Supreme Court No. _____

In the Supreme Court of the State of California

The People, Plaintiff and Respondent, **v.** **Johnny Aguilar, Jr.**, Defendant and Appellant.	Court of Appeal **No. F061462** Fresno County Superior Court No. F09903920

After Decision of the Court of Appeal,
Fifth Appellate District

Appeal From the Judgment of the Superior Court of Fresno County
Honorable Edward Sarkisian, Jr., Judge

Petition for Review

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Appointed by Court of Appeal,
in Conjunction with the Central
California Appellate Program
Independent Case System

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Petition for Review

To the Honorable Tani Cantil-Sakauye, Chief Justice, and the Honorable Associate Justices of the California Supreme Court:

Pursuant to California Rules of Court, rule 8.500,[1] defendant Johnny Aguilar, Jr. petitions for review of a Court of Appeal opinion affirming his judgment of arson and murder. A copy of the opinion (opn) is attached.

In seeking review, defendant highlights not only trial errors, but also a fundamental defect in the appellate process. It may be difficult to imagine a 73-page opinion somehow missing something truly material, but that's exactly what happened here. A reader would never know that by any objective measure, this was an extremely close case for the body tasked with reaching a verdict: the jury. Jurors deliberated for days, announced an impasse, reheard the key evidence at issue over and over and over and over and over again, and finally agreed on a verdict presumably explained by compromise.

And why is that important? Because the opinion finds arguable Sixth Amendment and other errors harmless by simply reciting judgment-favorable

[1] Further rule citations are to the California Rules of Court; unspecified statutory citations are to the Penal Code.

evidence. Under that approach, of course, virtually no trial errors could impact a judgment: only evidentiary insufficiency would trigger reversal. Unfortunately, the Court of Appeal isn't alone in using this sort of analysis. So defendant seeks this court's intervention: either a full review grant, exploring what it means to examine the effect of error; or a grant and transfer, directing the Court of Appeal to follow settled principles in reevaluating this case.

Issues Presented for Review

For Full Review (rule 8.500(b)(1)) or *Review and Transfer* (rule 8.500(b)(4)):

1. Where the Court of Appeal isn't alone in mistakenly relying on a judgment-favoring view of the evidence to find even federal constitutional errors harmless, should this court should grant review or transfer for reconsideration?

For Full Review:

2. Where an investigating officer is allowed to testify that he interviewed a nontestifying witness who didn't corroborate defendant's alibi, is the implied hearsay deemed testimonial and therefore in violation of the Confrontation Clause?
3. Where defendant argues ineffective assistance in counsel's failure to litigate and seek instructional support for a specific challenge to specific evidence, is the claim defeated by a record showing counsel made an unrelated, unsuccessful challenge to the same evidence?
4. Should CALCRIM No. 358 be modified so jurors understand that the "recorded" exception to a cautionary view of the defendant's hearsay doesn't apply when a police officer "records" the hearsay as reported by a third party?

5. Did the cumulative impact of the errors at defendant's trial deny him the federal due process right to a fundamentally fair trial?

6. Did use of a prior juvenile adjudication as a "strike" conviction violate defendant's federal constitutional rights to due process, notice, and jury trial?

Brief in Support of Request for Review

Statement of Case and Facts[2]

I. Introduction

Charged with murdering his close friend Mary Bustamonte and setting her motel room ablaze, defendant Johnny Aguilar, Jr. testified consistently with what he told police: although he'd been at the motel that night, he had nothing to with the incident. On the contrary, when he saw smoke coming from the general area of Bustamonte's room, he rushed to the nearest phone and called 911. But according to defendant's mother (Rebecca Duarte) and sister (Rebekah "Sweetie" Palacios), he told them quite a different story: in an obviously drugged state, he confessed to Bustamonte's murder and a coverup by arson.

The only detailed confession came into evidence through Palacios, despite her uncertainty as to whether she heard those details from defendant or from their brother Elias Robert — who didn't testify at trial. So to the extent Elias Robert may have been Palacios's source, the confession was inadmissible hearsay. But it went to the jury without limitation, as did their mother's less-detailed hearsay report with the same source problem.

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[2] Defendant provides only a brief summary here. He generally adopts the opinion's review of case and facts (opn. 1-46), except where noted.

With no eyewitness testimony as to what happened in Bustamonte's room, jurors had to contrast these irreconcilable versions of the fateful night. And they struggled with that task over several days of deliberation — rehearing Palacios's confession testimony five times, and at one point announcing they were hung — before convicting defendant of a lesser second-degree murder charge and arson.

II. The Opinion Omits and/or Misstates Material Evidentiary and Procedural Facts and Case Law Going to the Closeness of the Trial.[3]

Defendant is realistic: while reviewing what happened in the court below, an appellate opinion doesn't simply duplicate the trial. Instead, the court identifies "all the significant facts" in light of the appeal. (*In re S.C.* (2006) 138 Cal.App.4th 396, 402.) What's "significant" in the record, of course, is a matter of context: a reviewing court must "ferret[] out all of the operative facts that affect the resolution of issues tendered on appeal." (*Lewis v. County of Sacramento* (2001) 93 Cal.App.4th 107, 113.)

In this appeal, all defendant's claims of trial error (AOB args. I-IV) involved a contrast between two wildly different versions of Bustamonte's death and the motel fire. In the prosecutor's version, defendant made a complete murder-arson confession to Duarte and Palacios. In the other, defendant himself testified — largely consistent with his post-arrest interrogation — to a complete alibi. The closer that contrast for the jury, the stronger the case for prejudice from any error. (*People v. Garcia* (2005) 36 Cal.4th 777, 804; *People v. Newson* (1951) 37 Cal.2d 34, 46; *People v. Fleming* (1913) 166 Cal. 357, 383.) But a relative-closeness analysis can't fairly proceed from a lop-

[3] Defendant outlined these problems in a petition for rehearing (at arg. I); it was summarily denied on February 27, 2013.

sided or inaccurate summary. (*Holmes v. South Carolina* (2006) 547 U.S. 319, 331 [126 S.Ct. 1727, 164 L.Ed.2d 503] ["by evaluating the strength of only one party's evidence, no logical conclusion can be reached regarding the strength of contrary evidence offered by the other side to rebut or cast doubt"].)

A. Evidence

1. Andrew Brand *Didn't* See Defendant "Walking Away From" Bustamonte's Motel Room.

A casual reader of the opinion would be struck by a repeated, damning assertion — that motel resident Brand actually saw defendant *walking away from Bustamonte's room* while the fire's smoke was billowing: "When [Brand] noticed smoke emerging from Bustamonte's motel room, defendant was walking away from the room …." (Opn 2 [Introduction]; see also 4-5 [Facts — The Fire], 61 [partial factor in finding no prejudice from any defense counsel error re confession evidence], 62 [same], 67 [partial factor in finding no prejudice from any trial court error re admission of alibi-impeaching hearsay and denying confrontation].)

It's no wonder the opinion seizes on this "fact" as an important piece of the harmless error puzzle: had an independent witness identified defendant as coming directly *from the room* where Bustamonte lay dead or dying, that arguably would have been the most inculpatory non-confession evidence at trial — though still refuted by defendant's testimony, of course.

In any event, there was no such "fact" at all. Here's what actually happened; citations are to Brand's testimony and motel photographs introduced as exhibits:[4]

[4] On November 27, 2012, the trial exhibits were lodged with the Court of Appeal.

Brand lived in room 31 on the second floor of the Sahara Lodge's long north-south wing; his was the fourth room from the south end. (6RT 1674, 1682-1683, 1698-1699, 1722; exhibit 75; exhibit 204 [with "ARB" above his door].) There appear to have been approximately 15 rooms along that wing; Bustamonte's room 41 was the second from the "L" turn at the north end. (6RT 1627, 1633, 1636-1637, 1683-1684, 1688; exhibits 1, 75.) After stepping outside and seeing smoke toward the north end of his side of the motel, Brand ran down the south-end stairs behind him, reported a possible fire, then hurried up the same way. (6RT 1675-1676, 1684-1685, 1689-1690, 1700-1701, 1703, 1716, 1722; exhibits 75, 202, 204.) "And as I was going toward the end where the smoke was coming out, [defendant] approached me…." (6RT 1676, 1700-1701.) "He was … walking toward" Brand; i.e., as Brand was going north, defendant "was walking south." (6RT 1677, 1691 [north>south = left>right in photo], 1694; exhibit 75.) When Brand first saw defendant — the fact at issue here — he was "about a quarter of the way from [room] 41 to the … staircase" in the middle of the wing. (6RT 1678, exhibit 75.) Asked to mark defendant's initial location with an "X," Brand placed it in front of what presumably was room 38 or thereabouts — consistent with his testimony, around a quarter of the distance from room 41 to the central stairway. (6RT 1690; exhibit 75.)[5] Brand and defendant met near the top of the central stairway. (6RT 1691, 1701-1702; exhibit 75 [mid-photo circle].)

While it's true defendant was coming from the *direction* of room 41 — and 40, and 39, and the "L," and the rooms to its left — Brand *didn't* see him "walking from Bustamonte's room" as the opinion repeatedly states.

[5] The rooms presumably were numbered consecutively, increasing from south to north; e.g., Brand's nephew lived in room 40, just south of Bustamonte's room 41. (6RT 1684, 1702-1703.)

Defendant's accuracy concern is substantial. He testified that he'd gotten only as close as "about two doors from Mary's" before seeing smoke, turning back, and running into Brand. (9RT 2423, 2429-2430; cf. 10RT 2499 [three or four doors away].) So the two men's versions were perfectly consistent with each other and with defendant's alibi testimony. By contrast, evidence that defendant walked *from room 41 itself* would have been doubly damning — as both impeaching his testimony and providing strong circumstantial evidence of his guilt. Unfortunately, the opinion's legal analysis relies on the non-evidence for those very purposes.

2. Defendant Admitted Initial Uncertainty as to the Smoke's Source and Never Denied Having Seen Smoke.

According to the opinion, after walking upstairs defendant "noticed smoke coming from under the door of room 41." (Opn. 30.) It's true that this statement was included within his testimony. (9RT 2471 [affirming defense counsel's question about "smoke coming from Mary's room"]); 10RT 2499-2500 [same re prosecutor's question].) But initially he testified only as to seeing smoke, not to identifying a source room. (9RT 2423, 2429-2430.) And upon further cross-examination he admitted he couldn't "say in a certain specific location, but I seen smoke …." (10RT 2500-2502; see also 10RT 2546-2547 [defendant told police he saw police but wasn't sure if it was from Bustamonte's room or next door].)

The opinion adds that at one point defendant told Detective Gray "he never saw smoke." (Opn. 33.) But the record doesn't support this assertion. Gray testified defendant said he saw smoke coming from the roof; he wasn't sure whether it was from Bustamonte's or her neighbor's door. (10RT 2545-2547.) Then defendant made the "never" comment — but in a very different context from the one reported in the opinion: according to Gray, defendant

said, "'I never told you I saw *smoke coming from Mary's room*.'" (10RT 2547, italics added.) As a "followup question," the officers asked defendant to identify the smoke's specific source, but he responded, "I just *saw smoke*." (10RT 2547, italics added.) That is a very far cry from "I 'never saw smoke.'"[6]

3. Prosecution Evidence Showed Not Only That Defendant Was "Seen" Holding a Telephone; He in Fact Called 911.

The opinion acknowledges defendant's testimony about his actions upon seeing smoke upstairs: following Brand's suggestion, he rushed downstairs, called 911, and reported a fire. (Opn. 31.) But for all the opinion repeatedly reveals, defendant may have simply pretended to make the call as a ruse. Thus, Brand "directed defendant to the motel's payphone, where defendant was later *seen holding the receiver*." (Opn. 2, italics added; see also 5, 67-68.)

Unfairly — and significantly — overlooked by the opinion: Detective Gray testified that defendant *in fact* called 911, just as he said he did. (10RT 2551-2553.) Jurors certainly were aware of this, as their first deliberation request was for a recording of the call (not in evidence). (1CT 242-243; Supp CT 4.)

B. Procedural Facts

The opinion completely ignores procedural facts that — as a matter of law — support defendant's characterization of the case as close in the context of his issues.

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[6] On cross-examination, Gray reiterated that defendant "said he saw smoke[.]" (10RT 2551.) The detective went on to recount changes in defendant's story, including "I never seen smoke," but the context was a question about "where the smoke was coming from" according to defendant. (10RT 2551.) Viewed as a whole, Gray's testimony makes it clear that defendant denied only identifying Bustamonte's room as the smoke's source.

1. Lengthy Deliberations

The opinion characterizes the verdict as resulting from "a lengthy jury trial[.]" (Opn. 2.) The trial's "length" isn't broken down, but it should be: the relative time of jury deliberations supports defendant's argument that the case was close for these jurors. After hearing evidence spanning five whole or partial court days (Oct. 22, 25, 26, 27, and 28, 2010; 1CT 233-241), the jury spent another *four* such days in deliberation. (Oct. 29, Nov. 1, 2, and 3, 2010; 1CT 242-248; *People v. Anderson* (1978) 20 Cal.3d 647, 651 ["jury took several days of deliberation to reach its verdict"].) Despite two counts resulting from a single incident, jurors wrestled through more than eleven hours in actual (non-readback) time to reach their verdict. (1CT 242-247; *People v. Cardenas* (1982) 31 Cal.3d 897, 907 [12 hours]; see also *People v. Guiton* (1994) 4 Cal.4th 1116, 1130 [in determining whether prejudice occurred, reviewing court must examine entire record, including jury deliberations].)

2. Multiple Readback Requests, Especially re Evidence at Issue

Also missing from the opinion: acknowledgment and analysis of the jury's *seven* requests for readback of testimony — including *five* involving Palacios, with each of those including the very hearsay confession at issue on appeal. (Supp CT 6-7, 9-10; see AOB 29-30.) And of the two other readbacks, one was Duarte's testimony — with the other hearsay confession at issue here. (Supp CT 10.) Thus, the *record shows* the jury had a particularly difficult time with the very evidence whose use defendant challenges on appeal. (*People v. Dominguez* (2006) 39 Cal.4th 1141, 1160-1161 [jury question suggests "one or more jurors may have been considering" point at issue]; *People v. Samuels* (2005) 36 Cal.4th 96, 140, (conc. opn. of Werdegar, J.) ["Because the jury in this case specifically asked the trial court for guidance on the question of the possibility of parole, we know it was concerned about this issue."]; see also

People v. Guiton, supra [required whole-record examination includes deliberation record].)

3. Jury *Announced an Impasse*

There's no getting around it: *for defendant's jury*, the case was extremely close. Close enough that after almost six hours of deliberation, jurors announced they were deadlocked: "We have voted several times and are at a standstill. Can you offer us any suggestions so that we can move on?" (1CT 242-244; Supp CT 8; 11RT 2724-2725.) At least as of that point, "necessarily, at least one of the jurors was not persuaded by the strength of the prosecution's evidence. [Citation.]" (*People v. Thompkins* (1987) 195 Cal.App.3d 244, 251-252; see also *Guiton, supra* [required whole-record examination includes deliberation record].)

4. Jury Reached Lesser Verdict

On the one hand, defendant's conviction was very likely dependent upon the jury accepting Palacios's hearsay-confession testimony (whether she heard it from defendant, their brother Elias Robert, or both). On the other, that confession described a premeditated and deliberate murder. Yet the jury found defendant guilty only of unpremeditated second-degree murder in count 1. (1CT 249.) "In view of the verdict's reflecting the jury's selective belief in the evidence, we cannot conclude otherwise than that [the error] was prejudicial requiring reversal [citations]." (*People v. Epps* (1981) 122 Cal.App.3d 691, 694, 698; see also *Guiton, supra* [required whole-record examination includes verdict].)

C. Additional Relevant Case Law re Relative Closeness

The opinion ignores defendant's further reliance on established authority showing this case was quite close (AOB 50-51):

- Where, as here, the only direct evidence showing defendant's guilt is a statement that should be viewed with distrust, the case is a close one. (*People v. Medina* (1974) 41 Cal.App.3d 438, 463 [re accomplice testimony]; CALCRIM No. 358 [including cautionary admonition re defendant's hearsay admission of guilt].)

- The prosecution's case was "not overwhelming or irrefutable" where "[t]here was no eyewitness testimony to [Bustamonte's death], and the prosecution presented no physical evidence directly tying [defendant] to the murder." (*People v. Garcia*, *supra*, 36 Cal.4th 777, 804.)

- An erroneously admitted confession isn't harmless where "a successful prosecution depended on the jury's believing" it. (*Fulminante v. Arizona* (1991) 499 U.S. 279, 297 [111 S.Ct. 1246, 113 L.Ed.2d 302]; *People v. Cahill* (1993) 5 Cal.4th 478, 503 ["improper admission of a confession … is much more likely to be prejudicial"].) And here there was no other evidence directly connecting defendant to homicide or arson.

Necessity for Review – Argument

I. Where the Court of Appeal Isn't Alone in Mistakenly Relying on a Judgment-Favoring View of the Evidence to Find Even Federal Constitutional Errors Harmless, This Court Should Grant Review or Transfer for Reconsideration.

The opinion finds that if defendant correctly identified errors as to the hearsay-source issue and the alibi-impeachment evidence, reversal is unnecessary; the errors were harmless under the standards established by *Strickland v. Washington* (1984) 466 U.S. 668, 694 [104 S.Ct. 2052, 80 L.Ed.2d 674] [hearsay-source issue; prejudice as component of Sixth Amendment ineffective assistance]; *People v. Watson* (1956) 46 Cal.2d 818, 836 [alibi-impeachment hearsay issue; prejudice requiring reversal for state error]; and *Chapman v.*

California (1967) 386 U.S. 18, 24 [87 S.Ct. 824, 17 L.Ed.2d 705] [alibi-impeachment confrontation issue; state burden to prove error harmless beyond reasonable doubt]. (Opn 48, 61-63, 67-68; issues summarized at args. II & III, *post*.) Taking the same approach to both discussions, the opinion does no more than provide a list of evidentiary items viewed in a judgment-favoring light.[7] But under any and all standards, that's the wrong approach. Worse than wrong: as a matter of logic and law, it can't lead to the right answer.

Not that it's an unauthorized approach per se: essentially, it's the *proper* test for sufficiency of evidence to support a judgment — "'the familiar substantial evidence rule.'" (*Bankhead v. ArvinMeritor, Inc*. (2012) 205 Cal.App.4th 68, 77.) So it isn't a context-free rule: it's a standard of review governing an appellant's attack on a judgment as unsupported. In other words, it's an element of "[t]he proper test for determining a claim of insufficiency of evidence …." (*People v. Jones* (1990) 51 Cal.3d 294, 314.)

One major problem: defendant made no such claim in this appeal. And "[t]he familiar sufficiency-of-the-evidence analysis centering on whether a reasonable jury could have convicted an adequately represented defendant is considerably more deferential than the *Strickland* test for prejudice in an ineffective-assistance case, which seeks only to discover whether the absence of error would have given rise to a reasonable probability of acquittal, such that

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[7] As one notable example, the opinion condemns defendant's trial testimony as "riddled with inconsistencies …." (Opn 67.) But it was the *jury* who saw, heard, and evaluated that testimony, and the *jury* who still had a very difficult time reaching a verdict. Indeed, defendant's testimony was just as "riddled," if not much more so, with *consistencies* — as compared to itself, to his police interview, and to other evidence such as Brand's account of their meeting. In any event, the point here is that the evidence as a whole was very far from one-sided; the jury saw that; and the Court of Appeal has no place substituting its judgment for the jury's.

confidence in the verdict is undermined. [Citation.]" (*Tice v. Johnson* (4th Cir. 2011) 647 F.3d 87, 110.)

And what's inadequate for *Strickland* analysis is equally inadequate as state *Watson* review; the two prejudice standards are essentially identical. (*Richardson v. Superior Court* (2008) 43 Cal.4th 1040, 1050.) So even with *legally sufficient* evidence to support the judgment, if the possible prejudice from error is "more than … abstract[,]" reversal is necessary under *Watson*. (*People v. Wilkins* (Mar. 7, 2013, S190713) ___ Cal.4th ___ < http://www.courts.ca.gov/opinions/documents/S190713.PDF> at 20-21, incl. fn. 6; see also *People v. Giardino* (2000) 82 Cal.App.4th 454, 467 [under *Watson* review reversal is required where "the evidence supports conflicting conclusions" as to the matter in dispute].)

Of course, under the much less "forgiving" *Chapman* harmless error standard (*People v. Burnham* (1986) 176 Cal.App.3d 1134, 1149; *Fry v. Pliler* (2007) 551 U.S. 112, 116 [127 S.Ct. 2321, 2325, 168 L.Ed.2d 16]), the Court of Appeal's approach is much more erroneous. This court recently held as much: where instructional error was of federal constitutional dimension, the required standard of review was the "*opposite*" of the "less demanding" substantial-evidence review employed by the Court of Appeal. (*People v. Mil* (2012) 53 Cal.4th 400, 417-418, original italics.) Indeed, under *Chapman v. California, supra*, even an appellate declaration of "'overwhelming evidence'" in support of that verdict isn't enough. (386 U.S. 18, 23.) Only where the judgment-supporting evidence was truly "uncontroverted" — where the defendant "did not, and apparently could not, bring forth facts contesting" it — can the strength of the evidence justify a harmless error finding. (*Neder v. United States* (1999) 527 U.S. 1, 18-19 [119 S.Ct. 1827, 144 L.Ed.2d 35].)

For that matter, the Court of Appeal's approach to prejudice/harmless error analysis fails to take the most threshold step under all three standards — which require analysis of the *entire relevant record*. (*People v. Guiton, supra*, 4 Cal.4th 1116, 1130 [re *Watson*]; see *Watson* itself, 46 Cal.2d 818, 836 [calling for "an examination of the entire cause, including the evidence"]; *Wong v. Belmontes* (2009) 558 U.S. 15 [130 S.Ct. 383, 390, 175 L.Ed.2d 328] [re *Strickland*, "the reviewing court must consider all the evidence — the good and the bad — when evaluating prejudice"]; *Sears v. Upton* (2010) 571 U.S. ___ [130 S.Ct. 3259, 3266, 177 L.Ed.2d 1025] [*Strickland* prejudice "inquiry requires precisely the type of probing and fact-specific analysis that the state trial court failed to undertake below."]; *People v. Mil, supra*, 53 Cal.4th 400, 417 [quoting *Neder* re *Chapman* review: appellate court's threshold duty is "to 'conduct a thorough examination of the record'"]; see also pp. 4-11, *ante*.)

As well-settled standards, defendant acknowledges they don't exactly cry out for a review grant. But this court also should acknowledge something: *to the extent Courts of Appeal ignore or otherwise violate* those standards, a defendant's right to appeal might as well be nonexistent. After all, if reversal is reserved for cases with insufficient evidence to support the judgment, then there's no point in litigating other issues, no matter how substantial.

The United States Constitution doesn't require a state to provide an appeal. (*Johnson v. Fankell* (1997) 520 U.S. 911, 922, fn. 13 [117 S.Ct. 1800, 138 L.Ed.2d 108].) But where the state guarantees such a right — as California does (§ 1237) — "the procedures used in deciding appeals must comport with the demands of the Due Process . . . Clause[] of the Constitution." (*Evitts v. Lucey* (1985) 469 U.S. 387, 393 [105 S.Ct. 830, 83 L.Ed.2d 821]; U.S. Const., 14th Amend.) They do so only where they afford "adequate and effective appellate review[.]" (*Griffin v. Illinois* (1956) 351 U.S. 12, 20 [76 S.Ct.

585, 100 L.Ed. 891].) So federal due process is violated where the state "decided the appeal in a way that was arbitrary with respect to the issues involved." (*Evitts v. Lucey, supra,* 469 U.S. 387, 404.)

But in what sense might an appellate opinion be deemed "arbitrary"? The case law provides only vague hints. (See, e.g., *People v. Howard* (1992) 1 Cal.4th 1132, 1165-1166 [consistent with due process, appellate review must be "meaningful[,]" "adequate and effective"].) As a due process standard, "meaningful" is meaningless. Defendant neither asks nor expects this court to impose detailed, rigorous requirements on the issuance of all appellate opinions. But somewhere between that extreme and the result below, meaningful standards can and should be recognized.

Back to defendant's premise: what *is* the "extent" to which Courts of Appeal make these fundamental errors? As a single petitioner, he can't possibly be expected to know. But the errors surely are *not* confined to his case, and even a small sample of recent similar problems — in serious felony appeals raising substantial claims — should concern this court enough to grant review; the issue is "important" not only to this defendant, but to defendants as a class and to our system of justice. (Rule 8.500(b)(1).) To that end, he submits with this petition a motion for judicial notice of two recent petitions: *People v. Lewis*, S204103, and *People v. Huezo*, S204962. In each case, the petitioner asked this court to grant review to determine whether the Court of Appeal had found harmless error by mistakenly relying on a judgment-favoring view of the record — in an opinion issued *after* this court's *Mil* decision. (*Lewis*, issue 3; *Huezo*, issue 1.)

For that matter, *Mil* itself powerfully illustrates defendant's concern: had this court not granted review on the issue of *identifying* the appropriate review standard (53 Cal.4th 400, 408-417) — say, because it was deemed

well-established — Mr. Mil would have been the victim of constitutional errors in *both* the trial and appellate courts.

Unfortunately, that is precisely defendant's position right now. And because no California defendant should be there, this court should grant review to ensure proper *application* of the harmless error and prejudice standards. (Cf. *In re Ramirez* (2001) 94 Cal.App.4th 549, 562, disapproved on another point in *In re Dannenberg* (2005) 34 Cal.4th 1061, 1100 ["the question of the proper standard of review raises important legal and public policy issues"].) *Mil* took care of the problem in the instructional arena; *Aguilar* should do so in the much broader context of appellate review itself.

Even if this court deems full review unnecessary, defendant urges a grant and transfer to the Court of Appeal: the matter should be reconsidered and the court directed to make any changes in its opinion it considers appropriate in light of *Mil* and the points made in this petition.

II. Where an Investigating Officer Is Allowed to Testify that He Interviewed a Nontestifying Witness Who Didn't Corroborate Defendant's Alibi, the Implied Hearsay Should Be Deemed Testimonial and Therefore in Violation of the Confrontation Clause.

While admitting he spent Bustamonte's fateful night at the Sahara Lodge, defendant offered a complete alibi to the charged crimes: the fire started while he was downstairs, where he was hanging out for several hours with motel tenant Kenneth "Casper" Mulponce and another person. (Opn 30, 65.)

Cross-examining rebuttal witness Detective Gray about defendant's interrogation, defense counsel elicited testimony that defendant had told Gray about having been with Casper. Counsel asked if Gray "ever talk[ed] to Casper[,]" and the detective said he had done so. Counsel sought no informa-

tion, whether express or implied, about the substance of the Casper interview. (Opn 65-66; 10RT 2550.) But on redirect, and over defendant's hearsay objection, the prosecutor asked Gray, "*Any of that information pan out from Mr. Mulponce?*" The detective's response: "*No, sir, it did not.*" (Opn 66, italics added in opinion.) The court went on to sustain counsel's hearsay objection as to "What" Mulponce told Gray. (Opn 66.)

On appeal, defendant argued the "information didn't pan out" evidence was inadmissible as implied hearsay and a denial of the Sixth Amendment right to confrontation as "testimonial" under *Crawford v. Washington* (2004) 541 U.S. 36 [124 S.Ct. 1354, 158 L.Ed.2d 177]. (Opn 66; AOB arg III.)[8] In context — rebuttal to defendant's alibi testimony — the only relevance of such a question and Gray's negative response was "the implication taken from the spoken words." (*People v. Morgan* (2005) 125 Cal.App.4th 935, 943.)

The implication: During the interview, Casper — the only witness who *could have confirmed* defendant's alibi — did the opposite. After all, his "information" didn't "pan out"; i.e., it didn't "turn out, especially successfully." (Dictionary.com unabridged (Random House, Inc.), <http://dictionary.reference.com/browse/pan out> (accessed Mar. 11, 2013); see, e.g., *Ajaxo, Inc. v. E*Trade Financial Corp.* (2010) 187 Cal.App.4th 1295, 1303.) This was inadmissible hearsay, offered for its truth — and as a direct, if implied, contradiction to defendant's alibi testimony. "[T]he truth of

[8] Defense counsel didn't add a confrontation objection to his hearsay complaint (AOB 70), but as defendant argued on appeal, such an objection would have been futile, given the court's ruling that the "pan out" question didn't even call for inadmissible hearsay. (*People v. Welch* (1993) 5 Cal.4th 228, 237.) Alternatively, defendant grounded his claim in ineffective assistance. (AOB 70.) Neither respondent nor the Court of Appeal suggested the confrontation issue wasn't preserved for appeal.

the implied statement is a necessary part of the inferential reasoning process." (*People v. Morgan, supra*, 125 Cal.App.4th 935, 943.)

Where a party introduces testimony including an "implied hearsay statement" offered to prove its truth, it is "equally inadmissible hearsay evidence as is evidence of an express hearsay statement offered to prove the truth of the facts expressly asserted. [Citation.]" (*People v. Pic'l* (1981) 114 Cal.App.3d 824, 885, disapproved on another point in *People v. Kimble* (1988) 44 Cal.3d 480, 498; see also, e.g., *People v. Hill* (1992) 3 Cal.4th 959, 988-990, overruled on another point in *People v. Price* (2001) 25 Cal.4th 1046, 1069, fn. 13 [testimony implied additional assertion for its truth]; *People v. McNamara* (1892) 94 Cal. 509, 514-515 [officer's testimony that he arrested defendant based on information from non-testifying witness was inadmissible].)

Moreover, "where … the inescapable inference from the testimony is that a non-testifying witness has furnished the police with evidence of the defendant's guilt, the testimony is hearsay, and the defendant's right of confrontation is defeated, notwithstanding that the actual statements made by the non-testifying witness are not repeated. [Citation.]" (*Postell v. State* (Fla. App. 1981) 398 So. 851, 854, fns. omitted.)

Postell preceded the Sixth Amendment Confrontation Clause regime ushered in by *Crawford v. Washington*, *supra*, 541 U.S. 36. The key question nowadays: was the hearsay "testimonial" in nature? "Where testimonial evidence is at issue, … the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination." (*Id.* at 68.) Among testimonial statements are those "that declarants would reasonably expect to be used prosecutorially" (*id*. at 51); for example, answers "knowingly given in response to structured police questioning" (*id.* at 53, fn. 4).

Casper's interview, conducted by a police detective investigating defendant as a murder suspect, was such a structure. And just as the state hearsay rule does, so the Sixth Amendment applies equally to implied and express statements. (*Ocampo v. Vail* (9th Cir. 2011) 649 F.3d 1098, 1111.) "[I]f the substance of an out-of-court testimonial statement is likely to be inferred by the jury, the statement is subject to the Confrontation Clause." (*Ibid*.)

While some out-of-state courts have recognized this principle (see, e.g., *Wheeler v. State* (Del. 2012) 36 A.2d 310, 318-320, citing and following "[s]everal federal circuit courts" including the Ninth Circuit's *Ocampo* opinion), there doesn't appear to be any such acknowledgment in California. Defendant urges this court to resolve the significant constitutional issue.

The Court of Appeal avoids it by holding "any possible error to be harmless" under *Watson* or *Chapman*. (Opn 67.) But this analysis is infected by the problems defendant has already identified at argument I, *ante*. Indeed, Casper's implied hearsay was uniquely powerful: it was the only evidence *directly undermining* defendant's otherwise credible alibi testimony. The opinion simply lists evidentiary items supporting the judgment and conflicting to a greater or lesser extent with defendant's testimony. (Opn 67-68.) In fact, none of that evidence went directly to defendant's repeated claim of where he was and what he was doing *when the fire started*. The error should require reversal under any standard.

III. Where Defendant Argues Ineffective Assistance in Counsel's Failure to Litigate and Seek Instructional Support for a Specific Challenge to Specific Evidence, the Claim Isn't Defeated by a Record Showing Counsel Made an Unrelated, Unsuccessful Challenge to the Same Evidence.

Defendant insisted to the police and the jury — at length, repeatedly, and consistently — that he had nothing to do with Bustamonte's death and the fire. But jurors heard quite another story from defendant via Palacios and Duarte: a hearsay confession, "'probably the most probative and damaging evidence that can be admitted against [a criminal defendant].' [Citation.]" (*Fulminante v. Arizona*, *supra*, 499 U.S. 279, 296.) Indeed, Palacios's version included point-by-point detail, from motive through murder and coverup.

True, the jury also heard confused and confusing testimony suggesting those details came not from defendant, but from his nontestifying brother Elias Robert. (Opn 34, 42 [acknowledging Palacios's and Duarte's "inconsistent claims as to whether defendant made certain inculpatory statements directly to them, or they learned the information from defendant's brother."].) If so, they were inadmissible hearsay and should have been excluded from evidence. At minimum, the source (or sources) of information was unclear. But that ambiguity carried its own significance: unless the jury *found by a preponderance of evidence* that the testifying witnesses reported what defendant personally told them, the confession details should have been off-limits in reaching a verdict. (Evid. Code, § 403, subd. (c)(1).)

Unfortunately, the jury had no way of knowing this, because the hearsay-source issue was never litigated at trial, despite the same problem with the witnesses' preliminary hearing testimony. (Opn 34-38.) As a result, the court neither excluded confession details nor instructed the jury about the prosecutor's "preliminary fact" burden to prove their source. Nor was that burden ad-

dressed in closing arguments. In failing to protect defendant from improper use of such enormously prejudicial evidence, defense counsel was constitutionally ineffective. (*Strickland v. Washington, supra*.)

Aside from the erroneous prejudice analysis discussed at argument I, *ante*, the opinion's rejection of this claim suffers from additional problems requiring review. The central analytical defect is the opinion's erroneous conflation of two *unrelated* questions involving the same trial evidence — defendant's hearsay confessions as reported by Palacios and Duarte:

1. Was counsel ineffective in letting that evidence go to the jury without objection or a preliminary fact instruction or closing argument challenging the preliminary fact?

2. Did counsel properly argue to the jury that the remaining evidence insufficiently corroborated the confession evidence, so that corpus delicti was unproved?

Question 1 was the primary issue on appeal. (AOB arg. I.) Defendant argued ineffective assistance; the Court of Appeal found otherwise. (Opn 46-63.) Both defendant and the court gave question 2 a "Yes" answer. (AOB 42: "There was nothing wrong with [counsel's corpus delicti] strategy, per se." Opn 52: although "counsel's efforts were not successful," "we will not second guess" "his apparent tactical decision to rely on the corpus delicti rule[.]")

The problem is that the opinion treats the second answer as resolving the first issue. (Opn 49-52.) It does nothing of the sort. The opinion fails to explain — and the record suggests no logical explanation — what would have been reasonable about counsel's "apparent" decision to rely on corpus delicti principles *instead of* directly raising the hearsay-source issue. Why not do both? More to the point, why *didn't* counsel do both? Absent an answer to that

question, defendant's issue remains unresolved — unless this court grants review.

The analytical issue is an important one: does *any* apparent strategy as to certain evidence absolve counsel from taking an otherwise proper, situation-dictated, *unrelated* action to protect the defendant from misuse of that evidence? The problem is no different than one where, say, defense counsel makes a proper, though unsuccessful, Fourth Amendment objection to evidence including the defendant's post-arrest confession. If on appeal the defendant challenges counsel's failure to *additionally* raise a Fifth Amendment objection, it's no answer to call the other one a valid "tactical decision." That's simply not the issue.

On the contrary, the fact that counsel *did* challenge the hearsay confession evidence in some way strongly suggests he had no strategic purpose in failing to make an even stronger challenge. (See opn 34, 35-38, 42, 51, 53-54: Court of Appeal concedes Palacios and Duarte made "inconsistent claims" about their hearsay source(s); a hearsay-source challenge would have been a "valid tactical decision[.]") "[S]ince defendant's trial counsel *did* in fact object to the introduction of the statements, albeit on nonnmeritorious grounds, this fact underscores our conclusion that there could have been no tactical reason for counsel's failure to make a *meritorious* objection to the same evidence. [Citation.])" (*People v. Roberts* (2011) 195 Cal.App.4th 1106, 1131, original italics.)

The opinion includes another example of the same problem, suggesting an alternative defense strategy not to raise a hearsay-source challenge to admission of the confession evidence: counsel relied on the witnesses' hearsay-source confusion as general impeachment of their inculpatory testimony. (Opn 59-60.) But again, had counsel successfully excluded that testimony, the de-

fense gain would have been much greater, with impeachment still available as a fallback strategy.[9] And the opinion fails to explain why counsel neither requested a preliminary-fact instruction nor made a hearsay-source preliminary fact argument to the jury. (See AOB args. I-E and –F; the latter headnoted point is ignored in the opinion.)

Finally, the opinion finds no problem with counsel's failure to request a preliminary fact instruction, because CALCRIM No. 358 took care of everything such an instruction would have covered. (Opn 57-59.) But the opinion materially misreads the pattern instructions, which did *not* identify a burden *or* standard of proof governing the jury's decision "whether the Defendant made" "oral statements before the trial" according to the evidence. (Opn 59; 10RT 2605-2606.)

The Court of Appeal is satisfied jurors would have turned to the "one instruction on the topic" of burden of proof: CALCRIM No. 220, which had the court saying, "*Whenever I tell you the People must prove something*, I mean they must prove it beyond a reasonable doubt." (Opn. 59; 10RT 2592.) *By its very terms*, the CALCRIM 220 burden didn't apply to the CALCRIM 358 scenario. The latter instruction included neither the word "prove," nor any derivatives, nor the concept of either party shouldering a burden to establish a fact. So far from supporting the opinion's conclusion, the instructions refute it.

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[9] The opinion declares that had the trial court "excluded any part of" Palacios's and Duarte's testimony, "then defense counsel would not have been able to impeach Palacios and Duarte with the inconsistencies between their initial statements to Detective Gray, their preliminary hearing testimony, and their trial testimony …." (Opn 60.) The opinion doesn't say why that would be so. But as the cross-examining party, counsel would have been able to introduce the witnesses' prior inconsistent statements for impeachment. (Evid. Code, § 1235.) And if by doing so he opened the door to the rest of the statements on redirect, he would have been right where he ended up anyway.

(Cf. *People v. Castillo* (1997) 16 Cal.4th 1009, 1020 (conc. opn. of Brown, J.): "Although the average layperson may not be familiar with the Latin phrase inclusio unius est exclusio alterius, the deductive concept is commonly understood ….")

Similarly, the opinion characterizes the instructions here as "*identical*" to those approved in *People v. Hinton* (2006) 37 Cal.4th 839, 891-892. (Opn 58-59, original italics.) Not so: *Hinton* was a CALJIC trial (e.g., *id.* at 871, 875-876); the trial court here relied on CALCRIM. And neither the """exclusive judges""" nor """must reject""" language in the opinion's *Hinton* quotation (opn 58) is included in CALCRIM No. 358.

Moreover, although *Hinton* was satisfied with the instructions as given in that case, this court relied in material part on closing arguments: defense counsel expressly argued doubt as to the existence of the preliminary fact and "'urged the jury to reject the evidence.'" (Opn 58, quoting *Hinton*.) That didn't happen here; neither attorney explained the preliminary-fact requirement and burden to the jury. As defendant noted in discussing the defense hearsay-source argument, it was "context-free …; counsel didn't point out that jurors had to find defendant was [Palacios's] direct 'source' before they could consider each 'detail.'" (AOB 28-29; see *People v. Simon* (1995) 9 Cal.4th 493, 506, fn. 10 [*Watson* reversal for instructional error in failing to quantify burden of proof]: "We have reviewed the arguments of counsel in an effort to determine if the nature of the burden might have been conveyed to the jury during closing argument. It was not. …." See also *United States v. Solano* (9th Cir. 1993) 10 F.3d 682, 684: "The jury was not told which side had the burden of proof, nor was it told what standard of proof applied.")

IV. CALCRIM No. 358 Should Be Modified So Jurors Understand that the "Recorded" Exception to a Cautionary View of the Defendant's Hearsay Doesn't Apply When a Police Officer Simply "Records" the Hearsay as Reported by a Third Party.

Among the instructions requested by both parties was CALCRIM No. 358, the pattern instruction on "Evidence of Defendant's Statements." (1RT 47; 1CT 223.) In any event, the court had a duty to read it, given "evidence of an out-of-court oral statement by the defendant" — several, actually. (CALCRIM No. 358, Bench Notes, Instructional Duty, ¶ 1.)

But that requirement applied only to the instruction's general opening paragraph. (*Ibid.*; instruction quoted at opn 64.) The issue here concerns the bracketed second paragraph, a defense-favoring admonition about *inculpatory* statements: "[Consider with caution any statement made by (the/a) defendant tending to show (his/her) guilt unless the statement was written or otherwise recorded.]" As to that cautionary instruction, the court must read it "when there is evidence of an incriminating out-of-court oral statement made by the defendant. [Citations.]" (*Id.*, emphasis omitted, ¶ 2.) The Bench Notes explain further: "If the jury heard both inculpatory and exculpatory, or only inculpatory, statements attributed to the defendant, give the bracketed paragraph." (*Id.*, ¶ 3.)

So after Palacios's and Duarte's testimony recounting defendant's oral confession, the court had to give the cautionary paragraph — unless its exception applied: "The bracketed cautionary instruction is *not required when the defendant's incriminating statements are written or tape-recorded*. [Citations.]" (*Ibid.*, italics added.) What is or isn't "required," of course, concerns the trial court — not the jury.

Here, the incriminating statements were neither written nor tape-recorded. According to both witnesses, defendant (and/or Elias Robert) spoke

directly to them, and no recording device was involved. (Cf. arg. III, *ante*: ambiguous evidence whether witnesses actually heard defendant.) The trial court therefore included the bracketed cautionary paragraph.

But apparently neither the court nor counsel noticed something odd about the cautionary instruction itself: as written, it includes *both* the required jury admonition ("Consider with caution any statement made by (the/a) defendant tending to show (his/her) guilt") *and the exception to the sua sponte instructional mandate* ("unless the statement was written or otherwise recorded[]"). Effectively, what the Judicial Council presumably designed as a legal consideration for the trial court — if the admissions were written or recorded, don't give this instruction — becomes a *factual* question for the jury: if the admissions were written or recorded, you don't need to consider them with caution. Here's the oddity: if the admissions were written or recorded, the jury shouldn't be getting the cautionary instruction in the first place.

Of course, an oddity isn't necessarily an error. And where a defendant's inculpatory statements were *both* oral and written/recorded, the "unless" clause makes sense. In such a case, the jury's duty of caution would extend only to the oral, unrecorded statements; not to the others.[10]

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[10] CALCRIM could prevent the sort of error that occurred here by telling judges that the conditional clause itself should be read only in this limited circumstance; it should normally be excluded from No. 358. That's exactly the approach taken in CALJIC No. 2.71 (Fall 2009 Revision)). The bracketed admonition is similar: "[Evidence of an oral admission of [a] [the] defendant not contained in an audio or video recording and not made in court should be viewed with caution.]" But the accompanying Comment explains: "This fall 2009 revision adds the words 'not contained in an audio or video recording' to the [bracketed] paragraph. It is applicable when there are both recorded and unrecorded oral statements by the defendant. *If there are no recorded statements, it should be deleted.*" (Italics added.)

But that's not defendant's case. According to witnesses, *all* of defendant's "statement[s] … tending to show guilt" were made orally, and none were directly "recorded." So the "written or otherwise recorded" exception was inapplicable as a matter of law, and it should have been removed from the instruction. It wasn't, so here's what the court told the jury:

> Consider with caution any statement made by the Defendant tending to show his guilt, *unless the statement was written or otherwise recorded*.

(Opn 64, italics added in opinion.)

In the context of defendant's trial, this was a material error. Jurors were supposed to consider defendant's purported confession "with caution," but they mistakenly learned caution was unnecessary — to the extent the police "recorded" defendant's hearsay *as reported by Palacios and Duarte*.

The opinion identifies the correct standard of review: "A defendant who contends that an instruction is subject to an erroneous interpretation by the jury must show a 'reasonable likelihood that the jury understood the instruction in the way asserted by the defendant' and caused the jury to misapply the law. [Citation.]" (Opn 65.) But the standard isn't truly applied, with the opinion simply declaring the instruction "clear and unambiguous." (Opn 65.)

On the contrary, *in the context of this trial*, a reasonable juror's perspective should concern this court — enough to grant review and consider whether the pattern instruction should be modified.

Here's what the trial court told the jury: "You have heard evidence that the Defendant made oral statements before the trial." (10RT 2605.) Of course; several witnesses testified about defendant's statements. And jurors had to "decide whether the Defendant made any such statements in whole or in part." (10RT 2605-2606.) As for how to evaluate this evidence, the jury received a

single contingent instruction: "Consider with caution any statement made by the Defendant tending to show his guilt, unless the statement was written or otherwise recorded."

To apply this cautionary admonition, jurors needed to review the evidence of defendant's hearsay:

(1) Did any of it "tend[] to show his guilt"? Only some, but it was by far the strongest evidence against him: his own confessions.

(2) Were any of the statements described by Palacios and Duarte "written or otherwise recorded"? Here's the relevant evidence the jury reasonably would have considered:

(a) Both witnesses described oral statements made by defendant, with no direct recording.

(b) Both witnesses also reported those statements to Detective Gray. (Opn 19, 21-24, 26.)

(c) Gray's interview with Palacios — including her recounting of defendant's oral admissions — was "tape-recorded and then transcribed." (9RT 2323; 8RT 2001-2002.)

(d) The Duarte interview — similarly incorporating defendant's oral admissions — was also "recorded" and transcribed. (8RT 2049.)

Analyzing these facts, the jury had to determine whether the admissions were "written or otherwise recorded." And a reasonable juror would have understood "recorded" to mean "set down in writing or the like, as for the purpose of preserving evidence." (Dictionary.com unabridged (Random House, Inc.), <http://dictionary.reference.com/browse/record> (accessed Mar. 11, 2013).) Detective Gray unquestionably "recorded" defendant's oral admissions *as reported by Palacios and Duarte*; indeed, he presumably did so to preserve evidence, according to the common understanding of this concept. So

it's at least reasonably likely jurors concluded the cautionary instruction was inapplicable. That's especially true where, as here, neither counsel clarified the point in closing argument. (*Middleton v. McNeil* (2004) 541 U.S. 433, 437-438 [124 S.Ct. 1830, 158 L.Ed.2d 701]; see, e.g., 10RT 2690-2691 [defense counsel simply read instruction aloud and told jurors they were free to apply it].)

V. The Cumulative Impact of the Errors Denied Defendant Due Process and a Fair Trial.

Even if the individual trial errors discussed at arguments II through IV didn't require reversal when considered separately, defendant sought consideration of their cumulative impact on the fairness of his trial. (AOB arg. IV; *People v. Hill* (1998) 17 Cal.4th 800, 844-845; *Taylor v. Kentucky* (1978) 436 U.S. 478, 487-488 [98 S.Ct. 1930, 56 L.Ed.2d 468] [cumulative errors as violation of federal due process right to fair trial].) The Court of Appeal momentarily acknowledges and rejects this claim (opn 68, fn. 16); defendant urges this court to consider it.

VI. The Use of a Prior Juvenile Adjudication as a "Strike" Violated Defendant's Rights to Due Process, Notice, and Jury Trial Under the Fifth, Sixth and Fourteenth Amendments.

In *Apprendi v. New Jersey* (2000) 530 U.S. 466 [120 S.Ct. 2348, 147 L.Ed.2d 435], the United States Supreme Court held that under the Fourteenth Amendment's Due Process Clause, "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and proved beyond a reasonable doubt." (*Id.* at 490.)

In the instant case, the prior "strike" used by the court to double defendant's sentence terms (11RT 2769-2770) was a juvenile adjudication in which defendant was never afforded a jury trial. (11RT 2747-2750.) But a juvenile

adjudication does not fall within *Apprendi*'s exception for "the fact of a prior conviction." A contrary conclusion would ignore the significant differences between adult convictions and juvenile adjudications, and would fail to consider the scope of the term "conviction" as used by the United States Supreme Court in *Apprendi* and other decisions.

Defendant acknowledges this court rejected this contention in *People v. Nguyen* (2009) 46 Cal.4th 1007 (cert. den., Apr. 19, 2010), a decision binding the Court of Appeal. (Opn 72-73.) Nevertheless, defendant believes *Nguyen* was incorrectly decided and anticipates the issue to be addressed by the United States Supreme Court. He therefore makes this argument to preserve the issue for federal review. (Rule 8.508.)

Conclusion

For the reasons explained above, defendant requests that this court grant review or, at minimum, transfer the matter to the Court of Appeal with direction to reconsider in light of the points raised here.

Dated: _____

Respectfully submitted,

_____
Stephen Greenberg
Attorney for Appellant
Johnny Aguilar, Jr.

Certificate of Length

I certify pursuant to rule 8.504(d)(1) that the word count for this document is 8,350 words, excluding the tables and this certificate.

Dated: _____

_____
Stephen Greenberg

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On the date stated below, I served the document(s) described below on each of the listed parties by mailing a copy through the U.S. Postal Service in Nevada City, California.

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Executed _____ at Nevada City, California. I declare under penalty of perjury that the foregoing is true and correct.

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