**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA**

**FIRST APPELLATE DISTRICT**

**DIVISION FIVE**

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| **THE PEOPLE OF THE STATE OF CALIFORNIA**,<br><br>Plaintiff and Respondent,<br><br>vs.<br><br>**RICKY R. SANDERS**,<br><br>Defendant and Appellant. | No. A142875<br><br>Superior Court No. SC077150 |

An appeal from a judgment of the Superior Court
of the State of California for the County of San Mateo,
the Honorable Clifford V. Cretan, presiding

# APPELLANT'S PETITION FOR REHEARING

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**PETITION FOR REHEARING**

TO THE HONORABLE BARBARA J. R. JONES, PRESIDING JUSTICE OF DIVISION FIVE OF THE FIRST DISTRICT COURT OF APPEAL:

Pursuant to rules 8.268(b) and 8.500(c)(2) of the Rules of Court appellant petitions for rehearing to call the court's attention to omissions and misstatements of fact in its September 29, 2016 opinion.

## ARGUMENT

### THE COURT'S OPINION MISSTATES AND OMITS MATERIAL FACTS IN ITS FACTUAL "BACKGROUND" SECTION.

#### A. "February 21, 2011: Party City in Daly City (counts 1-3)"

In its opinion, the court omitted the fact that the robber directed Byrne to put the money from the safe in a trash bag found in the office. Byrne testified he moved the trash can close to the safe as she was removing money. (RT VI, p. 294.) Fingerprints found on the trash can and trash bag in the office did not match appellant's. (RT XVIII, p. 1969.) Though Byrne selected appellant in a video of a live lineup, as the court does state, she only chose him as the more similar of two subjects, each of whom was somewhat similar to the robber. (Opinion, p. 3; RT VI, pp. 354, 356-357, 328-329.) Byrne could not identify appellant as the robber in the courtroom. (RT VI, p. 327.)

The factual summary in the court's opinion should, like those contained in the parties' briefs, "summariz[e] all of the operative facts that affect the resolution of issues tendered on appeal." (*Lewis*

*v. County of Sacramento* (2001) 93 Cal.App.4th 107, 113.) Only by doing so can the issues, many of which depend on evaluation of evidence favorable to each side, be properly resolved. Indeed, the Supreme Court's policy of declining review dependent on disputes about the record unless brought to the Court of Appeal's attention (Rule 8.500(c)(2)) demonstrates the importance of a summary of all the operative facts, not just those supporting the jury's verdict. A factual summary that does so has the immediate benefit of obviating the need for a rehearing petition solely for this purpose.

Appellant assumes the court's omission is inadvertent. If however, the court has implicitly regarded the record in the light most favorable to verdict, it has not afforded appellant constitutionally adequate appellate review, and it has correspondingly deprived him of due process. (U.S. Const., Amend. 14; *Evitts v. Lucey* (1985) 469 U.S. 387, 393; *Griffin v. Illinois* (1956) 351 U.S. 12, 20.)

Deferential regard for the evidence as supporting the verdict is only appropriate when undertaking review for substantial

evidence of each element of the jury's guilty verdict. Appellant raised no claim of insufficient evidence to support the finding he committed any of the robberies. The only question for the jury here was whether appellant was the person who robbed the various stores. Relevant to appellant's claims of prosecutorial misconduct directed at proving identity – through evidence the same gun was used in each offense – and ineffective assistance of counsel in failing to object, a more balanced view of the evidence is required to determine whether these errors may have affected the jury's findings.

The prosecutor's theory was that appellant was guilty of each robbery because despite the disparity in identity evidence and eyewitness descriptions, the same person using the same gun perpetrated each robbery. Whether or not the prosecutor guidance of several witnesses in their testimony about the description of the gun affected the jury's verdict must take into account all discrepancies in eyewitness description, prior identification and any forensic evidence of the identity of the robber. This court held the

prosecutor's misconduct and the defense counsel's failure to object to it harmless without expressly taking this aspect of the record into account. (Opinion, pp. 18-19.) The absence from the court's factual summary gives the false impression there were no such discrepancies, and therefore it deprives appellant of constitutionally adequate appellate review.

**B. "2. April 10, 2011: Colma BevMo (counts 4-6)"**

At page 3 of its opinion, the court states, "McNab described the man as stocky and about five feet nine or ten inches tall." McNab testified he was not good at estimating heights, and he could only say the robber was slightly shorter than the prosecutor's 6'2" height. McNab himself was 6'4" and he could see the top of the man's hat. (RT VII, pp. 497-498.) McNab never stated an approximate figure for the robber's height.

In addition, the opinion omits the facts McNab identified subject Jerome Malone in a photographic lineup (RT VII, pp. 509-510; RT XVI, p. 1674; People's Ex. No. 10) and that surveillance video showed Malone entering the store about three hours prior to the

robbery. (RT XVI, p. 1673.)

The opinion also omits that McNab was unable to identify appellant in either of two photographic lineups he viewed, and that neither he nor co-worker Ruperto were able to identify appellant in court as the robber. (RT VII, pp. 481-482, 507, 511, 522-526, 532; People's Ex. No. 12.) The omission of the fact another person was identified in at least one of the robberies and omission of the discrepancies in the description of the robber deprive appellant of adequate appellate review for the reasons discussed in the previous section of this brief.

**C. "3. April 17, 2011: Colma Petco (counts 7-9)"**

On page 3 of its opinion, the court stated "Oeztel selected appellant's picture from a photographic lineup. . ." In fact, though Oetzel opined appellant was the person whose photograph he selected (RT VIII, pp. 554-555, 568), no officer testified appellant's photograph was even included in the lineup Oetzel viewed. An eyewitness's opinion the defendant is the person in the lineup is of no evidentiary value. The witness did not assemble the lineup and

cannot authenticate the image as being of the defendant. (Evid. Code § 1400.) For reasons already discussed, this interpretation of the record deprives appellant of constitutional appellate review. (U.S. Const., Amend. 14; *Evitts, supra,* 469 U.S., p. 393; *Griffin, supra,* 351 U.S., p. 20.)

**D. "4. May 1, 2011: Redwood City BevMo (counts 10, 11 and 18)"**

On page 4 of its opinion, the court omitted the fact that Jacobsen and Smith, the eyewitnesses testifying about the robbery each identified Malone as the robber. Each expressed a great deal of confidence in his certainty Malone was the suspect. (RT IX, pp. 607, 626; RT XV, pp. 1453-1457; RT VI, pp. 1672-1674.) For reasons already discussed, this omission deprives appellant of constitutional appellate review. (U.S. Const., Amend. 14; *Evitts, supra,* 469 U.S., p. 393; *Griffin, supra,* 351 U.S., p. 20.)

**E. "6. Redwood City Gamestop (counts 14-18)"**

On page 4 of its opinion, the court referred both in its heading and in the body of its summary to this robbery as the "Redwood

City" Gamestop. The store on Junipero Serra is in Colma. (RT X, pp. 791-792.)

**F. "7. Pacifica Ross Dress for Less (counts 19-23)"**

On page 5 of its opinion, the court stated Fernandez received the first call inferentially from appellant on May 7, 2011. Fernandez testified she told police on May 9, the call came in "a couple of days prior to the attempted robbery." (RT X, p. 786 [prosecutor's words].) She personally testified it was the "Thursday" before the attempted robbery. (RT X, p. 786.) Judicial notice of the calendar will confirm that date was May 5, 2011.

The court also wrote the man that approached witnesses Speros and Gal wore a "black jacket with 'Security' written on it." Speros testified the man wore "a black jacket and a *black hat* that said 'security' written on it in white." (RT IX, p. 718, emphasis added.)

In addition, the court's opinion omits the fact that Speros and Gal each viewed two photographic lineups in November 2011, after appellant was arrested, and each identified someone other than appellant as the robber in the first. Neither was able to identify

anyone in the second. (RT IX, pp. 740-744, 757, 772-773, 780; RT XVI, pp. 1641-1650.) The omission of this fact and the error in the date of the call to the Ross store each of which are material to the identity of the robber deprives appellant of constitutional appellate review for reasons already discussed. (U.S. Const., Amend. 14; *Evitts, supra*, 469 U.S., p. 393; *Griffin, supra*, 351 U.S., p. 20.)

**G. "8. May 22, 2011: San Bruno Petco (counts 24-26)"**

The court omitted the fact that Flores was unable to identify appellant as the robber. (RT XV, pp. 1451-1452.) Again, omission of facts calling into question the identity of the robber in one or more incidents deprives appellant of constitutional appellate review for reasons already discussed. (U.S. Const., Amend. 14; *Evitts, supra*, 469 U.S., p. 393; *Griffin, supra*, 351 U.S., p. 20.)

**H. "9. August 7, 2011: San Mateo PetSmart (Counts 27-30)"**

On page 6 of its opinion, the court omitted the fact that eyewitness Chang described the robber as being as light as 145 pounds. (RT XII, p. 1012.) The court also omitted that Chang could

not identify appellant as the robber when she viewed a photographic lineup in November 2011. (RT XII, pp. 1022-1023, 1037-1038; RT XVIII, p. 1825.)

Hernandez did not identify appellant as the robber until more than two months later and only after the shooting. Therefore, the record did no establish identification of appellant contemporaneously with the August attempted robbery. Chang's description of a dramatically smaller man and her inability to identify appellant from her single encounter with him is material to whether the error raised on appeal unfairly affected the verdict. The omission of these facts deprives appellant of constitutional appellate review for reasons already discussed. (U.S. Const., Amend. 14; *Evitts, supra*, 469 U.S., p. 393; *Griffin, supra*, 351 U.S., p. 20.)

### I. "11. October 8, 2011: San Mateo Pet Smart Redux (counts 36-44)"

On page 7 of its opinion, the court stated that Hernandez described the robber as 5'10". However, the opinion omits that Ni described him as short as 5'7". (RT XII, p. 1089.) In addition, the

court stated identified appellant from a photographic lineup. Opinion, p. 7.) However, neither Detective Riccardi nor Detective Williams, who showed Hernandez the lineup, testified the photograph Hernandez selected was appellant's. As previously discussed, Hernandez's opinion appellant is the person in the lineup photo is of no evidentiary value.

Finally, the opinion omits the fact that no phone associated with appellant was near the scene. Nor was his phone moving towards it or away from it at any time relevant to the offense. (RT V, pp. 1557-1559.) For reasons already discussed, these omissions deprive appellant of constitutionally adequate appellate review. (U.S. Const., Amend. 14; *Evitts, supra,* 469 U.S., p. 393; *Griffin, supra,* 351 U.S., p. 20.)

**J. "13. Post-arrest Activity"**

On page 8 of its opinion, the court states: "Appellate was arrested in November 2014 and his calls from jail were recorded." The recorded jail calls occurred after appellant's arrest and detention in Santa Rita Jail in Alameda County in November 2011. (See, e.g.,

Peo. Ex. 42A; AUG CT, p. 30.)

The court's opinion also states the "first call" was to Navab Akuila. (Opinion, p. 8.) According to the time on the transcript of the calls played for the jury, the first call on November 2, 2011 was to Steve Faz. (AUG CT, p. 30.) The call to which the court refers in its opinion occurred on November 7, 2011. (Peo. Ex. 44A; AUG CT, p. 40.)

**K. "Defense"**

On page 9 of its opinion, the court described appellant's testimony on his own behalf as "attempting to shift the blame to . . . Charlie Hustle." While it is true that appellant testified to many facts that were consistent with Hustle being a suspect, characterizing his testimony as "attempting to shift blame" presumes that when he testified he was guilty and knowingly attempted to present a false defense. Appellant accepts that once a jury renders a verdict he no longer enjoys the presumption of innocence. However, the rebuttal of that presumption represented by the jury's verdict does not necessarily imply appellant testified falsely on the matters involving

Hustle or that he attempted to fabricate a defense. Nor is the notion he did so material to the issues presented to or addressed by the court in its opinion.

**L. "B. Convictions and Sentence"**

On page 11 of its opinion, the court stated appellant's "'68 years to life'" sentence was the result of a "37-year minimum term . . . (calculated as the eight-year upper term for mayhem, plus 25 years for the enhancement under section 12022.53, subdivision (d), plus five years for the serious felony under section 667, subdivision (a)), plus a 25-year-to-life enhancement under section 12022.53, subdivision (d), plus a five-year serious felony enhancement. [Citations]." The components of the "minimum term" are correctly stated. However, appellant believes they add up to 38 years, not 37.

## CONCLUSION

For the foregoing reasons, appellant urges this court to grant rehearing and reconsider its decision in this matter.

## CERTIFICATION OF WORD COUNT

I, Alan Siraco, appellate counsel of record for Ricky Sanders in

this matter, do hereby certify under rule 8.360(b) of the Rules of Court, that according to the software used to prepare it, this brief contains 2,131 words.

DATED: October 13, 2016 Respectfully submitted

By: _____
ALAN SIRACO
Attorney for Appellant

**PROOF OF SERVICE**

I am over the age of 18 years and not a party to this action. My business address is 2777 Yulupa Avenue, PMB 169, Santa Rosa, California, 95405. My electronic address is siracolawoffice@sonic.net.

On October 12, 2016, I served a copy of the attached APPELLANT'S PETITION FOR REHEARING on the following by:

____ Electronic transmission: transmitting a .pdf of this document by electronic mail to the party(s) identified on the attached service *for whom an e-mail address is indicated* using the e-mail address(es) indicated; *or*

_✓_ Mail: placing a true copy thereof in an envelope with first class postage prepaid and depositing it in the United States mail, addressed as follows:

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I declare under penalty of perjury that the foregoing is true and correct. Executed this 12th day of October 2016 at Sonoma County California.

_____
Alan Siraco