IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

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

APPELLANT'S REPLY BRIEF

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

[redacted]
Attorney for Defendant/Appellant
Ajay Kumar Dev

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REPLY

Appellant, Ajay Kumar Dev, submits the following as his reply brief. Appellant has not responded to those points which were covered adequately in his opening brief and does not concede any arguments made therein.

I. APPELLANT'S CONVICTIONS SHOULD BE REVERSED BECAUSE ANY ERROR IN THIS CASE, EITHER ALONE OR CUMMULATIVELY, PREJUDICED APPELLANT REQUIRING A NEW TRIAL.

Respondent concedes that the trial court erred by failing to instruct the jury pursuant to CALCRIM No. 359 prohibiting the jury from convicting a defendant exclusively on any statement he or she may have made out-of-court. Respondent argues, however, that this claim fails because the error was harmless. (RB at 23.)

In determining whether there was a reasonable probability the jury convicted Ajay based solely on statements he made during the pretext call and/or statements Sapna attributed to Ajay during her testimony, Respondent ignores the effusive weaknesses in the prosecution's case. In this regard, Respondent fails to address the undeniable and systematic inadequacies of the prosecution's case-in-chief and, instead, simply concludes, without any analysis, that Sapna's testimony and her pregnancies were sufficient to render the errors in Ajay's case harmless. (RB at 23.)

By ignoring the flaws in the prosecution's case, Respondent implicitly concedes that the inconsistencies and implausibility of Sapna's testimony rendered the case against Ajay extremely weak. Specifically, despite Respondent's claim that this error along with the other errors alleged in the opening brief were harmless, Respondent does not contest Appellant's argument that it is highly unlikely that Sapna could have developed such a sincere and deep bond of familial love for Ajay and Peggy had, as she claimed, Ajay started raping her two weeks into their relationship. (AOB at 58-59.) Moreover, as uncontested by Respondent, the medical records equally supported a showing that Sapna lied about the charges as, unlike most rape cases, Sapna was physically examined by professionals specifically looking for signs of sexual abuse during the alleged periods of rape and other sexual assaults due to the adoption

proceedings and there was no evidence of rape or other sexual assault. (AOB at 59.) Even Respondent appears to agree that evidence of rape or sexual assault would have been evident especially where, as here, the victim claimed to be brutally raped almost every other day for a period of years. Therefore, unlike rape cases concerning an isolated rape where a physical exam may be inconclusive with regard to proving or disproving the occurrence of a sexual assault, the same uncertainty cannot apply where the alleged rapes average approximately every other day for a period of years. In these circumstances, such abuse could not go undetected and Respondent never refutes this point. Similarly, as undisputed by Respondent, not only would evidence of rape and sexual assault have been exposed by the medical records introduced at trial, given the serial nature of the allegations, it would have also been evident psychologically through sleep disturbances and/or other post traumatic stress disorder symptoms which were also never exhibited by Sapna. (AOB at 59.)

Respondent also never refutes the implausibility of Sapna's behavior after she moved out of the Dev home. That is, that it would be incomprehensible for a victim of serial rape, occurring almost every other day for a period of years, who claims to move out of her host-parents' home to escape regular brutal sexual abuse, to then make every conceivable effort to maintain a close loving relationship with her alleged abuser -- including, but not limited to, calling and emailing Ajay regularly begging to repair the relationship; volunteering to go to Motel 6 with Ajay weeks after moving out to negotiate a contract in which the Devs would continue to pay for Sapna's education; and agreeing to sleep over at the Dev home within months of moving out when Peggy had her surgery. (AOB at 60-65.) By leaving these contentions unanswered, Respondent tacitly concedes that all of this behavior, undisputed in the record, is completely inconsistent with a rape victim who claims she was raped approximately every other day for

five years straight, thus, making the prosecution's case-in-chief highly questionable at best.

Similarly, Respondent does not contest the fact that Sapna attempted to falsify the date in which she went to the police to report these alleged instances of rape and sexual assault. (AOB at 65-66.) Sapna testified she went to the police on January 29, 2004 after Ajay attempted to rape her at the Dev home. (AOB at 65-66.) However, the record unequivocally shows she did not go to the police on this date and, rather, reported these alleged rapes, four days later, on February 2, 2004, a day after her boyfriend, Will, broke up with her due to Ajay's actions. Therefore, Sapna's effort to falsify the date she went to the police shows her deliberate efforts to concoct a story more consistent and sympathetic with a victim who had just been raped rather than a vengeful act to punish Ajay for ending her relationship with her boyfriend, Will. Most significantly, the record clearly shows that Sapna did not initially report any attempted rape on January 29, 2004 (AOB at 65-66) which, as undisputed by Respondent, seems inexplicable, if true, thereby further illustrating the severe credibility problems with Sapna's testimony and, thus, the serious weaknesses in the prosecution's case-in-chief.

In addition to the implausibilities in Sapna's testimony, Respondent also fails to dispute the plethora of the inconsistencies in Sapna's testimony which equally render the prosecution's case-in-chief extremely weak. For example, Respondent does not contest the fact that when Sapna initially went to the police, she expressly reported that Ajay never forced her to orally copulate him adamantly emphasizing that such an act was utterly "disgusting." Yet, once a prosecution was initiated, Sapna's testimony radically changed at the preliminary hearing wherein she not only claimed Ajay forced her to orally copulate him while watching pornography, she testified she could never forget such a horrific act. (AOB at 66-68.) As

uncontested by Respondent, this radical and material sea-change in Sapna's story severely undermines her credibility and further demonstrates the severe weaknesses in the prosecution's case-in-chief.

On a related note, Respondent does not contest that Sapna falsely testified about Ajay showing her "18 & Confused" at 15 years of age, which would have been 1999, since this pornographic film was not made until 2000. (AOB at 69-70.) Additionally, as undisputed by Respondent, the relevant pornography found on the Dev family computer, moved to Sapna's room in June 2003, was only viewed when Sapna lived with the Devs and viewing ceased consistent with Sapna moving out of the house tending to show that Ajay was not the computer user viewing the pornography at issue. All these facts and inconsistencies, uncontested in the record and by Respondent, degrade the prosecution's case-in-chief and show that the case at bar was extremely close rendering any error severely prejudicial.

Respondent also fails to contest one of the most important aspects of this case: the Dev family dynamic surrounding the cultural pressures Ajay and Peggy were under to ensure Sapna's virginity pre-marriage and Sapna's rebellious quest for sexual independence once she turned 18 years old. This critical family and cultural dynamic informs the entire case and, in large part, explains why Sapna would falsely accuse Ajay of rape. Even when Sapna was desperately trying to elicit an admission from Ajay during the pretext call, Sapna let her guard down at the end of the call and tacitly conceded she had been impregnated by "a boy," rather than Ajay, in response to Ajay erroneously suggesting the "boy's name" would be in the pregnancy medical records to prove his innocence. As opposed to refuting Ajay's argument by denying she engaged in any sexual activity with a boy, she simply explained in Nepali, so Detective Hermann would not understand, that her pregnancy medical record would not prove his

innocence because the "boy's name" was not in the medical record as Ajay had assumed.

Equally problematic for Sapna was the fact that her pregnancy medical records showed that she deliberately lied about the [redacted] and prevent a possible pregnancy. These actions show that Sapna would go to great lengths to cover-up her sexual activity to outwardly conform to the cultural norms of her family regarding her virginity and, therefore, as with the plethora of evidence impugning Sapna's veracity, continues to show the case was close and that any trial error could have unfairly swayed the jury toward a wrongful conviction.

Most conspicuously ignored by Respondent is the undeniable timing of the pregnancies. Respondent fails to provide any explanation for how, despite allegations of serial rape occurring almost every other day for five years straight, Sapna only got pregnant and/or had a pregnancy scare a total of three times and, even more compelling, how and why these three pregnancies perfectly coincide with the narrow time periods in which Sapna was having consensual sex with her peers behind Ajay and Peggy's back and without their consent. (AOB at 71-76.) These facts, alone, strongly support a conclusion that Sapna falsely accused Ajay of rape establishing that the case was extremely close and rendering any trial error highly prejudicial warranting reversal.

Oddly, while Respondent does not contest the veracity of any of the facts or arguments presented by Appellant to demonstrate how the evidence reasonably supports a conclusion that Sapna falsely accused Ajay of rape, he suggests that Sapna's testimony regarding the rapes and her pregnancies establish there can be no prejudice in this case -- not with respect to the failure to instruct on CALCRIM No. 359 and not with respect to the other errors in this case. (RB at 23, 31, 36-39, 43-44, 52, 58-59, 64-65, 68, 74,

75.) This conclusory approach wherein incriminating evidence supporting the convictions is cherry-picked and then analyzed in isolation is only meaningful when examining a sufficiency of evidence claim. However, here sufficiency is not an issue. Appellant does not dispute that the jury was entitled to convict based on the evidence. The issue is whether, absent the trial errors, the jury would have still convicted Ajay of the charges and, thus, whether Ajay was afforded a fair trial. Therefore, it is essentially meaningless to simply point to Sapna's incriminating testimony and evidence of her pregnancies in an effort to establish the trial errors in this case are harmless. By white-washing the complexities in this case and ignoring the overwhelming deficiencies in Sapna's testimony and the prosecution's case-in-chief, Respondent, in effect, left the issue of harmlessness unrebutted.

In determining prejudice for state and federal based claims, Appellant must demonstrate there was a reasonable probability that, but for the error, he would have obtained a more favorable verdict or, for federal constitutional claims, the state must demonstrate the error is not harmless beyond a reasonable doubt. (*People v. Watson* (1956) 46 Cal.2d 818, 836; *Chapman v. California* (1967) 386 U.S. 18.) In this regard, Appellant is not required to prove his innocence. However, whereas here, the facts of the case reasonably support innocence, as undisputed by Respondent, there can be no question that the case was extremely close rendering any trial error prejudicial under both *Watson* and *Chapman*. Since Appellant relied on this in-depth prejudice argument for all of his claims, Respondent's failure to meaningfully address it upfront in the first claim, impacts the overall resolution of all the claims in the appeal both individually and cumulatively. Therefore, even if Sapna's testimony satisfies the *Alvarez* "slight" evidence test with respect to the CALCRIM No. 359 claim, Respondent's overall silence on Appellant's harmlessness argument leaves

the remaining prejudice claims essentially unrefuted. In this regard, Appellant should be granted a new trial based on trial errors weighed both individually and cumulatively.

II. APPELLANT'S CONVICTION SHOULD BE REVERSED BECAUSE THE TRIAL COURT PERMITTED THE VICTIM TO TRANSLATE THE PRETEXT CALL AS AN EXPERT AND FAILED TO APPOINT A CERTIFIED INTERPRETER TO TRANSLATE THE PRETEXT CALL.

A. The Trial Court Abused Its Discretion By Failing To Appoint A Certified Interpreter To Interpret The Portions Of The Pretext Call Spoken In Nepali.

Respondent argues that the trial court had no obligation to appoint a certified interpreter to translate the Nepali portions of the pretext call because, according to *People v. Aguilar* (1984) 35 Cal.3d 785, 793, Evidence Code section 752 only requires a certified interpreter in three instances none of which apply to Appellant trial. (RB at 27-28.) However, *Aguilar* is inapposite as it does not address Evidence Code section 752. Instead, *Aguilar* only applies to the California Constitution's requirement to provide a defendant an interpreter in order to satisfy due process requirements. (*Id.* at pp. 787, 790.) Independent of this state constitutional guarantee made to the defendant, the California Constitution, California law and the federal constitution still require that a trial be conducted in English not simply so that a defendant understands the proceedings and can communicate with his or her lawyer, but so that the jury can understand the evidence and weigh it accordingly. (AOB at 81-82.)

According to Respondent, *Aguilar* only requires an interpreter when:

> (1) They make the questioning of a non-English-speaking witness possible; (2) they facilitate the non-English-speaking defendant's understanding of the colloquy between the attorneys, the witness, and the judge; and (3) they enable the non-English speaking defendant and his English-speaking attorney to

> communicate . . . an interpreter performing the first service will be called 'witness interpreter,' one performing the second service, a 'proceedings interpreter,' and one performing the third service a "defense interpreter."

(*Id.* at p. 793.) Even though *Aguilar* does not concern Evidence Code section 752, the first circumstance in *Aguilar* arguably applies to Appellant's case. That is, an interpreter is required to allow a witness to testify. *Aguilar* cannot be limited to instances where a witness is "questioned." It is not simply the "questioning" that prompts the need for the interpreter. It is the need for the jury, judge, lawyers, and defendant to understand the evidence being introduced. In this regard, Respondent fails to refute Appellant's argument that all trials must be conducted in English which, in the case at bar, would require that Ajay's statements made in Nepali during the pretext call be interpreted by a certified expert. Respondent simply ignores Appellant's reliance on *People v. Arceo* (1987) 32 Cal. 40, 42, 44 and *Gardiana v. Small Claims Court* (1976) 59 Cal.App.3d 412, 418 which clearly provide that it would be an abuse of discretion to fail to appoint a certified interpreter where a witness does not speak or understand English. (AOB at 81-82.) Here, while Appellant may have been fluent in English, there is no dispute that the jury could not understand his statements made during the pretext call when he spoke in Nepali. Therefore, given the minimum requirement that trials be conducted in English, the trial court should have appointed a certified interpreter to translate the non-English portions of the pretext call. Under Respondent's interpretation of the law, the trial court has no obligation to ensure that the evidence introduced by the prosecution, claiming to be an admission by the defendant, be interpreted by a certified interpreter. This result is simply absurd.

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B. Sapna Was Not Competent To Interpret The Pretext Call.

1. The Record Unequivocally Shows Sapna Was Treated As Expert Translator Of The Pretext Call.

Respondent appears to concede that the Nepali portions of the pretext call required English interpretation. However, rather than requiring a certified interpreter, Respondent argues that Sapna was qualified to interpret the pretext call. Specifically, Respondent argues that the trial court treated Sapna as a percipient witness rather than an expert witness. (RB at 30.) This is false. The trial court very clearly instructed the jury that Sapna "translated" the pretext call after "reviewing" it and that she was qualified to make this "translation" because she spoke fluent English and Nepali. (5 RT 957; RB 29.) As held by the trial court:

> There may by other portions of [the] translation that the defense disputes as well. Again, they get to attack the translation if they want through putting on their own evidence or through cross-examination the People's evidence, but as [Sapna] testified, this is what she listened to. She speaks English and Nepali. She says that -- and can tell you what was on there, and apparently she reviewed it, and this is part of her testimony now that this is what she heard, and it's accurate under her understanding of the two languages as far as the translation goes, so that's the state of the evidence where we are now.

(5 RT 957.) This ruling by the trial court designated Sapna as a qualified interpreter. Sapna did not simply recall the conversation that took place during the pretext call approximately 5 years prior. She did not use the tape to refresh her recollection. According to the trial court, she "accurately" translated it based on her language skills. This made her an expert. As undisputed by Respondent, "interpreters are treated as expert witnesses and subject to the same rules of competency and examinations are experts

generally." (*Gardiana v. Small Claims Court, supra,* 59 Cal.App.3d at p. 420; AOB 83.)

Respondent further suggests that Sapna was only a percipient witness, and not an expert, because the trial court clearly instructed the jury that Sapna's translation "was simply the prosecution's version of the evidence" and the defense could and would dispute her translation. (RB at 30.) These facts, however, are irrelevant to determining whether Sapna was erroneously treated as an expert. Expert witnesses called by the prosecution also represent the "prosecution's version of the evidence" and are almost always disputed by defense experts. Therefore, the trial court's explanation to the jury about the disputed nature of the translation has absolutely no bearing on Sapna's status as an expert witness.

2. Sapna Was A Biased Expert Translator.

Respondent attempts to minimize the impact of Sapna's bias by arguing that, even as an expert witness, any bias would have been neutralized by cross examination which exposes this type of unavoidable bias wherein an expert is called and retained by either the prosecution or defense. (RB at 30-31.) However, this is not a case where bias simply resulted from one party retaining the services of an expert in an effort to support its theory of the case. Therefore, the cases relied on by Respondent are inapposite and ignore the authority in the opening brief clearly establishing that the law forbids retention of a biased interpreter. (RB at 30-31; AOB at 83.) In fact, contrary to the scenario laid out by Respondent, Sapna was not "retained" and had no vested interest in maintaining a professional reputation wherein real objectivity would be critical to future business, thereby, tempering any otherwise unavoidable bias. Rather, as uncontradicted by Respondent, Sapna specifically initiated the pretext call for the sole purpose of eliciting an admission from Ajay. Therefore, it is hard to imagine an expert in a more biased position -- not

only because Sapna was the alleged victim in the case which, alone, would be more than enough to disqualify her as an expert interpreter, but because she was asked to translate an inaudible portion of the pretext call affording her the opportunity to fabricate an admission unchallenged.

C. Appellant Was Prejudiced By This Error.

Respondent argues that Appellant did not suffer prejudice from this error because the defense called expert Shakti Aryal to translate the disputed portions of the pretext call spoken in Nepali. (RB at 31.) However, conveniently, Respondent white-washes the fact that Aryal testified that the portion of the tape wherein Sapna attributes an admission to Ajay was essentially "inaudible" because there was a "gap" in the tape leaving Sapna's "expert" testimony, in large part, unchallenged. (AOB at 84-86.) In this regard, it seems unfathomable that being allowed to translate the only unambiguous admission of sex, albeit after Sapna turned 18, would not severely prejudice Ajay. Moreover, the fact that, after this alleged admission, the pretext recording clearly shows that Sapna repeatedly criticized Ajay for not admitting anything, a point never made by the defense and thus probably missed by the jury, supports the strong possibility that Sapna and the prosecution exploited an opportunity to fabricate an admission against Ajay. In these circumstances, this error was prejudicial under any measure.

The error is also highly prejudicial because the jury was made to believe Sapna was "translating" the pretext as a qualified expert who had proficient language skills to do so. Therefore, any cross examination would have little effect on Sapna's credibility as her language skills were not in dispute making it almost impossible to impugn her "translation." By instructing the jury Sapna's role was to listen to the tape and tell the jury what it said based on her language skills versus her independent memory, the trial court not only elevated her to expert status giving her undue

credibility, it redirected the issue of credibility to her language skills as opposed to her inherent bias and opportunity to fabricate. That is, why would the jury doubt Sapna's translation when the trial court essentially told the jury she was qualified to translate the tape?

This error was made even more prejudicial by the fact that the defense failed to point out to the jury that, after this alleged admission translated by Sapna, Sapna repeatedly criticized Ajay for not admitting anything. Specifically, after the "fucked" comment she asserted, “Because I want you to talk to me. I want you to say it.” (15 CT 4174) Clearly, if Sapna believed Ajay’s use of the word “**fucked**” was an admission of sex, she would have never excoriated him for refusing to admit the allegations. Secondly, after the alleged "**sex with"** translation, Sapna again excoriated Ajay for not admitting it stating, “I just wanted to ask you about things, but you aren’t. Definitely you are not telling me anything about this. I am gonna go.” (15 CT 4184) Therefore, despite Sapna's translation to the contrary, Sapna's own statements made during the pretext call establish that Ajay never made an admission of sex or rape. In fact, according to Sapna, he never admitted "anything." (15 CT 4184) Respondent completely fails to explain or address this undeniable point in the record.

In addition, contrary to Respondent's argument, the fact that the jury received both the defense and prosecution translations during deliberations did not mitigate the extraordinary prejudice resulting from his error. (RB at 31.) Nothing in these written translations reversed the effects of elevating Sapna's status to an expert nor redirecting the focus of her credibility to her language skills over her bias. Moreover, as misstated by Respondent, the jury did not receive both the defense and prosecution translations during deliberations. (RB at 31; AOB at 85-86.) Rather, as clearly explained in the opening brief, the jury was mistakenly given a defense version of the translation with Sapna's handwritten corrections suggesting that the

evidence indisputably supported a finding that Ajay admitting having sex with Sapna after 18 years old -- even though the evidence on this point was highly contested. (9 CT 2480; 15 CT 4176; AOB at 85-86.) In addition, as argued in the opening brief and ignored by Respondent, prejudice also resulted from the fact that the jury was only given the prosecution version of the translation during the trial when the pretext call was played before the jury as evidence. (5 RT 959, 961; 7 RT 1761; 9 CT 2458-2499; 12 CT 3261, 3264-3265; AOB at 86.)

Finally, as argued previously, Respondent simply ignores Appellant's arguments regarding the plethora of evidence supporting the defense case and the consistent and effusive problems with the prosecution's case and Sapna's testimony most significantly the family tension around Sapna's independence, her undeniable acts to cover-up her sexual activity starting at age 18, and the unanswerable question: if Sapna's allegations are true, how could she only get pregnant three times in narrow window of time perfectly corresponding with her independent sexual activity which she tried to hide from the Devs and her biological father -- if she was being raped, without condoms or any other kind of birth control, two to three times a week for five years straight. These undisputed facts make this case undeniably close and, thus, render any trial error extremely prejudicial warranting reversal and a new trial.

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

A. With Respect To The Translated Portions Of The Pretext Call, The Jury Should Have Been Instructed To Use Caution When Determining What Ajay Allegedly Told Sapna.

In large part, Respondent and Appellant appear to agree that California law requires instructing the jury to exercise caution where a witness attributes an admission to the defendant made out-of-court. (RB at 33-35.) Without stating so directly, Respondent appears to also agree with Appellant that a recorded statement, by itself, does not, in all instances, obviate the need for jurors to exercise caution when determining the contents of an alleged out-of-court statement made by a defendant. Instead, Respondent appears to be arguing there was no error in instructing the jury pursuant to CALCRIM No. 358, which obviates the need to exercise caution where a defendant's statement is recorded, because Sapna's testimony regarding any alleged admissions was corroborated and, therefore, the potential for fabrication was minimized not requiring jurors to cautiously weigh the truth of any said admissions. Specifically, Respondent argues:

> [T]his is not a case where the only evidence of a purported admission was the testimony of a percipient witness describing what he or she allegedly heard the defendant say. In other words, this is not a case where the jury was forced to rely on the uncorroborated testimony of a witness in deciding whether the alleged statement was actually made. Thus, the concerns expressed in cases such as *Frye* and *Gardner* (i.e., unscrupulous witnesses who torture facts or commit perjury and/or witnesses who simply misapprehend, misremember, or

> misstate the defendant's comments) are not at issue.

(RB at 35.) In short, Respondent appears to be arguing that there are no concerns for fabrication in the case at bar because the record clearly shows that Ajay indisputably participated in the pretext call. (RB at 35-36.) However, this does not resolve the dilemma at hand. That is, where the recorded pretext call is inaudible and/or spoken in a foreign language subject to highly disputed translation, the victim hearsay testimony attributing an admission to the defendant is no different than a non-recorded incident. Interestingly, Respondent does not contest the fact that the pretext tape is inaudible, due to a gap in the tape, exactly in the spot where Sapna attributes the only unambiguous alleged admission of sex albeit after Sapna turned 18 years old. Instead, Respondent suggests that because the tape was authenticated and we know Sapna is speaking to Ajay there is no issue or mis-instruction. The problem with this argument is that identifying who is speaking on the tape is not the issue and, thus, does not resolve the issue. The issue is what Ajay said during that pretext call not whether he was the person having the conversation with Sapna during the pretext call. In this regard, Respondent simply fails to address the crux of the matter which is the fact that the recorded nature of the pretext call is irrelevant where portions of it are inaudible and, thus, just as non-recorded cases, jurors should exercise caution where a witness claims the defendant has made an out-of-court admission. In this circumstance, the same concerns regarding fabrication are ever-present and, thus, similarly required additional caution.

B. <u>Appellant Did Not Forfeit This Claim</u>.

Respondent argues Appellant forfeited this claim because "a trial court has no sua sponte duty to revise or improve upon an accurate statement of law without a request from counsel." (RB at 32, citing *People*

v. Lee (2011) 51 Cal.4th 620, 638.) However, since CALCRIM No. 358 is not an accurate statement of the law, as it over-broadly exempts all writings and recordings from a necessary exercise of caution, it is reviewable on appeal absent defense objection. (See AOB 87-90, 94-96.)

C. This Error Caused Prejudice Requiring Reversal Of Appellant's Convictions.

Respondent argues that Appellant could not have suffered prejudice from any failure to properly instruct the jury on exercising caution with respect to Sapna's translation of an inaudible portion of the pretext recording wherein she claims Ajay admitted having sex with her after she was 18 years old. (RB at 37.) Respondent appears to be arguing that there could be no prejudice with respect to this translation because there was an equally incriminating admission on the pretext call making the second translation cumulative. This argument is premised on a faulty assumption that the first alleged admission made in the pretext call is unambiguous.

Both the prosecution and defense agree that on page 21 of the translation of the pretext call, in response to Sapna asking how her life could be ruined by accusing him of rape, Ajay answered: "Because you have fucked me after 18 years of your age." (9 CT 2478; 15 CT 4174.) The dispute at trial was whether "fucked" was used to convey profanity, as in being betrayed or "fucked over," or whether it was meant literally to mean sexual intercourse. Ignoring the arguments presented in the opening brief, Respondent concludes there is only one way to interpret this statement -- an admission of sex after 18. (RB at 37.) Specifically, Respondent argues that "fucked" could not have been used in a profane manner because "it makes no sense" in the context of "after 18 years of your age." (RB at 37.) However, Sapna accused Ajay of raping her from age 15 to 20. Therefore, the significance of age 18 is perplexing in this

context if, as suggested by Respondent, it suggests an admission to the charges. In this regard, Respondent's interpretation "does not make sense."

Moreover, as the protracted emails between Ajay, Peggy and Birendra (Sapna's biological father) undeniably show, starting at 18 years of age, Sapna started having consensual sex with older boys she met through college and systematically lied about her sexual independence to Ajay, Peggy, and Birendra in a clear effort to protect her reputation in the Nepali community to ensure herself, her Nepali family and the Devs would not suffer public shame, economic loss, and social ostracism as a result of her conduct which was indisputably forbidden in her culture. (AOB at 13-20.) In this regard, Sapna's behavior "after 18" "fucked" Ajay over and the record very clearly supports this point.

Notably, Respondent never contests and cannot contest the fact that Sapna was having consensual sexual intercourse with older boys after she turned 18 years old in contravention of Ajay, Peggy, and Birendra's express dictates and against the strong-hold of Nepali cultural values; that Sapna went to extraordinary lengths to cover-up her sexual independence understanding the cultural consequences it would bring to herself, her biological family, and the Devs; that Sapna understood that, if her sexual independence was exposed, her biological family in Nepal, who were already very poor due to the number of daughters in their family, would suffer devastating, if not life-threatening, economic and social loss; that Sapna understood that her sexual independence, if exposed, would bring shame and disrespect to her host-family, the Devs, who were her only means of staying in the United States; and that in traditional patriarchal cultures, like Nepal, rape is often the only defense a woman has available to her in order to avoid or minimize these devastating social and economic consequences. Therefore, contrary to Respondent's contention, it very much "made sense," in this context, that Ajay would, in utter exasperation

and anger, tell Sapna that, once she turned 18, she started "fucking him over."

Sapna knew what was at stake by deciding to have pre-marital sex as a Nepali female, even in America. Thereafter, when the issue came to a head and Ajay threatened to expose her secret (with the honest intention of compelling Sapna to stop having pre-marital sex to both protect her best interests and salvage his reputation), Ajay and Sapna were poised in a very serious game of chicken wherein Sapna was threatening to accuse Ajay of rape to prevent him from exposing her sexual exploits which would have devastating effects on herself and her Nepali family and Ajay was threatening to expose her sexual exploits and send her back to Nepal in a sincere and desperate effort to save Sapna's future and, at the same time, his reputation and status in the Nepali community. This is what the pretext call was about.

Therefore, when Sapna asks how accusing Ajay of rape could ruin her reputation, Ajay understands that he will have to actually expose her sexual exploits (not just threaten to do so) in order to defend himself which, in turn, will ruin her reputation. Therefore, it makes sense that he would answer her question by angrily asserting, "Because you have fucked me after 18 years of your age." (9 CT 2478.) Meaning, your life will be ruined because you will force me to expose your sexual conduct which will result in seriously compromising both of us in the eyes and traditions of the Nepali community.

As skewed by Respondent, Ajay does not immediately discuss consent contiguous with his "fucked" statement. (RB at 37.) This is a serious misstatement of the record. Instead, Sapna counters by boldly claiming, "Okay, so?" after Ajay says "Because you have fucked me after 18 years of your age." (9 CT 2478; 15 CT 4174.) Why would Sapna respond by essentially saying "So what" if she believed Ajay was admitting

to raping her after 18 years of age? Therefore, it is Respondent's interpretation of the pretext call that "makes no sense." What makes more sense is that Sapna knows exactly what Ajay is referring to by being "fucked over" by her pre-marital sexual conduct and is trying to hold her own ground by suggesting that exposure of her conduct will have no bearing on her accusations of rape against Ajay. This interpretation is consistent with what Sapna tells us repeatedly later on in the pretext call -- that she is frustrated with Ajay because he won't admit it. (15 CT 4174, 4184.) Significantly, Respondent never addresses this point and never explains how Sapna's translations could be accurate given the fact that she undisputedly begs Ajay to admit it multiple times after these alleged admissions are made. (15 CT 4174, 4184.)

The "consent" comment at issue is made four seconds after Sapna counters "Okay, so." (15 CT 4174.) Therefore, it is an explanation as to how exposing her independent sexual conduct, as proved by the clinic visit Ajay accompanied Sapna to, would undermine any false allegations of rape. In this regard, Ajay explains that it would not look like rape because it would look like there was consent given by his presence at the clinic. i.e. "That means you have given me consent." (9 CT 2478.) Again, while ignored by Respondent, Appellant explains this in the opening brief and, given this context, establishes there were reasonable interpretations, other than an admission, to this colloquy between Ajay and Sapna. Sapna and Ajay are not having a measured business conversation. Rather, they are having a very heated family argument wherein each one feels that their life is on the line: Sapna -- because she fears Ajay is going to expose her sexual exploits and send her back to Nepal and Ajay -- because he fears Sapna is going to falsely accuse him of rape, publically, to protect herself. Their conversation is filled with short hand, innuendo and cultural nuance that is very difficult for an outsider to fully understand. Therefore, despite

Respondent's attempt to negate the complexities of the case and the pretext call, the totality of the facts defy this oversimplification. Not only do the Dev family emails undeniably support the defense theory of the case that Ajay used profanity during the pretext call, Sapna's own statements, uncontested by Respondent, further support this reading of the record as she repeatedly criticized Ajay for failing to admit it. (15 CT 4174, 4184.)

Respondent completely fails to address these highly significant problems with the prosecution's case-in-chief and, thus, cannot conclude that "the jury correctly treated appellant's remark as an admission." (RB at 37.) First, the facts don't support this conclusion. Second, this conclusion is irrelevant as a matter of law. Harmless error analysis does not ask whether the jury correctly weighed the evidence. Far from this erroneous legal standard, harmless error analysis asks for "an examination of the entire record." (*Watson, supra*, 46 Cal.2d at p. 836; *see also People v. Gonzales* (1967) 66 Cal.2d 482, 493 ["Any meaningful assessment of prejudice must proceed in light of the entire record."]; *People v. Wheelwright* (1968) 262 Cal.App.2d 63, 71 ["A reweighing of all the evidence is our inevitable obligation."]; *People v. Breverman* (1998) 19 Cal.4th 142, 165 [harmless error analysis under *Watson* requires "an examination of the entire record.") Therefore, the question remains: based on the entire record - how close was the case? Not only does the pretext call itself raise questions about whether Ajay ever admitted having sex with Sapna, the remaining portions of the record also raise serious doubts as to Ajay's guilt as argued in *Argument I, supra*, especially with respect to the fact that neither the prosecution nor Respondent have ever been able to explain how, given allegations of rape almost every other day for a five year period, Sapna only got pregnant three times, after she turned 18 years old, during intermittent narrow windows of time perfectly coinciding with Ajay and Peggy's suspicion, later confirmed by Araz Taifehesmatian at

trial, that Sapna was having consensual sex with older boys at college and resolutely covering it up.

Given the amount of exculpatory evidence presented at Ajay's trial and the fact that the "fucked" statement could easily be interpreted as profanity, rather than an admission of sex, there can be no doubt that Sapna's later translation of an inaudible portion of the tape was clearly an admission of sex required caution and the failure to so instruct severely prejudiced Ajay. To compound this error, the jury was not only advised that it did not have to exercise caution when determining whether Sapna's was being truthful about attributing an admission to Ajay, it was advised she was an expert and, therefore, the jury could ascribe even more weight to her testimony if it wanted. Therefore, contrary to Respondent's argument, the "sex" translation was not cumulative, but instead highly prejudicial in that it most likely informed the jury's decision to interpret "fucked" as an admission of sex rather than an expression of profanity. (AOB at 99-103.) As dictated by California law, prejudice in failing to properly instruct the jury to exercise caution where a hostile witness attributes an incriminating out-of-court statement to the defendant is measured by whether there was a conflict in the evidence and whether the alleged statement bears directly on the defendant's guilt. (AOB at 97-98.) As argued at length in the opening brief and unrebutted by Respondent, Appellant has met both of these criteria. For these reasons, this Court should reverse Appellant's convictions and grant him a new trial wherein the jury is properly instructed to exercise caution in determining whether Sapna's effort to attribute an admission to Ajay during the pretext call was truthful.

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

Respondent concedes, by omission, that the Nepali documents were properly authenticated under Evidence Code sections 403 subdivision (a)(3), 1410, and 1530 and that, as a consequence, the trial court's ruling to the contrary was error. Respondent, nevertheless, argues that the Nepali documents should not have been admitted for other reasons.

A. Judicial Notice And Impeachment.

At trial, the court refused to take judicial notice of the Nepali documents because it found there was no evidence the Nepali judgment was "criminal" and, thus, qualified as a conviction pursuant to Evidence Code section 452.5. (AOB at 128-130.) Respondent, however, does not contest that the record clearly shows the Nepali judgment was criminal in nature and, thus, qualified as a "conviction" under section 452.5. Instead, Respondent argues that taking judicial notice of the Nepali record of conviction would have been improper because a trial court cannot take judicial notice of the truth of the facts supporting the conviction. It can only take judicial notice of the truth that a prior conviction exists. (RB at 39-40.) First, contrary to Respondent's position, California law supports taking judicial notice that the facts supporting a conviction are true in some instances. Second, even where judicial notice is limited to the truth of the existence of the conviction, it was still reversible error to exclude the Nepali record of conviction for this limited purpose.

In *Solinsky v. Grant* (1992) 6 Cal.App.4th 1548, 1568, the Fifth District Court of Appeal reasoned, in *dicta*, that absolutely no factual findings underlying a criminal conviction can be judicially noticed as true because "taking judicial notice of the truth of a judge's factual finding

would appear to us to be tantamount to taking judicial notice that the judge's factual finding must necessarily have been correct and that the judge is therefore infallible. We resist the temptation to do so." (*Ibid*.) However, in reaching this conclusion, the *Solinsky* court recognized that its position contravened Jefferson's Evidence Benchbook along with a plethora of other cases which permit noticing the truth of findings of facts, conclusions of law, and judgments. (*Id.* at p. 1564-1565; *see also State Farm Fire v. Dominguez* (1982) 131 Cal.App.3d 1, 5 (Defendant's conviction for murder was properly judicially noticed for truth of the underlying facts in civil suit for wrongful death.) While there continues to be great debate regarding the scope of underlying facts that can be judicially noticed with regard to a judgment, most courts have found that, where the findings of fact result from an adversarial hearing or trial, facts contained in that judgment or record of conviction can be judicially noticed for their truth. (*Id.* at p. 1568; *Lockley v. Law Office of Cantrell* (2001) 91 Cal.App.4th 875, 885-886.) As held in *Lockley*:

> The appropriate setting for resolving facts reasonably subject to dispute is the adversary hearing. It is therefore improper for courts to take judicial notice of any facts that are not the product of an adversary hearing which involve[s] the question of their existence or nonexistence. [Citation.] "A litigant should not be bound by the court's inclusion in a court order of an assertion of fact that the litigant has not had the opportunity to contest or dispute."

(*Id.* at p. 882.) In the case at bar, as uncontested by Respondent, Sapna's date of birth was indisputably a finding of fact within the Nepali record of conviction resulting from an adversarial trial wherein Sapna had every opportunity to contest and dispute the fact at issue. Therefore, the Nepali conviction for fraud, based on a false date of birth, should have been judicially noticed for its truth, thus, conclusively proving Sapna's date of

birth was April 28, 1983 as "judicial notice is thus a substitute for formal proof." (*Solinsky, supra,* 6 Cal.App. at p. 1564.)

However, even if it is determined that the facts underlying the Nepali conviction were not subject to judicial notice consistent with the *dicta* in *Solinsky*, the trial court erred because it also refused to admit the Nepali conviction to prove the truth of the conviction, i.e. the existence of the conviction. Even Respondent agrees the Nepali conviction could and should have been judicially noticed in this regard. (RB 39-41.) Had the trial court properly taken judicial notice of the Nepali conviction, the defense would have been able to impeach Sapna who continued to claim her date of birth was January 5, 1984 rather than April 28, 1983. As clearly explained in *Lockley*, it is well-established that:

> [C]ourts may not take judicial notice of hearsay allegations. An appellate court's description of facts is merely the hearsay assertions of the justices who delivered the opinion. Hearsay statements within the opinion are inadmissible unless they fall within an exception to the hearsay rule.

(*Lockley, supra*, 91 Cal.App.4th at p. 885, *emphasis added*.) The California Supreme Court also made this clear in *People v. Woodell* (1998) 17 Cal.4th 448, 459-460 wherein it expressly held that "hearsay" facts recited in an appellate opinion could be introduced against the defendant for the non-hearsay purpose of determining underlying conduct of a prior conviction. Therefore, even if Sapna's date of birth and the other underlying facts supporting the Nepali record of conviction could not have been offered for their truth, they should have admitted for the non-hearsay purpose of impeachment. (See Evid. Code §§ 785, 1202.)

In other words, at a minimum, the trial court should have admitted the Nepali conviction for the truth of its existence and permitted the defense to rely on it for the non-hearsay purpose of impeaching Sapna. Therefore,

when Sapna insisted her date of birth was January 5, 1984, the defense should have been permitted to rely on the Nepali conviction, as extrinsic evidence, to impeach her during cross examination by asking: isn't it true you were convicted of passport fraud wherein it was found you lied about your date of birth; and isn't it true the Nepali court found your date of birth to be April 28, 1983; and isn't it true your uncle testified that you were born on April 28, 1983 at your home in Boriya Villiage, Saptari District, and that you falsified your date of birth to be adopted by the Devs, etc.

Therefore, even if only the existence of the Nepali prior conviction was judicially noticed, the entire "record of conviction" and all of the attendant hearsay allegations were admissible for the non-hearsay purpose of impeachment. This point is uncontested by Respondent and supported by *People v. Mathew* (1991) 229 Cal.App.3d 930, 936 ("Our high court has declared [in *Guerrero*] that the trier of fact may 'look to the entire record of the conviction to determine the substance of a prior foreign conviction.'"); *People v. Guerrero* (1988) 44 Cal.3d 343 (trier of fact need not limit review of a prior conviction to the judgment, but can look to the entire record of conviction to determine the nature and substance of the conviction); and *People v. Martinez* (2000) 22 Cal.4th 106 (admissible evidence outside the scope of the record of conviction can be used to prove a service of prior prison terms); *People v. Dunlap* (1993) 18 Cal.App.4th 1468 (same). In this regard, the jury would have had to accept, as fact, that the court in Nepal found Sapna guilty of passport fraud by falsely claiming her date of birth was January 5, 1984 rather than April 28, 1983, but, at the same time, the jury would have been permitted to independently decide Sapna's real date of birth as it related to the charges at Appellant's trial.

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B. Res Judicata Is Independent From Judicial Notice And Has Different Requirements.

Respondent is incorrect that judicial notice and *res judicata* have the same requirements. They are distinct doctrines and should not be confused. As clearly noted in *Solinsky*,

> [A] finding of fact that was judicially noticed would be removed as a subject of dispute and would be accepted for evidentiary purposes as true. The effect would be that without resort to concepts of collateral estoppel or res judicata that would litigate whether the issue was fully addressed and resolved, a finding of fact would be removed from dispute in the other action in which it was judicially noticed.

(*Solinsky, supra,* 6 Cal.App. at p. 1564.) Therefore, judicial notice is not defeated if the requirements of res judicata are not met.

C. Appellant Was Prejudiced By This Error Requiring Reversal Of His Convictions And A New Trial.

In sum, despite Respondent's argument to the contrary, there is legal support for taking judicial notice of the facts underlying the Nepali conviction for their truth especially since the facts at issue were all subject to an adversarial trial wherein Sapna was given the opportunity to contest them. Had the trial court properly taken judicial notice of the Nepali conviction, at a minimum, the fact that Sapna lied about her date of birth and the finding that Sapna's date of birth was April 28, 1983 would have been "treated as true for purposes of proof" as "judicial notice is [] a substitute for formal proof." (*Solinsky, supra,* 6 Cal.App.4th at p. 1564.) As discussed at length in the opening brief, the failure to take judicial notice of the Nepali conviction severely prejudiced Appellant both because he would have been acquitted of 12 counts which required proof Sapna was a minor at the time of the alleged offenses (AOB at 140) and, more importantly, because it prohibited the defense from exposing the fact that

Sapna had a genuine and compelling motive for falsely accusing Ajay of rape impacting all the charges at issue during the trial. (AOB at 140-149.) That is, as undisputed by Respondent, the false date of birth shows that Sapna legitimately feared the Devs could and, given the breakdown of the family relationship, would most likely reverse the adoption and send her back to Nepal where she would be subject to economic devastation, social ostracism, and gender subjugation, thus, foreclosing any opportunity for American citizenship and American freedom which she unequivocally declared were of vital importance to her. This prejudice was only exacerbated by the prosecution's claim during closing argument that Sapna had no motive to lie or falsely accuse Ajay of rape. Specifically, the prosecution argued:

> Now, lastly, I'd like to talk about two things. One, what would it take for the defendant to be innocent? One, Sapna would have to be making all this up, and she'd have to have some motive to still be doing this. And it is not the Violence Against Women Act because she already had her LPR. If she wanted to stay a citizen, she didn't have to say anything at all, no, she was already on track to being a citizen. She didn't have to say anything about this.

(19 RT 5142.) The prosecution clearly knew how important this issue was to the defense and it exploited the exclusion of this evidence to convince the jury, falsely, that no such motive existed. This undeniable insult to injury clearly resulted in prejudicing Appellant. Therefore, given the magnitude of what the date of birth proved, the trial court's failure to admit the Nepali conviction and permit the defense to prove Sapna lied about her date of birth effectively denied Appellant of his Fifth and Sixth Amendment Constitutional rights to present a defense.

Alternatively, even if the underlying facts of the Nepali conviction could not have been judicially noticed, there is almost no dispute that the

existence of the Nepali conviction could and should have been judicially noticed. While Respondent concedes this point, respondent suggests the facts underlying Nepali conviction could not be admitted for any purpose. Specifically, Respondent criticizes Appellant for wanting "to use the unsubstantiated, hearsay factual assertions from the Nepali court documents as a means of discrediting Sapna's version of events and destroying her credibility." (RB at 41.) In so far as Respondent posits that Appellant was precluded from using these facts for the non-hearsay purpose of impeaching or "discrediting" Sapna, Respondent is simply mistaken as argued, *supra*.

Respondent further suggests that Appellant could not have been prejudiced by the trial court's failure to admit the existence of the Nepali conviction for its truth and permit impeachment of the underlying facts because the jury heard extensive evidence about the Nepali conviction. (RB at 43.) However, as argued at length in the opening brief and ignored by Respondent, all of this "evidence" was negated by the fact that the trial court expressly instructed the jury to ignore it. (AOB at 146-147.) In this regard, the trial court instructed the jury it could not acknowledge the existence of the Nepali conviction: "the actual judgment or decision the Nepal Court made, whether it would be characterized as finding one thing or another, is not before you, and you're not to speculate as to exactly what the Nepal Court did. . . . There's no evidence of whether there was a finding of fraud or mistake." (7 RT 1727) The trial court also instructed the jury it could not rely on the facts underlying the Nepali conviction for any purpose including impeaching Sapna: "There's no evidence of anything like that [fraud] except there was a result from the Nepal Court that apparently identified one birth date over another. That's all you know, all you're allowed. I don't even know if you know that. That's what the evidence has been put on for. It's up to you to decide whether anything has

actually been proved or not, but the evidence is not to be received for any of those other purposes that I just laid out." (7 RT 1727)

In other words, the jury could consider the existence of the Nepal proceeding which delayed Sapna returning to the United States to support the dissuading charges, but was prohibited from considering the result of the proceeding, i.e. the conviction for passport fraud based on a false date of birth, to support the defense theory that Sapna had a genuine and compelling motive for falsely accusing Ajay of rape. This selective admission of the Nepali record of conviction was especially invidious because the trial court essentially directed the jury to find the Nepali conviction could not discredit Sapna's claim that her date of birth was January 5, 1984 thereby dismantling a critical aspect of the defense. In so far as the trial court directed the jury to find Sapna's date of birth was January 5, 1984, it denied Appellant his Sixth Amendment right to a jury trial with respect to counts 23, 24, 26, 28, 29, 31, 33, 34, 36, 56, 59, and 62 as Sapna's date of birth was an element of those alleged offenses. (*See In re Winship* (1970) 397 U.S. 358; *Apprendi v. New Jersey* (2000) 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (finding that any fact that increases the penalty above the statutory maximum, such as an element of the offense, must be submitted to the jury and proved beyond a reasonable doubt.) With respect to all of the counts, the trial courts actions directing the jury to find Sapna's date of birth was April 28, 1983 lowered the prosecution's burden of proof further denying Appellant of his Fifth and Fourteenth Amendment rights to due process. (*Ibid*.)

Furthermore, to aggravate matters, the trial court permitted several prosecution witnesses to impermissibly vouch for Sapna's claim that her date of birth was January 5, 1984 leaving almost no room for the jury to decide this issue independently. (AOB at 145.) As recognized by the United States Supreme Court, vouching is not only unconstitutional it is

highly prejudicial. (*See generally*, *United States v. Young* (1985) 470 U.S. 1, 8, 105 S.Ct. 1038, 84 L.Ed.2d 1; *Berger v. United States* (1935) 295 U.S. 78, 88-89, 55 S.Ct. 629, 79 L.Ed. 1314.)

Therefore, contrary to Respondent's claim, the fact that the jury heard evidence about the Nepali trial and conviction absent formal introduction of the Nepali judgment did not render the error harmless. Rather, since the trial court instructed the jury to disregard any impeachment value found in the Nepali conviction, the prejudice suffered by Appellant was far greater than simply excluding the documents. By so instructing the jury, the trial court essentially directed the jury to find Sapna's testimony credible on this point, thus, completely undermining one of the most critical aspects of the defense -- explaining why Sapna would falsely accuse Ajay of rape. In this regard, it's hard to imagine a more prejudicial error.

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

Respondent argues that Appellant's claim should be defeated because much of the pornography introduced at Appellant's trial was legitimately admitted to show Ajay had an attraction to minors. Respondent relies on purported child pornography to make this argument which completely misconstrues Appellant's argument.[1] (RB at 49-50.) As

[1] In the opening brief, Appellant explicitly outlined the adult pornography relevant to the claim: Exhibits 45, 46, 47, 48, 49, 50. (AOB at 151-153.) However, in responding to the claim, Respondent relies on Exhibits 42, 42(a), 43, 44, 45, 46, 50. (RB at 49-50.) In this regard, Exhibits 42, 42(a), 43, and 44 are irrelevant *Argument V* and, in large part, are addressed in *Argument VI, infra*. With respect to Exhibit 45, these files were openly and legally purchased by Ajay to help facilitate fertility

made explicitly clear in the opening brief, this claim is specifically related to the erroneous introduction of adult pornography only and has nothing to do with the admissibility and/or relevance of any child pornography or purported child pornography found on the Dev computers. The crux of the claim is that adult pornography is not relevant to show an attraction to minors and the erroneous admission of such evidence prejudiced Appellant warranting reversal. Respondent does not seem to contest this point and, therefore, by omission, concedes it.

In so far as Respondent is arguing that child pornography and/or purported child pornography is relevant to prove an attraction to minors (RB at 49-50), this issue is addressed in *Argument VI, infra*.

In large part, the limiting instruction argument is a red-herring as the adult pornography at issue was not admissible for any purpose and, thus, there was no need for a limiting instruction.[2] As uncontested by Respondent, the adult pornography was not admissible to show Ajay had an attraction to minors. Similarly, as uncontested by Respondent, the adult pornography was not admissible to show the requisite mental state for the

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treatments. (See AOB at 151, 163; 15 RT 4096.) The suggestion that one of the files in Exhibit 45, "Ashleylove," had images of "young girls" was debunked at trial and addressed in footnote 45 of the opening brief. (AOB at 151.) As unaddressed and undisputed by Respondent, Brent Buehring ultimately conceded he had no idea what images were contained in the "Ashelylove" listed in Exhibit 45. Finally, Exhibits 46 and 50 (AOB 152-153) were viewable and, with two exceptions, determined to be adult pornography. Therefore, Respondent incorrectly summarizes this evidence as containing seven child pornography videos. The prosecution expert, Dr. Stewart, clearly ruled out five of the seven as child pornography. (11 RT 2854, 2865; 12 RT 3004-3006.) Consequently, as presented in the opening brief and acknowledged by Respondent, Appellant does not contest there were two child pornography videos found on the Dell Tower computer. (AOB at 152-153, fn. 47; RB at 45, fn. 10.) Appellant addresses the evidentiary value of these videos in *Argument VII, infra.*

[2] The erroneous admission of this adult pornography, however, was even more prejudicial because the jury likely placed impermissible weight on this inflammatory evidence with respect to the rape charges as well.

rape charges as the rape charges are general intent crimes. (AOB at 167; 2 RT 60-63; 3 RT 391-394.) The two other theories the prosecution relied on to admit the adult pornography were that it was relevant to (1) bolster Sapna's credibility by showing Sapna could decipher between pornography Ajay allegedly showed her and the pornography she could not otherwise identify (RB at 45); and (2) to show Ajay intentionally placed the pornography on his computers as evidenced by the sheer volume of it, i.e. to show "ownership and possession." (RB at 45; 3 RT 399-400.)

As admonished in *People v. Pitts* (1990) 223 Cal.App.3d 606, 835 "Although a prior act need not be a crime to be admissible under Evidence Code section 1101 [Citation omitted], such evidence is not admissible solely to corroborate or bolster a witness's credibility." (*Ibid.* citing *People v. Key* (1984) 153 Cal.App.3d 888, 894, 203 Cal.Rprtr. 144; see *People v. Bunyard* (1988) 45 Cal.3d 1189, 1207, fn. 7, 249 Cal.Rptr. 71, 756 P.2d 795.) Therefore, contrary to Respondent's position, the adult pornography could not be admitted for this purpose.

Finally, if the adult pornography had no relevance to the charges, then it did not matter whether Ajay possessed it or not. Therefore, while there is a plethora of evidence that Ajay did not possess the majority of the adult pornography (AOB 163-166), it simply didn't matter. As a consequence, the "sheer volume" of adult pornography could not be admitted to show "ownership [or] possession" as these issues were neither relevant nor in dispute. (*People v. Pitts* (1990) 223 Cal.App.3d 606, 830-831 [in order for 1101(b) evidence to be admissible the ultimate fact to be proved must actually be in dispute].) Moreover, even if ownership was an issue, which it is not, the prosecution had the burden of proving Ajay possessed it by a preponderance of evidence before it could be admitted. (*People v. Simon* (1986) 184 Cal.App.3d 125, 129-130 [both the fact of the uncharged act and the defendant's connection to it must be proved by a

preponderance of evidence before it can be admitted as, absent these requirements, the evidence is irrelevant]; see also *People v. Carpenter* (1997) 15 Cal.4th 312, 380-383; *People v. Medina* (1995) 11 Cal.4th 694, 793.) However, as undisputed by Respondent, with the exception of Exhibit 45 which Ajay purchased for fertility treatments with Peggy, the adult pornography was placed on the Dev computers via a computer virus which generated a "porn-storm" or was most likely viewed by Sapna as evidenced by the contemporaneously viewed H-Bomb file which she undeniably viewed for a school term paper. (AOB 163-166.) Therefore, the adult pornography should have been excluded on these grounds as well.

Respondent argues the erroneous admission of the adult pornography was not harmless, in large part, because the jury acquitted Ajay of the pornography charges -- counts 64 and 65. (RB at 52.) However, it is possible that the jury acquitted Ajay of these counts because all of the pornography found on the computers had a last accessed date in 2003 which would have made Sapna either 19 or 20 years old at the time it was allegedly viewed. (11 RT 2915; 10 CT 2864-2867.) Therefore, since counts 64 and 65 both require proof that Sapna was a minor, the lack of proof on this element may have been the basis of the acquittals and, otherwise, the jury was very tainted by this inherently prejudicial and inflammatory evidence. (See AOB 163-166, 168-169.)

Moreover, contrary to Respondent's argument, the pretext call does not simply render Appellant's claims harmless. The statements Respondent refers to as alleged admissions in the pretext call are highly ambiguous and suspect. While this issue is thoroughly addressed, *supra*, in *Arguments I, II and III*, most significantly, Respondent fails to explain how Ajay's alleged statements could be admissions when Sapna unequivocally and repeatedly excoriates Ajay during the pretext call for <u>not</u> admitting it <u>after</u> these alleged admissions were made. (15 CT 4174, 4184.) In this regard, it is

very likely that the erroneous admission of pornography unfairly pushed the jury to the conclusion that these very ambiguous statements were admissions as argued by the prosecution.

In addition, Respondent simply ignores the fact that Sapna had a very compelling reason to falsely accuse Ajay of rape and that the pregnancy evidence strongly bears this out. Again, there is no explanation for how and why Sapna only got pregnant during the narrow window of time she was having sex with her peers and, yet, never got pregnant any other time despite the fact that she was allegedly being raped almost every other day for a period of five straight years. This is inconceivable. Therefore, it is highly likely the erroneous admission of the adult pornography prejudiced Appellant warranting reversal.

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

A. The Defense Clearly Objected To The Introduction Of The Kazaa Logs And Preserved The Claim for Appeal.

Respondent argues this Court should not review the Kazaa claim on appeal because it was forfeited by Appellant. However, as raised in the opening brief, defense counsel clearly objected to the introduction of the Kazaa log evidence. (AOB at 170; 11 RT 2828-2831.) However, in so far as Respondent argues the prosecutorial misconduct claim was not properly preserved, Respondent appears to suggest that defense counsel should have known the prosecution was lying to the trial court when it made its offer of proof about the Kazaa logs and should have objected accordingly. Since this Court has discretion to review potentially forfeited issues on appeal

(see generally *People v. Bruner* (1995) 9 Cal.4th 1178, 1183, fn. 5), Appellant respectfully asks that discretion be exercised in this case as it would be extremely unfair to penalize Appellant, not only for the prosecution's misconduct, but for the defense's failure to essentially catch the prosecution in a lie. The defense cannot be accountable for knowing when the prosecution has made misrepresentations to the court.

B. The Prosecution's Explanation Of The Kazaa Search Modality Was Deceptively Misleading On The Material Issue Of Intent.

Respondent concedes that the evidence at trial indisputably established that, under Kazaa, a user who innocently searches for music will inadvertently download pornography unknowingly. (RB at 56; 11 RT 2845, 2890, 2891, 2893.) He argues, however, that the prosecution did not commit misconduct because he did not misrepresent this fact to the trial court and/or the jury. In this regard, Respondent contends,

> [T]he prosecutor merely described for the court how a Kazaa user would search for files concerning a particular subject matter: 'You type in the search terms you're looking for, and this is what comes up; and that's how these things are acquired….' As for the hypothetical search mentioned by the prosecutor, he was simply pointing out that if a user inputs terms related to one subject matter (i.e. the President), he or she can expect to get results that are related to that search topic as opposed to some random unrelated topic (i.e. pornography).

(RB at 55; 11 RT 2830.) However, this is not what the prosecution argued to the trial court as an offer of proof and not what he argued to the jury during closing argument. Under Respondent's position, the prosecution simply explained that if a Kazaa user searched for President, he or she would get results related to President. (RB at 55.) But, this is not what the prosecutor explained to the trial court. Rather, the prosecution explicitly

told the trial court that a search for President would exclude inadvertent results for pornography. Specifically, the prosecution expressly stated: "[I]t's not like I typed in White House President, 1600 Pennsylvania Avenue, and, oh, my gosh, I got 'Nine-Year-Old Gets Raped.'" (11 RT 2830.) That is exactly how Kazaa worked and Respondent never disputes this fact. Therefore, the prosecution lied to the trial court.[3]

Moreover, Respondent simply ignores the same misstatements made to the jury during closing argument wherein the prosecution again mischaracterized the Kazaa evidence and argued false evidence to the jury.

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

(See AOB at 175; 18 RT 5013-5014.) Despite Respondent's argument to the contrary, there is no other way to interpret the argument the prosecution made to the jury. He did not simply explain that specified search terms would yield like results. He argued that the pornography results were necessarily the result of pornographic search terms which is utterly false. Referring to the pornographic material found on the computer, the prosecution argued, "You have to ask for it." (18 RT 5013-5014.) This is false. You don't necessarily have to ask for it. It can and often is

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[3] While it is possible the prosecution misunderstood the Kazaa log evidence, Respondent does not dispute the fact that the Brent Buehring clearly knew how the Kazaa log worked and that this knowledge was imputed to the prosecution for purposes of prosecutorial misconduct. (AOB at 173-174.)

inadvertently placed on a computer especially where, as here, the Kazaa logs show 96.5% of the files were music and 3.5% were pornography. Therefore, these arguments made to the trial court and jury constituted misconduct because they were knowingly false representations.

C. The Kazaa Logs Did Not Show Ajay Intended To Search For Child Pornography And, Therefore, Were Inadmissible.

The Kazaa logs do not show that Ajay deliberately searched for child pornography on his computer. As made clear by prosecution expert Brent Buehring, the Kazaa user could innocently search for music and inadvertently and unknowingly download child pornography. (AOB at 173; 11 RT 2807, 2841, 2845, 2891, 2893.) Therefore, the Kazaa files could not prove Ajay's "intent" or an attraction to minors because there was no evidence Ajay used relevant search terms to procure child pornography. Moreover, the fact that the Kazaa logs contained 96.5% music files and 3.5% pornography files supports the conclusion that the child pornography was inadvertently and unknowing placed on Ajay's laptop consistent with the peer-to-peer nature of the Kazaa program. In this regard, Respondent appears not to refute Appellant's argument that the search modality in the Kazaa program ruled out evidence of intent. Rather, like the adult pornography evidence, Respondent argues that the "sheer quantity" of Kazaa log evidence showed Ajay's intent and it also bolstered Sapna's credibility. (RB at 57-58.) However, these arguments are unsupported.

First, the "sheer quantity" argument is circular as it assumes that a large quantity of pornography would not be accidentally placed on a computer whereas a small number of pornography files might be, i.e. that the more pornography on the computer, the higher likelihood that the user intentionally searched for it. However, as prosecution expert Brent Buehring testified, this was not true for the Kazaa files as users often searched for music and inadvertently and unknowingly had pornography

downloaded on the computer -- even large quantities of pornography.[4] (AOB at 173; 11 RT 2807, 2841, 2845, 2891, 2893.) In this regard, "sheer volume" was irrelevant to show intent.

Put another way, before the prosecution could rely on the Kazaa evidence (or any of the pornography) to prove intent under Evidence Code section 1101, subdivision (b), it had to establish that the pornography at issue belonged to Ajay. Appellant addressed this at length in the opening brief and Respondent has simply left these arguments unanswered. In this regard, *People v. Carter* (1975) 46 Cal.App.3d 260,263, *People v. Long* (1970) 7 Cal.App.3d 586, 592, and *People v. Ewoldt* (1994) 7 Cal.4th 380, 460 are directly on point as they discuss the necessity to first prove the defendant committed a prior bad act before admitting it to prove intent. Otherwise, as noted in *Long*, a "vicious circle" is created where insubstantial proof of a prior bad act is used to bolster unsubstantiated proof of intent. (*Long*, *supra*, 7 Cal.App.3d at p. 592; AOB 182.) This is exactly what happened in the case at bar. The sheer number of pornography files found on the Dev computers were used to show Ajay's intent, but the record did not affirmatively show Ajay possessed those files. In fact, Brent Buehring clearly testified that he had no idea who was using the computer

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[4] Respondent again confuses the issue by relying on pornography not relevant to the claim. For example, Respondent argues that "all" the pornographic material found on the Dev computers, including the Kazaa logs, shows Appellant had an attraction to minors. (RB at 57.) However, the only pornography relevant to this claim, *Argument VI,* is the Kazaa log evidence which the prosecution was permitted to rely on as child pornography. This was extremely prejudicial because it involved 122 files of purported child pornography. The "seven" child pornography videos Respondent points to Brent Buehring identifying were clearly debunked by prosecution expert Deborah Stewart who clarified there were only <u>two</u> child pornography videos found on the Dev computers. (8 RT 2046-2048; 11 RT 2854, 2865.) Therefore, in the end, the only child pornography at issue were the two child pornography videos found on the Dell Tower computer which are addressed, *infra*, in *Argument VIII* (the e-mail claim).

at the time pornography downloaded or was being viewed. (11 RT 2936.) And, with respect to the Kazaa files, the record tended to show Sapna was the user when the Kazaa files were downloaded as the Kazaa files show a contemporaneous "H-Bomb" file which Sapna searched for while working on a term paper for school. (AOB at 180; 6 RT 1215; 11 RT 2884-2885, 2895; 17 RT 4705-4707, 4790-4791; 11 CT 3184-3203.) These points are never contested by Respondent. Therefore, it was impermissible to allow the prosecution to admit the Kazaa files to show Ajay harbored the requisite intent under the lewd and lascivious charges where there was insufficient proof he either searched for or possessed those files.

Second, as argued *supra,* evidence introduced under Evidence Code section 1101, subdivision (b), cannot be introduced to bolster a witness's credibility. (*People v. Pitts, supra,* 223 Cal.App.3d at p. 835; *People v. Key, supra,* 153 Cal.App.3d at p. 894; *People v. Bunyard, supra,* 45 Cal.3d at pp. 1207, fn. 7.) Therefore, contrary to Respondent's position, the Kazaa log evidence was not admissible for this purpose.

Finally, even if could be shown that Ajay intentionally searched and possessed the 122 Kazaa files purporting to be child pornography (which it cannot), *Ewoldt* clearly provides that prior bad act evidence should not be admitted to prove intent where intent is not a disputed issue. Here, like *Ewoldt*, the age of the victim and the nature of the charged acts were independently sufficient to show intent. That is, fondling a minor's breasts, touching her genitalia, and/or having sex with her necessarily shows the requisite intent to support the lewd and lacivious charges and no other evidence was necessary to establish this element of the charges. In this regard, Respondent completely fails to distinguish *Ewoldt* which is directly on point and indistinguishable from the facts of this case. For all of these reasons, the Kazaa log evidence was inadmissible and should have been excluded from Appellant's trial.

D. <u>This Error Prejudiced Appellant Warranting Reversal And A New Trial.</u>

Respondent suggests that the erroneous introduction of 122 files purporting to be potential child pornography did not prejudice Appellant because only file names, dates and descriptions were admitted. (RB at 58-59.) However, as uncontested by Respondent, child pornography by its nature is extremely prejudicial and, in most instances, cannot be mitigated. (See *People v. Page* (2008) 44 Cal.4th 1, 41, fn. 17; *Jacobson v. United States* (1992) 503 U.S. 540, 550; *People v. Earle* (2009) 172 Cal.App.4th 372, 399.) Moreover, as emphasized by Respondent, the prosecution specifically argued that the sheer number of files indicated Ajay was more likely to have possessed the child pornography. (RB at 58.) Therefore, given this argument, the erroneous introduction of 122 files, whether or not viewable, compared to the two child pornography shown to the jury, would have had an enormous impact.

In addition, one of the main disputes at trial concerned who viewed the child pornography videos found on the Dell Tower computer. Peggy Dev testified that she spoke to Ajay while he was at work on the exact date and approximate time the child pornography was being viewed at the Dev home as evidenced by a computer log. (15 RT 4102-4109.) The defense attempted to corroborate this testimony with an e-mail affirmatively showing Ajay was at work during this date and time, but the trial court excluded this evidence. (*See Argument VII*.) Consequently, there can be no doubt the erroneous introduction of 122 purported child pornography files would have seriously contributed to the jury's determination on this critical issue. Therefore, contrary to Respondent's argument, it cannot be said that "This innocuous form of evidence surely was far less inflammatory than the pornographic evidence not in dispute -- the three videos that were shown in their entirety to the jury." (RB at 59.) Just the opposite was true: the

erroneous admission of the 122 purported child pornography files likely under-cut Peggy's uncorroborated testimony severely discounting the defense's otherwise very compelling defense that Ajay was clearly at work when the two admitted child pornography videos were being viewed at the Dev home.

Similarly, as ignored by Respondent, Appellant also suffered severe prejudice because the prosecution mischaracterized the Kazaa evidence during closing argument and erroneously told the jury that the Kazza files necessarily evidenced Ajay searching for child pornography ruling out the very likely possibility that the Kazza files were, in fact, inadvertently and unknowingly placed on Ajay's laptop as a result of a search for music. (18 RT 5013-5014; AOB 173-175.) As falsely argued by prosecution, "The most important thing about those [Kazaa files] is how you get that information. You have to ask for -- you search for certain search terms." (18 RT 5013-5014.) But, you didn't have to ask for it. Child pornography could end up on your computer, through a Kazaa search, without asking for it or searching for it. Therefore, the jury was seriously misled on this point causing severe, undeniable and unfounded bias against Appellant.

Finally, as argued *supra*, the prosecution case was very weak. Sapna's testimony was wrought with inconsistencies and implausibilities. The pretext call was not as damming as Respondent suggests. Not only were the alleged admissions highly ambiguous and suspect as argued *supra* in *Arguments I, II,* and *III,* Respondent never explains how these translated statements could have been admissions when the record undisputedly shows that after each one of these alleged admissions, Sapna repeatedly condemned Ajay in utter frustration for not admitting anything. (15 CT 4174, 4184.) Therefore, the pretext call evidence does not, as Respondent suggests, render any and all of Appellant's claims harmless. And, finally, as uncontested by Respondent, the timing of the pregnancies are glaringly

suspicious as Sapna only got pregnant during a small window of time perfectly corresponding with the times she was surreptitiously engaged in consensual sex with her peers and, strikingly, never got pregnant previously as a result of the alleged rapes despite the fact that Sapna claimed she was raped almost every other day for a period of five years. This is utterly inconsistent with the prosecution's case. Therefore, Appellant's convictions should be reversed and he should be granted a new trial.

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

A. Appellant Properly Laid A Foundation To Introduce The E-Mail At Issue.

In *People v. Hawkins* (2002) 98 Cal.App.4th 1428, 1450 the Sixth District Court of Appeal held that a computer generated date/time stamp is admissible under Evidence Code section 1552, as non-hearsay evidence, as long as there is sufficient evidence to establish the computer at issue was operating properly at the time of the date/time stamp was printed out. At issue in this case, is an e-mail with a date/time stamp time of September 26, 2003 at 8:48 a.m.

With respect to the foundational requirement established by *Hawkins*, Respondent argues "Appellant did not offer sufficient evidence establishing the accuracy of the date and time information for the computer server at Appellant's work." (RB at 64.) In making this argument, Respondent fails to respond to any of the evidence Appellant offered with regard to Ajay's work computer and, similarly, ignores the well-established case law clarifying that only a very low evidentiary threshold is legally necessary to meet this foundational requirement. (AOB at 193-196.) In

this regard, Respondent offers no explanation as to why the testimony from Michael Mullen, the system administrator at the Department of Water Resources (Ajay's work), and defense expert, Jeffrey Fischbach, failed to meet this low foundational requirement. Mullen explained that, on the date Ajay sent this e-mail to Peggy, the e-mail at the Department of Water Resources operated internally and could not be accessed remotely meaning Ajay had to have been located at work if he was using his work e-mail. (15 RT 4017-4020.) Fischbach explained, as uncontested by the prosecution and Respondent, an e-mail date/time stamp (which is computer generated) is often even more reliable than an individual computer date/time stamp because it cannot be manipulated by an individual computer user as it is provided for by the e-mail company's server -- like Yahoo or Hotmail -- which users cannot access or manipulate. (17 RT 4771.) No doubt this was more evidence than the foundational evidence deemed sufficient in *Hawkins* wherein a defense expert testified the computer at issue appeared to be functioning properly, but admitted a systems administrator could change the date. (*Hawkins, supra*, 98 Cal.App.4th at p. 1437.)

Respondent, nevertheless, suggests the defense was obligated to show that "the last time that the accuracy of the date and time information had been checked." (RB at 64.) However, there is no legal support for such a requirement. In fact, as acknowledged by Respondent, the California Supreme Court may decide that no testimony regarding the accuracy and reliability of a computer is necessary as a prerequisite to admission. (RB at 62; see *People v. Goldsmith*, review granted May 9, 2012, S201443.) Even in *People v. Lugashi* (1988) 205 Cal.App.3d 632, 636, 642, unaddressed by Respondent, the Court of Appeal held absolutely no evidence regarding the computer hardware or software, its maintenance or reliability or any system of internal checks was necessary to lay a foundation to introduce a computer print-out from Wells Fargo bank in a

credit card fraud case. Therefore, contrary to Respondent's position, Appellant met the foundational requirement to introduce the date/time stamp of his work e-mail establishing he was at work while the prosecution claimed two child pornography videos were being viewed at the Dev home.

B. The Date/Time Stamp Is Not Hearsay And, Thus, Was Admissible To Show Ajay Was Not Home When The Prosecution Claimed Child Pornography Was Being Watched At His Home.

Respondent concedes that *Hawkins* provides that the time/date stamp on Ajay's work e-mail should have been introduced as non-hearsay because that information was generated by a machine rather than a person. (RB at 63.) In this regard, the date/time stamp should have been admitted for the truth of the matter asserted. Respondent, however, urges *Hawkins* is wrongly decided and suggests it may be better to resolve this issue after the California Supreme Court decides *Goldsmith* wherein the High Court is reviewing whether information generated from an Automated Traffic Enforcement System (ATES) is hearsay and, if so, whether any exceptions apply. (RB at 62; *People v. Goldsmith*, review granted May 9, 2012, S201443.) Notably, however, if the California Supreme Court holds that date/time stamps or any other computer generated information is hearsay and, thus, subject to exclusion, then almost all of the pornography evidence introduced by the prosecution should have subject to exclusion on this basis as, in large part, it consisted of computer generated files with date/time stamps and file names. In this regard, Appellant respectfully requests the right to reserve the opportunity to brief this issue supplementally post-*Goldsmith*.

Alternatively, even as non-hearsay evidence, the date/time stamp on the e-mail was admissible as impeachment since Sapna testified Ajay showed her these two child pornography videos and claimed she never watched them independently. (4 RT 792-795, 819-821; 5 RT 915-916,

1111-1112, 1159; 6 RT 1322.) Therefore, since the prosecution introduced evidence of a computer log showing the two child pornography videos may have been viewed at the Dev home at September 26, 2003 at 8:55 a.m., at a minimum, the defense should have been able to introduce the e-mail to impeach this evidence. (10 CT 2866.) Therefore, for all these reasons, it was error to exclude the E-mail evidence as hearsay evidence.

C. <u>This Error Prejudiced Appellant Warranting Reversal And A New Trial</u>.

Respondent suggests this error is not harmless because Peggy Dev testified to Ajay being at work during the approximate time the two child pornography videos were being viewed at the Dev home, thus, making the e-mail evidence cumulative. (RB at 64-65.) This argument is simply disingenuous given the great lengths the prosecution went to discredit Peggy and taint her testimony as self-serving. (15 RT 4101-4104; 18 RT 4976, 19 RT 5017, 5127.) Therefore, it is undeniable that the jury would have placed much more weight on computer generated neutral evidence over that of Ajay's wife who clearly believed in his innocence and could, thus, be seen as biased. (*See Cullen v. Pinholster* (2011) __ U.S. __, 131 S.Ct. 1388, 1431-1432 (dissent by J. Sotomayor) quoting *Arizona v. Fulmenante* (1991) 499 U.S. 279, 298-299 [evidence is not "merely cumulative" if it corroborates other evidence that is "unbelievable" on its own]; *People v. McKinnon* (2011) 52 Cal.4th 610 quoting *People v. Mattson* (1990) 50 Cal.3d 826, 871 [identical evidence is not cumulative when each carries different weight.].) Moreover, Respondent's argument ignores the enormously inherent prejudicial impact of child pornography evidence. (*People v. Page, supra*, 44 Cal.4th at 41, fn. 17; *Jacobson v. United States, supra*, 503 U.S. at p. 550.) Respondent also ignores the fact that, despite the trial court's exclusion of the e-mail evidence, the prosecution nevertheless relied on it during his closing argument and flatly

misstated the time of the e-mail, thus, disproving Peggy's testimony that Ajay was at work at the time the child pornography was being viewed at the Dev home. (AOB at 189, 199; 19 RT 5141.) Therefore, the error was necessarily prejudicial contrary to Respondent's position.

Finally, Respondent again purports that the error is harmless because the pretext call and Sapna's testimony were sufficiently "damning evidence" to render any error harmless. (RB at 65.) However, as repeatedly argued by Appellant, the pretext call did not contain undeniable admissions from Ajay. Rather, the alleged admissions were highly suspicious as Sapna, who had a very serious motive to falsely accuse Ajay of rape, was permitted to translate the alleged admissions, giving her the perfect opportunity to fabricate them, which was further evidenced by the fact that the pretext call itself shows Sapna repeatedly excoriated Ajay for failing to admit it. Moreover, both the prosecution and Respondent fail to explain how Sapna could have been raped almost every other day for a five year period and only get pregnant during a small window of time perfectly coinciding with the periods of time she was having sex with her peers and lying about it for fear exposure of this truth might send her back to Nepal where she and her biological family would suffer devastating social and economic consequences. Given these undeniable facts, reversal is required.

VIII. APPELLANT'S CONVICTIONS MUST BE REVERSED BECAUSE THE TRIAL COURT SANCTIONED PROSECUTORIAL MISCONDUCT DURING CLOSING ARGUMENT BY ALLOWING THE PROSECUTION TO ATTRIBUTE AN ADMISSION OF RAPE TO APPELLANT THAT DID NOT EXIST.

A. The Prosecution Clearly Committed *Griffin* Error.

Respondent concedes that, during closing argument, the prosecution pontificated Ajay wrote a note to his lawyer during the preliminary hearing wherein Ajay admitted raping Sapna in a Bangkok hotel room in 2003. (RB at 66; AOB at 200; 19 RT 5124-1526.) Respondent does not appear to

contest the fact that no such note existed or the fact that the prosecution had absolutely no way of knowing what the note at issue stated. Respondent, however, argues the prosecution's argument was "reasonable." (RB at 68.) Specifically, Respondent argues, "[F]ocusing on the fact that only Sapna and appellant know what happened in the Bangkok motel room, the prosecution reasonably concluded that appellant must have told defense counsel that he and Sapna had sex." (RB at 67-68.) There was absolutely nothing reasonable about this conclusion. It was pure conjecture and nothing more.

As argued at length in the opening brief and ignored by Respondent, any note Ajay could have written to his lawyer about the hotel room he and Sapna shared in Bangkok was completely consistent with his innocence. That is, Ajay knew and understood that, if the rape allegations were true, no rape victim would knowingly accompany her rapist over 8,000 miles away to share a hotel room with him and then forget she was raped both when reporting the rapes to the police and, then again, when testifying to the rapes at a preliminary hearing. This is what the defense was legitimately trying to expose. However, rather than expose this very glaring implausibility in Sapna's testimony, the prosecution eviscerated the defense by fabricating an admission of rape and attributing it to Ajay. This epitomizes prosecutorial misconduct and constituted reversible *Griffin* error.

Remarkably, Respondent concludes the prosecution's misconduct did not constitute *Griffin* error because "the prosecutor did not make any comments, either directly or indirectly, regarding appellant's decision not to testify at trial." (RB at 67.) Respondent's unreasoned conclusion ignores the fact that *Griffin* is directly on point and cannot be factually distinguished from this case. As argued at length in the opening brief, in *Griffin v. California* (1965) 380 U.S. 609, 615, the Supreme Court held that

the Fifth Amendment of the United States constitution, incorporated to the States through the Fourteenth Amendment, "forbids either comment by the prosecution on the accused's silence or instruction by the court that such silence is evidence of guilt." In this regard, the High Court warned that prosecutorial misconduct includes reference to "facts peculiarly within the accused's knowledge" (*Id*. at p. 614) or argument concerning facts which the defendant would be "the only person able to dispute the testimony." (*United States v. Hasting* (1983) 461 U.S. 499, 503.) In fact, like the argument by the prosecution in this case, the constitutionally defective argument in *Griffin* included references to "He would know that. He would know how she got down the alley. He would know how the blood got on the bottom of the concrete steps. He would know how long he was with her in that box. He would know how her wig got off." (*Griffin v. California, supra,* 380 U.S. at p. 611.) These arguments are eerily similar to the arguments made by the prosecution in this case: "There's only one other person on the planet who knows that they had sex in the motel room in Nepal." (19 RT 5125) These facts are indistinguishable from *Griffin* and Respondent makes no effort to explain how and why *Griffin* differs from this case. Consequently, there can be no question that the prosecution's argument constituted *Griffin* error.

B. This Court Should Review Appellant's Additional Claims Of Constitutional Magnitude Related To The Prosecution's Attempt To Fabricate An Admission Of Rape And Attribute It To Ajay Because The Trial Court Thwarted Defense Counsel's Opportunity To Fully Object To The Prosecution's Misconduct.

Notably, Respondent does not argue that Appellant's additional claims of federal constitutional magnitude including more egregious forms of prosecutorial misconduct, confrontation clause violations, and serious abuses of the right to counsel lacked merit. (RB at 67; AOB at 204-211.) Instead, he argues these claims were forfeited by defense counsel. In

making this argument, Respondent conspicuously ignores the fact that the trial court expressly instructed defense counsel not to make such objections in front of the jury and then explicitly denied defense counsel the opportunity to elaborate on his objections outside the presence of the jury. (See AOB at 202, fn. 64.) Specifically, the trial court previously admonished defense counsel: "First off, asserting in front of the jury that the prosecutor has engaged in misconduct and using the word "misconduct" has clearly been held by the courts of appeal to be improper and itself misconduct." (14 RT 3635) After apologizing, the trial court again admonished defense counsel: "it shall not happen again." (14 RT 3635) Given these circumstances, it was clearly futile for defense counsel to expand the scope of his objection as the trial court denied him a fair opportunity to preserve the record for appeal. (*People v. Turner* (1990) 50 Cal.3d 668, 703 [Defendant is not required to object when an objection would have been futile]; *People v. Chavez* (1980) 26 Cal.3d 334, 350, fn. 5 [same]; *People v. Downey* (2000) 82 Cal.App.4th 899, 912 [Defendant is not required to object when the trial court completely failed to exercise the discretion vested in it by law, thereby denying the defendant a fair hearing and depriving the defendant of fundamental procedural rights].)

C. <u>This Error Prejudiced Appellant Warranting Reversal And A New Trial</u>.

As repeatedly argued by Respondent, there could be no reversal in Appellant's case because any error would be deemed harmless by the pretext call and Sapna's testimony. However, as argued *supra* in *Arguments I,II,* and *III*, the pretext call did not contain unequivocal admissions of rape. Far from it, the statements relied on by the prosecution and Respondent as alleged admissions made during the pretext call were highly ambiguous and suspect and were further rendered questionable by the fact that Sapna, herself, kept criticizing Ajay for failing to admit it after

these statements were made. Therefore, contrary to Respondent's position, the prosecution's misconduct, openly sanctioned by the trial court, wherein the prosecution falsely attributed an admission of rape to Ajay more likely convinced the jury, unfairly and without any foundation, that the statements made in the pretext call were admissions of guilt despite all the evidence to the contrary. This was clearly prejudicial warranting reversal.

IX. APPELLANT'S CONSTITUTIONAL RIGHT TO A MEANINGFUL APPEAL WAS DENIED WHERE THE TRIAL COURT REFUSED TO HOLD AN EVIDENTIARY HEARING TO RESOLVE MATERIAL UNSETTLED PORTIONS OF THE RECORD.

Respondent suggests the trial court did not err by denying Appellant an evidentiary hearing to resolve three unsettled record issues because sufficient or "appropriate" procedures were utilized to settle the record such as a Meet and Confer, elaborate briefing, and review of defense and prosecution declarations. (RB at 70.) The problem with this analysis is that it ignores the criteria upon which an evidentiary hearing must be granted. Admittedly, the California Supreme Court has recognized there is "scant decisional authority construing settlement procedures." (*Marks v. Superior Court* (2002) 27 Cal.4th 176, 195.) Nevertheless, in almost all other contexts an evidentiary hearing is necessary where the moving party has made a prima facie case for relief and there is a factual dispute requiring resolution on a material issue. (*People v. Manibusan* (2013) 58 Cal.4th 40, 55 [evidentiary hearing is required to resolve juror misconduct claim where defense makes prima facie case of misconduct, the supporting declarations are not hearsay and do not contain deliberative process, and there is a material conflict in the facts]; *In re Stevenson* (2013) 213 Cal.App.4th 841, 855-857 [petitioner in habeas corpus action must make a prima facie case for relief and, if "relief hinges on the resolution of factual disputes, then the court should order an evidentiary hearing"] *People v.*

Homick (2013) 55 Cal.4th 816, 891-893 [where capital defendant challenged admission of special circumstance prior conviction on constitutional grounds evidentiary hearing was necessary where defendant made prima facie case for relief]; *Spaccia v. Superior Court* (2012) 209 Cal.App.4th 93 [in case for recusal of district attorney office evidentiary hearing was required where defendant made a prima facie case for relief];[5] *In re Bacigalupo* (2012) 55 Cal.4th 312 [habeas petitioner is entitled to evidentiary hearing where he or she alleges a prima facie case for relief and there is a material factual issue in dispute].) Presumably, this is why the trial court evaluated the unsettled record issues "in the light most favorable to the defense." (ART (1/31/2012) 41, 47.) That is, evaluating factual issues "in the light most favorable to the defense" is essentially no different than asking whether the defense has made a prima facie for relief. Assuming this is the correct legal standard, Respondent's arguments lack merit.

A. Appellant Has Made A Prima Facie Case There Is A Missing Jury Note From The Clerk's Transcript.

As undisputed by Respondent, with respect to whether the jury could take the testimony of one of Sapna's friends for the truth of the matter asserted, Juror No. 1 clearly stated in his declaration: "To my best recollection, we submitted a jury note on this question during deliberations" and further explained the jury note was not contained in the packet of jury notes counsel showed him purporting to be the jury notes contained in the clerk's transcript. (RB at 71; 1 ACT (2/17/12) at 237.) The minute orders

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[5] The California Supreme Court recently granted review in *Packer v. Superior Court* (2013) 314 P.3d 487, 165 Cal.Rptr. 249 (Review Granted, Case No. S213894) on the following issue: "Did the trial court abuse its discretion by denying a motion for recusal without an evidentiary hearing on the grounds that defendant failed to make a prima facie showing that recusal was warranted." This case may be instructive on resolving the necessity for an evidentiary hearing in a record settlement case.

corroborate this allegation as they suggest there may be a missing jury note for June 24, 2009. (AOB at 220-222.) Regardless of the minute orders, however, Juror No. 1's declaration is sufficient to make out a prima facie case that the record is missing a jury note warranting an evidentiary hearing to resolve the matter.

Respondent suggests that the fact that Juror No. 1 did not submit the note and no other juror recalls submitting such a note defeats the claim. There is no legal basis for this conclusion. In fact, as uncontested by Respondent, Juror No. 1's declaration is not hearsay and does not contain deliberative process. Therefore, it is a proper offer of proof on the issue. The fact that Juror No. 1 could not recall "who wrote the note or what date it was allegedly submitted to the court" counsels in favor of an evidentiary hearing especially where Juror No. 1 clearly recalled the note was submitted "during deliberations." (RB at 71; 1 ACT (2/17/12) 237.) Similarly, the fact that "none of the other jurors who were interviewed could provide any more concrete details in support of the proposed statement" also favors the need for an evidentiary hearing allowing those jurors who could not be interviewed to be subpoenaed and weigh in on the issue. In this regard, Respondent's argument only highlights the necessity for an evidentiary hearing.

Conspicuously lacking from Respondent's argument is an outright denial that there was a jury note missing from the clerk's transcript and that, without resolution of this issue at an evidentiary hearing, it is impossible to determine whether Appellant has been denied a meaningful right to appeal. (See generally *People v. Catlin* (2001) 26 Cal.4th 81, 166-167 citing *People v. Alvarez* (1996) 14 Cal.4th 155, 196, fn. 8 [omission in clerk's transcript warrants reversal where defendant's ability to prosecute his appeal is prejudiced].) Certainly Respondent does not contest the materiality of instructing the jury on the necessary weight to be given to the testimony of

one of Sapna's friends -- all of whom either directly corroborated or contravened Sapna's version of events. Therefore, given the fact that the jury note directly bore on the credibility of Sapna's testimony, who was the prosecution's main witness, remand is necessary to resolve this critical issue on appeal.

B. Appellant Has Made A Prima Facie Case The Jury Never Received Exhibit 36B: The Video-Taped Police Interview Between Detective Hermann And Sapna.

Respondent argues the trial court properly resolved whether the jury received Exhibit 36B per its request because (1) the trial court granted the jury's request to see Exhibit 36B (12 CT 3239; 1 ART 19); (2) the trial court indicated that it does not provide written responses to logistical questions; and (3) the trial court recalls the court clerk confirming the exhibit logs had been completed and the evidence had been delivered to the jury. (RB at 72-73.) However, contrary to Respondent's argument, these facts do not resolve the matter.

Appellant does not contest that the record indicates the trial court granted the jury's request to see Exhibit 36B: the police interview between Detective Hermann and Sapna Dev. Appellant's claim is that the jury never got the requested piece of evidence and that there is sufficient evidence supporting this error to rebut any presumption to the contrary. (AOB at 225.) Therefore, the granting of the jury's request, alone, is not sufficient to determine whether the jury actually received Exhibit 36B. (AOB at 225; see *People v. Garris* (1953) 120 Cal.App.2d 617, 618 [noting that any presumption that a trial court acts in accordance with its duty is rebuttable].) In this regard, Respondent has left Appellant's rebuttal argument on this point unanswered and, thus, concedes (1) the jury note asking for Exhibit 36B was submitted to the clerk after the bailiff delivered the evidence to the jury establishing Exhibit 36B was initially missing from the evidence; and (2) the jury could not have later received Exhibit 36B

because the bailiff was certain he never delivered a DVD, VHS tape or CD disc to the jury during deliberations after he initially brought the jury all the admitted evidence. (AOB at 225-226.)

Similarly, the absence of any written response to the jury's request for Exhibit 36B equally rebuts the presumption that jury, in fact, received the requested evidence. Moreover, the trial court's claim that it did not provide written responses to "logistical" requests such as this one is completely belied by the record as, with other almost identical logistical requests, the trial court clearly provided a written response. (AOB at 227-229.) Therefore, at a minimum, the issue is disputed and requires resolution at an evidentiary hearing.

Finally, the fact that the trial court confirmed the clerk logged all the evidence and the clerk delivered the evidence to the bailiff does not prove the jury received Exhibit 36B because, even if true, the clerk's conduct does not undermine the fact that (1) the jury note proves the jury did not have Exhibit 36B as a result of the initial deliverance of evidence; and (2) per the bailiff, the bailiff never delivered it to the jury subsequently. Therefore, it cannot be disputed that Appellant has made a prima facie case that the jury never received Exhibit 36B and that any evidence Respondent relies on to the contrary shows the issue is in dispute requiring an evidentiary hearing.

C. Appellant Has Made A Prima Facie Case The Jury Never Received 50 Pieces Of Evidence After The Case Was Re-Opened.

With respect to whether the jury received a second batch of evidence resulting from the defense re-opening the case approximately three hours after the jury started deliberating, Respondent claims the issue "exceeds the limited purpose of settled statements" because "[w]hether or not the bailiff complied with the court's order is not a proper subject within the scope of settled statements." (RB at 74.) In support of its position, Respondent quotes the trial court noting, "Nothing in the record indicates whether the

bailiff actually followed the Court's order to deliver any part of the admitted evidence to the jury." (RB at 74; 2 ACT 308.) However, the record belies this conclusion as the minute order from June 11, 2009 expressly indicates that the bailiff delivered the initial batch of admitted evidence to the jury at 10:35 am. (12 CT 3238-3239.) Specifically, the minute order reads:

> DEREK SCHMIDT was sworn to take charge of the jury thereafter, the jurors retired to select a foreperson and begin deliberations. Verdict forms and admitted exhibits were delivered to the Jury room.

(12 CT 3238-3239.) No equivalent notation is made after the trial court re-opens the case and admits approximately 50 other exhibits. (12 CT 3238-3239.) Moreover, the bailiff explained in his declaration that he never delivered a second batch of evidence to the jury after the case was re-opened. (1 ACT (2/17/2012) 269-270.) Therefore, Respondent seems to be arguing that Appellant is not entitled to a record on appeal that sufficiently clarifies whether the jury received approximately 50 pieces of evidence after the case was re-opened especially where both the record and extrinsic evidence, a declaration from the bailiff, indicate it did not. Again, since Appellant has made a prima facie case that the jury did not receive evidence admitted as a result of re-opening the case, he deserves an evidentiary hearing on the issue and the trial court's assertions to the contrary simply place the issue in dispute further necessitating the requirement for an evidentiary hearing.

D. <u>This Error Prejudiced Appellant's Right To A Meaningful Appeal And Requires Remand</u>.

Without resolution of these unsettled record issues at an evidentiary hearing, Appellant was denied a meaningful right to appeal. (AOB at 215-220.) As undisputed by Respondent, all of these issues (depending on their ultimate factual resolution) support arguable issues on appeal. That is, the

jury was entitled to have the trial court read-back or repeat the instruction with respect to the proper weight to accord testimony from a witness critical to determining Sapna's credibility; and the jury was certainly entitled to review all of the admitted evidence at trial. (See Pen. Code § 1138; U.S. Const., 5th, 6th, & 14th Amends.; see also *Turner v. Louisiana* (1965) 379 U.S. 466, 85 S.Ct. 546, 13 L.Ed.2d 424 [the requirement that a jury's verdict "must be placed upon the evidence developed at trial goes to the fundamental integrity of all that is embraced in the constitutional concept of trial by jury"]; *Sheppard v. Maxwell* (1966) 384 U.S. 333, 86 S.Ct. 1507 ["jury's verdict must be based on evidence received in open court"]; *Irvin v.* Dowd (1961) 366 U.S. 717, 81 S.Ct. 1639 [right to trial by jury and due process guaranteed by 5th, 6th, and 14th Amendments to U.S. Constitution provide that the jury's "verdict must be based upon the evidence developed at trial"]; *People v. Frye* (1998) 18 Cal.4th 894, 1007, *rev'd on other grounds* ["[P]ursuant to § 1138, the jury has a right to rehear testimony and instructions on request during deliberations" and "[a]lthough the primary concern of section 1138 is the jury's right to be apprised of the evidence, a violation of the statutory mandate implicates a defendant's right to a fair trial conducted substantially in accordance with the law."] citing *People v. Wader* (1993) 5 Cal.4th 610, 661, *People v. Pride* (1992) 3 Cal.4th 195, 266, *People v. Weatherford* (1945) 27 Cal.2d 401, 420, and *People v. Butler* (1973) 47 Cal.App.3d 273, 280.) Therefore, since the unresolved omissions in the record clearly support potential issues for appeal, the failure to hold an evidentiary hearing and provide Appellant a meaningful record on appeal clearly prejudiced Appellant requiring remand.

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X. DUE PROCESS DEMANDS THAT APPELLANT'S CONVICTIONSBE REVERSED AND HE BE GRANTED A NEW TRIAL BASED ON THE CUMULATIVE EFFECT OF ALL THE ERRORS IN THIS CASE.

The face of Appellant's trial would have been immeasurably different absent the cumulative effect of the numerous and significant errors infecting the trial. There can be no doubt these multitude of errors worked together to systematically deny Appellant a fundamentally fair trial.

To start, the jury would have had a firm understanding as to why Sapna would falsely accuse Ajay of rape as she legitimately feared Ajay and Peggy were going to reverse the adoption, based on her false date of birth, and send her back to Nepal due to a very serious break down in the family relationship commencing when Sapna turned 18 and started having sexual relations with her peers without consent from Ajay, Peggy, or Birendra (Sapna's biological father in Nepal) and against the values of the Nepali culture. That is, having sexually emancipated herself in America, Sapna could never return to Nepal. Therefore, when it appeared Ajay and Peggy were going to reverse the adoption, resulting in Sapna's deportation to Nepal, Sapna made a choice. She falsely accused Ajay of rape. This allegation preserved her reputation by making her a victim rather than a tainted woman and ultimately prevented her deportation.

Ajay, however, was prevented from explaining this to the jury because the Nepali record of conviction was excluded, thus, preventing the defense from proving Sapna lied about her date of birth in order to be adopted (thus allowing for reversal of the adoption and deportation); because the defense was prevented from relying on the Nepali record of conviction for impeachment; because the trial court invited prosecution witnesses Luz Dunn and Detective Hermann to openly vouch that Sapna's birthday was January 5, 1984 and the Nepali conviction was a sham; and because the trial court further instructed the jury it could <u>not</u> rely on

testimony referring to and/or INS documents containing Sapna's April 28, 1983 birthday for the truth of the matter asserted essentially directing the jury to find Sapna's birthday was January 5, 1984. As a result, Ajay was denied the opportunity to expose the fact that Sapna had a very real motive for falsely accusing him of rape.

Had Ajay been able to present this defense and highlight the fact that Sapna only got pregnant during a very small window of time perfectly corresponding with the time period she was surreptitiously having sex with her peers in grave contravention of Nepali cultural values and, strikingly, never got pregnant any other times despite allegations of rape almost every other day for five years straight, the jury likely would have acquitted Ajay of all the charges.

Instead, however, the jury was permitted to stigmatize Ajay as a lecherous pervert based on the erroneous admission of both adult and purported child pornography that had no relevance to the case and, in large part, could not be attributed to Ajay. With respect to the only arguably admissible child pornography in the case, Ajay was further denied a fair trial as the trial court prevented the defense from introducing an e-mail Ajay sent to Peggy from work establishing that he was not at home when the two child pornography videos were, according to the prosecution, being viewed at the Dev home. This error was then exacerbated by the fact that the prosecution, then, relied on the excluded email during closing argument and misstated the relevant time stamp convincing the jury Ajay had plenty of time to both view the child pornography at home and return to work in time to send the email at issue. The cumulative effect of these errors is undeniable as they accomplished exactly what the prosecution hoped -- that the jury would stigmatize Ajay as a sick pervert and, thus, resolve any ambiguities in the case against him.

As if this was not enough, the prosecution then found a way, on two separate occasions, to fabricate admissions of rape against Ajay. First, Sapna was permitted to translate an inaudible portion of the pretext call and attribute an admission of rape to Ajay. Thankfully, Sapna's own words spoken during the pretext call belie this detrimental translation as, during the pretext call, Sapna excoriated Ajay for failing to admit it after this alleged admission was made. Nevertheless, the prosecution then fabricated a second admission of rape during closing argument wherein he told the jury Ajay wrote his lawyer a note during the preliminary hearing admitting he raped Sapna at a hotel in Bangkok on a layover to Nepal. Alone this error justifies reversal. However, cumulatively, there can be no doubt that the fabrication of two admissions fundamentally denied Ajay a fair trial - especially in light of the inflammatory pornography errors and the fact the defense was prohibited from explaining why Sapna would falsely accuse Ajay of rape.

Finally, these egregious errors also seeped into the jury deliberations as it appears the jury was never properly instructed on how to weigh testimony from one of Sapna's friends and never given Exhibit 36B along with approximately 50 other exhibits admitted after the case had been re-opened. The failure to give the jury Exhibit 36B was particularly damaging because the defense relied on the video-taped police interview to expose the systematic inconsistencies in Sapna's testimony and, during closing argument, repeatedly implored the jury to view it during their deliberations.

In sum, Ajay's trial was wrought with grievous errors at every stage of the trial -- during the presentation of evidence, during closing argument, and during jury deliberations. That is, at every turn Ajay's trial was severely compromised. Respondent argues that the pretext call should render any cumulative error claim harmless. (RB at 75.) However, this

ignores both the exculpatory aspects of the pretext call and the exculpatory nature of the defense.

With respect to the pretext call, Ajay plainly denied the allegations of rape a total of 24 times and, where the prosecution attempted to attribute admissions of rape to Ajay made during the pretext call, the record unequivocally shows Sapna thereafter criticized Ajay for failing to admit it. Therefore, these statements could not be admissions.

With respect to the remaining nature of the defense, the timing of the pregnancies were glaringly exculpatory. As undisputed by Respondent, it is inordinately dubious that, despite allegations of rape almost every other day for five straight years, Sapna only got pregnant during a small window of time perfectly corresponding with the time period she was having sex with her peers and deliberately hiding her sexual activity from Ajay, Peggy, and Birendra (her biological father in Nepal) for fear that her conduct would bring shame to her family and result in socially and economically devastating consequences for herself and her Nepali family. Therefore, contrary to Respondent's argument, the overwhelming amount of exculpatory evidence in the case justifies reversal based on the cumulative impact of the collective errors. In this regard, the cumulative errors denied Ajay his Fifth and Fourteenth Amendment rights to a fundamentally fair trial. For this reason, the convictions must be reversed and Ajay must be granted a new trial.

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CONCLUSION

For the foregoing reasons, Appellant respectfully asks this Court to reverse his convictions and grant him a new trial.

DATE: March 17, 2014

Respectfully submitted,

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Word Count Certificate

Counsel for Appellant hereby certifies that this brief on the merits is in 13 point font and contains 19,208 words as counted by the word count function of counsel's word processing program.

I declare under penalty of perjury that the foregoing word count certificate is true and correct. Executed on March 17, 2014 at Los Angeles, California.

DATE: March 17, 2014

Respectfully submitted,

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PROOF OF SERVICE

I, the undersigned, declare that I am a resident of Los Angeles County, California; that my business address is the Law Office of [redacted] that I am over the age of eighteen years; that I am not a party to the above-entitled action; and that I served by mail the documents described herein to the following:

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A copy of: **APPELLANT'S REPLY BRIEF**

This proof of service is executed on March 17, 2014 at Los Angeles, California. I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

LAUREN E. ESKENAZI-IHRIG