No.

IN THE SUPREME COURT OF THE UNITED STATES

JOAQUIN GONZALES,

Petitioner,

v.

STATE OF CALIFORNIA,

Respondent.

On Petition for Writ of Certiorari
to the California Court of Appeal
First District

PETITION FOR WRIT OF CERTIORARI

Walter K. Pyle
2039 Shattuck Avenue, Suite 202
Berkeley, CA 94704-1116
(510) 849-4424
walt@wfkplaw.com
Counsel of Record
Attorney for Petitioner

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QUESTIONS PRESENTED

[The First Question] An Automated License Plate Reader (ALPR) system uses mobile camera units attached to police patrol cars and stationary cameras at intersections to automatically photograph millions of license plates of passing cars and, using optical character recognition, read the numbers and record in a database the date, time and location of each vehicle.

The First Question Presented is: Did a detective's warrantless search of an ALPR database for images and locations of Petitioner's license plate violate petitioner's Fourth Amendment reasonable expectation of privacy in the record of his physical movements?

[The Second Question] In *Chapman v. California*, 386 U.S. 18, 23 (1967) the Court stated that when deciding whether the erroneous admission of evidence is harmless error, "[t]he question is whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction."

The Second Question Presented is: Did the California Court of Appeal apply a standard below the one adopted by this Court in *Chapman* when it concluded that any constitutional error in admitting the ALPR evidence to show what license plates were on Petitioner's car at the time of an alleged shooting was harmless beyond a reasonable doubt, because there was "other evidence" to establish what plates were on Petitioner's car?

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Joaquin Gonzales respectfully petitions for a writ of certiorari to the California Court of Appeal, First District, to review its decision denying his claim that a detective's warrantless search of an Automated License Plate Reader (ALPR) digital database, which records photos of millions of vehicle license plates, with date, time and location, violated his Fourth Amendment reasonable expectation of privacy in the record of his physical movements.

INTRODUCTION

The driver of a Nissan Maxima testified that after he honked at a Buick in the early morning hours of July 3, 2015, the Buick pulled along his left side and the passenger window rolled down about six inches. The driver of the Nissan heard a "pop" and the Buick turned and drove off. The driver examined his car a few minutes later, and found what appeared to be a bullet hole in the lower door moulding of the Nissan. The Buick was registered to Petitioner.

No weapon was found, but petitioner was convicted of assault with a firearm, shooting at an occupied motor vehicle, and being a felon in possession of a firearm.

Petitioner had obtained replacement license plates for the Buick after the incident, and he told the investigators someone had taken one of the plates "like, a couple days previous or something" before his arrest. The State introduced evidence obtained from an Automated License Plate Reader (ALPR) database showing photos of the old plates on the Buick the day before the incident, which, the prosecutor argued, showed petitioner made a false statement to sheriff's deputies who interviewed him. In closing argument the prosecutor directed the jury's attention to a jury instruction that said if the defendant made a false statement about the crime, the jury "may consider it in determining his guilt."

OPINION BELOW

The opinion of the California Court of Appeal appears as Appendix A. The issues raised in this petition were unreported; the other issues were published in *People v. Gonzalez* [*sic*], 42 Cal. App. 5th 1144 (2019). The order of the Court of Appeal denying rehearing appears as Appendix B, and is unreported. The order of the California Supreme Court denying discretionary review appears as Appendix C, and is unreported.

JURISDICTION

The judgment of the California Court of Appeal was entered on December 5, 2019. The Court of Appeal denied a timely petition for rehearing on December 20, 2019. The California Supreme Court denied discretionary review on February 26, 2020. This petition is filed within 90

days of the California Supreme Court's order, and is timely pursuant to Rule 13.1 of this Court.

The jurisdiction of this court is invoked pursuant to 28 U.S.C. §1257(a), as a petition for a writ of certiorari to review the judgment of the highest court of a State.

CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment to the United States Constitution provides, in pertinent part:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE

Shortly after midnight on July 3, 2015, a red and white Buick coming off the freeway merged abruptly and cut off a white Nissan driven by Eli Ortiz. Ortiz honked at the Buick (2 RT 490),[1] and the Buick, driven by a Latino male, followed the Nissan for several blocks. (1 RT 418-419.) At a stop sign the Buick pulled into the left lane, alongside the Nissan. (1 RT 430, 457.) Mr. Ortiz testified that the front passenger window of the Buick rolled down about six inches, and he heard a noise, "like, pop" (2 RT 494), but did not see a gun or see a flash. (2 RT 530.) The Buick made a left turn and drove off. (2 RT 294.) When Ortiz inspected his car door a few minutes later, he found a hole near the bottom of his door, as shown

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[1] Reference is to the volume and page number of the Reporter's Transcript (RT) in the record on appeal filed with the California Court of Appeal. The Clerk's Transcript will be referenced "CT."

by the photo that is Exhibit 4. (2 RT 532-533.) Ortiz estimated the hole, if he stood next to it, was at or below his knee. (2 RT 534.)

A witness, Mr. Ounkeo, was behind the two cars and took a video of the Buick and the Nissan on his smart phone. (1 RT 422-423.) He heard a "loud pop"(1 RT 431), but did not see a flash. (2 RT 463.)

It turned out the license plate for the Buick was registered to appellant. (2 RT 616.)

Later that day Ortiz told Officer Santamaria it was dark and he didn't get a good look into the other vehicle (2 RT 535), and explained that he "couldn't recognize him exactly, because it was dark," but he the man looked like "a person who was Latino who had been born here," that being the only description he gave Santamaria. (2 RT 536.)

Ortiz testified that a little later, two other officers came and Ortiz helped them take off the inside door panel (2 RT 536), and the officers found a bullet inside the door. (2 RT 503.) They put the bullet in a bag and took it with them. (2 RT 504.) The officers did not testify at trial.

Late in the afternoon of July 3, 3015 Deputy Lema stopped the Buick, which was driven by appellant, arrested him for driving on a suspended license, and impounded the car. (2 RT 586-588.) An inventory search by Lema "throughout the car" disclosed nothing of evidentiary value. (2 RT 587.) A 30-day "hold" was placed on the car, after which it was released to appellant. (2 RT 659.)

Detective Moschetti testified he "inspected" the Buick about July 7th (2 RT 653), and Detective Lopez testified he attempted to obtain samples from the car for a gunshot residue test on the same date. (2 RT 679, 683.) He wore gloves (5 RT 685), but because he is a law enforcement officer it is possible he has gunshot residue on his person. (2 RT 700.)

Two grains of gunshot residue were recovered from one of the samples Lopez obtained. (2 RT 714.)

Department of Motor Vehicle records showed that appellant obtained replacement license plates for his car on July 3rd for the reason that a plate had been stolen. (3 RT 744-746, 748.)

The case languished for some five months, and then on December 7, 2015 officers interviewed Mr. Ortiz again and took a recorded statement. (2 RT 505, 689.) They also showed him photos, and one of the photos [of Petitioner] "appeared similar" to the driver. (2 RT 508.) But Ortiz was not 100 percent sure the defendant was the driver of the other car. (2 RT 510.)

An "Automated License Plate Reader" (ALPR) system employs cameras, some mounted on police cars and some on stationary sites at intersections, that search for something that looks like a license plate, and takes a picture of the plate and the car, using optical character recognition to read the number, and the information is recorded in a database that logs a picture of the plate and car, and the location, date, and time the picture was taken. (2 RT 555-556.) The system is a commercial product owned by 3M, which provides cameras and a "support package." (2 RT 558, 559.) An officer can query a plate number against the database. (2 RT 561.)

On December 15th Detective Moschetti utilized an ALPR program to search for images of appellant's license plate. (2 RT 634-635.) He printed out two "hits" from just prior to the time of the shooting; he believes there were more, but these two were the ones relevant to the time frame. (2 RT 636.)

The ALPR records played a not insignificant role in the case. The prosecutor argued that the jury should consider the ALPR information

relevant to appellant's consciousness of guilt, and to support the People's argument that the defendant gave false or misleading statements in his second interview with Moschetti. (3 RT 785-786.) The prosecutor argued that the photo from the Automate License Plate Reader showed the plate hadn't been gone "a week or a couple of days," as Petitioner had said, and argued that petitioner "would know he had that plate on at that time." (3 RT 786.) The court gave a jury instruction that a defendant's false statement may show he was aware of his guilt, and the jury "may consider it in determining his guilt." (CT 134.)

REASONS FOR GRANTING THE PETITION

I.
THIS CASE PRESENTS AN IMPORTANT AND RECURRING CONSTITUTIONAL QUESTION ABOUT THE SCOPE OF PRIVACY RIGHTS IN LIGHT OF RECENT ADVANCES IN THE DIGITAL AGE.

It is becoming increasingly apparent that technology has the power to shrink the realm of guaranteed privacy. And as advances in technology have enhanced the Government's capacity to encroach upon areas previously safe from inquisitive eyes, this Court has sought "to assure preservation of that degree of privacy against government that existed when the Fourth Amendment was adopted." *Kyllo v. United States*, 533 U.S. 27, 34 (2001).

For many years, Supreme Court precedent did not recognize an individual's expectation of privacy in records maintained by third parties. *Smith v. Maryland* 442 U.S. 735, 743-744 (1979) [no expectation of privacy for phone numbers dialed and captured by a "pen register" installed by telephone company at its central office]; *United States v. Miller*, 425 U.S. 435, 442-443 (1976) [depositor had no expectation of privacy in checks

and bank records maintained pursuant to Bank Secrecy Act]; see also *United States v. Carpenter*, 819 F.3d 880, 888 (6th Cir. 2016) [citing *Smith v. Maryland*, *supra* at 741 for the proposition there is no reasonable expectation of privacy in cell-site location information collected by cell phone wireless providers].

This all changed with *Carpenter v. United States*, 585 US __ , 134 S. Ct. 2206, 201 L. Ed. 2d 507 (2018). In *Carpenter* the government urged the court to apply the traditional "third-party doctrine" applicable to business records to cell-site location information (CSLI), but the Court recognized that CSLI data—which records when and where an individual's cell phone is located—was different. The detailed, historical, and exhaustive collection of information about persons' movements implicates privacy concerns far beyond those considered in earlier cases. "The Government's position fails to contend with the seismic shifts in digital technology that made possible the tracking of not only Carpenter's location but also everyone else's, not for a short period but for years and years." 138 S.Ct., at 2219. This meant that a search of cell-site records containing cell-site location information was a Fourth Amendment search requiring a warrant supported by probable cause. "Whether the government employs its own surveillance technology as in *Jones* [see *United States v. Jones* 565 U.S. 400 (2012)] or leverages the technology of a wireless carrier, we hold that an individual maintains a legitimate expectation of privacy in the record of his physical movements as captured through CSLI." *Id*., 134 S.Ct. at 2217. Although Carpenter's movements were visible to the public, a person does not surrender all Fourth Amendment protection by venturing into the public sphere, because "society's expectation has been that law enforcement agents and others would not—and indeed, in the

main, simply could not—secretly monitor and catalogue every single movement of an individual's car [by attaching a GPS device] for a very long period." *Ibid*., citing *Jones*, 565 U.S. at 430. Similarly, when the Government accessed CSLI information from the wireless carriers, "it invaded Carpenter's reasonable expectation of privacy in the whole of his physical movements." *Id*., at 2219. This implicates Fourth Amendment protections: "Having found that the acquisition of Carpenter's CSLI was a search, we also conclude that the Government must generally obtain a warrant supported by probable cause before acquiring such records." *Id*. at 2221.

A.
Individuals Urgently Need Protections Against a New and Powerful Surveillance Methodology.

Cell-site location information is not the only recent development in technology that has the potential to seriously infringe on individuals' privacy expectations.

Automated License Plate Reader (ALPR) systems are computer-controlled camera systems—generally mounted on police vehicles or on fixed objects such as light poles—that automatically capture images of every license plate that comes into view. See Griffith, David, *12 Things You Need to Know About LPR* , Police Magazine (April 3, 2020), available at https://www.policemag.com/342447/12-things-you-need-to-know-about-lpr.

Patrol cars will typically have two or four cameras; a camera on the right will read plates on the parked cars as the unit passes by, and another camera on the left captures oncoming traffic or cars parked on the left, reading every plate the patrol car encounters, regardless whether

individual drivers are suspected of criminal activity. (2 RT 556.) The information is stored digitally, with the location, date, and time the pictures were taken. (2 RT 555.) The program is a commercial product owned by 3M and purchased by various agencies. (2 RT 558.) The one used in the case at bar services about 50 agencies in California. (2 RT 555.)

These systems make it possible to collect information on an almost unimaginable scale. In the United Kingdom, where ALPR was first widely adopted beginning in 2002, law enforcement agencies reportedly were recording between ten and twelve million license plates *per day* by 2010. Dryer, Randy L. & Stroud, S. Shane, *Automatic License Plate Readers: An Effective Law Enforcement Tool or Big Brother's Latest Instrument of Mass Surveillance? Some Suggestions for Legislative Action*, 55 Jurimetrics J. 225, 229 (American Bar Association, Winter, 2015.) One manufacturer of ALPR devices, ELSAG North America, advertises that its Mobile Plate Hunter 900 (MPH-900) can capture up to 1,800 "reads" per minute. *Id*., at p. 232.

B.
There Is Good Reason to Address Whether Constitutional Principles Applicable to Cell Site Location Information Are Applicable to Automated License Plate Readers.

The ALPR database, with its millions of license plate photos, allows police to go back in time to recreate a person's past movements, something not possible with a GPS tracker or a one-time "license plate check."[2] Monitoring an individual's location and movements over an extended period of time by collecting and recording photos of his license plate can

[2] It should be kept in mind that Petitioner is not asserting an expectation of privacy in his license plate as such; he is asserting an expectation of privacy in the historical record of his physical movements.

and frequently will expose extraordinarily sensitive details of a person's life including, potentially, "a wealth of detail about . . . familial, political, professional, religious, and sexual associations." *United States v. Jones, supra, 132* S. Ct. at 955 (Sotomayor, J., concurring).

Tracking a person's past movements through an ALPR system can result in detailed and encyclopedic information, compiled automatically and almost effortlessly. Petitioner submits that the reasoning underlying the *Carpenter* decision could and should be applied to ALPR systems. Yet in the context of monitoring the historical locations of an individual's vehicle there currently exists far less protection against government overreach than was afforded in *Carpenter*. In *Carpenter*, the government at least had to obtain a court order under the Stored Communications Act, which required that the government show "reasonable grounds" to believe the records were relevant to an ongoing investigation. *Carpenter*, 224 S.Ct. at 2213. In contrast, law enforcement access to the records of Petitioner's movements was not in any way limited by court oversight. This shortcoming presents an important question of federal law that has not been, but should be, settled by this Court. Supreme Court Rule 10(c).

Thus far there are few cases addressing people's expectation of privacy with respect to the information gathered by ALPR systems.[3] But

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[3] Our research has discovered two recent reported cases addressing the point. Neither is definitive.

In *United States v. Yang*, ___ F.3d __ , No. 18-10341, 2020 WL 2110973, 2020 U.S. App. LEXIS 14168 (9th Cir. 5-4-2020) the court ruled that the defendant lacked standing to claim an expectation of privacy in the historical location data of a rental vehicle he had failed to return by the contract due date.

In *Commonwealth v. McCarthy*, No. SJC-12750, 484 Mass. 493, 2020 Mass. LEXIS 195 (4-16-2020) police utilized a total of only four stationary cameras, one at each end of two bridges across the Cape Cod Canal, to track when and how many times the defendant passed onto or off of the Cape.

the widespread use of ALPR data, coupled with the lack of restraint on government conduct in the use of that data, affects the privacy rights of millions of individuals. The question whether there is a reasonable expectation of privacy under the Fourth Amendment in a person's movements, as reflected in an ALPR database, requires definitive resolution by this Court. Without guidance from this Court, a car owner "cannot know the scope of his constitutional protection, nor can a policeman know the scope of his authority." *New York v. Belton*, 453 U.S. 454, 459–460 (1981). As law enforcement seeks ever greater quantities of location data and other sensitive digital records, the need for this Court to weigh in on privacy issues grows more urgent each day.

"The Founding generation crafted the Fourth Amendment as a response to the reviled general warrants and writs of assistance of the colonial era, which allowed British officers to rummage through homes in an unrestrained search for evidence of criminal activity." *Carpenter* at 2213 [internal quotes omitted], citing *Riley v. California*, 573 U.S. __ , 134 S.Ct. 2473, 2494 (2014). New technologies such as ALPR databases give police the power to rummage unrestrained through digital trails which result from an individual's mere participation in a modern society. The surveillance implications of advances in science like ALPR technology demand careful scrutiny, lest they become the modern-day replacements for the writs of assistance so scorned by the Founders.

Driving, like carrying a cell phone, is an indispensable part of modern life, one we should not reasonably expect citizens to forgo in order to avoid government surveillance. The Court should grant the petition

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That "limited picture" did not track enough of his comings and goings to reveal the privacies of life, and for that reason did not constitute a search.

and determine what restraints the Constitution places on the power of the government to track the movements of its citizens over long periods of time through ALPR systems.

II.
IN *CHAPMAN v. CALIFORNIA* THIS COURT PROMULGATED A HARMLESS ERROR STANDARD THAT REQUIRES THE STATE TO PROVE BEYOND A REASONABLE DOUBT THAT THE CONSTITUTIONAL ERROR DID NOT AFFECT THE VERDICT. IN THIS CASE THE COURT REJECTED THAT STANDARD, AND APPLIED ONE IN COMMON USE IN CALIFORNIA, WHICH ASSESSES THE PERSUASIVENESS OF OTHER EVIDENCE AGAINST THE DEFENDANT. THE COURT SHOULD GRANT THE PETITION TO ENSURE THAT STATES FOLLOW THE LAW AS ESTABLISHED BY THIS COURT.

But the need to define privacy rights in the face of advancing technology is not the only reason to grant the petition. There is also a defect in the reasoning of the opinion in this case that recurs regularly in California reviewing courts, and requires the intervention of this Court. Like many other California decisions, the court here found harmless constitutional error because the record contained ample "other evidence" to support the verdict. The appellate court made no attempt to determine whether the error affected the verdict.

A.
How the ALPR Evidence Was Presented to the Jury

The State presented evidence at trial that a report for Petitioner's license plate was created from the ALPR program. (2 RT 562.) Detective Moschetti testified that he printed out the report on December 15, 2015. (2 RT 635.) A better understanding of how the system works can be had

by reviewing the actual report, which was introduced in evidence as Exhibit 32 and which appears in Appendix D to this petition.

A technician from the Sheriff's Cybersecurity Unit testified that the first page of the report shows search parameters with a "start time" of 6/1/2014 and an "end time" of 12/15/2015, the date of the printout.[4] (2 RT 553, 565.) An LPR [License Plate Recognition] Summary shows a total of "91 LPR Reads." App. 20. Detective Moschetti printed out two of the "hits" that were generated several hours before the shooting. (2 RT 564, 633-634.)

Page 2 of the report is a map with two dots that signify locations where the license plate was encountered by ALPR cameras in the relevant time frame. (2 RT 563, 636.)

Page 3 shows the time of day for the two matches, one between noon and 1:00 p.m. and the other between 2:00 p.m. and 3:00 p.m. (2 RT 563.)

Page 4 shows the actual photos of the front of the car and the license plate for the two matches, with the times and addresses where the photos were taken. (2 RT 563-564.) The top picture was taken at 151st Avenue in San Leandro (Calif.) on July 2nd at 2:25 p.m. and the second one on Mateo Street in San Leandro at 12:35 p.m. on the same date, both matching the 7CHZ518 number the officer searched for. (2 RT 564.)

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[4] The start and end times suggest that the search covered an 18 month period. A supervisor of the Sheriff's Cybersecurity Unit testified that the license plate photos are stored for a "maximum of 365 days." (2 RT 561.) There was no testimony about the methodology used to ensure that old data was in fact deleted.

B.
The Prosecution Urged the Jury to Use the ALPR Data for Petitioner's License Plate "In Determining His Guilt."

In the case at bar, Petitioner had obtained replacement license plates shortly after the incident giving rise to the charges. In a police interview (several months later) he told police that one of his license plates had been stolen and he got new plates "[a]bout a week, I think, a couple days" before the day of the incident. App. 3; Exhibit 34-A, Lines 34-36, 95-106. The prosecutor urged the jury to follow a jury instruction that told them that if the defendant made a false statement about the crime, the jury "may consider it in determining his guilt." (3 RT 785.) He argued that the ALPR data proved that "he was a liar" when he made statements to law enforcement officers, stating, "You have a photo from the previous day on July 2d on that Automated License Plate Reader, and that photo is take about 2:00 in the afternoon on July 2d." (3 RT 786.)

Given these facts, to prove beyond a reasonable doubt that any constitutional error in admitting the ALPR evidence was harmless, the State would have to show that the jury did not consider what the jury instruction told them they could consider "in determining his guilt," and show that they disregarded the prosecutor's entreaties.

Did the State fulfill its obligation?

In the California Court of Appeal, the State argued in its brief that "any error was harmless because other evidence besides the ALPR records showed that appellant changed his license plate shortly after the shooting" (Respondent's Brief, p. 12), and that "even without the ALPR records there was evidence that appellant changed the plate shortly after the shooting" (Respondent's Brief, p. 20).

That convinced the California court, which repeated the test espoused by the State, and found any error harmless because there was abundant other evidence "supporting the prosecutor's consciousness of guilt argument." App. 5.

The logic of the appellate court's analysis, of course, required the reviewing court to make the unwarranted assumption that the jury in fact believed the "other evidence" and found it convincing. But "where the credibility of the prosecution's witnesses is not conceded, the strength of the prosecution's case cannot be assessed without making the sort of factual findings that have traditionally been reserved for the trier of fact." *Holmes v. South Carolina*, 547 U.S. 319, 330 (2006).

Weighing the strength of the evidence is a task outside a reviewing court's job description. "The opinion of the Court in *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979), makes clear that it is the responsibility of the jury—not the court—to decide what conclusions should be drawn from evidence admitted at trial." *Cavazos v. Smith*, 565 U.S. 1, 3-4, 132 S.Ct. 2, 3-4, 181 L.Ed.2d 311 (2011) (per curiam).

C.
California Courts Commonly Measure Harmless Error by Looking to Whether Other Evidence Supported the Verdict.

Neither the State of California nor the appellate court addressed the question this Court tells us is the one which must be answered: "The question is whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction." *Chapman*, 386 U.S. at 23.

Chapman, then, instructs the reviewing court to consider "not what effect the constitutional error might generally be expected to have upon a

reasonable jury, but rather what effect it had upon the guilty verdict in the case at hand." *Sullivan v. Louisiana*, 508 U.S. 275, 279 (1993). Hypothesizing a guilty verdict that was never rendered, in a trial that never took place, would violate the right to have the accused's guilt decided by a jury. *Ibid*.

The harmless error test utilized by the reviewing court here—whether there was "other evidence" to prove the case—was not an outlier; it is a test that is used repeatedly by the California courts. For example, in *People v. Moore*, 51 Cal. 4th 1104, 1128-1129 (2011), the case cited by the appellate court to support it's decision, an accomplice, Avery, had testified that the defendant personally participated in the robbery and murders of the apartment managers of the building where defendant used to live. The defendant sought to suppress a bag of jewelry seized by police when they entered defendant's apartment shortly before they arrested him, arguing that they had only an arrest warrant, not a search warrant. The California Supreme Court concluded that even if there was a Fourth Amendment violation, the admission of the challenged evidence was harmless beyond a reasonable doubt. *People v. Moore*, *supra*, 51 Cal. 4th 1104, 1128. The court cited *Chapman v. California*, but significantly, it did not address whether the inadmissible evidence "possibly influenced the jury adversely," see *Chapman*, 386 U.S. at 23, or whether the State had proved that "the error complained of did not contribute to the verdict obtained," *id*. at 24. Instead, the court observed that "the bag and the jewelry found inside it were not the only, or even the most compelling, corroboration of Avery's testimony." In light of Avery's testimony and "other corroborating evidence," said the court, any error was harmless under *Chapman*. *People v. Moore*, *supra* 51 Cal. 4th at 1129.

Other California decisions routinely assess the nature and extent of the evidence against the defendant.

In *People v. Katzenberger*, 178 Cal.App.4th 1260, 1269 (2010), an assault case, the court found no prejudice under *Chapman* by (1) pointing to a purportedly "plausible claim" by the alleged victim as to why police found no bruises or marks, and (2) discounting defense-favorable testimony because, *inter alia*, it "does not compel a conclusion" that no blow was inflicted.

People v. Vang, 185 Cal.App.4th 309, 322 (2010) asserted there is no prejudicial error "in cases where there is other evidence to support" inferences drawn by jury.[5]

In *People v. Gonzalez*, 210 Cal.App.4th 875, 995 (2012) the court concluded that "the admission of Christopher's confession was harmless because even excluding the unlawful confession we conclude there is sufficient admissible evidence in the record from a variety of 'disinterested reliable' witnesses to support his conviction."

In *People v. Diaz*, 213 Cal.App.4th 743, 758 (2013) the court, citing *Chapman*, stated that "any error in admitting the evidence . . . was harmless in light of the overwhelming evidence of defendant's guilt."

In *People v. Dowdell*, 227 Cal. App. 4th 1388, 1405 (2014) the court ruled that even if defendant's statement to police should have been excluded as involuntary, reversal was not required under *Chapman* because the prosecution presented "an abundance of evidence" establishing defendant's guilt and "the jury was not likely to credit [his] self-serving testimony."

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[5] The California Supreme Court subsequently granted review in *Vang*, but, finding no error, it was unnecessary to address the issue of prejudice. *People v. Vang*, 52 Cal.4th 1038, 1052 (2011).

Even justices on this Court have raised their eyebrows about whether California courts take the *Chapman* standard seriously. In *People v. Gamache*, 48 Cal.4th 347, 387 (2010) the California Supreme Court, purportedly applying the *Chapman* standard, stated that "the burden remains with the defendant to demonstrate prejudice." This court denied defendant's petition for certiorari, but, in a statement accompanying the denial, four justices, although agreeing that the error was in fact harmless, issued a warning that "in future cases the California courts should take care to ensure that their burden allocation conforms to the commands of *Chapman*." *Gamache v. California*, 562 U.S. 1083, 131 S.Ct. 591, 593 (2010) (statement of Sotomayor, J., joined by Ginsburg, Breyer, and Kagan, JJ.).

That did not happen. Four years later, in *People v. Jackson*, 58 Cal.4th 724 (2014) the California Supreme Court held that any error in forcing the defendant to wear a stun belt throughout his murder trial was harmless under *Chapman*, because there was no evidence that the error had any adverse effect. *Id*. at 740. In a dissenting opinion, Justice Liu pointed out that "under *Chapman*, reversal is unwarranted *not* when the record is devoid of evidence that the error had an adverse effect, but *only* when the state has shown beyond a reasonable doubt that the error *did not* have an adverse effect." *Id*. at 778 [italics in original]. Citing *Gamache* and two other California Supreme Court decisions in which the California court arguably deviated from *Chapman's* mandate, Justice Liu concluded, "Given the precedential force of these decisions, it is reasonable to worry that *Chapman* will continue to mean something different in the courts of California than what the high court has repeatedly said it means." *People v. Jackson*, *supra*, 58 Cal.4th 724, 808. This Court denied a petition for writ of certiorari. *Jackson v. California* 135 S. Ct. 677 (2015).

As more recent California decisions show, these warnings largely continued to go unheeded, and, as in the case at bar, the courts often avoid the question whether the error affected the verdict and instead continue to ask whether there was other evidence supporting the verdict.

For example, in *People v. Anthony*, 32 Cal.App.5th 1102, 1126 (2019) the court ruled that the defendant's statements were obtained in violation of *Miranda* [see *Miranda v. Arizona*, 834 U.S. 436 (1966)], but found them harmless beyond a reasonable doubt because "[o]ther evidence provided ample support for his convictions."

In *People v. Winn*, 40 Cal.App.5th 1213 (2019) the court ruled that even assuming a due process violation in admitting a photo of the murder victim while he was alive, any error was harmless under *Chapman* because (1) "the evidence against Winn was overwhelming;" (2) "his claim of self-defense was not credible" and was supported by little but "his own self-serving statements;" and, notwithstanding defendant's argument that a jury could have questioned the credibility of the State's witnesses, (3) it was not reasonably probable the jury would have reached a more favorable verdict absent the error; and finally (4) the defendant "cannot show he was prejudiced." *Id*. at 1221. The appellate court found additional error in the trial court's failure to inquire about defendant's claim that defense counsel deprived him of his right to testify, but ruled the error was harmless beyond a reasonable doubt because "the evidence against Winn was overwhelming" and "the case for self-defense was weak. " *Id*. at 1225.

Nor has the practice of weighing "other evidence" to disprove prejudice been confined to intermediate appellate courts. In *People v. Young*, 7 Cal.5th 905, 926 (2019) an officer began interrogating the

defendant by playing a recording of a telephone call in which defendant admitted shooting a robbery victim, then gave *Miranda* warnings and asked if defendant wanted to tell his side of the story, to which defendant replied, "You heard it all" and then asked for an attorney. Defendant's response was admitted into evidence. *Id*. at 923. The California Supreme Court ruled that even if this was a "question-first" *Miranda* violation [see *Missouri v. Seibert*, 542 U.S. 600 (2004)], any error would have been harmless because the recording itself "provided decisive evidence of defendant's guilt" and no juror would have believed defense counsel's explanation that defendant was merely "posturing" in the telephone call. *Young*, *supra*, 7 Cal.5th at 926. This time the decision was unanimous.

The test under *Chapman* is not whether there was other evidence to support the jury's verdict, or whether the erroneously admitted evidence was necessary to the conviction. Indeed, in the *Chapman* case itself the California Supreme Court had characterized the evidence as "overwhelming," and determined that a more favorable result was not reasonably probable absent the error. *People v. Teale*, 63 Cal.2d 178, 197 (1965). Nevertheless, this Court reversed their convictions. *Chapman* established that the test is not, as the California court had thought, whether the evidence against the accused is overwhelming, or whether in a trial without the error a guilty verdict would surely have been rendered. Rather, "The question is whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction." *Chapman* at 23, quoting *Fahy v. Connecticut*, 375 U.S. 85, 86-87 (1963). The *Chapman* case says nothing about the weight of the evidence, yet today California cases continue to weigh the evidence when they determine whether the *Chapman* standard has been met.

It is readily apparent that the evidence in the case at bar carried far less weight than that in *Chapman*. In *Chapman*, a bartender at the "Spot Club" in Lodi, California, was seen locking up shortly after 2 a.m., accompanied by a man and woman who resembled the two defendants, Ruth Chapman and Thomas Teale. The following morning the bartender's body was found in a ditch north of town, with a bullet hole in the back of his head and two on the left side of his head. *People v. Teale, supra* 63 Cal.2d 178, 183-184. The bullets came from a .22 weapon similar to a pistol purchased by Mrs. Chapman six days earlier. A check signed by Mrs. Chapman was found near the body, and Type A blood (the victim's type) was found on her blouse, shirt and shoes and on Teale's shirt and jacket. Fibers from the victim's shoes matched fibers found in the defendants' automobile, and hairs found in the automobile matched the victim. Red paint found on the floor mat of the automobile came from the shoes of the victim. *Id*., at 184. Teale confessed to a jailhouse informant that he and Mrs. Chapman were going to take the bartender out in the country and rob him, but as the bartender was starting to get out of the car Mrs. Chapman shot him in the back of the head and then shot him two more times when he fell. When she was arrested Mrs. Chapman initially claimed she had been in Ukiah at the time of the murder, then said she was at the bus depot in San Francisco. However, a registration card in her handwriting was located at a motel in Woodland [near Sacramento, north of Lodi] with fictitious names and a fictitious license plate number for the car Teale was driving when he was arrested. *Id*. at 185.

Not only was the evidence in the case at bar far from overwhelming, it was physically impossible for events to have occurred the way the prosecution theorized. The passenger window of the Buick was only

rolled down "about six inches," App. 2, and the cars were "pretty close together" (1 RT 458), so a shot fired out the passenger window would have gone over the top of the Nissan, or at most struck near he top of the driver's side window. Instead, the bullet hole the prosecution claimed came from the Buick, as shown in a photo of the door (Exhibit 4 in Appendix E to this petition), was only approximately nine inches above the bottom of the door. It is likely the jury was bothered by the bullet's apparent disregard of the laws of physics, because during deliberations they asked for a readback of evidence "regarding the distance between the 2 cars when stopped on the Via Alamitos and the opening in the Buick's window" (CT 145) and "testimony describing the size of the Buick's passenger window opening." (CT 146.)

In addition, the bullet was found *inside* the Nissan's door. Why didn't the bullet (a nominal .38 caliber, 2 RT 674) continue through the fiberboard inner door panel and on out the other side of the Nissan? Finally, no one saw a muzzle flash, whereas the State's expert witness said a shot like that would probably create a flash.[6] (2 RT 715 [testimony of Ann Keeler, State's gunshot residue expert].)

Given the conflicts inherent in the State's case, it may well have been the prosecutor's adjuration, supported by an instruction from the court to consider Petitioner's misleading statement as consciousness of his guilt, that tipped the scales in favor of the State. A reasonable juror might think digital evidence, supported by photographic proof, was more

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[6] In deciding whether the "pop" heard by the drivers, App. 2, was a gunshot or was something else, a reasonable juror might take into consideration that because Independence day fell on Saturday, July 4, 2015, the holiday was officially observed (by California and the federal government) on Friday, July 3rd, the date of the incident.

convincing than testimony subject to human frailties. Neither the prosecution nor the appellate court attempted to negate that possibility.

CONCLUSION

There are two compelling reasons to grant this petition.

First, billions of bits of data that trace the movements of millions of individuals are easily available to the government through Automated License Plate Readers, with virtually no restrictions on the government's access to or uses of the data. The information is assembled with respect to anyone who drives, without the government knowing whether the police will ever need the data in the future.

The Framers adopted the Fourth Amendment to protect the people from arbitrary abuses of power, and "to place obstacles in the way of a too permeating police surveillance." *Carpenter*, 138 S.Ct. at 2114, quoting *United States v. Di Re*, 332 U.S. 581, 595 (1948). ALPR systems allow the government to go back in time to trace a person's whereabouts, without the person knowing he is being tracked. If something turns up, the subject will find out he has effectively been tailed for months on end. Petitioner submits that when the Framers adopted the Fourth Amendment, they did not envision a government that would entrust to the Executive branch a tool so amenable to misuse without any oversight by the Judicial branch.

The Fourth Amendment was intended to provide people with security against unreasonable searches, but there is no decision by this court that says that protection includes ALPR databases. Given the rapidly expanding pool of data, the time is right for the court to address this shortcoming, and to determine the scope of the protection the

Constitution affords the people against sophisticated systems that threaten the people's expectation of privacy.

Second, the appellate court in this case ignored Supreme Court precedent that requires a reviewing court to determine whether there is a reasonable possibility that a constitutional error might have contributed to the conviction, and instead based its decision on a standard rejected by this Court in the *Chapman* case, citing a California Supreme Court decision that had done the same thing.

This misapplication of the harmless error standard occurs on a regular basis. We have cited several reported cases that show how California courts have repeatedly ignored the *Chapman* standard, but we did not include references to unpublished decisions of the California Court of Appeal, which comprise some 96% of California's appellate criminal case decisions. See 2019 Court Statistics Report, p. 49, available at: https://www.courts.ca.gov/gov/documents/2019-Court-Statistics-Report.pdf. Even the brief track record disclosed by the cited cases shows that one can safely bet that a California court will do the same thing again next month, and again and again in the months which follow. This recurring practice regularly deprives individuals of their right to have a jury—not a reviewing court—weigh the evidence against them.

Respectfully submitted,

Walter K. Pyle
2039 Shattuck Avenue, Suite 202
Berkeley, CA 94704-1116
(510) 849-4424
Attorney for Petitioner

Appendix
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Appendix A

Decision
of the California Court of Appeal

Filed 12/5/19

CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. JOAQUIN GONZALEZ, Defendant and Appellant.	A150198 (Alameda County Super. Ct. No. H58965)

Joaquin Gonzalez appeals following his convictions for assault with a firearm and related crimes. We agree with his contentions that the trial court erred in admitting uncertified, unauthenticated records to prove he suffered a prior felony conviction, and that he is entitled to a remand to allow the trial court to exercise its newly-granted discretion regarding a firearm enhancement. We reject his remaining arguments.

BACKGROUND

A jury convicted appellant of assault with a firearm (Pen. Code, § 245, subd. (a)(2)), shooting at an occupied motor vehicle (*id.,* § 246), and possession of a firearm by a felon (*id.,* § 29800, subd. (a)(1)). As to the assault count, the jury found true an allegation that appellant personally used a firearm during the commission of the offense (Pen. Code, § 12022.5, subd. (a)). The jury also found true an allegation that appellant had a prior felony conviction for attempted second degree robbery (Pen. Code, § 211),

* Pursuant to California Rules of Court, rules 8.1105(b) and 8.1110, this opinion is certified for publication with the exception of parts I, II, IV, and V.

which was a serious felony (*id.*, §§ 667, subd. (a)(1), 1192.7, subd. (c)) and a strike (*id.*, §§ 667, subds. (d)(1) & (e)(1), 1170.12, subds. (b)(1) & (c)(1)).

The evidence at trial was as follows. Around 12:20 a.m. on July 3, 2015, a red Buick with a white trunk and white top merged abruptly onto a street after exiting the freeway and nearly collided with a white Nissan. The Nissan was driven by Eli Ortiz, who honked for a few seconds at the Buick.[1] The Buick followed closely behind Ortiz for several streets and then pulled up to the left of Ortiz at a stop sign. Ortiz saw the Buick's front passenger window roll down about six inches and heard a loud popping noise coming from his left. The Buick then drove away. Ortiz pulled over to examine his car and found a hole in the driver's side door. Officers subsequently removed a bullet from the driver's side door.

Wansin Ounkeo, a computer forensic examiner with the Alameda County Sheriff's Office, witnessed the near-collision when the Buick came off the freeway. He followed the two cars and used his cell phone to take a video. The video, which was played for the jury, showed a red Buick with a white trunk and roof. When the Buick pulled up beside the Nissan, Ounkeo heard a loud pop from ahead of him, but did not see a gun or a flash.

In the early evening of July 3, Deputy Jennifer Lema of the Alameda County Sheriff's Office saw appellant driving the Buick. She arrested him for driving with a suspended license. Law enforcement found gunshot residue on the interior passenger window of appellant's car. A search of appellant's cell phone revealed that a picture of the interior passenger compartment of the Buick had been taken at 12:33 a.m. on July 3, approximately 15 minutes after Ounkeo took his video.

Appellant's home was searched and a back license plate with the number 7CHZ518 was found in a closet. This plate was on the Buick in the video taken by Ounkeo. A report from an automated license plate reader program revealed two photos of the Buick with license plate number 7CHZ518, taken on July 2, 2015. When Deputy Lema arrested appellant on the evening of July 3, after the shooting, the Buick had

[1] Ortiz testified through an interpreter.

different license plates. According to the DMV records and testimony from a DMV manager, appellant had been to the DMV some time before noon on July 3, 2015 and had turned in one license plate bearing number 7CHZ518, completed a form stating the other plate had been stolen, and received new license plates. When questioned about the plates in a May 2016 police interview, appellant told police one of his license plates was stolen and he got new plates "[a]bout a week, I think, a couple days" before his July 2015 arrest.[2]

The day after the shooting, Ortiz told police it was dark and he did not get a good look into the Buick, but the driver was a Latino who had been born in the United States. In December 2015, Ortiz picked appellant out of a photographic lineup as the person who "reminded me more" of the perpetrator. He testified at trial that he felt "a little" pressure to pick someone from the photo lineup, and he was not 100 percent sure when he picked the photograph. In court, Ortiz identified appellant as "resembl[ing]" the Buick driver, but he again was not 100 percent sure appellant was the driver. Ounkeo testified that he could not see into the Buick or identify the driver.

DISCUSSION

I. *Automated License Plate Reader Program*

Appellant contends that the admission of a report generated by an automatic license plate reader database violated his Fourth Amendment rights. We find any error harmless.

A. *Additional Background*

An automated license plate reader program is used by fifty Bay Area law enforcement agencies. The program uses cameras—either fixed or mounted on patrol cars—to photograph the license plate of every car the cameras encounter. The program reads the license plate numbers and stores the photographs in a database for one year. Law enforcement officers can search the database for a specific license plate number and

[2] A video of the interview was played for the jury and transcripts were provided to the jury.

generate a report showing photographs of that number and the date, time, and location of the photograph.

A database search was conducted for license plate number 7CHZ518 (the license plate shown in Ounkeo's video), and the report generated shows two photographs of the license plate on a red car with a white hood, both taken on July 2, 2015. The report was admitted into evidence at trial.

B. *Analysis*

We need not decide whether, as the parties dispute, appellant forfeited this challenge or had a reasonable expectation of privacy in the license plate data.[3] Instead, we conclude that any error in admitting the automated license plate reader report was harmless beyond a reasonable doubt. (*People v. Moore* (2011) 51 Cal.4th 1104, 1128–1129.)

The report showed that appellant's Buick bore license plate number 7CHZ518 on July 2, 2015, hours before the shooting. The sole relevance of this fact, as argued by the prosecutor, was that the jury could infer consciousness of guilt by comparing this evidence to appellant's May 2016 statement to police that he replaced these plates a couple of days or a week before his arrest on July 3, 2015. After discussing other evidence that appellant's statement to police was false—the original plate was in the video taken by Ounkeo, the back plate was not stolen because it was found in his home, and appellant got new plates on July 3, 2015—the prosecutor argued: "We know he tried to have some sort of built-in defense: That couldn't have been his car . . . at the scene of the shooting. He's got different license plates on his car now."

As the prosecutor argued, other evidence proved that appellant's Buick had license plate number 7CHZ518 before the shooting: Ounkeo's video captured the Buick's license plate and showed this number. Even more evidence, in addition to Ounkeo's video,

[3] An amicus brief regarding the latter issue was filed by the Electronic Frontier Foundation, American Civil Liberties Union Foundation, and American Civil Liberties Union Foundation of Northern California.

contradicted appellant's statement that his license plates were replaced days before his arrest: DMV records and testimony from the DMV manager showed that appellant got new plates on the morning of the day he was arrested, only hours after the shooting. And yet more evidence contradicted appellant's statement that one of his plates was stolen, supporting the prosecutor's consciousness of guilt argument: appellant had one of the old license plates in a closet and turned the other in to the DMV. Accordingly, we conclude any error in the admission of the automated license plate reader program report was harmless beyond a reasonable doubt.[4]

II. *Jury Instruction*

Appellant argues it was error to instruct the jury, as part of CALCRIM No. 315, "You've heard eyewitness testimony identifying the Defendant." Appellant contends that, although no eyewitness definitively identified appellant as the perpetrator, "a reasonable juror could interpret the judge's statement as instructing the jury that the testimony was sufficient to qualify as an identification" and it therefore "lessen[ed] the prosecution's burden of proving the defendant's identity."

" 'If a jury instruction is ambiguous, we inquire whether there is a reasonable likelihood that the jury misunderstood and misapplied the instruction.' [Citations.] ' " ' "[T]he correctness of jury instructions is to be determined from the entire charge of the court, not from a consideration of parts of an instruction or from a particular instruction." ' " ' [Citation.] The reviewing court also must consider the arguments of counsel in assessing the probable impact of the instruction on the jury." (*People v. Young* (2005) 34 Cal.4th 1149, 1202.)

As described above, Ortiz picked appellant's photo out of a photographic lineup in December 2015, although he testified at trial he was not 100 percent sure and had felt

[4] Appellant also argues the prejudice from any error in admitting the automated license plate reader report should be cumulated with prejudice from instructional error (see part II, *post*). As explained below, we reject appellant's claim of instructional error, leaving no prejudice to cumulate.

pressured to pick someone. In addition, Ortiz testified at trial that appellant "resembles" the perpetrator.

We find no reasonable likelihood that the jury construed the challenged instruction in the manner suggested by appellant.[5] First, CALCRIM No. 315, considered as a whole, does not assume that the eyewitness testimony was definitive. To the contrary, the instruction directs the jury to evaluate identification testimony by considering questions such as "Did the witness ever change his or her mind about the identification?"; "How certain was the witness when he or she made an identification?"; and "Was the witness able to identify the Defendant in a photographic lineup?" The instruction also points the jury to factors that, in this case, indicated weakness in the identification: "How well could the witness see the perpetrator?"; "What were circumstances affecting the witness's ability to observe, such as lighting"; and "How much time passed between the event and the time when the witness identified the defendant?"

Second, the prosecutor's closing argument conceded that Ortiz's identification was not conclusive: "[Appellant] was identified in a photo lineup by the victim. Now, I'll tell you the victim said he wasn't 100 percent sure. It was dark that night. He did get a view of him. He did say that. He said it was dark that night, and he wasn't sure. But sure enough, you heard about the procedures that take place in these photo lineups. . . . And sure enough, he selected the Defendant out of the six photos, and he came here into court and identified the Defendant as the person that was driving that car. Again, he wasn't 100 percent sure, but he says that's the person that resembles the person that was driving the car that night." Defense counsel's closing argument further emphasized the uncertainty of the identification.

[5] Because we find no error, we need not decide whether, as the parties dispute, appellant forfeited the challenge or was prejudiced by any error.

III. *Prior Conviction*

Appellant contends the trial court erred in admitting uncertified and unauthenticated records to prove his prior conviction. On this issue, we agree with appellant and will reverse the finding.

A. *Additional Background*

A bifurcated jury trial was held on the allegation that appellant suffered a prior strike conviction. Before the trial, the court gave appellant's counsel "the documents the DA indicates he wants to use," including a reporter's transcript from a 2004 plea hearing, a 2004 plea form, and a 2004 minute order. The prosecutor represented that the records were printed from the court's online records system and sought judicial notice of their accuracy and authenticity.[6] Appellant objected, arguing there was no foundation and the documents were not certified copies. The prosecutor responded, "As the Court is aware, we no longer have court files in Alameda County. All of those court files have been scanned and put into the Odyssey system. Asking the Court to take judicial notice of these documents is the same as asking the Court to take judicial notice of the court file that wouldn't have been certified, but would have been here in court and available for all of us to view."

The court reviewed the records, noting that the name of one of the defendants listed in the 2004 records was an alias of appellant's, and that the 2004 minute orders used the same "Personal File Number" to identify appellant as in the current case. The court granted the People's request for judicial notice and the records were provided to the jury.[7] No other evidence was presented on this allegation. The jury found the allegation true.

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[6] Although the court stated the documents "have been printed out from our Odyssey system," the court was apparently relying on the prosecutor's representation.

[7] The court did not grant the request for judicial notice as to a document setting forth probation terms and conditions, because it deemed this document unnecessary.

B. *Analysis*

Evidence Code[8] section 452, subdivision (d), provides for permissive judicial notice of "[r]ecords of . . . any court of this state . . . ." Section 452.5, subdivision (a), provides that these official records "include any computer-generated official court records, as specified by the Judicial Council, that relate to criminal convictions, when the record is certified by a clerk of the superior court pursuant to Section 69844.5 of the Government Code [providing for certification and submission for entry into a computer system operated by the Department of Justice] at the time of computer entry." No such certification was submitted here.

We do not construe section 452.5, subdivision (a), to provide the exclusive means of submitting computer-generated court records for judicial notice. Indeed, subdivision (b) of the same section does not reference section 452, but nonetheless provides for the admissibility of an electronic copy of a record of conviction: "An official record of conviction certified in accordance with subdivision (a) of Section 1530, *or an electronically digitized copy thereof*, is admissible under Section 1280 to prove the . . . prior conviction . . . recorded by the record." (§ 452.5, subd. (b)(1), italics added.)[9] Section 1530, subdivision (a), in turn, provides when a purported copy of a writing is "attested or certified as a correct copy of the writing or entry by a public employee, or a deputy of a public employee, having the legal custody of the writing," the copy is "prima

[8] All undesignated section references are to the Evidence Code.

[9] An electronically digitized copy must be an exact reproduction of the original and must either "bear[] an electronic signature or watermark unique to the entity responsible for certifying the document" or be "transmitted by the clerk of the superior court in a manner showing that the copy was prepared and transmitted by that clerk of the superior court." (§ 452.5, subd. (b)(2).)

facie evidence of the existence and content of such writing . . . ."[10] This certification also was not presented here.

Certification serves to authenticate a copy of a writing: "[U]nder sections 1530 and 452.5, subdivision (b), a properly certified copy of an official court record is a self-authenticated document that is presumptively reliable, and standing alone may be sufficient to prove a prior felony conviction." (*People v. Skiles* (2011) 51 Cal.4th 1178, 1186 (*Skiles*).) However, "nothing in section 1530 forbids authentication by another method." (*Skiles*, at p. 1187.) " 'Authentication of a writing means (a) the introduction of evidence sufficient to sustain a finding that it is the writing that the proponent of the evidence claims it is or (b) the establishment of such facts by any other means provided by law.' (§ 1400.)" (*Skiles*, at p. 1187.) "[T]he statutory certification process is a 'means provided by law' establishing that the official writing is the writing that the proponent of the evidence claims it is. (§ 1400, subd. (b).)" (*Skiles*, at p. 1187.) But "[o]ther evidence may establish that a [purported copy of an official writing] is authentic and reliable. When considered together, the evidence may suffice to prove a prior felony conviction." (*Ibid.*) "For example, a writing can be authenticated by circumstantial evidence and by its contents." (*Ibid.*)

"[T]he proponent of a [noncertified] copy of an official writing has the burden of producing evidence of its authenticity. Because a noncertified copy of an official writing does not constitute prima facie evidence of the existence and content of such writing under section 1530, the proponent must present additional authenticating evidence." (*Skiles, supra,* 51 Cal.4th at p. 1189; see also *id.* at pp. 1186–1187 ["Since a certified copy of an official writing 'is prima facie evidence of the existence and content of such writing or entry' under section 1530, we may infer that a noncertified copy, by itself, is not reliable enough to constitute such prima facie evidence."].)

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[10] "For the purpose of evidence, whenever a copy of a writing is attested or certified, the attestation or certificate must state in substance that the copy is a correct copy of the original, or of a specified part thereof, as the case may be." (§ 1531.)

In *Skiles,* the prosecution introduced "certified copies of court records in [an] Alabama case," including "a single page of an indictment," as well as a "faxed . . . certified copy of the first page of defendant's Alabama indictment, which apparently had been missing" from the other court records and which was necessary to prove the conviction was a serious felony. (*Skiles, supra,* 51 Cal.4th at pp. 1182–1183 & fn. 1.) The Supreme Court concluded the faxed record was not certified "[b]ecause the public official did not examine and compare the faxed copy with the original, with a certificate of its correctness." (*Id.* at p. 1186.) However, it considered the certified records and the content of the faxed record, finding the faxed indictment page was "similar to, and consistent with," the certified indictment page "of unquestioned authenticity," in that the count numbering and pagination shown in the two pages was consecutive and the documents showed "the same Alabama court and county, bear the same date, and are certified by the same court clerk." (*Id.* at p. 1188.) In addition, the faxed page "relate[d] to the same counts listed in the grand jury's true bill, another document of unquestioned authenticity." (*Ibid.*) The Supreme Court concluded that this evidence supported "a determination that the [faxed] document . . . was an accurate representation of a court document in the same Alabama case and an authentic representation of counts 1 and 2 of the indictment." (*Ibid.*)

In this case, there were no certified records to compare with the uncertified conviction records. Indeed, no additional evidence at all was presented on the authenticity of the records.

The People note, as they did below, that the trial court no longer kept physical court files, but instead maintained digital copies on the court's own electronic system. To be sure, " '[j]udicial notice ordinarily may be taken of a court's own records . . . .' " (*People v. Cavanna* (1989) 214 Cal.App.3d 1054, 1058.) But the court did not take judicial notice of the digital copies on the court's electronic system, nor did the court print out the records from this system itself. (See *People v. Mendoza* (2015) 241 Cal.App.4th 764, 773, fn. 1 [taking judicial notice of "online San Bernardino and Riverside Superior Courts' dockets"].) Although the prosecutor represented that the

records were printed from the court's electronic system, no *evidence* was introduced on this point. (Cf. *People v. Martinez* (2000) 22 Cal.4th 106, 112, 120 [where "uncertified computer printouts of criminal history information" were submitted to prove a prior prison term, a district attorney's office employee testified that, "[s]hortly before testifying, [he] obtained the printout from the Department's CLETS [California Law Enforcement Telecommunications System] computer system"].)

The People also point to the contents of the records as evidence of their authenticity. Our Supreme Court has indicated that the contents of uncertified records alone cannot be sufficient to support a finding of authenticity. (*Skiles, supra,* 51 Cal.4th at pp. 1186–1187 ["Since a certified copy of an official writing 'is prima facie evidence of the existence and content of such writing or entry' under section 1530, we may infer that a noncertified copy, by itself, is not reliable enough to constitute such prima facie evidence."].) Even assuming otherwise, the contents do not support such a finding here. That the records displayed Alameda County Superior Court file stamps and a "PFN" number that was the same one used in appellant's current case is not sufficient, standing alone, to satisfy the prosecutor's burden of establishing the documents were authentic conviction records for the purpose of proving appellant suffered a prior conviction. (See *People v. Goldsmith* (2014) 59 Cal.4th 258, 267 ["The purpose of the evidence will determine what must be shown for authentication, which may vary from case to case."].)

We conclude the trial court erred in admitting the uncertified, unauthenticated exhibits as proof that appellant suffered a prior conviction. As these exhibits were the only evidence presented to prove this allegation, we will reverse the jury's finding for insufficient evidence. "It is well settled that if the jury's finding on a strike allegation is reversed on appeal for insufficient evidence, the allegation may be retried to a new jury." (*People v. Anderson* (2009) 47 Cal.4th 92, 102.) Accordingly, we will remand to permit the People to retry the allegation before a new jury.

IV. *Sentencing Factors*

Appellant contends the trial court impermissibly used the same fact to impose the upper term on the assault count and the enhancement for personal use of a firearm. We reject the challenge.

A. *Additional Background*

In sentencing appellant for the assault with a firearm count, the trial court discussed the aggravating and mitigating factors as follows, citing the California Rules of Court: "Rule 4.421(a)(1), the offense involved great violence and threat of great bodily harm. The Defendant fired a gun at an occupied vehicle striking the victim's side door. Fortunately, the bullet was stuck in the door. It was low in the door on the victim's driver side. Had the bullet shot been just a little bit higher, it would have gone through the door seriously injuring and very possibly killed the victim given the large caliber of bullet that was used; [¶] Subsection (a) subsection (2) The Defendant was armed and used a weapon at the time of the commission of the crime. I'm not going to use this as a Circumstance in Aggravation. However, it is noted for the record; [¶] Subsection (b) subsection (1) The Defendant has engaged in violent conduct which indicates a serious danger to society, particularly under these circumstances. The victim merely honked at the Defendant for -- as the Defendant cut him off in a dangerous driving maneuver. In return, the Defendant followed him, stalked him, and got himself in a position where he could then fire a gun towards the driver. All this occurred in a residential neighborhood placing other possible innocent bystanders and victims at risk; [¶] (b)(4) The Defendant was on Court probation when the crime was committed; [¶] (b)(5) The Defendant's prior performance on formal and Court probation was unsatisfactory. He was on Court probation at the time of the arrest, and he had suffered seven probation revocations while on probation." The court found there no mitigating circumstances.

The court sentenced appellant to the upper term of four years. (See Pen. Code, § 245, subd. (a)(2).)

B. *Analysis*

Section 1170, subdivision (b), provides, in relevant part, "the court may not impose an upper term by using the fact of any enhancement upon which sentence is imposed under any provision of law."

Appellant forfeited this claim by failing to object below. " '[C]omplaints about the manner in which the trial court exercises its sentencing discretion and articulates its supporting reasons cannot be raised for the first time on appeal.' [Citation.] '[C]laims involving the trial court's failure to properly make or articulate its discretionary sentencing choices' are subject to forfeiture, including '. . . cases in which the court purportedly erred because it double-counted a particular sentencing factor . . . .' " (*People v. Boyce* (2014) 59 Cal.4th 672, 730–731; see also *People v. Sperling* (2017) 12 Cal.App.5th 1094, 1100 [applying forfeiture rule to dual use of facts claim]; *People v. Kurtenbach* (2012) 204 Cal.App.4th 1264, 1292 [same].)

Even if the claim were preserved and meritorious, appellant fails to demonstrate prejudice. " 'Improper dual use of the same fact for imposition of both an upper term and a consecutive term or other enhancement does not necessitate resentencing if "[i]t is not reasonably probable that a more favorable sentence would have been imposed in the absence of the error." ' [Citation.] Only a single aggravating factor is required to impose the upper term [citation], and the same is true of the choice to impose a consecutive sentence [citation]." (*People v. Osband* (1996) 13 Cal.4th 622, 728–729.) Accordingly, where "the court could have selected disparate facts from among those it recited to justify the imposition of both [the enhancement] and the upper term, and . . . [the record reveals] no reasonable probability that it would not have done so[, r]esentencing is not required." (*Id.* at p. 729.) The trial court found multiple aggravating factors and no mitigating factors. There is no reasonable probability a more favorable sentence would have been imposed absent the assumed error.

V. *Newly-Granted Sentencing Discretion*

The trial court imposed a four-year term for the personal use of a firearm enhancement (Pen. Code, § 12022.5, subd. (a)). Appellant argues (and the People agree)

he is entitled to a remand of this enhancement pursuant to new legislation granting trial courts the discretion to strike or dismiss a firearm enhancement. (Pen. Code, § 12022.53, subd. (h), as amended by Stats. 2017, ch. 682, § 2, eff. Jan. 1, 2018; *People v. Robbins* (2018) 19 Cal.App.5th 660, 679 [Pen. Code, § 12022.53, subd. (h) applies retroactively in cases that are not yet final on appeal on its effective date].) We will reverse and remand the enhancement to permit the trial court to exercise its discretion.[11]

DISPOSITION

The finding that appellant suffered a prior felony conviction and the sentence for the firearm enhancement are reversed, and the matter is remanded for proceedings not inconsistent with this opinion. In all other respects, the judgment is affirmed.

[11] Appellant argues he is also entitled to a remand of a prior serious felony enhancement pursuant to new legislation granting trial courts discretion to strike these enhancements. (See *People v. Bipialaka* (2019) 34 Cal.App.5th 455, 464.) We are reversing the prior serious felony conviction for insufficient evidence, rendering this claim moot.

SIMONS, Acting P.J.

We concur.

NEEDHAM, J.

BURNS, J.

(A150198)

Superior Court of Alameda County, No. H58965, Hon. Leopoldo E. Dorado, Judge.

Walter K. Pyle, under appointment by the Court of Appeal, for Defendant and Appellant.

Nathan Freed Wessler, Brett Max Kaufman, Jennifer Lynch, Andrew Crocker, Jennifer S. Granick, Vasudha Talla and Matthew Cagle for American Civil Liberties Union Foundation, American Civil Liberties Union Foundation of Northern California and Electronic Frontier Foundation as Amici Curiae on behalf of Defendant and Appellant.

Xavier Becerra, Attorney General, Jeffrey M. Laurence, Senior Assistant Attorney General, Donna M. Provenzano and Melissa A Meth, Deputy Attorneys General, for Plaintiff and Respondent.

Appendix B

Order
of the California Court of Appeal
Denying Petition for Rehearing

COURT OF APPEAL, FIRST APPELLATE DISTRICT
350 MCALLISTER STREET
SAN FRANCISCO, CA 94102
DIVISION 5

THE PEOPLE,
Plaintiff and Respondent,
v.
JOAQUIN GONZALEZ,
Defendant and Appellant.

A150198
Alameda County Super. Ct. No. H58965

BY THE COURT:

The petition for rehearing is denied.

Date: 12/20/2019

Simons, J., Acting P.J.

ACTING PRESIDING JUSTICE

oruu

Appendix C

Order of the California Supreme Court Denying Discretionary Review

Court of Appeal, First Appellate District, Division Five - No. A150198

S260079

IN THE SUPREME COURT OF CALIFORNIA

En Banc

THE PEOPLE, Plaintiff and Respondent,

v.

JOAQUIN GONZALEZ, Defendant and Appellant.

The petition for review is denied.

CANTIL-SAKAUYE

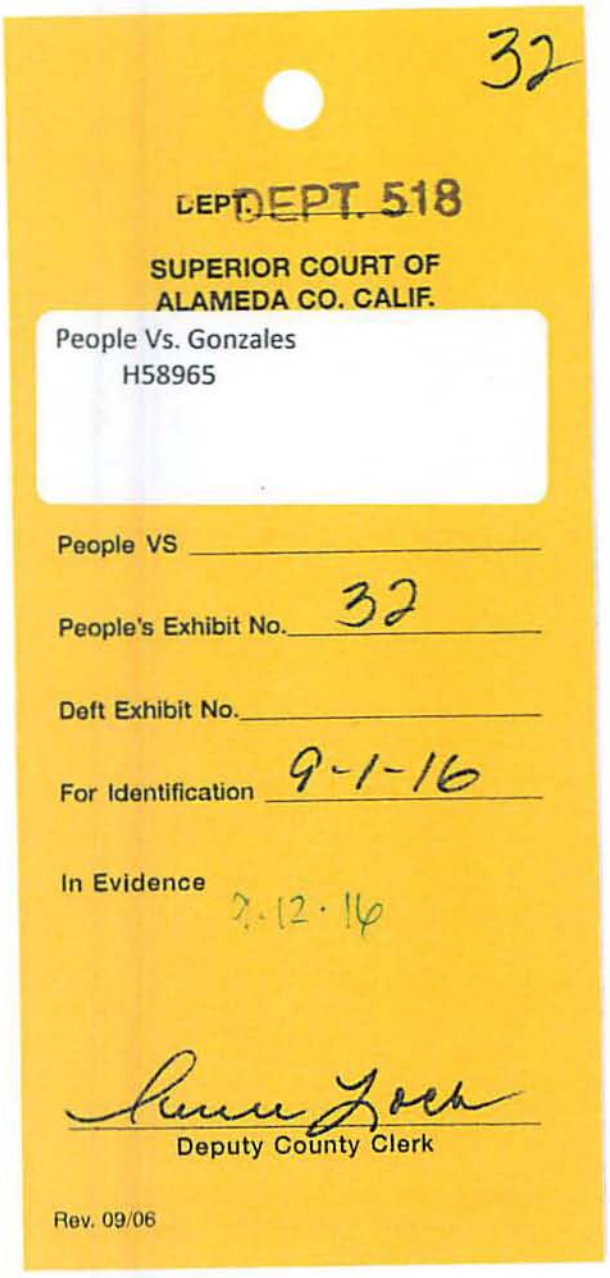
Chief Justice

Appendix D

Printout of Results of Search of Automated License Plate Reader Database

(Trial Exhibit 32)

Supreme Court Rule 14.1(i)(vi)



32

DEPT. DEPT. 518

SUPERIOR COURT OF
ALAMEDA CO. CALIF.

People Vs. Gonzales
H58965

People VS _____

People's Exhibit No. 32

Deft Exhibit No. _____

For Identification 9-1-16

In Evidence 9-12-16

Deputy County Clerk

Rev. 09/06

#15-11348

App. 20

7CHZ518 LPR HITS ON 7/2/15

1 OF 4

LAW ENFORCEMENT SENSITIVE

License Plate #7CHZ518

Share Print PDF

Search Query

Start Time	6/1/2014 00:00
End Time	12/15/2015 23:59
Case Number	1511348
Search Purpose	Violent Crime
License Plate Number	7CHZ518

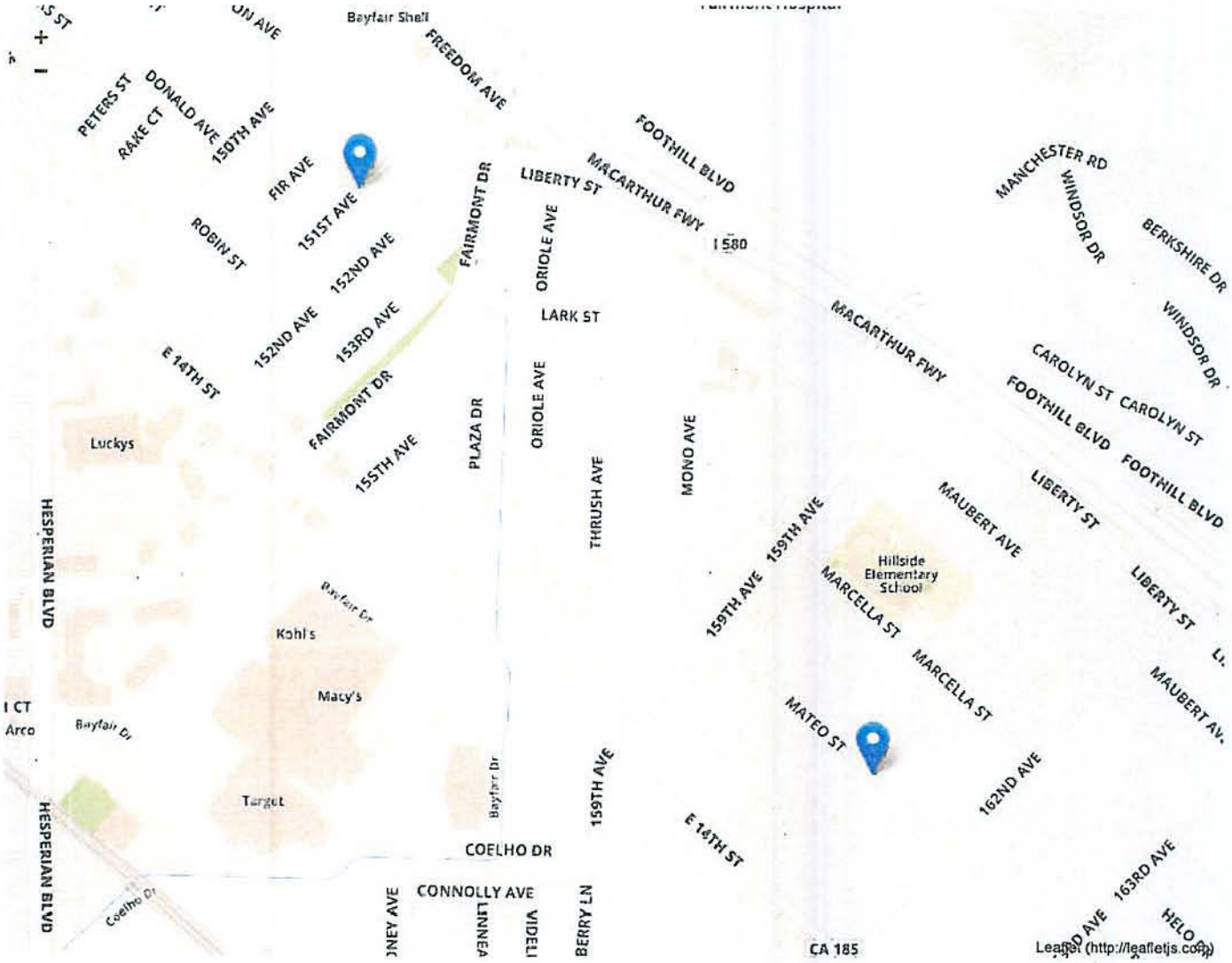
Summary

LPR	91 LPR Reads

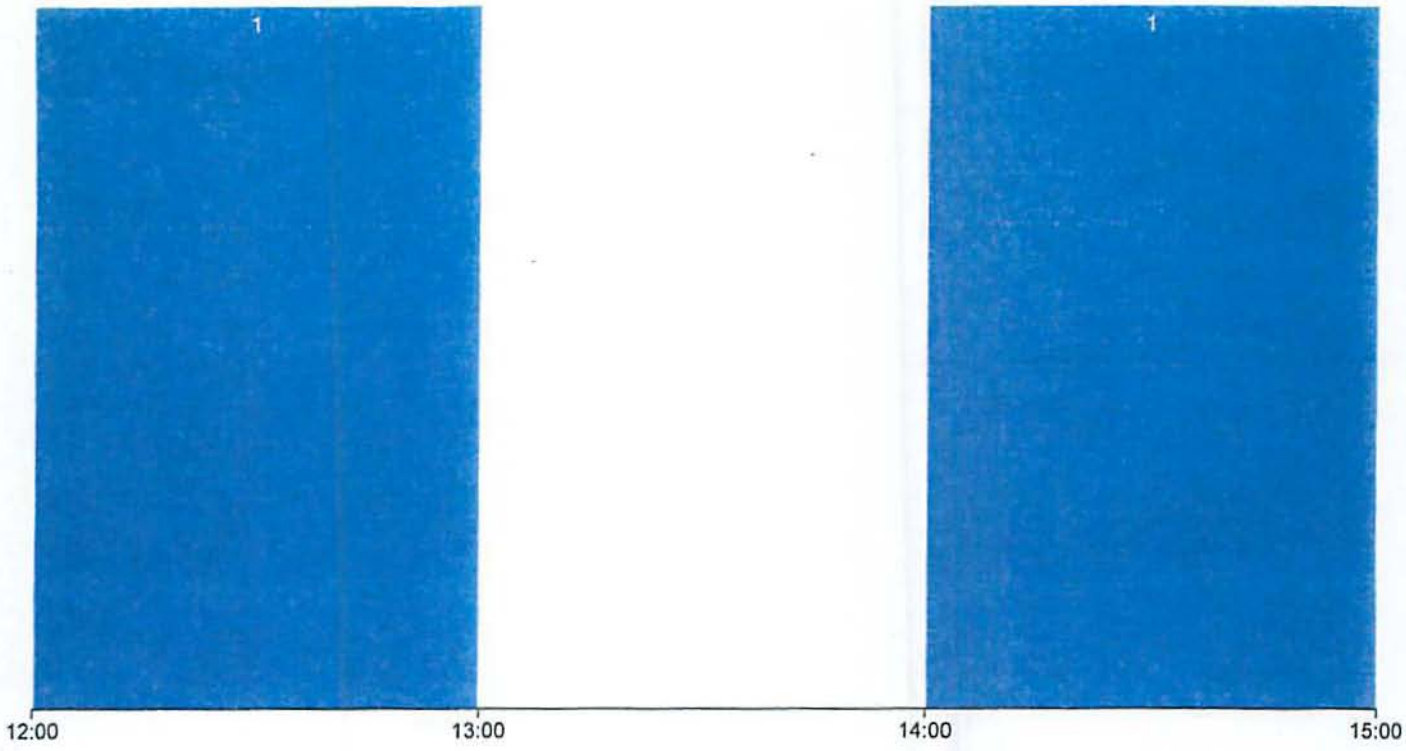
15-11348

1ST ROAD - MATEO STREET
2ND ROAD - 151ST AVE & LARK STREET

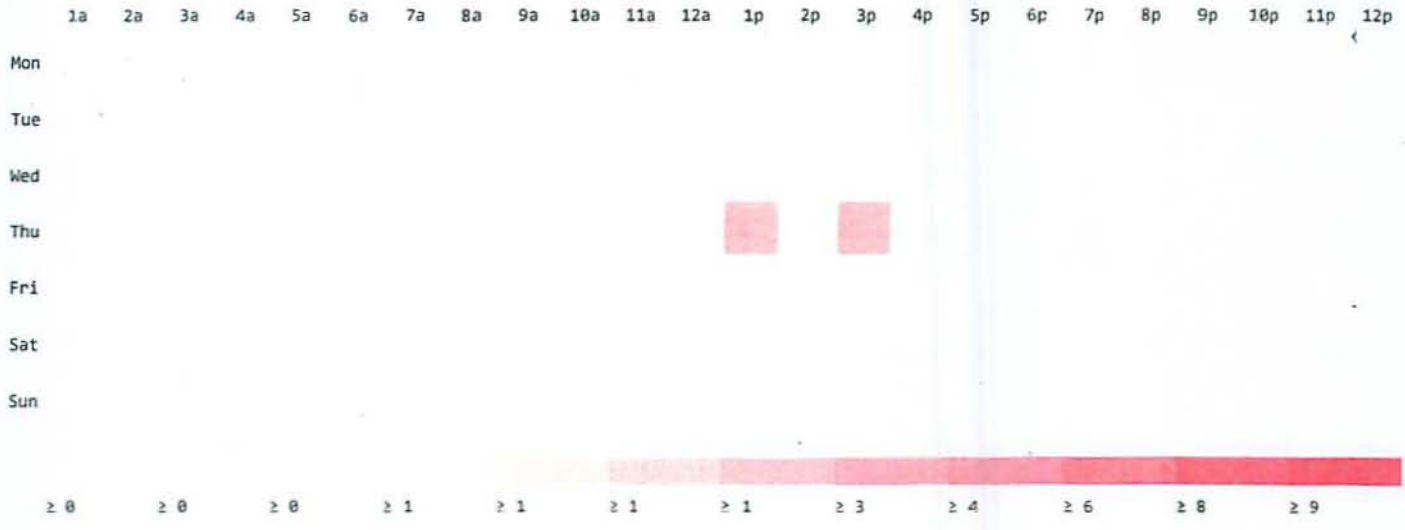
Map



LPR Timeline



LPR Frequency Chart



15-11348

VEHICLE AND LICENSE PLATE CAPTURES

LPR Reads

Showing all 2 reads

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Address	1601-1611 151st Ave, San Leandro, CA 94578, USA
Site Name	BOSS3_7395 ETS-PIPS-2936 ETS-PIPS-2936 NULL
Camera	BOSS3_7395 ETS-PIPS-2936 ETS-PIPS-2936 NULL
Database	BOSS3

Timestamp	2015-07-02T12:35:53.407-07:00
ddress	16099-16105 Mateo St, San Leandro, CA 94578, USA
Site Name	BOSS3_7395 ETS-PIPS-2936 ETS-PIPS-2936 NULL
Camera	BOSS3_7395 ETS-PIPS-2936 ETS-PIPS-2936 NULL
Database	BOSS3

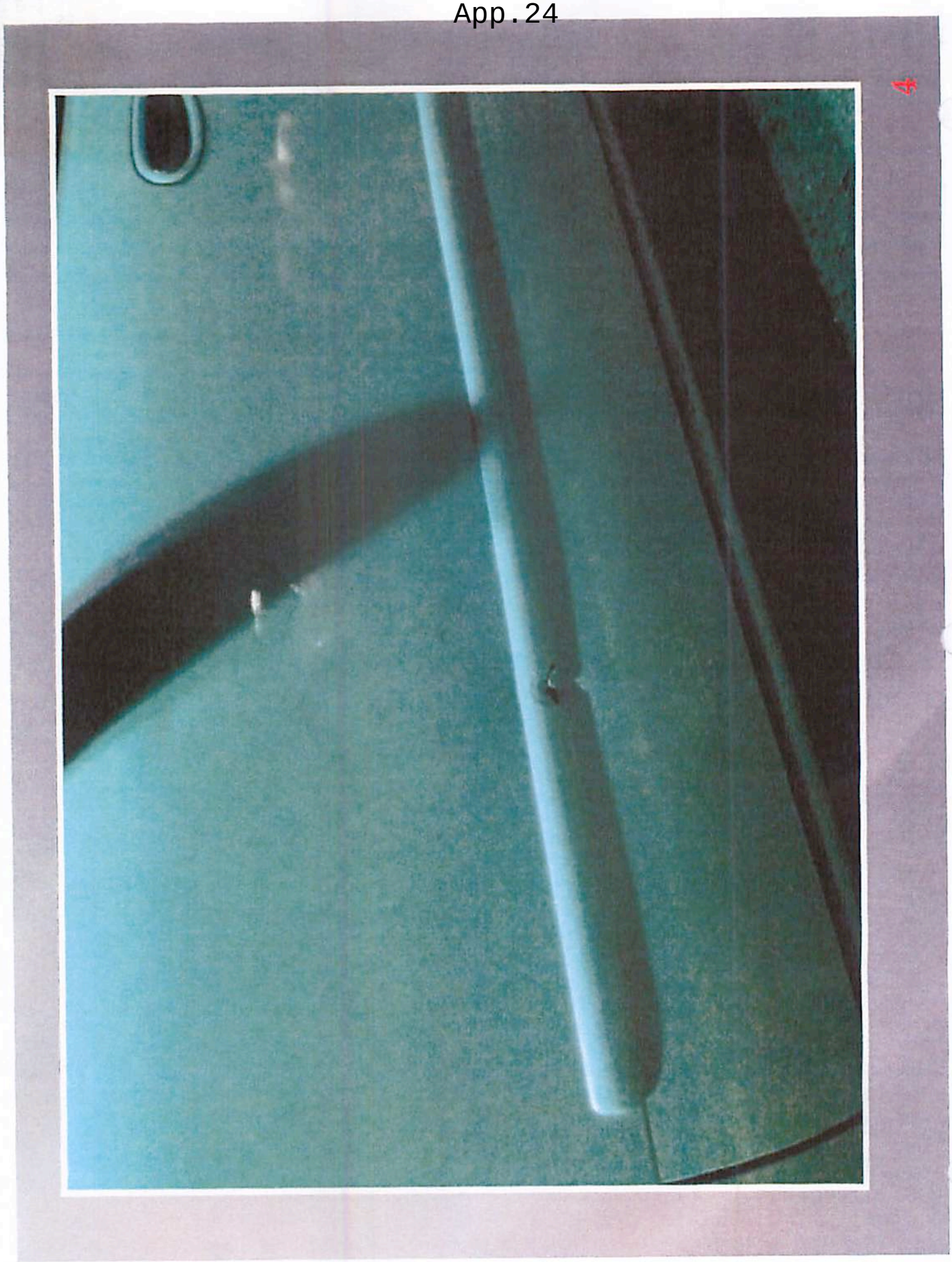
Notice: The following information is to be used for analysis and investigative work only.
LAW ENFORCEMENT SENSITIVE

Appendix E

Photo of Bullet Hole in Victim's Car

(Trial Exhibit 4)

Supreme Court Rule 14.1(i)(vi)




Gonzales
H58965
4
Ex-2 (Rev. 09/06)