NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

CODY MCLAURIN SAKOMAN,

Petitioner,

vs.

STATE OF CALIFORNIA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE CALIFORNIA COURT OF APPEAL
SIXTH APPELLATE DISTRICT

MOTION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS

HILDA SCHEIB

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Counsel of Record for Petitioner,
CODY MCLAURIN SAKOMAN

TO THE HONORABLE CHIEF JUSTICE OF THE SUPREME COURT OF THE UNITED STATES AND TO THE HONORABLE ASSOCIATE JUSTICES OF THE COURT:

Pursuant to Rule 39 of the Rules of the Supreme Court of the United States, petitioner, CODY MCLAURIN SAKOMAN respectfully requests leave to file a petition for writ of certiorari in forma pauperis. In making this application, petitioner notes that he has proceeded in forma pauperis in state court and has been represented by appointed counsel in both the California Court of Appeal and the California Supreme Court. These facts are memorialized in the attached declaration of counsel.

Dated: November 10, 2018

Respectfully submitted,

HILDA SCHEIB

Attorney for Petitioner

DECLARATION OF HILDA SCHEIB, ESQ.

I am an attorney licensed to practice in California. I am a member of the bar of this court. I am the attorney of record for petitioner CODY MCLAURIN SAKOMAN.

The facts stated in this declaration are within my personal and firsthand knowledge. If called as a witness in this action, I could and would testify competently under oath to the following facts.

At present, petitioner is incarcerated in the California state penitentiary at High Desert State Prison. Petitioner has been in custody since 2016.

On September 13 2016, petitioner filed a notice of appeal. On January 10, 2017, I was appointed by the California Court of Appeal, Sixth Appellate District, to represent petitioner in proceedings in that Court and to file a Petition for Review to represent him in the California Supreme Court . I have remained petitioner's counsel of record to this time. Petitioner has proceeded in forma pauperis in state court.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed this 10th day of November, 2018, at San Francisco, California.

Hilda Scheib

HILDA SCHEIB

SIXTH DISTRICT APPELLATE PROGRAM
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Attorneys for Appellant

IN THE COURT OF APPEAL OF THE STATE OF

SIXTH APPELLATE DISTRICT

ORIGI

PEOPLE OF THE STATE OF CALIFORNIA	)	
	)	Case No. H043933
vs.	)	
	)	SANTA CRUZ County
CODY SAKOMAN	)	Superior Court No. F27718

RECOMMENDATION OF COUNSEL ON APPEAL

TO THE CLERK OF THE ABOVE-ENTITLED COURT:

Notice is hereby given that the SIXTH DISTRICT APPELLATE PROGRAM recomends and wishes to associate with the hereinafter named attorney for purposes of representing the above-named appellant.

HILDA SCHEIB	September 22, 2016

Respectfully submitted:

DALLAS SACHER
Executive Director

Attorney's Address:

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San Quentin, CA 94974

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Counsel of Record for Petitioner,
CODY MCLAURIN SAKOMAN

QUESTION PRESENTED FOR REVIEW

Whether a defendant was denied his rights to a fair trial and to due process of law under the Fifth, Sixth and Fourteenth Amendments when the trial court failed to respond to a request from the deliberating jury for readback of the testimony of three crucial witnesses, either by ordering the readback or by acknowledging that a request had been received and would be acted upon, thereby coercing – albeit inadvertently – the jury into reaching a verdict.

LIST OF PARTIES

CODY MCLAURIN SAKOMAN, petitioner, was the appellant in the California Court of Appeal, Sixth Appellate District and the California Supreme Court.

Respondent STATE OF CALIFORNIA was respondent in the Court of Appeal, Sixth Appellate District and the California Supreme Court.

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OPINIONS AND ORDER BELOW

The unreported opinion of the California Court of Appeal, Sixth Appellate District, dated June 6, 2018, affirming the judgment on appeal, is attached hereto as Appendix A [App. A.]. The unreported order of the California Supreme Court, dated August 15, 2018, denying a petition for review, appears as Appendix B. [App. B.]

JURISDICTION

The California Court of Appeal, Sixth Appellate District, affirmed petitioner's conviction on June 6, 2018 in an unpublished opinion. (App. A.) The California Supreme Court denied review on August 15, 2018. (App. B.) This petition is filed within 90 days of that date. Rule 13.1. Petitioner invokes the jurisdiction of this Court under 28 U.S.C. section 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

Thd Fifth Amendment to the United States Constitution provides:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation." U.S. Const. Amend. V.

The Sixth Amendment to the United States Constitution provides in relevant part:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence." U.S. Const. Amend. VI.

Section 1 of the Fourteenth Amendment to the United States Constitution provides:

> "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."
> U.S. Const. amend. XIV, § 1.

STATEMENT OF THE CASE

On December 8, 2014, the Santa Cruz district attorney charged petitioner by information with: **count one:** unlawful driving or taking of a vehicle (Veh. Code § 10851, subd.(a)); **counts two and four:** felony evading an officer (Veh. Code § 2800.2, subd.(a)); **count three:** carjacking (Pen. Code § 215, subd.(a); **count five:** possession of a firearm by a felon (Pen. Code § 29800, subd.(a)(1)). (CT 1:23-27) [All statutory references are to the Califoria Penal Code unless otherwise indicated.]

The information also alleged, as to count four, a prior serious felony conviction, pursuant to section 667, subdivision (a), i.e., a first degree burglary (§ 459), committed on April 21, 2004, and as to count five, the same prior felony conviction as well as a violation of section 4502 in Marin County (date unspecified.) The information also contained special allegations of (1) a strike prior pursuant to section 667, subdivisions (b)-(i), i.e., the 2004 first degree burglary; and (2) of prior prison term commitments pursuant to section 667.5, subdivision (b), i.e., the 2004 first degree burglary and the section 4502 Marin County conviction. (CT 1:25-27)

Jury trial began on June 6, 2016. (CT 1:161)

On June 16, 2016, petitioner waived his right to jury trial on the prior

strike and prior prison term priors. (CT 1:176)

On June 17, 2016, the jury returned its verdicts, finding petitioner guilty on counts one, two, three and four and not guilty on count five. The jury found true all enhancements. (CT 2:232, 267-272; RT 12:2755) Petitioner having waived his right to jury trial on his prior conviction, the trial court found true that petitioner had suffered a conviction for first degree burglary (§ 459) in 2004. The court also found true that petitioner had served two prior prison term pursuant to section 667.5, subdivision (b), the 2004 first degree burglary and a 2010 violation of section 496. (RT 11:2502; 12:2788)

On August 30, 2016, the trial court denied petitioner's motion pursuant to *People v... Superior Court (Romero)* (1997) 13 Cal.4th 497, 530. (RT 13:3010) The court then sentenced petitioner to a state prison term of 15 years, comprised of a term of 5 years on the count three carjacking (§ 215) conviction, doubled, pursuant to section 667(b)-(i) to 10 years; and an enhancement of 5 years pursuant to section 667, subdivision (a). A term of 2 years was imposed on the count one auto theft conviction, doubled as a second strike, and ordered to run concurrent to count three; similarly, on the counts two and three evasion (§ 10851, subd.(a)) convictions, the court imposed two year terms, doubled as second strikes, to run concurrent to the count three

term. The parties having stipulated that petitioner could be sentenced on only a single prior prison term enhancement (§ 667.5, subd.(b)), the court stayed the one-year sentence on the prior prison term enhancement. (CT 2:438, 439; RT 13:3027, 3029)

On appeal to the Sixth District Court of Appeal, appellant urged that his constitutional rights under the Fifth, Sixth and Fourteenth Amendments had been violated by the trial court's failure to respond to a jury request for readback of the testimony of three crucial witnesses, either by ordering the requested testimony read to jurors or by informing the jury that the court had received the request and would be acting on it within a reasonable time. The Court of Appeal issued its unpublished decision on June 6, 2018, affirming the conviction and denying relief on this ground (App. A., pp. 6-9), but remanding to the trial court on a separate issue, for a recalculation of custody credits awarded appellant. (App. A.)

Petitioner sought review in the California Supreme Court, again raising the issue of the trial court's failure to respond to the jury's request for readback of the testimony of three witnesses. On August 15, 2018, the Supreme Court summarily denied review in an unpublished order, with no discussion or reference to the issue. (App. B.)

STATEMENT OF FACTS

On October 5, 2014, a Volvo SUV was reported stolen from the side yard of a home in Santa Cruz, California. The car had been parked behind an unlocked fence, the keys in the unlocked vehicle. (RT 7:1557-1560) A surveillance camera revealed that a man had jumped the fence, tried to enter the back of the house, and approached the Volvo. The theft was reported to police. (RT 7:1560-1563)

On August 24, 2015, Timothy Staley pled no contest to violation of section 10851 in regard to the theft of the Volvo, and to section 496, subdivision (d), possession of a stolen vehicle, and t0 section 148.10, resisting an officer causing serious injury. Staley was found in a stolen vehicle, where a knife was present. (RT 9:2098)

At around noon on October 7, 2014, California Highway Patrol (CHP) sergeant Ethan Jackson, a member of a law enforcement team designed to combat vehicle theft in Santa Cruz, spotted a 2013 Volvo SC60 SUV that had recently been reported as stolen. Jackson saw the Volvo in the vicinity of an EconoLodge motel and recognized the license plate as that of the stolen vehicle. Jackson got a good look at the driver. He saw no one else in the Volvo. Through his rearview mirror, the sergeant saw the Volvo turn into the

EconoLodge parking lot, then saw Staley speaking to a woman there. (RT 3:543, 549, 556-557)

Another member of the surveillance team informed Jackson that, from his vantage inside the parking lot, he could see the Volvo preparing to leave. That officer had seen an adult male walk from a location where another man and a woman stood, toward the Volvo. He then opened the driver's door and prepare to leave. The man walked directly in front of the officer, who described the man as a white male, in his late 20's to early 30's, slightly over 6' tall, slender, wearing a short-sleeved shirt and with close-cropped hair, a stubbly beard and multiple tattoos on his arms. At trial, the officer identified appellant as that man. (RT 3:571-572, 575, 584-585)

The Volvo passed directly in front of Jackson's vantage, then drove away. Jackson did not see the driver then.The sergeant, as well as other units, followed from a distance of a couple of blocks. Because of traffic, Jackson lost sight of the Volvo. (RT 3:551-552, 564, 565-566)

Bryan Fuentes, also part of the surveillance team, saw Tim Staley drive the Volvo into the EconoLodge parking lot. He also saw appellant walk in a few minutes later. Staley, appellant and an unidentified woman all went to different cars, then all pulled out of the parking lot within seconds of each

other. Fuentes also saw the Volvo learning the EconoLodge parking lot. (RT 6:1330, 1333-1335, 1344-1345)

Kelly Lindholm, another member of the team, having heard a radio transmission, took a position directly across from the EconoLodge. From there, she saw the Volvo exiting the parking lot. From a distance of 30', she identified the driver as male, white or Hispanic, between 25-30, with a 3-4 day-old beard and a close haircut, and wearing a short-sleeved shirt. (RT 5:591-593, 603) Lindholm followed directly behind the Volvo until Fuentes got in front of her. (RT 5:598-599)

Meanwhile, Alexander Robert Teaford, a Santa Cruz police officer, was the "cover car" or "rover" in the search for the Volvo. Responding to a dispatch from a CHP officer who was behind the Volvo, Teaford went to the location and eventually got in behind the CHP vehicle, which then pulled off to the side. The Volvo took off, with Teaford directly behind it, at a distance of 10-40'. Teaford activated all his overhead emergency lights and siren, at the same time as he notified dispatch that he believed the Volvo was "running from him." (RT 3:614-615) At the corner of Laurel and Pacific Streets, Teaford lost sight of the car. Shortly afterward, Teaford's sergeant terminated the pursuit. His involvement lasted only two minutes. At the time, Teaford was

the only officer pursuing the car. (RT 3:616-618; 5:1006)

But Ryan Kiar, a Santa Cruz police officer, responded to Teaford's dispatch by driving to the general area. He spotted a parked Volvo SUV. Kiar had followed the vehicle, as it drove over solid yellow lines, traveled in the wrong lanes, speeded, ignored stop signs. During the drive, Kiar saw the driver clearly at one point when he passed directly in front of him. The entire pursuit lasted 2 minutes and covered 1.2 miles. (RT 5:1125-1139, 1144)

Later, Kiar learned that a suspect had been detained. Kiar recognized the suspect as the driver of the Volvo. (RT 4:1140, 1156)

The Volvo was located at approximately 3:30 p.m. A subsequent search of the vehicle revealed a Ruger 10/22 semiautomatic 22 cal. magazine-fed rifle in the rear of the car. There was no magazine in it, making it "of dubious value," according to Santa Cruz deputy Steve Ryan. (RT 6:1378; 7:1557)

Meanwhile, at about 1:00 p.m. on October 7, Oscar Ayala was outside of his mobile park home, looking for a receipt in the interior of his Toyota Tacoma pickup truck, when he heard someone jumping the fence. He then saw a man quickly come to where he [Ayala] was standing and heard him say, "Give me your keys." Ayala was holding the keys in his hand. (RT 5:1026-1028, 1034-1039, 1043) When Ayala refused, the man grabbed him very hard

on his right arm in two different spots , then hit him on that arm. (RT 5:1045) The man then wrapped his arms around Ayala, until Ayala let go of the keys. The man grabbed them, got in the truck and drove away quickly. He never asked for money or showed a weapon. (RT 5:1045-1047, 1096) According to Ayala, the only injuries he suffered were psychological. (RT 5:1055)

Salome Ayala, Oscar's wife, and Sylvia, his daughter, sat in the living room when Salome saw a man approaching, then grabbing Oscar, who began screaming that his truck was being stolen. As the two women were going out toward Oscar, they saw that the man had driven away in the pickup truck. Oscar was just getting up off the ground and ran toward the house, yelling at them to call the police. (RT 6:1161, 1166; 7:1582, 1585-1586) Sylvia did. (RT 5:1166; 7:1590)

Santa Cruz deputy sheriff Christopher Hankes was dispatched to the Ayalas' home. When he got there, Oscar was visibly shaken. (RT 6:1191, 1197) He questioned Oscar, using Sylvia as an interpreter, and learned that the suspect was 6' tall, between 25-35, of medium build, with blonde hair but no beard or moustache and a purple or burgundy shirt. Oscar said he could identify the suspect. (RT 6:1304-1306, 1321-1322; 7:1593) During the questioning, Hankes learned that a suspect had been detained. He arranged for

an infield showup and drove Oscar and Sylvia to the location where the suspect was. Hankes was not present when Oscar made his identification, but learned about it through radio dispatch. (RT 6:1307-1312; 7:1591-1592, 1596)

Petitioner was not in police car when Ayala observed him. He had been in an unmarked car but was moved out, first into a shady area, then into the sun for better visibility. He was wearing a jacket that had been in the truck. Ayala, who had been admonished by Spanish-speaking detective Bill Azua, was in a police car, responded to questioning by identifying appellant as the man who had taken his truck. (RT 5:1062-1067) According to Azua, Ayala spontaneously said that appellant was the man who had taken his Tacoma. (RT 7:1521, 1524, 1598, 1004)

Sergeant Roy Morales assisted with a subsequent interview of Ayala at the police station. After describing what had occurred, he volunteered to Morales that he had had memory problems very soon before the incident. (RT 7:1558)

At trial, Ayala was unable to identify petitioner. (RT 5:1040-1041) On cross-examination, Ayala confirmed that he was asked to identify petitioner not only at the beach but also in a subsequent interview at the police station. In his interview with Hankes, Ayala – speaking through his daughter, Sylvia --

said that he was able to identify petitioner because he wore Ayala's jacket that had been in the truck. (RT 5:1077, 1086. 1097, 1103; 6:1325; 7:1598)

Ayala also had spoken to investigators for the public defender and the district attorney. (RT 5:1077-1078) In every interview, Ayala said that the man who assaulted him did not have a beard. In his initial interview, Ayala said that the man who assaulted him had blonde hair, no beard, a purple or burgundy shirt and no noticeable tattoos. (RT 5:1079-1080) Ayala agreed at trial that appellant did not have blonde hair. (RT 5:1085) Ayala admitted that he had been tired at the time of the police interview and had told the interviewer that someone had "recommended me to sleep." At trial, Ayala did not recall to whom he was referring when he said that. (RT 5:1091-1094)

Christian Carrillo, a bilingual investigator for the public defender, interviewed Ayala in Spanish. Ayala described the man who took his truck as having blonde or light-colored hair. Ayala told Carrillo that no one told him before the infield showup that the man he was shown may or may not have been the robber. (RT 9:2089-2092, 2096) Ayala also told Carrillo that he was quite certain of his identification since the man he was shown wore Ayala's jacket, which had been in the truck. (RT 9:2092)

Other witnesses described seeing a green Toyota pickup truck speeding

in the area, pursued by police vehicles. One saw a green Toyota pickup speeding down the street, then hitting a curb a couple of times. He then saw police cars "flying down" the street, about a block behind the pickup. (RT 5:1109-1117) The eyewitness partially saw the driver partially through the passenger window, noting that he wore a plaid shirt, had a "5 o'clock shadow," short hair and a somewhat dark complexion. (RT 5:1119) At the scene, Davies identified appellant as the man he had seen driving. (RT 5:1121; 6:1356)

At around 11:30 a.m., another witness heard the revving on an engine and saw a large, dark-colored truck coming at full speed – or, as Goodwin later said, going "pretty fast" at 40-50 m.p.h. (RT 5:1020) -- from inland to the beach. According to the witness the truck then parked there, directly in front of the beach access area. (RT 5:1010-1015) A man jumped from the truck and, leaving the truck door open, ran to the beach, then headed to the right. The man was white and wore black jeans, a plaid shirt and a baseball cap. Eventually, Goodwin lost sight of him. (RT 5:1015)

Some 10-15 seconds later, several police officers arrived. One of them, who had been pursuing the green Toyota, drove his SUV directly on to the beach. He drove until his wheels got stuck in the sand, at which point, he continued on foot in the direction the man had run. Bush, guessing that the

man would leave the beach at a certain location, radioed to other officers to stand by at the top of the cliff. Bush followed the an up the cliff. At the top, the man jumped the fence. When Bush reached the top, the man was already handcuffed and had been taken into custody. (RT 5:1017-1018; 7:1624-1630, 1648-1652, 1656) Another police officer removed the key fob for the Volvo from appellant's pocket. (RT 7:1657)

Laura Zephro, forensic services supervisor for the sheriff's office, qualified as an expert in latent print identification. On October 7, someone from her office did a forensic examination of the Volvo. Analyzing 27 fingerprints, she concluded that appellant's fingerprints had two matches on a Coke can and one on a Berkeley Farms milk container, seven on a Fruit Loops bowl, several on a temporary license plate, four on a blue temporary license plate, 3 out of the 13 prints found on a modem, and one print on the passenger door and one on the passenger side exterior door. (RT 9:1800-1813)

Angela Myers, senior criminalist at the Department of Justice (DOJ) DNA lab in Richmond, did a DNA analysis on December 24, 2014 of sample from Ayala's left arm and collar area. On the samples taken from Ayala, he was the major contributor, with two minor contributors, from which appellant was not excluded. But, while the data did not exclude appellant as a minor

contributor, the evidence was too weak and the data too limited to support a conclusion that he was a source or a minor contributor. As Myers explained, appellant could not be excluded but the same was true for many, many others. Roughly 90% of the population also would not be excluded as possible minor contributors, based on that DNA sample. In sum, Myers opined, though appellant could not be excluded, the statistical data did not support his inclusion either. (RT 9:2021, 2025, 2030, 2034, 2042-2051, 2081, 2086.)

On October 7, appellant's blood was drawn and tested positive for methamphetamine. (RT 9:2099)

REASONS FOR GRANTING CERTIORARI

WHETHER A DEFENDANT'S RIGHTS TO A FAIR TRIAL AND DUE PROCESS OF LAW UNDER THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS ARE VIOLATED WHEN A TRIAL COURT FAILS TO REPLY TO OR ACKNOWLEDGE RECEIPT OF A JURY REQUEST DURING DELIBERATIONS FOR THE READBACK OF THE TESTIMONY OF THREE CRITICAL WITNESSES, RESULTING IN THE JURY RETURNING ITS GUILTY VERDICTS WITHOUT THE BENEFIT OF REHEARING THE TESTIMONY.

This Court has clearly stated that it is reversible error for a trial judge to answer a jury's question in a manner which is unresponsive or misleading. *Bollenbach v. United States,* 326 U.S. 607, 612-613 (1946). The actions of the trial court in this case in failing to answer or otherwise acknowledge receipt of a jury request during deliberations for readback of the testimony of three critical witnesses was unresponsive, thereby exercising a coercive effect on the jury in reaching its verdict. As such, the court's action violated appellant's rights to due process of law and a fair trial, as guaranteed by the Fifth, Sixth and Fourteenth Amendments to the United States Constitution.

In this case, on the second day of its deliberations –the first having begun at 10:00 a.m. on the previous day -- jurors requested readback of the testimony of three crucial witnesses related to the carjacking – Officer Ryan Kiar, Oscar Ayala and Salome Ayala. The court explained that it "hadn't had

conditions to respond to it until a little before the lunch hour. Before I could respond to that, the bailiff informed me they had reached a verdict. I never brought them in to see how much they wanted. At this point, they have a verdict." (CT 1:176; 2:231; RT 12:2753)

As the court further noted, "I'll still address the question here. I assume they didn't want additional readback at some point. It's their prerogative to request testimony read back or say they don't want it anymore, apparently that's what happened. . . [¶] The morning calendar was very busy and I wasn't able to clear the box in time to address the jury and have you come in and address them." (RT 12:2753) The jury verdicts were then read and accepted. (RT 12:2755)

California Penal Code section 1138, virtually unchanged from the form in which it was originally enacted in 1872, provides as follows: "After the jury have retired for deliberation, if there be any disagreement between them as to the testimony, or if they desire to be informed on any point of law arising in the case, they must require the officer to conduct them into court. Upon being brought into court, the information required must be given in the presence of, or after notice to, the prosecuting nd the defendant or his counsel, or after they have been called."

In its action in response to the jury's request for readback of critical testimony, the trial court erred. Even if the court's calendar prevented it from having the opportunity to provide the jury with readback immediately after it was requested, it still had the duty to inform the jury that it had received its request and intended to comply with it at some time in the near future. Without that response, the jury well may have concluded that the court did not intend to read back the requested testimony and that it was required to continue deliberating without it. Alternatively, jurors may have anticipated a lengthy delay until their request was granted.

Or, "by returning the jury to the jury room to deliberate on the basis of what information it did have, the court may very well have minimized, in the minds of the jurors, the significance of the testimony they had requested." *People v. Butler,* 47 Cal.App.3d 273, 281 (1975.) Or, one or more of the jurors, in agreeing to the verdicts, may have been caused by the court's apparent rebuff of their request for readback "to blend a degree of speculation or surmise into that part of the testimony that they had heard and understood, or - even more costly to the judicial process - may have surrendered their independent judgment to those who professed better hearing and memory." *Id.* The trial court's failure to quickly respond was error which effectively coerced

the jury into reaching a verdict and therefore prejudicially affected the outcome of this case.

As the California Supreme Court concluded in *People v. Weatherford,* 27 Cal.2d 401, 420 (1945), "The result of the judge's actions 'committed the jury to the questionable task of reaching its decisions on the basis of incomplete evidence imperfectly heard. It is evident that such a proceeding is not one 'conducted substantially according to law."

Section 1138 is unequivocal in providing that if jurors are in disagreement as to the testimony, they can request that it be read to them and that if they do so request, the court must read it to them. Any coercion to compel the jurors to forgo the right and duty set forth in section 1138, even it it is the result of inadvertence, is improper. *People v. Gonzales, supra,* 68 Cal.2d 467, 473 [conc./diss.opn., Peters, J.]. In this case, the jury was inadvertently coerced to forgo the right and duty to hear readback of the testimony of three critical witnesses.

In *Riley v. Deeds,* 567 F.3d 1117, 1122 (9th Cir., 1995), the Court concluded that a judge's failure to rule on a requested readback, received during deliberations while the judge was absent from the courtroom, and handled by the judge's law clerk, constituted reversible error. Though the trial

judge was not absent from the courtroom in this case, that judge also failed to rule on the request for readback, or to acknowledge its reeipt to the deliberating jurors. Though not absent from the court, he was in effect absent from the present proceedings because of his unavailability to rule on the request for readback. As this Court has recognized in *Capital Traction Co. v. Hof,* 174 U.S. 1, 13-14 (1898), the presence of a judge is at the "very core" of the constitutional guarantee of trial by an impartial jury. Unavailability to rule on a request made during deliberations is equivalent to absence for all practical purposes in an assessment of the right to an impartial jury, since in both cases, the court is unable to exercise its discretion to grant a readback request.

Under the facts of this case, the result was prejudicial. Having received received absolutely no response to their request or acknowledgement from the court that it had even received it, the jury well may have decided to forgo its right to have the testimony read back because jurors believed that the court did not intend to comply or to avoid lengthy delay. Under these circumstances, it would require unusual stamina on the part of one or more dissenting jurors to stand on their rights to review the evidence against the remaining jurors who would, of course, be more than somewhat rebellious at the thought of an indefinite delay on a Friday afternoon.

The jury requested readback of the testimony of Oscar Ayala, the victim of the carjacking, as well as of his wife, Salome Ayala, who partially witnessed it. Though it was never disclosed what the jury was interested in hearing, all three witnesses testified regarding appellant's appearance and, in Oscar and the officer's cases, the bases for their identification of appellant as the carjacker.

Salome could describe the man only as being white and "not clean looking." (RT 6:1113) Oscar identified appellant at the scene in large measure because he recognized the jacket the man wore as the one that had been in the truck. At trial, Oscar testified that it was very hard to identify his assailant (RT 5:1041, 1097, 1103) The jury also requested to re-hear the testimony of Officer Kiar, who identified appellant after his detention as the man he saw driving the Volvo SUV during the pursuit. Kiar explained that he identified appellant as the man he had seen driving the Volvo based on physical similarities, including some facial hair and the same shirt. Kiar's identification was also based on the fact that appellant wore the same jacket that he had seen the man wearing when he drove the Volvo (RT 5:1139, 1140; 6:1156), a conclusion that directly contradicted Ayala's claim that the jacket appellant wore was the one Ayala had kept in his truck. (RT 5:1041) This inconsistency

on the crucial issue of identification was fertile ground for disagreement among jurors.

As Justice Peters reasoned in his concurrrence and dissent in *Gonzales,* "Considerations of harmony or convenience must give way when the integrity of the decision-making process is called into account and when there is a danger that extraneous factors, which do not properly bear on the question of guilt or innocence, may compel those on whom we have placed the burden, however awesome, of determining truth to abdicate their duty and their right to review evidence and to properly determine the facts free from any coercion." *(Gonzales, supra,* 68 Cal.2d at p. 475.)

There is a strong possibility here that because of the prospect of a lengthy delay in response to its query or a belief that the court's nonresponse signaled a denial of its request for readback, the jury relinquished its right to hear a readback of critical testimony by the victim and two witnesses in favor of a more speedy arrival at a verdict of guilt on all but one charge. This outcome, though the result of inadvertence and not design, coerced the jury's verdicts. As such, it denied appellant a fair trial and due process of law under the Fifth, Sixth and Fourteenth Amendments.

This is an issue of relating to jury delierations is of wide-reaching

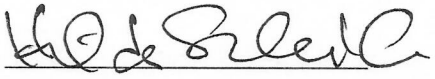
national importance, for which resolution by this Court is necessary.

CONCLUSION

For the reasons discussed above, petitioner respectfully requests that the petition for certiorari now be granted.

November 10, 2018

Respectfully submitted,



HILDA SCHEIB

Attorney for Petitioner

APPENDIX A

Opinion of the California Court of Appeal
Sixth Appellate District
June 8, 2018

Filed 6/6/18 P. v. Sakoman CA6

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. CODY SAKOMAN, Defendant and Appellant.	H043933 (Santa Cruz County Super. Ct. No. F27718)

Cody Sakoman was convicted by a jury of driving a vehicle without permission, carjacking, and two counts of evading a peace officer. During deliberations the jurors requested that certain trial testimony be read back to them, but before the trial court responded to their request the jury returned guilty verdicts. Defendant argues the trial court erred by not sua sponte asking the jurors whether they still wanted the testimony read back to them before delivering their verdicts. Defendant also contends that the trial court erred by not awarding him presentence conduct credit. Though we find no error regarding the trial court's treatment of the jury's readback request, we will reverse the judgment and remand the matter for calculation of defendant's presentence conduct credit.

I. TRIAL COURT PROCEEDINGS

Defendant's criminal charges stemmed from his unauthorized use of two vehicles one afternoon in October 2014.

A. THE VOLVO CHASE

A California Highway Patrol sergeant testified that he was on patrol around noon in Santa Cruz when a Volvo SUV passed him matching the description of a vehicle reported stolen. The sergeant was part of the Santa Cruz Auto Theft Reduction and Enforcement task force. A man identified later as Timothy Staley was driving the Volvo. When the Volvo turned into a motel parking lot, the sergeant drove his unmarked patrol car past the lot, alerted other officers, and positioned his car so that he could watch the parking lot entrance.

An inspector for the Santa Cruz County District Attorney's Office testified that he drove through the motel parking lot in an unmarked car in response to the CHP sergeant's report and saw a person (identified at trial as defendant) get into the Volvo. Defendant drove the Volvo out of the parking lot. The inspector followed in his car, but lost contact after a few minutes when defendant ran a red light.

A Santa Cruz police officer testified that the Volvo next passed in front of his marked patrol car. The officer turned on his lights and siren and chased the Volvo a short distance before losing contact when the Volvo turned a corner. A second Santa Cruz police officer testified about picking up the chase in another marked patrol car. The officer observed the Volvo swerve into oncoming traffic, run a red light, and maintain speeds over 60 miles per hour in a 25-mile-per-hour zone. The officer chased the Volvo with his lights and siren on, but the Volvo never stopped. The officer ultimately stopped his chase in the interest of public safety.

The Volvo was later recovered and processed for fingerprints. An expert in latent fingerprint identification testified that several fingerprints in the Volvo matched defendant. A rifle was also discovered in the Volvo's back seat.

B. THE TOYOTA CARJACKING

The same afternoon as the Volvo chase, Oscar Ayala walked out to his Toyota truck that was parked at the mobile home park where he lived. (The mobile home park

was about a half-mile from where the Volvo would later be discovered.) Ayala opened the driver's side door to look for some paperwork, heard what sounded like someone jumping over the exterior fence of the park, and saw a man approach him. The man told Ayala to give him the keys to the Toyota. The man seemed angry. When Ayala refused to comply, the man grabbed him very hard and hit him on his forearm, bicep, and elbow. Ayala continued to resist, and the man grabbed him by the back of the neck and also wrapped his arms around Ayala. Ayala eventually gave the man the keys, and the man drove off in the Toyota. Ayala yelled to his wife and daughter to call 911 after the man left, and police arrived about five minutes later. Ayala stated that his only injuries were "psychological," but also acknowledged sustaining bruises on his arm from the interaction.

Ayala's in-court identification of defendant as the man who took his truck was initially equivocal. He agreed that the man who took his Toyota was in court, but then answered "I don't see him" when the prosecutor asked Ayala to identify him. After a follow up question, Ayala said: "It's him?" Upon further questioning, Ayala ultimately indicated that defendant was the man who took his Toyota but that "he looks different." Ayala also acknowledged that a few days before the carjacking he had gone to the hospital complaining about memory issues, but that he had not experienced any memory problems since that hospital visit.

C. The Toyota Chase and Ayala's In-field Identification

A Santa Cruz police sergeant learned about the carjacking from a dispatcher and set up his marked patrol car at an intersection he thought defendant might use. The Toyota passed the intersection within 20 minutes after the sergeant heard the carjacking report, and the officer chased the truck with his lights and siren on. The Toyota exceeded the speed limit and did not stop at stop signs. The driver eventually got out of the truck and ran onto Seabright beach. The sergeant drove his patrol car onto the beach until it became stuck in the sand, and then followed the driver on foot while instructing other

officers via radio to position themselves on top of the cliff where he thought the driver might run. The driver ran up the cliff, and by the time the sergeant got to the top other officers had detained the driver. Defendant was identified by one of the arresting officers at trial as the driver.

The Santa Cruz County sheriff's deputy who had initially responded to Ayala's residence learned from a dispatcher that a suspect was in custody. He drove Ayala and Ayala's daughter (who provided Spanish translation assistance for her father) to the area where defendant had been detained. With Ayala's daughter translating, the deputy provided what he described at trial as the "witness admonishment that we commonly give to folks." He admonished Ayala that the person he would see may or may not be associated with the crime, and that Ayala should not feel pressured to make a decision.

Ayala testified that the in-field identification took place about 30 minutes after the carjacking. He rode with a peace officer and was asked to look at a man. He positively identified defendant as the person who had taken his Toyota, based on recognizing defendant's facial features and also because Ayala believed defendant was wearing one of Ayala's jackets that he had left in the truck. When defendant was searched incident to arrest, officers found the key to the stolen Volvo in his pocket.

D. TRIAL AND SENTENCING

Defendant was charged with driving a vehicle without permission (Veh. Code, § 10851, subd. (a)); two counts of evading a peace officer with willful disregard for public safety (Veh. Code, § 2800.2, subd. (a)); carjacking (Pen. Code, § 215, subd. (a)); and possessing a firearm as a felon (Pen. Code, § 29800, subd. (a)(1)). The information alleged that defendant had a prior serious felony conviction (Pen. Code, § 667, subd. (a)(1)); a prior strike conviction (Pen. Code, § 667, subds. (b)–(i)); and had served two prior prison terms (Pen. Code, § 667.5, subd. (b)).

The case proceeded to trial, with testimony consistent with the summary we have provided. In the afternoon on the second day of jury deliberations, the court was

informed the jury had reached verdicts. When defendant and counsel returned to the courtroom, the court made the following record outside the presence of the jury: "In the late morning, we got sent out the following on the record -- [¶] [']Can we get a copy of the court reporter's -- I'm assuming they meant testimony -- of Officer Kiar, Officer [*sic*] Ayala, Salome Ayala.['] [¶] And I hadn't had conditions to respond to it until a little before the lunch hour. Before I could respond to that, the bailiff informed me they had reached a verdict. [¶] I never brought them in to see how much they wanted. [¶] At this point, they have a verdict. [¶] I'll still address the question here. I assume they didn't want additional readback at some point. It's their prerogative to request testimony readback or say they don't want it anymore, apparently that's what happened. [¶] The morning calendar was very busy and I wasn't able to clear the box in time to address the jury and have [counsel] come in and address them." (No written request by the jury to have testimony read back is in the record on appeal.) The trial court then brought the jury into the courtroom to read the verdicts. The jury found defendant guilty of driving a vehicle without permission (Veh. Code, § 10851, subd. (a)); carjacking (Pen. Code, § 215, subd. (a)); and two counts of evading a peace officer with willful disregard for public safety (Veh. Code, § 2800.2, subd. (a)). Defendant was found not guilty of possessing a firearm as a felon (Pen. Code, § 29800). Defense counsel did not request that the court ask whether the jury still wanted testimony read back, nor did counsel object to the trial court proceeding without doing so. The parties waived jury on the special allegations, which the trial court found true after a court trial.

The trial court sentenced defendant to 15 years in prison, consisting of 10 years for carjacking (middle term, doubled because of the prior strike conviction (Pen. Code, §§ 215, subd. (b), 667, subd. (e)(1))), and five years for the prior serious felony conviction (Pen. Code, § 667, subd. (a)(1)). The court denied defendant's motion under

People v. Superior Court (Romero) (1996) 13 Cal.4th 497, imposed concurrent middle terms for the other counts, and stayed sentence for the prior prison term enhancement.[1]

Defendant received 694 actual days of presentence custody credit. When the court asked if defendant's "good-time/work-time credits" had been calculated, defense counsel responded that "CDC is no longer wanting them," and that they "just want actual credits." Apparently relying on defense counsel's representation, the trial court did not calculate or award any presentence conduct credit.

II. DISCUSSION

A. JURY'S READBACK REQUEST

Defendant argues the trial court violated Penal Code section 1138 by not responding to the jury's request to have testimony read back before the court accepted the verdicts. Penal Code section 1138 provides: "After the jury have retired for deliberation, if there be any disagreement between them as to the testimony, or if they desire to be informed on any point of law arising in the case, they must require the officer to conduct them into court. Upon being brought into court, the information required must be given in the presence of, or after notice to, the prosecuting attorney, and the defendant or his counsel, or after they have been called."

1. Defendant Forfeited the Issue by Not Objecting

Defense counsel said nothing when notified by the trial court about the jury's request to have testimony read back followed by the jury's announcement that it had reached verdicts. Defendant argues on appeal that his trial counsel did not forfeit the argument, citing *People v. Butler* (1975) 47 Cal.App.3d 273 (*Butler*). (See *Butler*, at

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[1] In response to a question from the courtroom clerk regarding the sentence for the two prior prison term enhancements alleged, the parties stipulated there had been only one prior prison commitment because the two prison priors were "the same term." A notation on the abstract of judgment suggests the single prior prison term enhancement imposed was to run concurrently, but the trial court stated at sentencing that it would "stay the sentence on the prior prison term."

p. 283–284 [finding Penal Code section 1138 argument was not forfeited because the "relative inaction of defense counsel ... cannot attenuate the jurors' fundamental right to be apprised of the evidence upon which they are sworn conscientiously to act."].) But the Supreme Court has expressed "doubts that ... [the *Butler* court] correctly allowed a defendant to assert a violation of the jury's right to readback of testimony" after trial counsel failed to object. (*People v. Hillhouse* (2002) 27 Cal.4th 469, 505.) And the Supreme Court found in a later opinion that a defendant's trial counsel's failure to object to a trial court's decision not to respond to a juror's note forfeited the issue on appeal. (*People v. Boyette* (2002) 29 Cal.4th 381, 430.) Defendant's failure to object here forfeited the Penal Code section 1138 issue.

Defendant does not argue on appeal that his trial counsel provided ineffective assistance by not objecting based on Penal Code section 1138. But in the interest of judicial economy we will nonetheless treat defendant's argument as complaining of ineffective assistance. To establish ineffectiveness of trial counsel in violation of a defendant's right to counsel under the Sixth Amendment to the United States Constitution, defendant must show both that counsel's performance was deficient and that he was prejudiced by the deficiency. (*People v. Ledesma* (1987) 43 Cal.3d 171, 216–217 (*Ledesma*).) Deficient performance is rarely shown if there was a tactical reason for trial counsel's conduct, and counsel has no duty to make a meritless objection. (See *People v. Cruz* (1980) 26 Cal.3d 233, 255–256 ["except in rare cases, an appellate court should not attempt to second-guess trial counsel as to tactics"]; *People v. Ochoa* (1998) 19 Cal.4th 353, 463 (*Ochoa*) ["Representation does not become deficient for failing to make meritless objections."].) To prove prejudice defendant must affirmatively show a reasonable probability that, but for his trial counsel's errors, the result would have been different. (*Ledesma*, at pp. 217–218.)

2. Trial Counsel Did Not Provide Ineffective Assistance

Defendant argues that the trial court's failure to respond to the jury's request "coerced the jury into reaching a verdict and therefore prejudicially affected the outcome of this case." But defendant's argument is based almost exclusively on the concurring and dissenting opinion of a single justice from the Supreme Court's decision in *People v. Gonzales* (1968) 68 Cal.2d 467 (*Gonzales*).

In *Gonzales*, the jury requested readback of certain testimony one afternoon and the court informed it that the court reporter would not be able to provide the information until the next morning. (*Gonzales*, *supra*, 68 Cal.2d at p. 472.) The trial court instructed the jurors to continue deliberating, "but that, if it was impossible to do so until the testimony was available, they could stop deliberating until the next morning." (*Ibid.*) The jury chose to continue deliberating, and returned a verdict shortly thereafter. The Supreme Court found the trial court "did not err in receiving the verdict without reading the testimony to the jury" because it "appears that before the court was able to fulfill the request the jury manifestly decided that the reading of the testimony was unnecessary." (*Id.* at pp. 472–473.) One justice dissented, reasoning that the trial court coerced the jury into reaching a verdict because "it would require unusual stamina on the part of one or more dissenting jurors to stand on their rights to review the evidence against the remaining jurors who would, of course, be more than somewhat rebellious at the thought of being locked up for the night at 3:30 in the afternoon." (*Id.* at p. 474, dis. opn. of Peters, J.) No other justice joined the dissent.

Defendant argues *Gonzales* is factually distinguishable because here "there was no indication to the jury from the court that it had received the jury request and intended to comply with it." Though we acknowledge that factual distinction, we do not find it legally significant. As the majority opinion in *Gonzales* explained, it is reasonable to infer that in returning verdicts the jury unanimously concluded that review of the

previously requested testimony was no longer necessary. (*Gonzalez*, *supra*, 68 Cal.2d at pp. 472–473.)

Butler, *supra*, 47 Cal.App.3d 273, provides an example of the sort of error that Penal Code section 1138 is meant to prevent. In that case, the jury requested readback of the testimony of several trial witnesses and the trial court denied the request. (*Butler*, at p. 277.) The trial court told the jury: to have a court reporter "reread what you have asked to be reread would perhaps take a full day. And you I trust will go back into the jury room and do your very best to arrive at a verdict *based on the information that you have*. Thank you for making the request, but it has to be denied. Go back and give it a good try." (*Id.* at p. 279.) In reversing, the *Butler* court reasoned that refusing to have testimony read back to the jury amounted to "jury coercion as opposed to a helpful attempt to accede to the jury's request in a manner reasonable under the exigencies of the situation." (*Id.* at p. 283.)

Unlike in *Butler*, the trial court here did not deny the jury's request to have testimony read back, but had simply not yet responded to the jury. The request arrived in the "late morning," and the trial court was apparently planning to address the issue promptly that afternoon until it learned that the jury had reached verdicts. Though it may have been advisable for the trial court to confirm the request was moot before the verdicts were read in order to resolve any doubt about the jury's deliberations, the trial court's decision not to do so did not violate Penal Code section 1138. And as there was no Penal Code section 1138 violation, we see no deficiency in trial counsel's performance. (See *Ochoa*, *supra*, 19 Cal.4th at p. 463.)

B. PRESENTENCE CONDUCT CREDIT

Defendant argues the trial court erred by not awarding defendant any presentence conduct credit, and alternatively contends his trial counsel provided ineffective assistance

by inviting the trial court not to calculate those credits.[2] The People contend that defendant forfeited the issue and further contend, based on defense counsel telling the trial court the Department of Corrections and Rehabilitation "just want[s] actual credits," that defendant should be estopped from seeking presentence conduct credit on appeal. Regardless of any error invited by defense counsel, the trial court had a duty to calculate defendant's presentence conduct credit.

"Everyone sentenced to prison for criminal conduct is entitled to credit against his term for all actual days of confinement solely attributable to the same conduct." (*People v. Buckhalter* (2001) 26 Cal.4th 20, 30 (*Buckhalter*).) It is the duty of the "court imposing the sentence" to determine not only a defendant's actual days of presentence confinement but also any applicable conduct credit. (Pen. Code, § 2900.5, subd. (d); accord *Buckhalter*, at p. 30.) The sentencing court must ensure that a defendant's total presentence custody credit is accurately reflected on the abstract of judgment. (*Buckhalter*, at p. 30.) Penal Code section 4019 provides the general formula for calculating presentence conduct credit (i.e., two days' conduct credit for each two days of actual custody). (Pen. Code, § 4019, subd. (f).) But presentence conduct credit for individuals who are convicted of a violent felony listed in Penal Code section 667.5, subdivision (c)—like defendant's carjacking conviction here (Pen. Code, § 667.5, subd. (c)(17)—"shall not exceed 15 percent of the actual period of confinement." (Pen. Code, § 2933.1, subd. (c).)

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[2] Penal Code section 1237.1 provides: "No appeal shall be taken by the defendant from a judgment of conviction on the ground of an error in the calculation of presentence custody credits, unless the defendant first presents the claim in the trial court at the time of sentencing, or if the error is not discovered until after sentencing, the defendant first makes a motion for correction of the record in the trial court." Though judicial economy would have been better served had defendant here first moved to correct the credit issue in the trial court before raising it on appeal, "[w]e reach the issue of presentence custody credit ... because it is not the only issue on appeal." (*People v. Jacobs* (2013) 220 Cal.App.4th 67, 71, fn. 2.)

We acknowledge that defendant's trial counsel incorrectly advised the trial court that it did not need to calculate defendant's conduct credit. But the trial court had an independent statutory duty to calculate those credits and include them in the abstract of judgment. Because the trial court failed to calculate those credits and defendant's appellate briefing does not include a calculation of what he believes his credits should be, we will remand the matter for the limited purpose of allowing the trial court to calculate defendant's presentence conduct credit.

III. DISPOSITION

The judgment is reversed and the matter is remanded to the trial court for the limited purpose of recalculating defendant's presentence custody credit, which shall include conduct credit under Penal Code section 2933.1, subdivision (c). The new abstract of judgment shall also reflect the trial court's decision to stay sentence on the prior prison term enhancement (Pen. Code, § 667.5, subd. (b)). The trial court is directed to prepare an amended abstract of judgment reflecting those modifications and to forward a certified copy of the amended abstract to the Department of Corrections and Rehabilitation.

Grover, J.

WE CONCUR:

Greenwood, P. J.

Premo, J.

APPENDIX B

Denial of Petition for Review

California Supreme Court

August 15, 2018

Court of Appeal, Sixth Appellate District - No. H043933

S249959

IN THE SUPREME COURT OF CALIFORNIA

En Banc

THE PEOPLE, Plaintiff and Respondent,

v.

CODY SAKOMAN, Defendant and Appellant.

The petition for review is denied.

CANTIL-SAKAUYE

Chief Justice

NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

CODY MCLAURIN SAKOMAN,

Petitioner,

vs.

STATE OF CALIFORNIA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE CALIFORNIA COURT OF APPEAL
SIXTH APPELLATE DISTRICT

PROOF OF SERVICE BY MAIL

PROOF OF SERVICE BY MAIL

[IN FORMA PAUPERIS]

I, HILDA SCHEIB, do swear and declare that on this date, November 10, 2018, pursuant to Supreme Court rule 29.3, served the within PETITION FOR WRIT OF CERTIORARI AND MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS on each party to the above proceeding or on every person required to be served, by depositing a sealed envelope containing the above documents in the United States mail, properly addressed to each of them and with first-class postage thereon fully prepaid. The names and addresses are as follows:

Office of the Attorney General
Xavier Becerra, Attorney General
455 Golden Gate Avenue
San Francisco, CA 94102

California Court of Appeal
Sixth Appellate District
333 W. Santa Clara St.
San Jose, CA 95113

Cody McLaurin Sakoman
BA9915
High Desert State Prison
P. O. Box 3030
Susanville, CA 96127-3030

I declare under penalty of perjury that the foregoing is true and correct. Executed this 11th day of November, 2018, in San Francisco, CA.

HILDA SCHEIB