulings in admitting the hearsay-ridden Instagram post via Detective Eberhardt's testimony also deprived Defendant of a fair trial and, therefore, amounted to a *per se* "miscarriage of justice." Therefore, Defendant must be afforded a new trial. *Sherrod,* 59 Cal.App.4th at p. 1174.

Even if the improper admission of the Instagram post and Detective Eberhardt's testimony on the same had not amounted to a deprivation of Defendant's fundamental rights, the post and detective's inadmissible testimony thereon were crucial to the People's case against Defendant. The prosecution relied on the post and the detective's testimony in making its case against

Defendant. (Dec. 21, 2022 Tr. 38-39.) The post was the *exclusive* evidence offered to show Defendant was carrying a concealed firearm in Count 2. The portion of the post from the "torylanez" account was introduced as an alleged admission that Defendant's own third-party culpability defense to Counts 1 and 4, assault with a semiautomatic firearm and negligent discharge of a firearm, respectively, was faulty. In allowing the post to be introduced mid-trial, Defendant was deprived of an opportunity to properly counter the post's contents. The jury was never provided an adequate limiting instruction. Accordingly, as with the discovery violation, it is also nonetheless "reasonably probable that a result more favorable to [Defendant] would have been reached …" but for the hearsay- and expert-based errors. *Watson*, 46 Cal.2d at p. 836; *Williams*, 13 Cal.3d at p. 563.

Assessed under the *per se* standard applied to erroneous rulings which deprive a defendant of a fair trial, or the prejudice standard outline in *Watson*, Defendant suffered a "miscarriage of justice" by the admission of the post and Detective Eberhardt's testimony, requiring he be afforded a new trial.

V. Improper Admission of Alleged Inculpatory Statements by the Defendant.

Inculpatory statements, which tended to incriminate Defendant as the shooter, were improperly introduced at trial, despite their factual falsity. On July 16, 2020, during an interview with Detective Ryan Stonger, Pete state that, following the shooting, Defendant exclaimed to her, "'please don't say anything because I'm on probation…[.]'" (Dec. 20, 2022 Tr. at 102, 128.) At trial, Pete testified that, after the shooting, Defendant said, "'I can't go to jail. I already got caught with a gun before. [¶] I can't go to jail no more. I'm already on probation.'" (Dec. 13, 2022 Tr. at 23-24.) However, a further investigation concluded that Defendant "was [not] on probation at the time the case was happening in July of 2020…," nor had he ever been convicted of a firearms

charge. Instead, he had been arrested in 2017 for a case that "resulted in diversion out of [Broward] County, Florida." (Dec. 20, 2022 Tr. at 102, 122-125, 128-129, 137-138.)

Testimony about a prior charged or uncharged offense has great potential to be "'highly inflammatory and prejudicial …' on the trier of fact" and the Supreme Court has "repeatedly warned that the admissibility of this type of evidence must be 'scrutinized with great care.'" *People v. Thompson* (1980) 27 Cal.3d 303, 314. Such testimony can lead a jury to conclude that a defendant is a person of "generally bad character" with a propensity to commit crimes (*People v. Sam* (1969) 71 Cal.2d 194, 206), and given the potentially damaging effect of this kind of evidence, it should not be admitted "[i]f the connection between the … offense and the ultimate fact in dispute is not clear…" (*Thompson*, 27 Cal.3d at p. 316). Although the introduction of evidence about a prior offense is proper if there is a direct relationship between that earlier offense and an element of the charged offense or fact at issue (*People v. Daniels* (1991) 52 Cal.3d 815, 857) it should be withheld if there is additional evidence that may be used to prove that same element or fact. *Thompson*, 27 Cal.3d at p. 318.

At trial, the defense elicited testimony from Detective Stonger regarding the disposition of Defendant's earlier interaction with the criminal justice system, during which he described investigating Defendant's background and learning that he was not, in fact, on probation, nor did he have any "information that [Defendant's] ever been on probation" at any time. (Dec. 20, 2022 Tr. at 102, 137.) Detective Stonger also testified on cross-examination that he had "run the defendant's RAP sheet" as part of his investigation, and it reflected he had "a criminal case that resulted in diversion out of [Broward] County, Florida in 2017." (Dec. 20, 2022 Tr. at 128-129, 137-138.) However, this testimony was insufficient to adequately minimize the blow imposed by the admission of Pete's statements. Pete's statements to police and testimony at trial wrongfully

painted Defendant as a gun-wielding career criminal despite their minimal value regarding whether he was the shooter in the case. Even if the People's version of events were to be accepted as true, their position amounts to what is more appropriately described as a singular incident of domestic violence between two feuding former paramours, not a criminal on a spree of gun violence.

By erroneously presenting Defendant in this false light, the evidence "'evoke[d] an emotional bias against [him]'" while also having "'very little effect on the issue[]'" of his guilt as to the charged offenses. *People v. Thomas* (2023) 14 Cal.5th 327, 363, quoting *People v. Williams* (2013) 58 Cal.4th 197, 270. The alleged inculpatory statements were not exclusively used to "'shore up'" the People's position or discredit Defendant. *Id.*, quoting *Doolin*, 45 Cal.4th at pp. 438-439. Instead, the evidence falsely placed Defendant in a light that played on the jury's feelings and the media's sensationalizing of the case, expanding it well beyond its actual domestic fact pattern. In *People v. Sam*, 71 Cal.2d 194, the Supreme Court warned against allowing the type of evidence of prior criminal acts introduced here because, in doing so, a court permits the prosecution "to place before the jury the largely irrelevant but manifestly harmful information … [through which] defendant was made to appear to be an antisocial individual of generally bad character, an immoral person unworthy of the jury's belief or consideration…[.]" *Id.* at p. 206. Rather, such information should be introduced only if the State can make "a substantial showing of [its] probative value" sufficient to "justify admission of [such] prejudicial and inflammatory evidence. Only then would the jury be able to "dispassionately perform its function of ascertaining the truth as to the events involved in *this* case." *Id.* No such probative value was present here, because the facts that the People sought to introduce were admissible through other evidence (*see*, e.g., Dec. 20, 2022 Tr. at 123-127, describing each of the different pieces of evidence the People sought to introduce to prove the same point). Moreover, the "connection between" Defendant's

alleged probation and firearm conviction in a different jurisdiction and the allegations that he was involved in a domestic dispute with Pete "is not clear" and certainly not direct evidence tending to prove the ultimate issues in this case. Therefore, the evidence should have been withheld by the Court. *Thompson*, 27 Cal.3d at pp. 316, 318.

By permitting these statements to be admitted at trial despite their patent untruth, the court abused its discretion to exclude evidence where its probative value was "substantially outweighed by the probability that its admission [would] … create [a] substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." Evi. Code § 352; *People v. Doolin* (2009) 45 Cal.4th 390, 438–439; *Thomas*, 14 Cal.5th at p. 363. This evidence resulted in the creation of jurors' "'emotional bias against'" Defendant. *Thomas*, 14 Cal.5th at p. 363. This erroneous ruling by the court deprived Defendant of a fair trial by an "unbiased…, unprejudiced…, [and] impartial jury." U.S. Const., amend. VI; Cal. Const., art. I, § 16; *see also* Cal. R. 4.30(b)(4). Therefore, it amounts to a *per se* "miscarriage of justice." *Sherrod*, 59 Cal.App.4th at p. 1174.

Assessment *Watson* requires the same conclusion. But for the admission of Pete's statements pertaining to Defendant's purported criminal history, which poisoned the jury to him, "it is reasonably probable that a result more favorable to [Defendant] would have been reached…[.]" *Williams*, 13 Cal.3d at p. 563. Under either standard, a new trial is warranted.

VI. Violation of Defendant's Right to Counsel.

From near the inception of Defendant's prosecution, he was represented by retained counsel, Shawn Holley, at least in part, for tactical reasons – she is a female attorney and he was facing charges alleging violence against a woman. On or around September 14, 2022, it was informally alleged by the People that Defendant, being aided and abetted by his defense team, had extended a bribe to Harris by way of financial and/or business benefits. When these allegations

came to light, Attorney Holley approached the prosecuting attorney, Kathy Ta, to express that the defense team was not involved in the alleged bribery, a position which the State apparently accepted as true at the time. Nonetheless, after representing Defendant for more than two years, twelve days prior to the start of trial, Attorney Holley stepped back in her role as primary counsel for Defendant. Secondary counsel from the defense team, George Mgdesyan and Sarkis Manukyan, stepped into Attorney Holley's former role, diminishing the impact of Defendant's above-described tactical maneuver of having female representation.

Thereafter, the matter proceeded to trial with Attorney Holley still on the larger defense team. Midtrial, on December 14, 2022, Harris was called as a prosecution witness and when the People indicated their intent to pursue additional witness tampering charges against Defendant, a sealed, sidebar hearing ensued. During this sidebar testimony, Harris claimed that Defendant "tried to offer [her] some favors in exchange for [her] not talking...," including "offer[ing] to hire an attorney for [her]." (Dec. 14, 2022 Tr. at 46.) She further claimed Defendant "kept asking what else [she] want[ed]..., what do you want to do..., what do you want to invest in...," and "offer[ed] to invest in her business." (Dec. 14, 2022 Tr. at 102, 104.) Despite Harris' erratic and inconsistent answers and the People's earlier position that they did not believe Attorney Holley to be involved in this purported bribery scheme, the People asked Harris, on the record, "And then, he told you his attorney, Shawn Holley, advised him to word [such inquiries] that way?" referencing her purported earlier statement. (Dec. 14, 2022 Tr. at 102.) Throughout the remainder of these proceedings, Attorney Holley was twice more referenced by name in connection with the alleged "investment plan." (Dec. 14, 2022 Tr. at 104-105.)

At that point, and mid-trial, Attorney Holley found it necessary to fully withdraw from her representation of Defendant. This left Defendant with two male attorneys, Mgdesyan and Manukyan, as his primary representatives, fully eradicating his tactics-based representation plan.

Claims pertaining to violation of a defendant's right to counsel fall within the purview of constitutional "miscarriage of justice" claims. *Fosselman*, 33 Cal.3d at pp. 582-583; *see also* Cal. Const., art. I, § 15; U.S. Const., amend. XI. As stated by the Supreme Court in *Fosselman,* because Section 1181 is "not [to] be read [as] limit[ing] the constitutional duty of trial courts to ensure that defendants be accorded due process of law…," and "[t]he Legislature has no power … to limit this constitutional obligation by statute…," "[i]f the court is able to determine [an] effectiveness issue on … [a] motion [for new trial], it should do so." *Id.* at pp. 582-583 (Internal citations omitted.) In fact, it has been observed "that trial judges are particularly well suited to observe courtroom performance and to rule on the adequacy of counsel in criminal cases tried before them." *Id.* at p. 582, citing *McMann v. Richardson* (1970) 397 U.S. 759, 771.

A. The Prosecution Prejudicially Interfered with Defendant's Right to Counsel.

Both the United States and California constitutions verify that a defendant in a criminal proceeding has a right to the assistance of counsel. U.S. Const., amend. VI; Cal. Const., art. I, § 15; *see also Doolin,* 45 Cal.4th at p. 417. This constitutional guarantee encompasses "the right to select and be represented by one's preferred attorney…[,]" not just any attorney. *Wheat v. United States* (1988) 486 U.S. 153, 159; *see also Powell v. Alabama* (1932) 287 U.S. 45, 53 ("[T]he right to counsel being conceded, a defendant should be afforded a fair opportunity to secure counsel of his own choice."); *People v. Lara* (2001) 86 Cal.App.4th 139, 152 (California law likewise provides that "[a] defendant has a constitutional and statutory right to counsel of his choice…[.]"); *People v. Ramirez* (2006) 39 Cal.4th 398, 422, 424 (same).

Of course, the prosecution may not interfere with a defendant's constitutional rights, inclusive of his right to counsel of his choosing. *Illinois v. Perkins* (1990) 496 U.S. 292, 299. This includes a mandate that the People not, without foundation, "include[] [defense counsel] as an additional villain" in their claims regarding a defendant's purported undesirable or criminal behavior. *People v. Turner* (1983) 145 Cal.App.3d 658, 674.[9] The State may not, "through careful use of words..., label[] defense counsel as an additional [perpetrator] in a prosecution of a[n] ... offense[.]" *Id.* Specifically, "'a *personal attack* on counsel's integrity'" which is "pervasive and egregious" is the type of impermissible commentary which will be deemed to require vacatur of a conviction, as it equates to an "obvious[]" and impermissible attempt at "casting aspersions on both [the defendant's] constitutional right to defend himself and his right to be represented by counsel." *People v. Taylor* (2001) 26 Cal.4th 1155, 1166-1167 ("remarks constitut[ing] an attack on the credibility and integrity of defense lawyers generally" are not sufficiently harmful to warrant such relief; italics added & citations omitted); *Turner,* 145 Cal.App.3d at p. 674 (citations omitted).

In the instant matter, despite their plain acknowledgement that Attorney Holley was not involved in the alleged bribery of Harris months earlier in September 2022, the People nonetheless opted to wait until midtrial to raise the exact same allegations against counsel, relying on nothing more than Harris' same inconsistent statements dating back to September. When their initial reliance on this unfounded information put defense counsel on guard, the People opted to lull her into a false sense of security by deceptively assuring her they did not believe her to be involved. Nonetheless, their "'personal attacks'" on Attorney Holley's "'integrity'" which painted her as an

[9] Disapproved on other grounds in *People v. Newman* (1999) 21 Cal.4th 413, 415.

"additional villain" or cohort to Defendant's alleged bribery. *Taylor,* 26 Cal.4th at pp. 1166-1167; *Turner,* 145 Cal.App.3d at p. 674.

Moreover, these claims were not merely "'personal'" in nature. They became both "'pervasive and egregious'" when the People opted, midtrial and without any further support for their unfounded claims, to raise these allegations a second time, this time before the court, leaving counsel with no choice but to disengage fully lest her presence harm her client. *Taylor,* 26 Cal.4th at p. 1167.

The prosecution's meddling with Attorney Holley's representation of Defendant resulted in him being deprived of his right to counsel of his choice. *Wheat*, 486 U.S. at p. 159. Further, such conduct was sufficiently prejudicial to warrant a new trial, as such behavior resulted in unexpected midtrial shifts in representation interrupting the cohesiveness of the defense, as well as recusal of his tactically advantageous female counsel before the jury and without explanation, factors which unquestionably could have "contributed materially to the verdict." *Wagner,* 13 Cal.3d at p. 621; *Muhlner*, 115 Cal. at p. 306; Pen. Code § 1181(5).

B. The Prosecutor's Actions Deprived Defendant of Conflict-Free Counsel..

Further, while the defendant unequivocally has the above-described right to counsel of his choosing, above all else, "the essential aim of the [Sixth] Amendment is to guarantee an *effective advocate for each criminal defendant*...[.]" *Wheat,* 486 U.S. at p. 159 (Italics added.) Effective advocacy requires representation "unhindered by a conflict of interests." *Holloway v. Arkansas* (1978) 435 U.S. 475, 483, n. 5; *People v. Rices* (2017) 4 Cal.5th 49, 65 (representation must be "'free from any conflict of interest that undermines counsel's loyalty to his or her client'"). "As a general proposition, such conflicts 'embrace all situations in which an attorney's loyalty to, or efforts on behalf of, a client are threatened by ... his own interests'" (*Doolin,* 45 Cal.4th at p. 417)

and is extended to all counsel, including retained representation (*People v. Bonin* (1989) 47 Cal.3d 808, 834). *See also People v. Mai* (2013) 57 Cal. 4th 986, 1009, citing *Glasser v. United States* (1942) 315 U.S. 60, 69-70.

There will be "no trouble concluding there was a conflict of interest that was real, not theoretical..." when, "trial counsel in a criminal case ... is worried that the prosecutor is scrutinizing his or her actions for possible criminal investigation and/or prosecution has a conflict of interest with representing the client zealously – he or she does not want to antagonize the prosecutor." *People v. Almanza* (2015) 233 Cal.App.4th 990, 1002.

Further, while "California courts have held that a defendant, upon *proper advisement*, may waive his right to retain counsel free from conflict of interest [citations]...," "[waivers] of constitutional rights must, of course, be 'knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences.' [Citation.]" *Alcocer v. Superior Court* (1988) 206 Cal.App.3d 951, 961. "One may waive only those rights of which he is aware, and cannot waive those of which he is ignorant." *Id.*, citing *In re Thomas S.* (1981) 124 Cal.App.3d 934, 939.

Trial court judges are not always in a position to see and predict actual conflicts that might arise at trial in "the murkier pre-trial context when relationships between parties are seen through a glass, darkly...[.]" *Wheat*, 486 U.S. at p. 162. As stated in *Alcocer v. Superior Court* (1988) 206 Cal.App.3d 951, 960, "Before the trial begins, the court may not be in the best position to evaluate the prejudicial consequences of a conflict." Therefore, parties must be on the lookout for and act proactively in response to such issues.

Here, the People were investigating and/or may have suspected Attorney Holley's involvement with the bribery allegations against her client in September 2022, but District

Attorney Ta disingenuously represented to counsel that she disbelieved the allegations. However, behind the scenes, "the prosecutor [continued] scrutinizing … her actions [in representing Defendant] for possible criminal investigation and/or prosecution…[,]" as shown by the People's later actions at trial. *Almanza*, 233 Cal.App.4th at p. 1002. Therefore, unbeknownst to Attorney Holley, a "real" "conflict of interest" which would ultimately preclude her from "representing [Defendant] zealously" because she had her own "legal…, professional…., [and] personal [interests]" in not "antagoniz[ing] the prosecutor" was brewing. *Id.* The People, knowing defense counsel's own well-curated professional reputation and that challenging her integrity stood not only to desecrate such reputation, but also place her ethical obligations and good standing with the State Bar in jeopardy, in reraising these contentions at trial, placed Attorney Holley in a position to have to withdraw from representation, or risk wrongfully placing her own interests threatened those of her client. *Doolin*, 45 Cal.4th at p. 417. The timing of this maneuver was tactical and conformed with the People's ambushing tactics observed throughout the proceedings: though they knew of their suspicions prior to trial, they kept them quiet. The court was not not privy to such concerns at that juncture, only learning of the same when it was too late – midtrial. *Wheat*, 486 U.S. at p. 162; *Alcocer*, 206 Cal.App.3d at p. 960; *Maxwell*, 30 Cal.3d at p. 620, fn. 12.

Defendant's right to conflict-free representation was therefore hindered when the People placed Attorney Holley in a position to choose between her interest in and loyalty to herself and her professional reputation, and her loyalty to her client. *Holloway*, 435 U.S. at p. 483, n. 5; *Rices*, 4 Cal.5th at p. 65. He could not adequately waive such conflict of which he was unaware (*Alcocer*, 206 Cal.App.3d at p. 961), and the court could not warn him of the same, due to its own ignorance of the issues (*Id.* at p. 960; *Wheat*, 486 U.S. at p. 162).

For the same reasons discussed above, i.e., the unexplained and last-minute shifts in representation, many of which occurred before the jury's very eyes, and which caused a lack of continuity and consistency in the defense, "it is reasonably probable that a result more favorable to the [defendant] would have been reached in the absence of the error...," requiring a new trial be ordered. *Williams*, 13 Cal.3d at p. 563; *see also Fosselman*, 33 Cal.3d at pp. 582-583.

VII. The DNA Evidence Admitted Against Defendant Failed to Comport with Industry-Accepted Standards in Violation of Defendant's Due Process Rights and Resulting in a Miscarriage of Justice.

At trial, the People introduced evidence that Defendant "could not be excluded" as a contributor to the DNA evidence collected from the firearm recovered in the SUV, though his profile was conclusively excluded as being present on the magazine. (Dec. 15-16, 2022 Tr. at 107-109.) Specifically, the prosecution expert, LAPD Criminalist Randy Zepeda, testified that "the DNA profile of the swab of the handgun ... was a mixture of at least four individuals, including at least one male..., [with] mixture proportions of 90 percent, 5 percent, 3 percent and 2 percent." "For the 90 percent contributor..., that's an unknown male, male one, so it's definitely not Mr. Peterson." As to the other profiles, the expert testified "the contribution of Mr. Daystar Peterson" was "inconclusive..., [¶] the statistics don't support inclusion or exclusion. That's just a neutral result." (Dec. 15-16, 2022 Tr. at 109.) However, the People pushed the issue further, attempting to stretch the expert's words in asking, "So Mr. Peterson can't be excluded as one of those individuals?" to which Criminalist Zepeda replied, "He can't be excluded or included. It's inconclusive. I can't really say anything as to his inclusion." (Dec. 15-16, 2022 Tr. at 109-110.) When asked on cross-examination, "Can you sit here and say [Defendant's] DNA is on the gun?" the criminalist replied, "No, it's an inclusive result, so I'm not making any conclusions as to his inclusion or exclusion." However, when further asked, "But because you can't give us any

conclusions, it's fair to say he is excluded, correct?" he again responded, "No, it's a neutral result. He's not included or excluded." (Dec. 15-16, 2022 Tr. at 115.) Based on the results of the analysis, he stated his conclusions another way: he was unable to say "that [Defendant] touched th[e] gun" or that "Defendant did not touch or handle th[e] gun…[.]" (Dec. 15-16, 2022 Tr. at 115-116, 118.) On recall, he once again testified that he was unable to say "Mr. Peterson's DNA was not on the gun…[;] [i]t was an inconclusive result, meaning that … it was basically neutral…, [he] couldn't say that he was included … [nor] excluded from the handgun." (Dec. 20, 2022 Tr. at 145, 154-155.)

When asked to further describe the nature of his analysis, the State's DNA expert described their STRmix method as comparative, stating "[his] job is just to make comparisons." (Dec. 15-16, 2022 Tr. at 103, 117.) However, the DNA on the firearm and magazine, notably and questionably, was not compared to *any other* persons in the vehicle at the time of the shooting; Criminalist Zepeda also indicated he did not have comparison swabs for anyone other than Defendant in this case, and specifically not for Harris, so the expert did not "know if Ms. Harris' DNA [was] on the magazine or the gun[.]" (Dec. 15-16, 2022 Tr. at 118.)

The defense called their own DNA expert, Marc Scott Taylor, a forensic scientist affiliated with the non-accredited Technical Associates, Inc. (Dec. 15-16, 2022 Tr. at 120, 149.) He agreed that, with regard to the DNA evidence on the gun, he could not "exclude Mr. Peterson" but there was also no "evidence … that Mr. Peterson touched the gun…." and when asked, if Defendant's "DNA [was] on the gun," he unequivocally answered, "Not that we can tell, no[.]" He similarly testified that "it would be surprising [to him] if [Defendant] handled [the gun] and his DNA [was] not on it," and the results in the case "literally mean[] that we can say nothing about whether his DNA is[, in fact,] present," a conclusion he opined did not inherently differ from that of the State's

expert. He did, however, note that it would have been the standard practice, "[i]n a case like this, where there's a shooting [and] there may be some confusion..., to collect [a DNA sample] from everybody that's there..., that had an opportunity to hold the gun, to shoot the gun." However, Mr. Scott failed to ever memorialize any of these findings in any formal report or documentary form. (Dec. 15-16, 2022 Tr. at 136, 140-141, 160-161, 167-169.)

That Defendant's profile was unable to be excluded was critical to the People's case against him, as there were many conflicting versions of events and issues regarding both ownership and who discharged the firearm, as discussed at more length above. Specifically, they stated in their opening argument, "importantly, the defendant could not be excluded" as one of the four profiles found on the gun, "[he] could not be excluded as one of those people." (Dec. 15-16, 2022 Tr. at 12-13.) The People reiterated this position in their closing, expressing, as to the gun, "[t]he defendant's results were inconclusive. [...] [When he] asked the expert, if the defense attorney ... argues to [the] jury, 'my client's DNA was not on that gun,' would that be an accurate statement? No. [¶] Do not be fooled by that argument. It's not accurate. He can't be included or excluded. [¶] His DNA very well may be on that gun. We just don't know. But he cannot say that it wasn't, okay. That's really important. He cannot say that his DNA was not on the gun." "My expert, the expert from the accredited lab, said that if you fire a gun you may see DNA. You may not. We just don't know. [¶] But don't be fooled by an argument that the defendant's DNA was not on the gun, because that's just not accurate. And we're seen attempts to mislead you. And I don't want that to happen again. That is not accurate." (Dec. 21, 2022 Tr. at 36-38.)

A. The Expert Testimony Offered at Defendant's Trial Did Not Comply With Industry-Accepted Reporting Standards.

The "STRmix™ methodology" used in this case "is a method of deoxyribonucleic acid (DNA) analysis." *People v. Davis* (2022) 75 Cal.App.5th 694, 700. It is "probabilistic genotyping software that employs a continuous model of DNA profile interpretation..." which has been validated "for the interpretation of single source and mixed DNA profiles."[10] A "mixed sample" DNA profile is one that indicates "the presence of DNA from more than one individual....,"[11] and "any [mixed] profile with three or more donors" is defined as a "complex mixture."[12] "DNA mixture vary in complexity" and, specifically regarding the number of contributors to a sample, "mixture complexity increases as the number of contributors increases."[13]

"The basic science behind DNA testing has long been accepted in court. 'It has now been over 20 years [now 30 years] since DNA evidence was first approved by a California appellate court to prove identity in a criminal case.' [Citations.]" *People v. Cordova* (2015) 62 Cal.4th 104, 128. DNA testing kits "all use the same basic methodology, specifically, polymerase chain reaction (PCR), which was developed in the 1980's. The methodology examines places on the DNA strand called short tandem repeats (STRs)." *People v. Cordova* (2015) 62 Cal.4th 104, 125-126; *see*

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[10] Bright, J., et al. (2016) Developmental validation of STRmix, expert software for the interpretation of forensic DNA profiles. *Forensic Science International: Genetics*, 23, 226-239.

[11] *Ibid.*

[12] Update on STRmix research in response to PCAST (2017) *STRmix: Empowering Forensic Science*, retrieved Mar. 13, 2023 from https://www.strmix.com/news/update-on-strmix-research-in-response-to-pcast/?acceptCookies=63ffae4846183.

See also Butler, J.M., et al. (June 2021) DNA Mixture Interpretation: A NIST Scientific Foundation Review. *U.S. Department of Commerce's National Institute of Standards and Technology*, https://doi.org/10.6028/NIST.IR.8351-draft ("complex mixtures" include "profiles with three or more contributors").

[13] Butler, *supra*, DNA Mixture Interpretation.

also District Attorney's Office v. Osborne (2009) 557 U.S. 52, 62 (since "the mid-1980[']s, there have been several major advances in DNA technology, culminating in STR technology").[14] "But DNA testing is continually being improved. '[T]he scientific methodology, while fundamentally the same, has become more refined and sophisticated.' [Citation.]" ... [Today,] [n]either the use of PCR ... nor STR technology to analyze mixed-source forensic samples [can be described as] new scientific technique[s].'" *People v. Cordova* (2015) 62 Cal.4th 104, 128, referring to *People v. Axell* (1991) 235 Cal.App.3d 836; *see also People v. Hill* (2001) 89 Cal.App.4th 48, 57 (the PCR methodologies, including the STR subtype, have acquired general acceptance in the scientific community); *People v. Davis* (2022) 75 Cal.App.5th 694, 717 ("[S]cientific and mathematical principles behind STRmix are well established and widely accepted in the scientific community, and STRmix has been the subject of numerous peer-reviewed articles published in scientific journals.")

However, this does not mean DNA analysis is not without its faults or errors, nor that it is immune from undue manipulation or the error of human interpretation. This is especially true in the case of "mixed samples," which complicate the "[i]nterpretation of DNA profiles"[15] due to the "ambiguity" intrinsically present in mixtures.[16] "DNA samples are not equal in complexity and some are more difficult to analyze than others," with "the number of contributors [and] mixture rations" being two factors "influencing the complexity," rendering "interpretation inherently more challenging than examining single-source samples" and can generate "issues [which], if not

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[14] *See also ibid.* ("Since its introduction in the mid-1980s (Gill et al. 1985), DNA testing has been an important resource to forensic science and the criminal justice system."); Dec. 15-16, 2022 Tr. at p. 103.

[15] Bright, *supra,* Developmental validation of STRmix.

[16] Butler, *supra,* DNA Mixture Interpretation.

properly considered and communicated, can lead to misunderstandings regarding the strength and relevance of DNA evidence in a case." "[T]he more complex the sample, the greater the uncertainty surrounding interpretation."[17]

Therefore, "[w]hen the evidence profile originates from a single individual, the weight of evidence can be presented as a match probability...," i.e., reaching one of "three primary conclusions...: *cannot exclude* (or *inclusion*), *can exclude*, or *inconclusive* which is sometimes also called *uninterpretable*...[.]" which should, nonetheless, preferably be supported by "the associated statistical weight."[18] However, where review must be "extended to ... mixed DNA profiles...," an "alternative to ... match probability" must be applied: "the likelihood ratio (*LR*)."[19] The *LR* "appears in many fields of ... science" and is widely accepted as "a standard measure of information."[20] In the field of forensic DNA analysis, "[t]he *LR* considers the probability of obtaining the evidence profile(s) given two competing propositions[.]"[21] It is "the only method recommended by the International Society for Forensic Genetics (ISFG)" – whose published recommendations are deemed by experts in the field as the "core fundamental principles for working with DNA mixtures"[22] – for ambiguous profiles. Ambiguous profiles include *all* mixtures[.]"[23] In fact, per ISFG, inclusion- or exclusion-based interpretation methods must be

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[17] *Ibid.*

[18] Bright, *supra,* Developmental validation of STRmix (Emphasis in original.)

[19] *Ibid.*

[20] Perlin, M.W. (2010) Explaining the likelihood ratio in DNA mixture interpretation in the Proceedings of Promega's Twenty First International Symposium on Human Identification. San Antonio, TX.

[21] Bright, J., *supra,* Developmental validation of STRmix.

[22] Butler, *supra,* DNA Mixture Interpretation.

[23] Bright, J., *supra,* Developmental validation of STRmix (Italics added.).

expressly "restricted to DNA profiles where the profiles are unambiguous."[24] The use of *LR* interpretation, and its "good legal and scientific standing," ensures "forensic science's credibility in court." "Without a likelihood ratio, highly informative DNA can be misreported. For example, one might incorrectly state that such evidence is inconclusive[.]"[25]

STRmix permits for a "likelihood ratio [to be] calculated" where "a reference profile is available from a person of interest."[26] It "assesses the evidential support for the identification hypothesis that a suspect contributed their DNA to the biological evidence."[27] In doing so, it compares "all members of the population, including possible relatives of the [person of interest] … by taking into account their prior probabilities based on population properties."[28] Analysis under *LR* attaches a numerical value to the possibility of a match, not a qualitative, comparative conclusion. It "summarizes in a single number the data support for a hypothesis…," "accounting for all of the evidence in favor of or against a particular hypothesis [] or proposition[.]" For purposes of forensic science, an *LR*-based conclusion would presented as, e.g., "it is a billion times more probable that the defendant contributed to the DNA than that it was a coincidental match to an unrelated black man" or "it is equally likely that the defendant contributed to the DNA as it is that it was a coincidental match to an unrelated black man."[29] Conversely, the inclusion, exclusion, or inconclusive direct comparison method of interpretation "does not include a statistical

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[24] Butler, *supra,* DNA Mixture Interpretation, citing ISFG 2006 Recommendations on DNA Mixture Interpretation.

[25] Perlin, *supra,* Explaining the likelihood ratio in DNA mixture interpretation.

[26] Bright, *supra,* Developmental validation of STRmix.

[27] Perlin, *supra,* Explaining the likelihood ratio in DNA mixture interpretation.

[28] Bright, *supra,* Developmental validation of STRmix.

[29] Perlin, *supra,* Explaining the likelihood ratio in DNA mixture interpretation.

evaluation of the strength of the evidence...," but rather an unsophisticated and oftentimes misleading "'yes' or 'no'" type response.[30]

The evidence in the present case was processed and manipulated in a way to specifically allow for the conclusion the State desired – that it could not be said that Defendant's DNA was not on the gun. (Dec. 21, 2022 Tr. at 36-38.) The State's expert testified in overly simplistic, non-quantative terms which failed to accurately portray the meaning behind the evidence to the jury, in a manner that permitted the People to present the evidence as being heavily inculpatory as to Defendant. However, under the above industrywide accepted standards, this plainly amounts to an erroneous conclusion. Contrary to the prosecution's position, analysis under the appropriate and established quantative standards would have shown that Defendant was no more likely than most other black men in the population to have been a contributor to the profile. It was inappropriate for any comparative and qualitative conclusions to have been reached based on the evidence available to the State's experts.

Even if it were permissible for the State's expert to have drawn its match probability conclusion herein, its "exclusion" or "inclusion" language used in doing so was lab-specific, a distinction that was never made for the jury and which, either way, resulted in further an undue lack of clarity regarding the realistic bounds of the conclusions reachable through the DNA evidence present in this case.[31] The process of DNA analysis "can be divided into two parts...: (1) *measurement* that involves a series of steps to generate a DNA profiles and (2) *interpretation* of

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[30] Bright, *supra,* Developmental validation of STRmix.

[31] *See,* e.g., The Guidance Document for the FBI Quality Assurance Standards for Forensic DNA Testing and DNA Databasing Laboratories. *Scientific Working Group on DNA Analysis Methods* (*SWGDAM*), eff. Jul. 1, 2020 & rev. Jan. 1, 2023 (Forensic Standard 11.2.6: The use of ... attribution statements for inclusions (e.g., match, consistent with, cannot be excluded) will be defined by the laboratory.")

the DNA profiled to help fact finders understand the value of the evidence." While the above-described "[m]easurements reflect the physical properties of the sample..., *interpretation* depends on the DNA analyst assigning values that are not inherent to the sample."[32] Such "[m]anual techniques for DNA profile interpretation are heuristically based and may be difficult to apply consistently between laboratories, individual scientists and even a single scientist."[33] The analyst's "interpretations are based on case context and their own training and experience." Such "interpretation of the same evidence may vary from person to person [and] ... is described as an opinion. [Citation.]"[34] Without fully understanding the context of the State's expert's analysis of the DNA evidence, the jurors could not possibly have weighed it properly. *See*, e.g., *Venegas*, 18 Cal.4th at p. 80.

B. The Problematic Processing of the DNA Evidence in Defendant's Case.

Even further issues are presented herein regarding the manner in which the DNA was manipulated in the instant case, being subjected to enhanced detection methods beyond the standard methods ordinarily applied. When enhanced detection methods are used, as they were here, "the potential for stochastic effects...," which make it "more difficult to confidently interpret the resulting DNA profile," "may increase."[35] In particular, "[m]ixed DNA samples ... with a significant difference in the ratio of components should be examined and interpreted carefully since the major component may be enhanced above its optimum level of interpretation."[36] Because

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[32] Butler, *supra*, DNA Mixture Interpretation.

[33] Bright, *supra*, Developmental validation of STRmix.

[34] Butler, *supra*, DNA Mixture Interpretation.

[35] *Ibid.; see also* SWGDAM Guidelines for STR Enhanced Detection Methods. *SWGDAM*, eff. Oct. 16, 2014.

[36] SWGDAM Guidelines for STR Enhanced Detection Methods.

"DNA tests performed on a … compromised sample cannot be used reliably to identify or eliminate an individual as the perpetrator of a crime…,"[37] the People's reliance on the overprocessed evidence in the instant case was erroneous. A case from the North Carolina Court of Appeals is instructive on this point. In *State v. Phillips* (2019) 268 N.C. App. 623, a multi-source DNA sample was manipulated to make "'billions and billions and billions of copies' … to improve visibility" of the sample. *Id.* at p. 627. A forensic biologist from the state crime lab then testified to the results of that processing including "describing the alleles of the minor contributor." *Id.* at p. 636. This testimony was found to have been erroneously admitted because it was "neither 'based upon sufficient facts or data' nor 'the product of reliable principles and methods." *Id.* The North Carolina court concluded that, "[a] reasonable possibility exists that, had the erroneous testimony not be admitted, a different result would have been reached at trial" and ordered the cause set for a new trial. 268 N.C. App. at p. 641. The same conclusion and outcome must be reached in this case.

Applying accepted scientific standards for complex mixed profile DNA samples to the instant case, the LAPD's November 24, 2021 Laboratory Report summarizing the testing of the DNA samples collected from the firearm and magazine against Defendant's profile. It described its lab standards as follows: The *LR* is measured on a scale of 0 to 1,000,000, with lesser numbers supporting the conclusion that Defendant's DNA was not present on the gun, and greater numbers supporting the conclusion that his DNA was present. More specifically, the report explained that "*LR*s less than .01 (including zero) are deemed exclusionary," meaning Defendant's DNA was not on the gun. "*LR*s from 0.1 to less than 1 provide limited support for exclusion of an individual to

[37] Strengthening Forensic Science in the United Sates (2009) *National Research Council's Committee on Identifying the Needs of the Forensic Sciences Community*, at p. 9.

a sample" and "indicate a degree of support" for the conclusion that Defendant's DNA was not present on the gun. Where "*LR* equals 1," the result is deemed "uninformative," meaning it "do[es] not support the inclusion or exclusion" of the Defendant to the gun sample. "*LR*s from 2 to 9,999 are considered inconclusive." "*LR*s with values greater than or equal to 10,000 provide support" for the conclusion that Defendant's DNA was present on the gun. The report indicated that it would not provide numerical values, before reaching its conclusion as to the Defendant's DNA on the gun, as follows: "The contribution of Daystar Peterson to the DNA mixture profile is inconclusive because the likelihood ratio was *uninformative*." (Italics added.) Per the report's own standards, "uninformative likelihood ratios" are those where the "LR equals 1." An LR ratio of 1 means it is equally likely the sample came from Defendant as it came from someone else in the identified control group.[38] This conclusion is reflected elsewhere in the documents submitted with report, specifically at the November 22, 2021 STRmix Interpretation Worksheet. In this Worksheet, the *LR* regarding Defendant's comparison to the gun was reported to be "1E2," or 100 ($1x10^2$). The same *LR*, 1E2, was reported across the stratified population. Therefore, it was determined equally likely a random member of the population was a contributor as it was that Defendant was a contributor. Notably, however, the African American control population had an *LR* of 3E2, or 300 ($3x10^2$), meaning it was marginally more likely a random member of the black community contributed to the mixture than that Defendant contributed thereto. While the Laboratory Report analyzing this data was disclosed in the pre-trial discovery phase, the STRmix Interpretation Worksheet was not part of the discovery turned over to the defense by the People. The defense only received the additional information immediately before trial and on the request of their DNA

[38] *See* The Evaluation of Forensic DNA Evidence: An Update. (1996) *National Research Council (U.S.) Committee on DNA Forensic Science,* National Academies Press (U.S.), Washington, D.C., 5: Statistical Issues.

expert. (Dec. 5, 2022 Tr. at 54-55.) Given the above information, this additional documentation was plainly material and exculpatory evidence within the meaning of *Brady v. Maryland* (1963) 373 U.S. 83, meaning the People were obligated to disclose it, even absent an explicit request by the defense for such evidence. *United States v. Bagley* (1985) 473 U.S. 667, 678; *In re Sassounian* (1995) 9 Cal.4th 535, 543.

Presenting the jury with the above-discussed numerical data would have significantly weakened the People's position and would have presented a far more accurate statement of what the evidence at issue was capable of showing: it was just as likely that a random member of the community contributed to the DNA profile on the gun, and even slightly *more* likely that a random member of the black community – of which Harris, Smith, and Pete were all members – had deposited DNA on the gun. Instead, however, the People presented the lab results in an unduly elusive manner, inherently suggesting the *LR* may be much more capable of supporting their conclusion that Defendant's DNA was present, while vehemently arguing that the defense could not argue the contrary, despite the fact that either supposition was equally possible, and per the *LR*, it was even more likely that the Defendant's position was the accurate one. By the People opting to stretch the conclusions capable of being reached regarding the DNA evidence as far as possible, so far as to be well in excess of accepted standards, the jurors were presented with evidence which was, at best, misleading. This issue was only magnified when the State's expert used manipulation tactics to reach this conclusion, as well as when they failed to express to the jury that their conclusions were limited to the lab's internal measures. Further, the defense expert on the issue of the DNA evidence failed to eradicate these issues with the prosecution expert's erroneous and overreaching conclusions. In fact, the defense expert was never asked to produce a report on the issue of DNA in advance of the trial, meaning there was no more dispositive *LR*-

based evidence on this issue capable of presentation to the jury to clarify the true weight of the DNA evidence on which the People heavily relied in securing their conviction against Defendant, nor did he present information to provide the jurors with an accurate understanding of the inherent limitations on what the People's expert had testified to.

C. The DNA Evidence Was Inadmissible.

"Given the particularly persuasive power of DNA evidence, trial courts must be vigilant to ensure that the proponent of such evidence has established its reliability." *People v. Jones* (2013) 57 Cal.4th 899, Liu, J. (concur. opn.), p. 985; *see also Oliver*, 46 Cal.App.3d at p. 751; *United States v. Williams* (N.D. Cal., 2019) 382 F.Supp.3d 928, 938 (where there are "too many reasons to question the reliability" of expert DNA testimony, the testimony must be deemed "not reliable" and "not admissible" by the court). The Supreme Court has long made clear that DNA evidence will be admissible where it is relevant to make an identification of a suspect, proper scientific procedures were used, *and* the probability of identification can be quantified. Evi. Code §§ 210, 352; *Venegas*, 18 Cal.4th at p. 82. Stating the final factor another way, the Second District expressed that, "a match between two DNA samples means little without data on probability…, [so] the calculation of statistical probability is an integral part of the process" of DNA analysis and interpretation. *Axell*, 235 Cal.App.3d at pp. 866-867. In fact, if the People wish to introduce DNA evidence that an individual has not been excluded as a contributor, the Supreme Court has identified the critical "question properly addressed by the DNA analysis" as follows: "Given that the suspect's known sample has satisfied the 'match criteria,' what is the probability that a person chosen at random from the relevant population would likewise have a DNA profile matching that of the evidentiary sample?" *Venegas*, 18 Cal.4th at pp. 63-64.

Herein, undoubtedly, the purpose of the State's introduction of the DNA evidence at issue was the "identification of a suspect" in the shooting of Pete. *Venegas*, 18 Cal.4th at p. 82. However, as to the second two *Venegas* factors, the utilization of proper scientific procedures and the quantification of the probability of identification, the State's evidence fell far short. *Id.* As discussed throughout, the People's expert opted to provide a comparative, qualitative analysis of the DNA evidence, expressing only that the profile for Defendant – which was compared to a small, complex mixed sample comprised of at least three other profiles, with each of the three possibly linked to Defendant comprising 5 percent or less to the overall mixture, and the "alleles overlap[ing] one another" – "could not be excluded...," or was "inconclusive." (Dec. 15-16, 2022 Tr. at 107-110, 115-116, 118, 134-136, 145, 154-155.) This is the exact type of conclusion that experts, including the ISFG, have admonished shall not be made on an ambiguous sample like the one at issue, lest the credibility of forensic science be eroded, e.g., by erroneous interpretations of inconclusiveness. Here, the use of this improper scientific procedure was only exacerbated by the increased risk for stochastic effects created by the use of enhanced detection methods. Therefore, this interpretation presented to the jury and relied upon by the People in their repeated conclusions that, "importantly, the defendant could not be excluded" as one of the several profiles found on the gun, lacked the degree of confidence necessary to reliably identify or eliminate Defendant as the shooter in the instant matter, and the expert's conclusions were plainly formed based on erroneous scientific standards. Moreover, despite the ready availability of *LR* results through STRmix analysis, the State's expert also declined to provide a quantified interpretation of the probability of identification in the instant matter, instead relying only the vague descriptions of non-exclusion and inconclusiveness. Without this information, the purported "match" relied upon

by the People "means little." *Axell*, 235 Cal.App.3d at pp. 866-867; *see also Venegas*, 18 Cal.4th at pp. 63-64.

D. The Erroneous Admission of the DNA Evidence Amounted to a Miscarriage of Justice.

As described by the California Constitution at Article VI, Section 13, the crux of an inquiry into the necessity of a new trial is whether the defendant has suffered a "miscarriage of justice." *See also Sherrod*, 59 Cal.App.4th at p. 1174.

The erroneous use of the DNA evidence in the instant case amounts to a due process violation, rendering it a *per se* miscarriage of justice. *Fosselman*, 33 Cal.3d at pp. 582-583, "The Fourteenth Amendment forbids 'fundamental unfairness in the use of evidence, whether true or false.' *Lisenba v. California*, 314 U.S. 219, 236. [...] As important as it is that persons who have committed crimes be convicted, there are considerations which transcend the question of guilt or innocence...," among them the right to a fair trial based on scientifically-sound evidence. *Blackburn v. Alabama* (1960) 361 U.S. 199, 206; *see also Chambers v. Mississippi* (1973) 410 U.S. 284 (due process requires "both fairness and reliability in the ascertainment of guilt and innocence"); *McDaniel v. Brown* (2010) 558 U.S. 120, 136 (DNA evidence is of the type which must be "presented in a fair and reliable manner" to comport with notions of due process). Therefore, not only may "a conviction predicated on ... tainted evidence []not be allowed to stand" as it amounts to a "miscarriage of justice" (*People v. Shirley* (1982) 31 Cal.3d 18, 70,[39] citing Cal. Const., art. VI, § 13), but if a conviction is secured through the People's presentation of evidence that was generated via the use of unfounded scientific principles and renders the trial "fundamentally unfair," a due process violation also exists. *People v. Partida* (2005) 37 Cal.4th

[39] Superseded by statute on other grounds as stated in *People v. Alexander* (2010) 49 Cal.4th 846, 881.

428, 439 (citations); *see also Jammal v. Van de Kamp* (9th Cir. 1991) 926 F.2d 918, 919; *People v. Collins* (1968) 68 Cal.2d 319 (describing that a defendant may be denied a fair trial due to the People's use of erroneous expert testimony); *People v. Pride* (1992) 3 Cal.4th 195, 242 (the same, referencing DNA evidence).

However, even if it does not amount to a violation of a constitutional magnitude, it is "reasonably probable that a result more favorable to the [defendant] would have been reached in the absence of the error[oneous]" admission of the DNA evidence in this case. *Watson,* 46 Cal.2d at p. 836; *Williams*, 13 Cal.3d at p. 563. In *People v. Collins,* 68 Cal.2d 319, the People presented expert testimony which failed to conform with accepted scientific principles. The evidence was deemed to have "distracted the jury from its proper and requisite function of weighing the evidence on the issue of guilt, encouraged the jurors to rely upon an engaging but logically irrelevant expert demonstration, foreclosed the possibility of an effective defense … and placed the jurors and defense counsel at a disadvantage in sifting relevant fact from inapplicable theory." 68 Cal.2d at p. 327. It was further found that "the technique employed by the prosecutor … lead to wild conjecture … [and] the prosecutor[] subsequent[ly] utilize[ed]" such erroneous expert testimony to support their argument for convicting of the defendant, leaving the "jurors … unduly impressed by the mystique of the [technical and scientific expert testimony] but … unable to assess its relevancy or value." *Id.* at pp. 329, 332. The Supreme Court, expressing "strong feelings that such [expert testimony], particularly in a criminal case, must be critically examined in view of the substantial unfairness to a defendant which may result from ill-conceived techniques with which the trier of fact is not technically equipped to cope … [citation]" and considering "the entire cause…," concluded it was "reasonably probable that a result more favorable to defendant would have been reached in the absence of the … error[.] [Citation.]" *Id.* at pp. 332-333; *see also,* e.g.,

Rayner v. Superintendent of SCI Forest (3rd. Cir., Feb. 1, 2023, No. 21-3230) 2023 U.S. App. LEXIS 2526, at *4 (a verdict reliant upon a mixed DNA sample which could have been left on the object at any time was erroneously premised on "pure speculation"). Because here, like in *Collins,* "the expert's deduction was not based on statistical data derived from [accepted] scientific research, but on ... theory unsupported by [reliable] evidence..." (*People v. Fierro* (1991) 1 Cal.4th 173, 216), the same result must be reached.

This result is only further clarified by consideration of the fact that DNA analysis and interpretation errors are particularly prejudicial not only because of the State's profound reliance on their manipulated interpretation of the evidence on the firearm, but also because jurors consider DNA evidence to be the "gold standard" of forensic science given its generally reduced susceptibility to human interpretational error, a fact known to the Court and parties alike. As described by the Supreme Court in *People v. Venegas* (1998) 18 Cal.4th 47, juries tend to exhibit an "uncritical acceptance of scientific evidence or technology that is so foreign to everyday experience as to be unusually difficult for laypersons to evaluate [citation]" and "[i]n most other instances..., jurors are permitted to rely on their own common sense and good judgment in evaluating the weight of the evidence presented to them. [Citations.] DNA evidence is different. Unlike [other forensic evidence], which jurors essentially can see for themselves, questions concerning whether a laboratory has adopted correct, scientifically accepted procedures for ... determining a match depend almost entirely on the technical interpretations of experts. [Citation.]" *Id.* at pp. 80-81. Therefore, that despite that the *LR* is the appropriate measure for "mixed profile" analyses, "American crime labs [often] avoid the *LR*, and prefer to report DNA inclusion statistics

that they find easier to explain in court...,"[40] such *LR* testimony is absolutely necessary to avoid the critical issue of overstating – or understating – the evidence to the jury who is relying on the veracity of such expert interpretations.[41] While, of course, no misleading evidence should be presented to the jury, if *any* misleading evidence is presented, it certainly should not be DNA evidence given the high value placed upon it by jurors, as occurred in the instant matter. As stated by the United States Supreme Court in *McDaniel v. Brown,* 558 U.S. 120 at page 136, "given the persuasiveness of [DNA] evidence in the eyes of the jury, it is important that it be presented in a fair and reliable manner." Accordingly, the use of the DNA evidence in this case unduly prejudicial.

Accordingly, because the DNA conclusions presented to the jury extended far beyond what should have been presented under sound scientific principles, and because, in fact, no qualitative comparison should have been made at all, especially one only capable of being reached after the sample underwent heavy manipulation tactics, the admission of and People's substantial reliance on this evidence amounted to a "miscarriage of justice" under either standard, requiring this motion for new trial be granted, as it is both "reasonably probable that a result more favorable to the [defendant] would have been reached in the absence of the error" (*Whittington*, 74 Cal.App.3d at p. 821, fn. 7; *Williams*, 13 Cal.3d at p. 563), and that Defendant was denied a "fair and impartial trial" as a result of such error (*Oliver*, 46 Cal.App.3d at p. 751).

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[40] Perlin, *supra,* Explaining the likelihood ratio in DNA mixture interpretation.

[41] Bright, *supra,* Developmental validation of STRmix.

See also Butler, *supra,* DNA Mixture Interpretation ("Even if the legal system does not implicitly appear to support the use of the likelihood ratio, it is recommended that the scientist is trained in the methodology and routinely uses it in case notes, advising the court in the preferred method before reporting the evidence in line with the court requirements. The scientific community has a responsibility to support improvement of standards of scientific reasoning in the courtroom.")

VIII. Evidence of Defendant's Creative Expression Was Improperly Used Against Him At Trial, Depriving Him of the Safeguards Prescribed by Recently Added Evidence Code § 352.2.

On January 1, 2023, Assembly Bill No. 2799 (Stats. 2022, ch. 973), also known as the Decriminalizing Artistic Expression Act, took effect. The Act limits the use of creative expression as evidence in criminal cases. As emphasized in the comments to the Assembly Bill Analysis, "*rap lyrics* and other *creative expressions* get used as '*racialized character evidence*: details or personal traits prosecutors use in insidious ways playing up racial stereotypes to imply guilt.'" *Venable,* 88 Cal.App.5th at p. 454.[42] The legislative intent behind AB 2799 was, *inter alia,* to "provide a framework by which courts can ensure that the use of an accused person's creative expression will not be used to introduce stereotypes or activate bias against the defendant, nor as character or propensity evidence." (Stats. 2022, ch. 973, § 1, subd. (a)) (AB 2799). Defendant was convicted just nine days before AB 2799 took effect. Yet he was deprived of the due process safeguards afforded by California's new law – a fair trial free from unfair prejudice, racial bias, and improper consideration of criminal propensity based on his "gangster" rapper persona, i.e., his creative expression.

A. Newly Added Evidence Code § 352.2.

California's recent precedent-setting legislation, AB 2799, added section 352.2 to the California Evidence Code. (Stats. 2022, ch. 973, § 2). Before its enactment, evidence of creative expression was generally admissible under section 352, giving judges broad discretion to determine whether the evidence was unduly prejudicial. *See Venable,* 88 Cal.App.5th at p. 455. Now, Evidence Code § 352.2 provides a new, heightened standard, which "*requires* a trial judge"

[42] Citing Assem. Com. on Pub. Safety, Assembly Floor Concurrence Analyses on Assem. Bill No. 2799 (2021–2022 Reg. Sess.) as amended Aug. 9, 2022, p. 2 (quoting ERIK NIELSON & ANDREA L. DENNIS, RAP ON TRIAL: RACE, LYRICS, & GUILT IN AMERICA (The New Press 2019).)

to regard the probative value of such evidence as "*minimal* absent certain markers of truth,[43] and to consider that undue prejudice includes [but is not limited to] the possibility the evidence will [explicitly or implicitly] inject racial bias [into the proceedings] and be used to improperly indicate the defendant's propensity for violence [or general criminal disposition]." *Id.*, citing Evid. Code § 352.2 (Italics added.) The new law, therefore, makes it "more likely" that evidence of creative expression "will be excluded[.]" *Id.* at p. 455.

As of today, the Fourth District Court of Appeal's decision in *People v. Venable*, 88 Cal.App.5th 445, is the only published decision analyzing Evidence Code § 352.2's new standard. In *Venable*, the defendant argued on direct appeal, *inter alia*, that the trial court erred in admitting a rap video in which he appeared as evidence to prove his guilt. The Court of Appeal disagreed, finding that the trial court reasonably determined that the video was not unduly prejudicial under Evidence Code § 352. However, upon petition for review, the California Supreme Court transferred the matter back to the Court of Appeal "with directions to vacate its decision and reconsider the cause in light of Assembly Bill No. 2799 (Stats. 2022, ch. 973)." *People v. Venable* (Oct. 26, 2022, No. S276495) 2022 Cal. LEXIS 6564. On remand, the Court of Appeal reversed the defendant's conviction and remanded the case for a new trial because: (1) admission of the creative expression did not comply with the new requirements under Evidence Code § 352.2; (2) admission of the video without the new appropriate safeguards was prejudicial to the defendant because of its content (i.e., a group of predominantly black men, including the defendant, displaying gang signs, drugs, money, and guns); and (3) "the Legislature intended Evidence Code section 352.2 to apply

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[43] *See* Evid. Code § 352.2, subd. (a) (listing the additional factors and stating the trial court "*shall* consider, in addition to the factors listed in Section 352, that: (1) the probative value of such expression for its literal truth or as a truthful narrative is minimal unless that expression is created near in time to the charged crime or crimes, bears a sufficient level of similarity to the charged crime or crimes, or includes factual detail not otherwise publicly available[.]" (Italics added.))

to nonfinal cases." Significantly, the Court of Appeal found that based on California Supreme Court precedent, Evidence Code § 352.2 applies retroactively to nonfinal cases because the section provides an "ameliorative benefit, specifically, a trial conducted without evidence that introduces bias and prejudice into the proceedings, limitations designed to increase the likelihood of acquittals and reduce punishment for an identified class of persons." *Id.* at p. 458, citing *People v. Frahs* (2020) 9 Cal.5th 618, 628 and *In re Estrada* (1965) 63 Cal.2d 740.

The court in the instant case likewise failed to consider the additional factors outlined in Evidence Code § 352.2 before admitting evidence of creative expression in the form of tattoos or prior to deciding the admissibility of rap lyrics at Defendant's trial. As discussed below, the evidence of the tattoos and rap music had minimal value and was unfairly prejudicial, ultimately swaying the jury to convict Defendant based on improper racial bias and stereotypes.

B. Statutory Interpretation of Section 352.2 Warrants A Finding That Tattoos Are Necessarily Included as Creative Expression Under the New Legislation.

"In construing a statute, [the court's] role is to ascertain the Legislature's intent so as to effectuate the purpose of the law. In determining intent, [courts] must look first to the words of the statute because they are the most reliable indicator of legislative intent. If the statutory language is clear and unambiguous, the plain meaning of the statute governs. If, however, the language supports more than one reasonable construction, [the court] may consider a variety of extrinsic aids, including the ostensible objects to be achieved, the evils to be remedied, the legislative history, public policy, contemporaneous administrative construction, and the statutory scheme of which the statute is a part." *People v. Lopez* (2003) 31 Cal.4th 1051, 1056 (internal citations & quotation marks omitted).

Evidence Code § 352.2, subd. (c) defines creative expression as "the expression or application of creativity or imagination in the production or arrangement of forms, sounds, words, movements, or symbols, *including, but not limited* to, music, dance, performance art, *visual art*, poetry, literature, film, and other such objects or media." (Italics added.) As assessed by the Ninth Circuit, tattoos are generally "composed of words, realistic or abstract images, symbols, or a combination of these … [and can] express a countless variety of messages[.]" *Anderson v. City of Hermosa Beach* (9th Cir. 2010) 621 F.3d 1051, 1061. Pertinent to this case, the *Anderson* court found that tattoos are a form of "visual art" and that the art of tattooing is a "collaborative creative process." *Id.* at pp. 1061-1062; *see also Jucha v. City of North Chicago* (N.D. Ill. 2014) 63 F.Supp.3d 820, 827 (identifying tattoos as visual art because they are "akin to paintings, drawings, and writings fixed in other media"). Assigning the "plain and commonsense meaning" (*People v. Murphy* (2001) 25 Cal.4th 136, 142) to the phrase "visual art" found in Evidence Code § 352.2, this Court should similarly find that tattoos are a form of creative expression under the plain meaning of the recent legislation, because tattoos consist of a creative arrangement of forms, words, and/or symbols.

However, even assuming *arguendo,* that this court were to find the plain meaning of the statutory text to be ambiguous, the court should nonetheless conclude that pursuant to the legislative intent, tattoos are necessarily included as a form of creative expression. In Evidence Code 352.2, the Legislature took strides to ensure its statutory language was non-exhaustive and non-exclusive, utilizing the phrase, "including, but not limited to," in describing what evidence falls within its confines. It made certain to clarify that the enumerated list under Evidence Code § 352.2, subd. (c) was a nonexclusive list of examples. *See,* e.g., *People v. Henderson* (2018) 20 Cal.App.5th 467, 471 (describing statutory interpretation of "including, but not limited to"

elsewhere in the legislation). As indicated in the statutory notes, the legislative intent behind the new framework is to ensure artists, particularly rap artists, are not criminalized based on evidence of creative expression that plays up stereotypes and racial bias. (Stats. 2022, ch. 973, § 1) (AB 2799). The notes explicitly include rap lyrics as a form of creative expression. *Id.* However, the legislative history reveals that the danger of undue prejudice behind lyrics is not based on the words used but rather the "label 'rap' that is attached to them." *See* Sen. Comm. on Pub. Safety, Analysis of Bill No. 2799 (2021-2022 Reg. Sess.) Jun. 14, 2022, at p. 5. Thus, as reflected by the legislative history, the significant risk of inherent bias is not constrained to rap lyrics. Instead, it extends to other forms of creative expression related to rap. *Id.* at p. 4 ("Due to the highly prejudicial nature of using *rap lyrics* and *related forms of creative expression* in a criminal trial, this bill requires a court, when a party seeks to admit such evidence…, to determine the question of admissibility outside the presence of the jury." [Italics added.]).

Accordingly, the statutory framework and its underlying public policy support a finding that Defendant's tattoos constitute a form of creative expression under Evidence Code § 352.2. Moreover, the prosecution weaponized Defendant's gun tattoo against him – both literally and figuratively – in including it at trial, as described below.

C. <u>Improper Admission of Defendant's Tattoos as Evidence of Creative Expression.</u>

At trial, the People were examining LAPD Officer Sandra Cabral about the gunshot residue testing when they sought to introduce Exhibit 18, a "a photograph that appears to depict the Defendant at the station" at or around the time of the GSR swabbing. (Dec. 12, 2022 Tr. at 107-108.) Defense counsel objected. (Dec. 12, 2022 Tr. at 108.) A summary of the sidebar discussion is as follows:

> DEFENSE COUNSEL: Counsel's asking about the GSR and showing a picture of my client. There's no relevance to this picture. It will only sway the jury, because my client looks like he's got tattoos. (Dec. 12, 2022 Tr. at 108.)
>
> [...]
>
> THE COURT: It's to show who the people are that she took a swab from. I don't see anything wrong. He has no shirt on. He has tattoos. Other than that, what's wrong with the picture? (Dec. 12, 2022 Tr. at 109.)

The People stated they would show pictures of Harris and Smith, who were also swabbed for GSR, from "the same vantage point," and the judge overruled the objection. (Dec. 12, 2022 Tr. at 109.) However, the pictures of Harris and Smith cannot earnestly be seen from the "same vantage point" when Defendant was the only one facing criminal charges. Instead, Exhibit 18 was "'racialized character evidence,'" and its admission into evidence was a deceptive ploy by the People "'playing up racial stereotypes to imply [Defendant's] guilt.'" *Venable*, 88 Cal.App.5th at p. 454 (Citation omitted.)

The People's actual intent to inject racial bias into the proceedings through Exhibit 18 was revealed during their cross-examination of Eric Culberson, Pete's friend and business relation. After Culberson testified he had never seen Defendant with a gun, the People asked Culberson: "Now, [defense] counsel asked you if you've ever seen Tory *talk* about guns or if you've ever *seen him with* guns; do you recall that?" (Dec. 19, 2022 Tr. at 118, italics added.) The People then asked, "Do you see the big gun that Tory has tattooed on the center of his chest?" (Dec. 19, 2022 Tr. at 118.) Defendant's tattoo was neither "big" nor relevant to the issue at hand: whether Culberson had ever "seen him with a gun." Yet, the People used the tattoo for its literal truth by equating it to a real weapon to imply Defendant *does* carry guns, as evidenced by the gun he "carries" on his chest.

Therefore, the prosecution *explicitly* and improperly introduced racial bias into the proceedings. They utilized Defendant's tattoo, which is intertwined with his rapper persona, to lead jurors to interpret it as evidence of criminal intent or motive because Defendant's gun tattoo could only lead to one conclusion: he is a violent criminal with a predisposition to commit crimes since, after all, he is a black "gangster" rapper. *See* Stats. 2022, ch. 973, § 1, subd. (a) (AB 2799) (stating that that the use of rap lyrics and other creative expression as circumstantial evidence of motive or intent is not a sufficient justification to overcome substantial evidence that the introduction of rap lyrics creates a substantial risk of unfair prejudice).

Ironically, Defendant's tattoo was an homage to his idol Tupac Shakur. Mr. Shakur used his music and tattoos to discuss socio-political issues affecting the black community in the nineties.[44] Yet, he, too, was misunderstood.[45] Mr. Shakur carried the same AK-47 tattoo on his chest as a symbol of black unity and the fight against racism.[46] Thus, the meaning behind Defendant's tattoo is quite the opposite of the meaning prosecutors designated to it and which jurors perceived. This type of unfair bias is the precise kind of highly prejudicial evidence that Evidence Code § 352.2 seeks to safeguard against, since the protections under Evidence Code § 352 too often fall short in cases involving rap artists. The prosecution's use of Defendant's creative expression as evidence of criminality erroneously thwarted the legislative purpose behind Evidence Code § 352.2.

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[44] *See* Sripathi, S. *Bars Behind Bars: Rap Lyrics, Character Evidence, and State v. Skinner* (2021) 24 J. Gender Race & Just. 207, 210.

[45] Tibbs, D.F. & Chauncey, S., *From Slavery to Hip-Hop: Punishing Black Speech and What's "Unconstitutional" About Prosecuting Young Black Men Through Art* (2016) 52 Wash. U. J.L. & Pol'y 33, 48. (stating Tupac Shakur used his 1996 hit song, How Do You Want It, to discuss how society harshly criticized "rap music and its artists instead of upholding [its] cultural value of the art form."

[46] *See Tupac Shakur's 21 Tattoos & Their Meanings*, https://bodyartguru.com/tupac-shakur-tattoos/.

In light of the aforementioned and under the facts of this case, there is no sensible reason for Evidence Code § 352.2 to be interpreted in a manner that excludes tattoos as a form of creative expression. "A tattoo suggests that the bearer of the tattoo is highly committed to the message he is displaying: by permanently engrafting a phrase or image onto his skin, the bearer of the tattoo suggests that the phrase or image is so important to him that he has chosen to display the phrase or image every day for the remainder of his life." *Anderson,* 621 F.3d 1051 at p. 1067. Due to its permanent nature, admission of Exhibit 18 and the People's use of Defendant's gun tattoo against him was arguably even *more* prejudicial than a video of a rap song, lyrics, or a rap album cover.[47] Thus, in order to effectuate the purpose of AB 2799, this court should find that Defendant's tattoo was a form of creative expression under Evidence Code § 352.2 and should have been considered under the standards outlined therein, with the conclusion ultimately being reached that its exclusion was required.

D. Improper Admission of Rap Lyrics and Rap Video.

As noted in the comments to the Assembly Floor Analysis, "[e]ven in cases where creative expressions are not admitted as evidence, its discussion in front of a jury can poison the well by allowing for explicit or implicit basis against certain forms of creative expression to play a role in the case. AB 2799 will ensure that creative expression is robustly evaluated before it can be admitted as evidence, and ensure that this evaluation takes place pretrial." *See* Assem. Com. on Pub. Safety, Analysis on Assem. Bill No. 2799 (2021-2022 Reg. Sess.), as amended Aug. 9, 2022, at p. 2. In this case, Defendant's rap lyrics were improperly discussed at trial and ruled admissible in contravention of Evidence Code § 352.2. (Stats. 2022, ch. 973, § 1, subd. (a)) (AB 2799).

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[47] *See* Sen. Comm. on Pub. Safety, Analysis of Bill No. 2799 (2021–2022 Reg. Sess.) June 14, 2022, p. 3 (noting prosecutors have used rap lyrics, related videos, and album covers in criminal trials as autographical accounts of real life rather than artistic forms of creative expression to provide insight into a defendant's thoughts, actions, or character.

During Pete's December 13, 2022 testimony before the jury, she expressed: "I got to watch Tory drop music videos chopping up horse legs and people laughing at it, like that's okay." (Dec. 13, 2022 Tr. at 154.) This statement before the jury by Pete who, notably and notoriously, goes by the stage name "Megan Thee Stallion," inferring any references to stallions or horses may be associated with her, poisoned the proceedings by directing the jury to infer that if Defendant was "chopping up horse legs" in a music video, he was violent enough to shoot her. Pete's testimony implicitly introduced bias into the proceedings because in society "[t]here's always this bias that … young black m[e]n [who are] … rapping … must only be saying what's autobiographical and true, because they can't possibly be creative." *See* Analysis on Assem. Bill No. 2799, *supra,* at p. 2, quoting Nielson & Dennis, Rap on Trial: Race, Lyrics, & Guilt in America (The New Press 2019). Pete's statement therefore became evidence of Defendant's criminal propensity or improper character evidence in violation of Evidence Code § 352.2.

Defendant's music video was also at the center of the People's Motion Re: Violation of Protective Orders, filed on March 17, 2022. According to the People, based on a declaration by Pete, not on credible testimony as required under Evidence Code § 352.2, subd. (b),[48] that the music video portrays Defendant "butchering horse meat in one of his new songs, clearly directed at Megan." (Dec. 20, 2022 Tr. at 125). The People used the video as evidence of Defendant's alleged violation of the criminal protective order previously put in place by the court. At trial, the People stated that if Defendant testified, they would use the video and other rap lyrics against him. (*See e.g.*, Dec. 20, 2022 Tr. at 125, seeking to admit lyrics of a song where Defendant denies shooting Pete and another song where Defendant "lies" about his height.) Without considering or

[48] Evid. Code, § 352.2 (listing relevant evidence that may be introduced at trial to assist the court's determination under the section as : [c]redible testimony on the genre of creative expression; [e]xperimental or social science research regarding racial bias as it relates to the creative expression; and rebuttal evidence).

applying the safeguards implemented via Evidence Code § 352.2, subd. (b) – i.e., whether the lyrics were written around the time of the crime, have some specific similarity to the crime, or depict "factual details" about the crime that are *unknown* to the public – the court held that the video and any rap lyrics related to the case were relevant and would be admissible if the Defendant testified. (Dec. 20, 2022 Tr. at 125.) Therefore, any determination of reliability regarding this music video, or any other rap lyrics that the People sought to introduce, was incomplete and erroneous without consideration under the new requirements of AB 2799.

E. The Court Impermissibly Chilled Defendant's Right to Testify.

The jury did not hear Defendant's personal version of accounts regarding the night in question because the trial judge ruled that if he testified, the State could introduce Defendant's music video and rap lyrics during their cross-examination of him. Defense counsel argued that the rap lyrics could not be used as evidence against the Defendant. Implicitly, defense counsel's argument was based on AB 2799. The bill, which was unanimously approved by the California Senate and Assembly in August 2022, was signed into law on September 30, 2022.[49] News of the new law quickly spread across the nations headlines as the first law of its kind.[50] However, the new law would not take effect until January 1, 2023. (Stats. 2022, ch. 973, § 1) (AB 2799). Notwithstanding the laws later operative date, on October 26, 2022, the California Supreme Court vacated the Court of Appeal's earlier decision in above-discussed *Venable*, which applied only

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[49] *See Governor Newsom Signs Rap Lyrics Bill, Joined by Meek Mill, Ty Dolla Sign, YG, Tyga, and More,* YOUTUBE (OCT 4, 2020). https://www.youtube.com/watch?v=1MuXzJx8T-A (rap artists joined Governor Newsom and Assemblymember Jones Sawyer to sign AB 2799, "a bill ensuring creative content – like lyrics and music videos – can't be used against artists in court without judicial review").

[50] *See* e.g., Mizelle, S. *California Gov. Gavin Newsom signs bill limiting the use of rap lyrics as evidence in criminal proceedings*, CNN (Oct. 1, 2022, 12:50 AM), https://www.cnn.com/2022/10/01/politics/rap-lyrics-in-court-california-gavin-newsom/index.html.

consideration of Evidence Code § 352 standards and *not* the amended Evidence Code § 352.2 standards, in light of Assembly Bill No. 2799. *Venable*, No. S276495, at p. 1.

Unfortunately, Defendant did not receive the same consideration extended by the Supreme Court in *Venable*. Instead, the trial judge ruled in favor of admissibility and stated to defense counsel: "If your client testifies, I'll have to take it on a case-by-case basis. But, essentially, *anything pertaining to this case, obviously, is fair game*." (Dec. 20, 2022 Tr. at 126, italics added.) Under Evidence Code § 352.2, the court's statement is a patently incorrect statement of the law. It was well known to the prosecutors in this case and, arguably, to the judicial system of California, that introduction of Defendant's creative expression would be devasting to his case. This is a reasonable presumption, especially considering the high-profile nature of AB 2799 at the time of Defendant's trial. Nonetheless, the court ruled in favor of admissibility without applying the appropriate safeguards under the new legislation, erring as a matter of law.

This error drastically prejudiced Defendant's defense because it wrongfully induced him to waive his constitutional right to present his version of events and to allow the jury to see him as Daystar, and not the violent, "gun carrying," tattooed gangster the People painted him to be. The court's error caused Defendant to surrender his constitutional right to testify in his own defense under the Fifth, Sixth, and Fourteenth Amendments to the federal Constitution and Article I, Section 15 of the California Constitution.

Furthermore, despite of the decisions under *People v. Collins* (1986) 42 Cal.3d 378 and *Luce v. United States* (1984) 469 U.S. 38, the Defendant did not forfeit his claim of error because the *Luce/Collins* rule does not apply in this case. Under the *Luce/Collins* rule, a Defendant forfeits his right to argue on appeal that his right to testify was violated if he did not in fact testify at trial. However, the *Luce/Collins* rule is distinguishable from the facts at issue because *Collins* and *Luce*

involved the admissibility of a prior conviction for impeachment purposes. Significantly, in those cases, the court had ample discretion under Evidence Code § 352 to determine the issue of admissibility. Distinctly, in the instant case, the evidence of creative evidence is *presumed* to be of "minimal" probative value *unless* the evidence passes the robust inquiry required under Evidence Code § 352.2. *Venable*, 88 Cal.App.5th at p. 455.

Further, the rationale under the *Luce/Collins* rule – the necessity of having the "precise nature of the defendant's testimony" to weigh the probative value against its prejudicial effect to review for a court's abuse of discretion – does not apply here. Rather, the instant inquiry is subject to de novo review because the question at issue "is one of law involving the determination of applicable legal principles." *People v. Genovese* (2008) 168 Cal.App.4th 817, 829. Therefore, the *Collins/Luce* rule does not require, under the facts of this case, that Defendant testified for preservation purposes. The record is clear. In this case, Evidence Code § 352.2 was applicable to the admission of the evidence of creative expression in Defendant's case, yet the trial court erroneously applied the far less stringent Evidence Code § 352 standard to find the evidence admissible. *Venable*, 88 Cal. App. 5th at p. 445 (noting the new standard under Evi. Code § 352.2 makes it more likely that evidence of creative expression will be excluded).

The trial court's error of law "impermissibly burdened defendant's exercise of his right to testify without impeachment by evidence" that the California Legislature "had already deemed more prejudicial than probative" absent application of the additional safeguards prescribed by Evidence Code § 352.2. *People v. Hall* (2018) 23 Cal.App.5th 576, 599. As a result, the court "deprived [Defendant] of the right to counsel's intelligent assistance on whether to exercise his rights to testify or not to testify, and impaired his right to a fair trial." *Id.*

F. Admission of Defendant's Tattoos and Rap Lyrics Was Unfairly Prejudicial.

As noted above, Defendant's testimony was of particular importance in this case because, although Daystar Peterson was the man who sat at the defense table during trial proceedings, the jury only saw one person since its inception: Tory Lanez, the rapper. As reflected by AB 2799, legal scholars, and prominent studies, anti-rap attitudes predominate in society due to racial bias and the stereotypical image of rappers as "violent, drug-involved, misogynistic thugs and criminals."[51] However, rappers are not what they talk about in their lyrics or who they portray themselves as in the media. As one analyst explains, "[a]s part of the image construction process, rap music lyrics are composed to support a financially viable image. As a result of this commercialization…. whether through image, lifestyle or lyrics…. [a]rtists frequently adopt mythical or real-life characters as alter egos or fictional personas."[52] Consequently, the jury convicted Tory Lanez of all charges. Yet, it is Daystar Peterson who will face the sentence.

For the reasons discussed above, admission of defendant's tattoos and the court's improper ruling regarding admission of the rap video and lyrics without consideration or application of the new safeguards imposed by AB 2799 was unfairly prejudicial. As discussed throughout this motion, there was no strong evidence implicating Defendant as the shooter, or owner of the firearm. Arguably, the only evidence directly placing the unregistered firearm in Defendant's hands was Pete's testimony, the erroneously admitted prior bad acts testimony and Instagram post, and Exhibit 18. Unquestionably, in the same manners as it used Defendant's inaccurate "criminal record" and the contents of the Instagram post, the People used Defendant's gun tattoo to paint

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[51] Andrea L. Dennis, Poetic (in)justice? Rap Music Lyrics As Art, Life, and Criminal Evidence (2007) 31 Colum. J.L. & Arts 1, 16–17.)

[52] *Ibid.* at 16-17, 23, n. 7.

him as a gun wielding criminal and to substantiate Pete's testimony. In light of the California Legislature expressly recognizing the highly prejudicial nature of using rap lyrics and related forms of creative expression in a criminal trial, it is reasonable to conclude that had the evidence not been admitted or used to induce Defendant to waive his right to testify, the trial could have resulted in an outcome more favorable to Defendant. Furthermore, in light of new framework under Evidence Code § 352.2 and the legislative intent behind it, substantial doubt exists regarding whether the judge would have ruled in favor of admission of the rap lyrics and evidence of creative expression had it considered this proper standard. Therefore, Defendant should be granted a new trial, at which the court must properly consider Evidence Code § 352.2, should the People again seek introduction of the lyrics and/or tattoos, in order to ensure that Defendant receives a fair trial under the new legislation.

IX. Defendant's Rights Under the Confrontation Clause Were Violated Regarding Harris' Testimony.

The Confrontation Clause to the Sixth Amendment to the United States Constitution provides that, "[i]n all criminal prosecutions, the accused shall enjoy the right to … be confronted with the witnesses against him[.]" *See also United States v. Owens* (1988) 484 U.S. 554, 557. The same right is guaranteed by the California Constitution. Cal. Const., art. I, § 15; *see also People v. Gutierrez* (2003) 29 Cal.4th 1196, 1202. In cases where a witness against a defendant does not testify at trial, his or her testimonial statements will only be admissible if the witness is both (1) unavailable, and (2) the defendant had an adequate prior opportunity to cross-examine the witness. *Crawford v. Washington* (2004) 541 U.S. 36, 60; *see also People v. Sanchez* (2016) 63 Cal.4th 665, 680 (applying the same standard in California).

As to the first prong of the *Crawford* analysis, the United States Supreme Court has long recognized that, in general, the Sixth Amendment right to confrontation encompasses a right to meet the witness face-to-face. *Pointer v. Texas* (1965) 380 U.S. 400, 403-404. Therefore, *Crawford* only applies in the case of a witness's unavailability. 541 U.S. at p. 60. While a witness is deemed "unavailable" if he or she properly invokes his or her privilege against self-incrimination, the same conclusion cannot be reached where the privilege-claiming witness is thereafter afforded immunity, vitiating the need for the exercise of such privilege, as such "unavailability" is premised on the witness being "*entitled to* the protection of the Fifth Amendment." *People v. Williams* (2008) 43 Cal.4th 584, 613, 618, 625 (Italics added.) Certainly, a witness who has immunity cannot claim "entitle[ment]" to such privilege. *People v. Lopez* (1999) 71 Cal.App.4th 1550, 1554 (if a witness receives immunity, the witness no longer has a privilege against self-incrimination); *Kastigar v. United States* (1972) 406 U.S. 441, 453 (a witness who has been granted immunity no longer possesses a Fifth Amendment right).

As to the second *Crawford* prong, cross-examination, sufficient opportunity to confront one's accuser requires he is afforded such an opportunity to address the accuser because, as stated by the California Supreme Court in *Sanchez*, 63 Cal.4th 665, "'[c]ross-examination is the principal means by which the believability of a witness and the truth of his testimony are tested.'" *Id.* at p. 680, quoting *Davis v. Alaska* (1974) 415 U.S. 308, 316.

Here, when Harris, invoked her Fifth Amendment privilege against self-incrimination, she was thereafter offered immunity and recalled to testify under the protections thereof. She nonetheless refused to cooperate with the People's case, to the point that they sought – and were granted – introduction of her September 2022 out-of-court statement, much of which inculpated Defendant. (Dec. 14-15, 2022 Tr. at 82, 112-116, 128-135, 139-140, 178, 181, 208; Dec. 15-16,

2022 Tr. at 71.) Harris was therefore, no longer "entitled" to plead the Fifth, meaning she was not "unavailable" within the meaning of *Crawford. Lopez*, 71 Cal.App.4th at p. 1554; *Kastigar*, 406 U.S. at p. 453. Moreover, the September 2022 statement admitted into evidence was collected exclusively in the presence of the prosecution and the defense did not even have a copy of the transcript of such statement until mid-trial. (Dec. 14-15, 2022 Tr. at 52-53.)

While the court had the statutory authority to admit the prior statement based on Harris' inconsistent testimony (*see* Evi. Code § 1235), this authority did not override constitutional considerations. *See*, e.g., *People v. Blakely* (2014) 225 Cal App 4th 1042, 1059 ("Of course, constitutional requirements supersede statutory language."); *see also* U.S. Const, art. VI, cl. 2 (the Supremacy Clause). Under the circumstances present herein, neither prong of *Crawford*, 541 U.S. 36, was satisfied, meaning when the testimonial statements within Harris' testimony were admitted as evidence, such admission was erroneous as violative of Defendant's federal and state constitutional rights to confront his accuser. *Id.* at p. 60; *Sanchez*, 63 Cal.4th at p. 680.

A motion for new trial may be properly premised on a claimed violation of the Confrontation Clause. *See*, e.g., *Fosselman*, 33 Cal.3d at pp. 582-583; *Cardenas*, 114 Cal.App.3d at p. 647; *see also People v. Homick* (2012) 55 Cal.4th 816, 894; *People v. Hoyos* (2007) 41 Cal.4th 872, 917, fn. 27[53] (each describing that a motion for new trial may be raised on non-statutory constitutional grounds). Harris' out-of-court statements, which heavily implicated Defendant and were self-preserving, were admitted over defense objection, rendering the error one of law, meaning it is *per se* a "miscarriage of justice" warranting a new trial. *Sherrod*, 59 Cal.App.4th at p. 1174. However, even if this were not the case, the admission of this testimony was deeply

[53] Reversed on other grounds in *People v. McKinnon* (2011) 52 Cal.4th 610, 636-643.

harmful to the defense's case and, had it not been erroneously admitted, "it is reasonably probable that a result more favorable to the [defendant] would have been reached…[,]" (*Watson*, 46 Cal.2d at p. 836; *Williams*, 13 Cal.3d at p. 563), requiring a new trial be ordered in either instance. *Muhlner*, 115 Cal. at p. 306.

X. Cumulative Effect of Errors.

Finally, the cumulative effect of multiple errors may be sufficient to cause the trial to have been unfair and hence cause a miscarriage of justice. *See,* e.g., *People v. Buffum* (1953) 40 Cal.2d 709, 726.[54] As much is true even where such errors, considered individually, would not warrant the same conclusion. *People v. Jackson* (1991) 235 Cal.App.3d 1670, 1681. If, in the absence of the cumulative errors, it is reasonably probable that the jury would have reached a result more favorable to a defendant, the decision must be reversed. *People v. Holt* (1984) 37 Cal.3d 436, 459.[55]

Therefore, while Defendant argues that he is entitled to the relief requested herein on each of the individual bases included herein, assuming, *arguendo*, the court were not find each or any of these bases persuasive and requiring vacatur of his convictions, cumulatively these errors undoubtedly do suffice to show he has suffered prejudice through such errors, amounting to an impermissible miscarriage of justice and requiring his instant motion for new trial be granted.

[Continued on the next page.]

[54] Overruled on other grounds by *People v. Morante* (1999) 20 Cal.4th 403, 415.

[55] Superseded by statute on another ground as stated in *People v. Muldrow* (1988) 202 Cal.App.3d 636, 645.

XI. Conclusion.

On the numerous bases outlined above, taken both individually and collectively, Defendant respectfully requests that this Honorable Court grant his instant motion, vacating the verdict against him and ordering a new trial.

Respectfully submitted,

Dated: March 29, 2023

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ATTORNEYS FOR DEFENDANT

PROOF OF SERVICE
STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the State of California. I am over the age of 18 years and not a party to the within action. My business address is 811 Wilshire Boulevard, 17th Floor, Los Angeles, California 90017.

On March 29, 2023, I served a true and correct copy of the within Notice of Motion and Motion for New Trial [Pen. Code § 1181 & Cal. Const., Art. VI, § 13] and Memorandum of Points and Authorities in support of the same on the interested parties in this action by placing the true copy/original thereof, enclosed in a sealed envelope, postage prepaid, addressed as follows:

Superior Court of California
County of Los Angeles – Central District
Clara Shortridge Foltz Criminal Justice Center
Attn: Hon. David Herriford, Judge
210 West Temple Street, Dept. 132
Los Angeles, CA 90012

Los Angeles County District Attorney
Central Branch Office
Attn: Alexander Scott, DDA (SBN: 278468)
Attn: Kathy Ta, DDA (SBN: 243716)
211 West Temple Street, Suite 900
Los Angeles, CA 90012

I am readily familiar with the business practice of my place of employment in respect to the collection and processing of correspondence, pleadings and notices for mailing with United States Postal Service.

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

Executed on March 29, 2023, at Los Angeles, California.

Sandy Tewfik

EXHIBIT A

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF LOS ANGELES, CENTRAL DISTRICT – CLARA SHORTRIDGE FOLTZ

People of the State of CALIFORNIA,

Plaintiff,

v.

DAYSTAR PETERSON,

Defendant.

Case No.: BA490599-01

DECLARATION OF JOSHUA FARIAS

[Filed concurrently with the DAYSTAR PETERSON'S Motion for a New Trial]

Date: April 10, 2023
Time: 8:30 AM
Judge: Hon. David Herriford, Judge
Dept.: 132

I, JOSHUA FARIAS, declare as follows:

1. I am a not a party in this matter.

2. I currently work as a Director, Photographer, and content creator for entertainers and high net-worth productions.

3. In and around December of 2016, I was hired by Mr. Daystar Peterson as a Graphic Designer. In and around January of 2017, I became Mr. Peterson's photographer and content creator.

4. By June of 2017, I became Mr. Daystar Peterson's fulltime content creator and social media manager. From time to time, I would manage his social media outlets, including but not limited to, his Instagram, which is known as @torylanez, and his YouTube channel. I also directed, managed, and took full creative control of his music videos for his music.

5. By December of 2019, I became the manager of his Instagram account, which is verified as @torylanez. My duties included, but not limited to, being the manager of the account managing posts on his feed and engaging in ideation of engagement with comments and messages the account may receive.

6. On September 25, 2020, I accessed the account in my customary practice. I reviewed a post that was published by an account @theshaderoom, which had a picture that appeared to represent Ms. Megan Pete and indicated "This goofy ass nigga say he ain't shoot her and they literally have matched the bullets from his gun to the ones in her foot." I proceeded to review the caption associated with the published post, which indicated "#MeganTheStallion's producer alleges that authorities have matched the bullets from #ToryLanez's gun to the ones found in her foot (See earlier posts)".

7. I further reviewed comments associated with the September 25, 2020 post by @theshaderoom, and I found a comment posted by an account @spliffkaay_, which indicate "People saying Kelsey shot her". To that comment, I replied "@spliffkaay_ that's not true."

8. I never consulted with Mr. Daystar Peterson in posting that comment on September 25, 2020

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

Executed this 14 day of March, 2023 at Miami (City), Fl (State)

JOSHUA FARIES