No. _____

**IN THE SUPREME COURT OF THE UNITED STATES**

SAMIR HANNA,

Petitioner,

vs.

STATE OF CALIFORNIA,

Respondent.

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**MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS***

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The Petitioner asks leave to file the attached petition for a writ of certiorari without prepayment of costs and to proceed *in forma pauperis*.

Petitioner has not previously sought or been granted leave to proceed in forma pauperis in any other court.

Petitioner's declaration in support of this motion is attached hereto.

Dated: June 1, 2020

EDWARD THOMAS DUNN, JR.
Attorney for Petitioner Samir Hanna

## AFFIDAVIT OR DECLARATION
## IN SUPPORT OF MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

I, Samir Hanna, am the petitioner in the above-entitled case. In support of my motion to proceed *in forma pauperis*, I state that because of my poverty I am unable to pay the costs of this case or to give security therefor; and I believe I am entitled to redress.

1. For both you and your spouse estimate the average amount of money received from each of the following sources during the past 12 months. Adjust any amount that was received weekly, biweekly, quarterly, semiannually, or annually to show the monthly rate. Use gross amounts, that is, amounts before any deductions for taxes or otherwise.

| **Income source** | **Average monthly amount during the past 12 months** | | **Amount expected next month** | |
|---|---|---|---|---|
| | You | Spouse | You | Spouse |
| Employment | $ Ø | $ 6,800 | $ Ø | $ 6,800 |
| Self-employment | $ n/a | $ n/a | $ n/a | $ n/a |
| Income from real property (such as rental income) | $ n/a | $ n/a | $ n/a | $ n/a |
| Interest and dividends | $ n/a | $ n/a | $ n/a | $ n/a |
| Gifts | $ n/a | $ n/a | $ n/a | $ n/a |
| Alimony | $ n/a | $ n/a | $ n/a | $ n/a |
| Child Support | $ n/a | $ n/a | $ n/a | $ n/a |
| Retirement (such as social security, pensions, annuities, insurance) | $ n/a | $ n/a | $ n/a | $ n/a |
| Disability (such as social security, insurance payments) | $ n/a | $ n/a | $ n/a | $ n/a |
| Unemployment payments | $ n/a | $ n/a | $ n/a | $ n/a |
| Public-assistance (such as welfare) | $ n/a | $ n/a | $ n/a | $ n/a |
| Other (specify): n/a | $ n/a | $ n/a | $ n/a | $ n/a |
| **Total monthly income:** | $ Ø | $ 6,800 | $ Ø | $ 6,800 |

2. List your employment history for the past two years, most recent first. (Gross monthly pay is before taxes or other deductions.)

| Employer | Address | Dates of Employment | Gross monthly pay |
|---|---|---|---|
| n/a | — | — | $ — |
| | | | $ |
| | | | $ |

3. List your spouse's employment history for the past two years, most recent employer first. (Gross monthly pay is before taxes or other deductions.)

| Employer | Address | Dates of Employment | Gross monthly pay |
|---|---|---|---|
| Foothill Family Service | 530 W. Badillo Covina, CA 91722 | Feb 2007 | $ 6,800.- |
| | | | $ |
| | | | $ |

4. How much cash do you and your spouse have? $_____
Below, state any money you or your spouse have in bank accounts or in any other financial institution.

| Type of account (e.g., checking or savings) | Amount you have | Amount your spouse has |
|---|---|---|
| Checking | $ Ø | $ 750.- |
| Saving | $ Ø | $ 1,900.- |
| | $ | $ |

5. List the assets, and their values, which you own or your spouse owns. Do not list clothing and ordinary household furnishings.

☐ Home
Value n/a

☐ Other real estate
Value n/a

☐ Motor Vehicle #1
Year, make & model 2005 Toyota Highlander
Value _____

☐ Motor Vehicle #2
Year, make & model 2013 Lexus ES350
Value _____

☐ Other assets
Description n/a
Value —

6. State every person, business, or organization owing you or your spouse money, and the amount owed.

| Person owing you or your spouse money | Amount owed to you | Amount owed to your spouse |
|---|---|---|
| | $ | $ |
| | $ | $ |
| | $ | $ |

7. State the persons who rely on you or your spouse for support. For minor children, list initials instead of names (e.g. "J.S." instead of "John Smith").

| Name | Relationship | Age |
|---|---|---|
| | | |
| | | |

8. Estimate the average monthly expenses of you and your family. Show separately the amounts paid by your spouse. Adjust any payments that are made weekly, biweekly, quarterly, or annually to show the monthly rate.

| | You | Your spouse |
|---|---|---|
| Rent or home-mortgage payment (include lot rented for mobile home)<br>Are real estate taxes included? ☐ Yes ☒ No<br>Is property insurance included? ☐ Yes ☒ No | $ Ø | $ 1,800.- |
| Utilities (electricity, heating fuel, water, sewer, and telephone) | $ 50.- | $ 190.- |
| Home maintenance (repairs and upkeep) | $ | $ 100.- |
| Food | $ | $ 400.- |
| Clothing | $ | $ 60.- |
| Laundry and dry-cleaning | $ | $ |
| Medical and dental expenses | $ 45.- | $ 20.- |

| | You | Your spouse |
|---|---|---|
| Transportation (not including motor vehicle payments) | $ 120. - | $ 180. - |
| Recreation, entertainment, newspapers, magazines, etc. | $ - | $ 340. - |
| *Insurance (not deducted from wages or included in mortgage payments)* | | |
| Homeowner's or renter's | $ - | $ 20. - |
| Life | $ - | $ - |
| Health | $ - | $ 342. - |
| Motor Vehicle | $ - | $ 150. - |
| Other: _____ | $ - | $ - |
| Taxes (not deducted from wages or included in mortgage payments) | | |
| (specify): _____ | $ | $ |
| Installment payments | | |
| Motor Vehicle | $ - | $ 339. - |
| Credit card(s) | $ 100. - | $ 100. - |
| Department store(s) | $ - | $ - |
| Other: Donations | $ - | $ 500. - |
| Alimony, maintenance, and support paid to others | $ - | $ - |
| *Regular expenses for operation of business, profession,* or farm (attach detailed statement) | $ - | $ - |
| Other (specify): _____ | $ - | $ - |
| **Total monthly expenses**: | $ 315. - | $ 4,541. - |

9. Do you expect any major changes to your monthly income or expenses or in your assets or liabilities during the next 12 months?

☐ Yes ☒ No If yes, describe on an attached sheet.

10. Have you paid – or will you be paying – an attorney any money for services in connection with this case, including the completion of this form? ☐ Yes ☒ No

If yes, how much? _____

If yes, state the attorney's name, address, and telephone number:

11. Have you paid—or will you be paying—anyone other than an attorney (such as a paralegal or a typist) any money for services in connection with this case, including the completion of this form?

☐ Yes ☒ No

If yes, how much? _____

If yes, state the person's name, address, and telephone number:

n/a

12. Provide any other information that will help explain why you cannot pay the costs of this case.

Due to unemployment because of this case.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on: June 1, , 2020

(Signature)

Docket No. _____

**IN THE SUPREME COURT OF THE UNITED STATES**

SAMIR HANNA,

Petitioner,

vs.

STATE OF CALIFORNIA,

Respondent.

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On Petition for Writ of Certiorari to the
Court of Appeal of the State of California
Second Appellate District, Division One

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# PETITION FOR WRIT OF CERTIORARI

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**LAW OFFICES OF E. THOMAS DUNN, JR.**
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Attorney for Petitioner Samir Hanna

## QUESTIONS PRESENTED

1.

Whether California's procedures for postconviction relief violate the Due Process Clause of the Fourteenth Amendment by failing to provide a mechanism through which a defendant, whose conviction has been found by a competent court to be invalid as a matter of law, may have that conviction set aside.

2.

Whether California's procedures for postconviction relief violate the Equal Protection Clause of the Fourteenth Amendment by providing a mechanism through which a defendant can obtain postconviction relief upon the presentation of "newly discovered evidence" of innocence, while refusing to make that same relief available to a defendant whose conviction was based upon an error of law committed by— and recently acknowledged by—the state courts handling his case.

## LIST OF RELATED PROCEEDINGS

(1) People v. Hanna, California Supreme Court case number **S259085**, defendant's petition for review, denied on January 2, 2020 (Appendix B).

(2) People v. Hanna, California Court of Appeal case number **B293714**, opinion dated September 30, 2019, reversing trial court's order granting defendant relief from conviction (*this decision* is the one to which this petition for writ of certiorari is directed) (Appendix A).

(3) People v. Hanna, California Court of Appeal case number **B271474**, opinion dated June 22, 2017, affirming denial of motion for relief from conviction, but inviting motion for relief from invalid conviction under newly effective California statute, California Penal Code section 1473.7 (Appendix D).

(4) People v. Hanna, California Court of Appeal case number B253275, order dated January 22, 2014, summarily denying petition for writ of coram vobis without prejudice, suggesting defendant address the impact of a recent decision interpreting charging statute (Appendix C).

(5) People v. Hanna, California Court of Appeal case number **B161471**, May 28, 2003, opinion affirming defendant's conviction in direct appeal (Appendix E).

(6) People v. Samir Hanna, Los Angeles County Superior Court case number **GA046612**, judgment of conviction entered against defendant on July 11, 2002.

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## CITATIONS TO RELEVANT UNPUBLISHED APPELLATE OPINIONS

1. People v. Hanna, 2020 Cal. LEXIS 147 (Cal., Jan. 2, 2020) [California Supreme Court order denying review];
2. People v. Hanna, 2019 Cal. App. Unpub. LEXIS 6587 (Cal. App. 2d Dist., Sept. 30, 2019) [Court of Appeal nonpub. opn, here on writ of certiorari].
3. People v. Hanna (June 22, 2017, B271474) 2017 Cal. App. Unpub. LEXIS 4285 [nonpub. opn.]
4. People v. Hanna (May 28, 2003, B161471) 2003 Cal. App. Unpub. LEXIS 5206, [nonpub. opn.] [2003 WL 21228113] (Hanna I, direct appeal).

## JURISDICTIONAL STATEMENT

The Court has jurisdiction in this case to grant a writ of certiorari, as the case presents two federal constitutional questions in need of resolution. The jurisdiction of this Court is thus invoked pursuant to 28 U.S.C. section 1257 (a). The petition is timely filed pursuant to Supreme Court rule 13.1 and the Court's Order (at 589 U.S.) dated Thursday, March 19, 2020, in which the time for filing of this petition for a writ of certiorari was extended from 90 to 150 days due to the COVID-19 pandemic. The writ of certiorari is sought following the January 2, 2020 denial of review of the California Court of Appeal's unpublished decision by the California Supreme Court.

## CONSTITUTIONAL AND STATUTORY PROVISIONS

This case presents questions that arise under section one of the Fourteenth Amendment to the United States Constitution. The relevant text provides, "No state shall . . . 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."

California Penal Code section 1473.7, subdivision (a)(2) is also critical to an understanding of the case. It provides:

> (a) A person no longer imprisoned or restrained may prosecute a motion to vacate a conviction or sentence for either of the following reasons: (1) . . . (2) Newly discovered evidence of actual innocence exists that requires vacation of the conviction or sentence as a matter of law or in the interests of justice.
>
> . . .
>
> (e) When ruling on the motion:
>
> (1) The court shall grant the motion to vacate the conviction or sentence if the moving party establishes, by a preponderance of the evidence, the existence of any of the grounds for relief specified in subdivision (a).

## STATEMENT OF THE CASE

On July 11, 2002, Samir Hanna (hereinafter, Hanna) was convicted in the California Superior Court for the County of Los Angeles of having violated California Penal Code section 289, subdivision (d) (unlawful penetration by a foreign object of a person *unconscious of the nature of the act*) following a court trial before the Honorable Teri Schwartz. He was thereafter granted probation.

At the time of Hanna's trial, no appellate court had yet had occasion to explicate the meaning of section 289, subdivision (d) of the California Penal Code, and the elements of the offense were not clearly defined. Consequently, in trying to discern what the elements of proof were for the crime charged, the parties and the trial court decided to analogize the case to *People v. Ogunmola* (1987) 193 Cal.App.3d 274, a California appellate opinion that interpreted and applied Penal Code section 261, subdivision (4), which defined the crime of forcible rape, because that statute's provisions also included the term "unconscious."

At trial, the victim testified that, during a physical therapy message, Hanna inserted two fingers into her vagina. She was shocked and "pushed [her] body up away from the table." Hanna asked if she was all right, and she said, "No."[1] On

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[1] These facts are taken directly from the factual statement in the Court of Appeal's unpublished opinion in Hanna's direct appeal, Court of Appeal case number B161471.

these facts, the trial court concluded that, because the victim had not consented to the defendant's act in advance and was unaware he was going to do what he did, she was "unconscious of the act" and, therefore, defendant was guilty of violating the statute.

Following Hanna's conviction, he filed a timely appeal, and on May 28, 2003, the Second District Court of Appeal, Division One, filed an unpublished opinion in case number B161471, affirming the judgment.[2] Hanna successfully completed probation on December 13, 2004. Subsequently, however, Hanna was able to retain new counsel, who arranged for an expert medical evaluation of the victim's claims, which Hanna continued to dispute.

After reviewing the case, the physician expert opined that the victim's description of the crime appeared to be false, and that her description of the charged crime could not possibly have happened as the victim alleged. Ordinarily, a defendant with such evidence would file a petition for writ of habeas corpus and seek a new trial; however, because defendant was not in custody, no habeas relief was available. The obloquy of a sex-related conviction, therefore, continued to

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[2] It should be noted that, in its decision, the Court of Appeal did not engage in any attempt to interpret the charging statute or to define its elements—no doubt because Hanna's counsel simply argued that the evidence adduced was insufficient to satisfy the requirements of the *Ogunmola* case, an argument the Court of Appeal easily rejected.

dog Hanna, preventing his employment and causing numerous associated problems for both him and his family.

On June 24, 2011, new counsel for Hanna filed a Petition seeking Coram Vobis relief in the Court of Appeal. Following consideration of the petition, the Court of Appeal entered an Order on August 25, 2011, denying the petition without prejudice to Hanna re-filing the petition in the Los Angeles County Superior Court. On October 25, 2011, pursuant to the court's order, Hanna filed a Petition for a Writ of Coram Nobis in the Superior Court, case number GA046612, which was substantively identical to the petition filed in the appellate court.

After considering the petition in chambers, the trial court issued an order setting an evidentiary hearing for November 29, 2011. An evidentiary hearing was held on that date and, following the argument of counsel, the court denied the petition, but it did so without prejudice because, at that point, while Hanna had presented expert medical testimony indicating that the crime *could not have occurred* the way the victim described it, input from Hanna's trial and appellate counsel had not yet been obtained, and the court observed that his testimony was a "missing link."

Unfortunately, trial counsel was "in the wind." It took more than two years for counsel to be located (for reasons irrelevant here). Once located, however,

prior counsel submitted a candid declaration that made it clear he never considered a medical defense to the charges in the underlying case. Because he thought that the appellate decision in *People v. Ogunmola* (1987) 193 Cal.App.3d 274 was analogous to this case and controlling, he had neither considered nor proffered any other defense to the charge.

On October 22, 2013, after considering the case anew with the inclusion of trial counsel's declaration, the court concluded that coram nobis relief was not an appropriate remedy and thereupon denied the petition. On December 23, 2013, Hanna returned to the Court of Appeal with another Petition for Writ of Coram Vobis, in case number B253275. On January 22, 2014, Division One of the Second District Court of Appeal issued the following Order, denying relief—but again, denying it "without prejudice":

> The petition for writ of error coram vobis, filed December 23, 2013, has been read and considered. The petition is denied because petitioner did not state grounds for relief for coram vobis. (*People v. Shipman* (1965) 62 Cal.2d.226.) This denial is without prejudice to petitioner's seeking other relief that is appropriate. Petitioner may wish to address the effect of *People v. Lyu* (2012) 203 Cal.App.4th 1293 on this case, if any. M-C-J (Underlining added.)

Subsequently, Hanna filed a motion in the trial court entitled, "Notice of Motion and Motion to Declare Defendant Samir Hanna Factually Innocent of [the] Penal Code § 289, subd. (d), Offense and to Set Aside His Conviction." The motion was based upon California Penal Code sections 851.86 and 1385, along with the case mentioned in the appellate court's Order—*People v. Lyu* (2012) 203 Cal.App.4th 1293. The *Lyu* opinion, which was decided by the same appellate court as had decided Hanna's direct appeal, was the very first published decision to construe the meaning and articulate the elements of the crime described in California Penal Code section 289, subdivision (d).

*Lyu* articulated the elements and settled the meaning of Penal Code section 289, subdivision (d) in a manner which the *Ogunmola* court simply could not have addressed, since section 289 was not before the court in the that case. As will be explained in the argument that follows, the court's analysis in *Lyu* makes it manifest that, at the time of Hanna's act, the alleged victim was simply ***not*** "unconscious" within the meaning of the statute, ***as a matter of law***. As a result, Hanna's act could not have violated Penal Code section 289, subdivision (d)(1), and he was therefore factually innocent of that charge.

Recognizing that the *Lyu* decision had clarified the law and rendered Hanna's conviction erroneous, the trial court confessed, "I don't know what the

remedy is for the change [sic] in the law. I really don't. . . . I don't know frankly what the appropriate way to handle this would be. So I'm just going to leave it. It is above my pay grade quite frankly. I don't have an answer." With that, the trial court denied the motion. Hanna timely appealed.

In its unpublished opinion in case number B271474, the Court of Appeal explained that the approach Hanna had taken in the trial court, basing his plea for relief on Penal Code sections 851.86 and 1385, was unavailing because Penal Code section 1203.4 was the exclusive means for a trial court to dismiss the conviction of a defendant who had successfully completed probation.[3] At the close of the court's opinion, however, the court noted:

> [I]n addition to section 1203.4, another statute may now provide an avenue of relief for Hanna. Effective January 1, 2017, section 1473.7 provides an explicit right for a person no longer imprisoned or restrained to prosecute a motion to vacate a conviction based on "[n]ewly discovered evidence of actual innocence . . . that requires vacation of the conviction . . . as a matter of law or in the interests of

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[3] A conviction dismissed under California Penal Code section 1203.4 does not operate to remove the conviction's immigration consequences, a problem for this Petitioner; for federal purposes, the conviction remains a disqualifying factor held against the convicted defendant, regardless of the state court's postconviction order dismissing the case. *Matter of Marroquin*, 23 I&N Dec. 705 (A.G. 2005).

justice." (§ 1473.7, subd. (a)(2).) . . . [A]s long as a conviction is vacated based on a defect in the underlying criminal proceedings, the immigration consequences of that conviction should be eliminated.

After the Court of Appeal filed its decision, Hanna returned to the trial court and filed a new motion—this time, pursuant to California Penal Code section 1473.7—urging the trial court to grant relief on the ground that the People had failed to affirmatively prove the element of unconsciousness at trial as required by section 289, subdivision (d), as that statute was interpreted by Division One of the Second District Court of Appeal in *Lyu*.

In essence, Hanna argued that the seminal definition of the element of unconsciousness elucidated in *Lyu* constituted a fact that was "newly discovered evidence of actual innocence, requiring vacation of the conviction as a matter of law"—and in the interests of justice. Following briefing and argument by counsel, the trial court agreed and granted Hanna's motion. The People thereafter filed notice of appeal, and the Court of Appeal's reversal of the trial court's order granting Hanna relief is what brings the case to this Honorable Court for review.

In reversing the trial court's order, the Court of Appeal held that a change in the law is not "evidence," and therefore, it can never constitute "newly discovered evidence" within the meaning of Penal Code section 1473.7. According to the

Court of Appeal, section 1473.7 provides no relief for any defendant whose conviction was constitutionally invalid because it was based on the trial court's erroneous understanding of the elements of the crime. By so holding, the Court of Appeal has effectively immunized the erroneous conviction with which Mr. Hanna has been saddled. Moreover, since California refuses to provide any other remedy for someone in Hanna's position, the postconviction remedies provided by the State of California are fundamentally inadequate to vindicate such a defendant's substantive constitutional rights—most specifically, the right to be convicted only upon proof of every element of a crime charged, beyond a reasonable doubt. *In re Winship,* 397 U.S. 358, 364, 90 S. Ct. 1068, 1073, 25 L. Ed. 2d 368, 375 (1970).

As Petitioner noted in his Petition for Review in the California Supreme Court, "If the remedy in section 1473.7 is not made available to him, the purpose of the legislation will be thwarted, and Hanna will be deprived of the equal protection of a law that was passed with people like him in mind" (Petition, p. 25). As a further injurious result, Mr. Hanna will likely be deported to Egypt soon—unless, that is, this Honorable Court intervenes by issuing a writ of certiorari to the Court of Appeal.[4]

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[4] The Ninth Circuit Court of Appeals has already affirmed an immigration court's determination that Mr. Hanna must be deported to Egypt because he was convicted under California Penal Code section 289, subdivision (d). Appendix F.

## WHY THE WRIT SHOULD BE GRANTED

Writing for the majority in *In re Winship*, Justice Brennan observed, "It is [] important in our free society that every individual going about his ordinary affairs have confidence that his government cannot adjudge him guilty of a criminal offense without convincing a proper factfinder of his guilt with utmost certainty." Accordingly, the majority concluded, "[W]e explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." 397 U.S. 358, 364, 90 S. Ct. 1068, 1073, 25 L. Ed. 2d 368, 375 (1970). Yet today, a half century later, a state court has done exactly what this Court sought to foreclose in *Winship*. California courts have turned a deaf ear to Samir Hanna's claim that their admission that his conviction was based upon a fatal misunderstanding of the elements of the criminal offense with which he was charged should be remediable.

California provides limited opportunities for convicted defendants to revisit their convictions once they have been entered by a court of competent jurisdiction. One mechanism provided—in fact, the primary mechanism—is a petition for writ of habeas corpus. Another is a motion to withdraw a guilty plea (which can be brought pursuant California Penal Code section 1018 within six months after an

order granting probation). Another is a petition for writ of coram nobis, which allows a court to correct its original judgment upon discovery of a fundamental error that did not appear in the records of the original proceedings and would have prevented the judgment from being pronounced. Such writs, however, are an extreme rarity, and the requirements of the writ render it virtually useless. *People v. Shipman,* 62 Cal.2d. 226, 397 P.2d 993, 42 Cal. Rptr. 1 (1965).[5]

The only other avenues available to those in California wanting to attack their convictions are provided by California Penal Code sections 1473.6 and 1473.7. The former permits attack on newly discovered government misconduct occurring in an underlying case. The latter, which is at issue here, allows convicted defendants to file motions to vacate convictions—either where guilty pleas were offered in ignorance of immigration consequences, or where "newly discovered evidence" shows the defendants were actually innocent of the crimes for which they were convicted.

Now that the California Supreme Court has refused to consider what the Court of Appeal has held—that California Penal Code section 1473.7 does not

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[5] A petitioner seeking a writ of coram nobis must show, among other things, that any "'newly discovered evidence . . . [does not go] to the merits of issues tried; issues of fact, once adjudicated, even though incorrectly, cannot be reopened except on motion for new trial.' [Citations.]" *People v. Shipman, supra*, 62 Cal.2d at 230, 397 P.2d 993, 42 Cal. Rptr. 1.

authorize a convicted defendant to obtain relief from an invalid conviction, where the elements of the crime were not proven beyond a reasonable doubt, if the invalidity of the conviction is proven by a new court decision instead of physical or documentary evidence—defendants in Petitioner Hanna's situation effectively are left with no remedy at all.

Because Hanna successfully completed probation and was not in custody, the habeas remedy provided by California law was never available to him. He actually filed three petitions seeking coram nobis (or coram vobis) relief along the tortuously long way; however, they were eventually denied pursuant to *People v. Shipman, supra*, 62 Cal.2d. 226, 397 P.2d 993, 42 Cal. Rptr. 1. Other remedies were inapplicable: He did not enter a plea of guilty, so there was no basis for moving to withdraw his plea, and no identifiable prosecutorial misconduct occurred in the underlying proceeding, so Penal Code section 1473.6 did not apply. Only Penal Code section 1473.7 was available to him, and the trial court—ironically, at the invitation of the Court of Appeal (see its opinion in case number B271474)—found he was entitled to relief. That door was slammed shut by the Court of Appeal when it reversed the trial court's order on the theory that "evidence" cannot be a new court decision, in fact, the very first decision to explain what the criminal statute of which Hanna was convicted requires as proof.

In 2009, this Court's majority held that federal courts may upset a State's postconviction relief procedures only if they are fundamentally inadequate to vindicate the substantive rights provided. *District Attorney's Office v. Osborne*, 557 U.S. 52, 69, 129 S. Ct. 2308, 2320, 174 L. Ed. 2d 38, 52 (2009). Furthermore, the majority observed that it is a petitioner's burden to demonstrate the inadequacy of any state-law procedures available to him in state postconviction relief. *Id.,* 557 U.S. at 71, 129 S. Ct. at 2321, 174 L. Ed.2d at 53, citing *Medina v. California,* 505 U.S. 437, 446, 448, 112 S. Ct. 2572, 120 L. Ed. 2d 353 (1992). Here, Petitioner Hanna submits that he has met that burden. By interpreting California Penal Code section 1473.7 so that *no remedy* remains for a defendant whose conviction was based on a trial judge's misunderstanding and errant definition of the elements of the crime charged, the postconviction remedies provided by the State of California are simply inadequate to vindicate Hanna's right to be convicted only upon proof of every element of the crime charged beyond a reasonable doubt, as required by the Fourteenth Amendment to the United States Constitution.

Moreover, by limiting the remedy provided by California Penal Code section 1473.7 to those defendants who can produce "newly discovered evidence" of a conviction's invalidity in documentary or physical form (although a court's written opinion and decision can easily be produced in such a form), California

has created a constitutional holding that runs afoul of the Fourteenth Amendment Equal Protection Clause. As this Court has observed:

> Our cases have recognized successful equal protection claims brought by a "class of one," where the plaintiff alleges that she has been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment. See *Sioux City Bridge Co. v. Dakota County*, 260 U.S. 441, 67 L. Ed. 340, 43 S. Ct. 190 (1923); *Allegheny Pittsburgh Coal Co. v. Commission of Webster Cty.*, 488 U.S. 336, 102 L. Ed. 2d 688, 109 S. Ct. 633 (1989). In so doing, we have explained that "'the purpose of the equal protection clause of the Fourteenth Amendment is to secure every person within the State's jurisdiction against intentional and arbitrary discrimination, whether occasioned by express terms of a statute or by its improper execution through duly constituted agents.'" *Sioux City Bridge Co., supra,* at 445 (quoting *Sunday Lake Iron Co. v. Township of Wakefield*, 247 U.S. 350, 352, 62 L. Ed. 1154, 38 S. Ct. 495 (1918)).

*Willowbrook v. Olech,* 528 U.S. 562, 120 S. Ct. 1073, 145 L. Ed. 2d 1060 (2000), limited on an unrelated ground in *Engquist v. Oregon Dep't of Agriculture,* 553

U.S. 591, 128 S. Ct. 2146, 170 L. Ed. 2d 975 (2008). That reasoning is apt and wholly applicable in this case. There is no rational basis for the Court of Appeal's arbitrary decision. *Rinaldi v. Yeager,* 384 U.S. 305, 308-309, 86 S. Ct. 1497, 16 L. Ed. 2d 577.[6] Consequently, this Court should find that the State of California's postconviction relief procedures are fundamentally inadequate to vindicate Petitioner Hanna's constitutional rights.

## CONCLUSION

Accordingly, and for all the above-stated reasons, this Court should grant a writ of certiorari to the California Court of Appeal.

Respectfully Submitted,

**LAW OFFICES OF E. THOMAS DUNN, JR.**

Dated: 06/01/2020

By: E. THOMAS DUNN, JR.
Counsel of Record
Attorney for Petitioner Samir Hanna

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[6] By reaching its decision, the California court has "has decided an important federal question in a way that conflicts with relevant decisions of [the United States Supreme] Court." Supreme Court Rules, Rule 10(c). Now, only this Honorable Court if left to vindicate Petitioner's constitutional rights.

# APPENDICES

# APPENDIX A

Filed 9/30/19 P. v. Hanna CA2/1

**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

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| THE PEOPLE,<br><br>Plaintiff and Appellant,<br><br>v.<br><br>SAMIR HANNA,<br><br>Defendant and Respondent. | B293714<br><br>(Los Angeles County Super. Ct. No. GA046612) |

APPEAL from an order of the Superior Court of Los Angeles County, Teri Schwartz, Judge. Reversed with directions.

Jackie Lacey, District Attorney, Margo Baxter, Head Deputy District Attorney, Phyllis C. Asayama and Matthew Brown, Deputy District Attorneys, for Plaintiff and Appellant.

E. Thomas Dunn, Jr., for Defendant and Respondent.

The People appeal from a trial court order granting Samir Hanna's motion, pursuant to Penal Code section 1473.7, subdivision (a)(2) to vacate his conviction for sexually penetrating an unconscious person with a foreign object (Pen. Code, § 289, subd. (d)(3)).[1] We agree the trial court erred in granting the motion, and reverse.

## BACKGROUND

### A. The Offense Conduct

Physical Therapy Rehab Association in Pasadena employed Hanna as a physical therapy aide. In March 2001, Ms. J. began receiving treatments from Hanna at the clinic. She developed a rapport with Hanna and discussed with him aspects of her personal life.

Ms. J. came to the clinic for treatment on May 25, 2001, complaining of back pain. Hanna told her he would massage her. He gave her a gown and told her to leave on her underclothes. Ms. J. complied and laid facedown on a massage table. Hanna entered the room and began massaging Ms. J.; he said that sometimes back pain proceeded into the legs and buttocks. He asked permission to massage Ms. J.'s legs and asked her to spread her legs a little. He also had her "move to the edge of the table closest to him."

As the massage progressed, Ms. J. could feel pressure from Hanna's penis against her leg; she sensed he should not be that close. Hanna continued to massage her legs and moved to her buttocks. Hanna then put his hand inside Ms. J.'s underpants and inserted two of his fingers into her vagina. Ms. J. was

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[1] Unless otherwise indicated, subsequent section references are to the Penal Code.

shocked and "pushed [her] body up away from the table." Hanna asked if everything was all right; she replied, "No." Hanna said, "Good session" and left the room.

**B. Hanna's Conviction and Direct Appeal**

The trial court convicted Hanna in 2002 on count 5 of the information, which charged misdemeanor battery[2] and on count 6, which charged sexually penetrating an unconscious person with a foreign object. As to each count, the court suspended imposition of sentence, placed Hanna on formal probation for three years, and ordered that he serve time in local custody.

In 2003, we held there was sufficient evidence as to count 6 that Hanna violated section 289, subdivision (d)(3). (*People v. Samir Hanna* (May 28, 2003, B161471) [nonpub. opn.] [2003 WL 21228113] (*Hanna I*).) That subdivision applies where the victim "[w]as not aware, knowing, perceiving, or cognizant of the essential characteristics of the act due to the perpetrator's fraud in fact." (§ 289, subd. (d)(3).) We found Hanna "gained Ms. J.'s trust over the course of prior physical therapy sessions and on the day in question had her assume a vulnerable position on the massage table, ostensibly for a massage. . . . Ms. J. was unaware that [Hanna] had accomplished an act of digital penetration until the crime had occurred. Thus, Ms. J. was unconscious of the nature of [Hanna's] act because she was not aware of the essential characteristics of that act due to [Hanna's] fraudulent

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[2] The information alleged as to count 5 that Hanna committed sexual battery in violation of section 243.4, former subdivision (d)(1). On July 11, 2002, on the trial court's motion, the court amended that count to allege instead a violation of section 242, and it convicted him on that count. The battery is not at issue in this appeal.

representation that he intended to give her a massage. [Citation.] And [Hanna] knew full well that from her facedown position Ms. J. could not see what he was doing and was unaware of the sexual assault he was about to perpetrate." We therefore affirmed the conviction. (*Hanna I*, *supra*, 2003 WL 21228113 at *2.)

Hanna's probation expired in December 2004.

### C. Our Opinion in *People v. Lyu*

In *People v. Lyu* (2012) 203 Cal.App.4th 1293 (*Lyu*), this division overturned a defendant's conviction for sexual penetration of an unconscious victim in violation of section 289, subdivision (d)(2) for insufficient evidence. That subdivision applies when the victim "[w]as not aware, knowing, perceiving, or cognizant that the act occurred." (*Ibid.*; see *Lyu*, *supra*, at p. 1299.)

In *Lyu*, the victim went to a massage parlor for a massage. The defendant began massaging her while she was sitting in a chair, but the two eventually went to a back room where another massage was occurring. (*Lyu*, *supra,* 203 Cal.App.4th at pp. 1295-1296.) After undressing under a sheet, the victim laid facedown on a bed; she was still under the sheet. She had told the defendant her lower back was sore. (*Id.* at p. 1296.) The victim testified that she was lying facedown when the defendant, without warning, inserted one or two fingers into her vagina. She immediately hit at him and said, " ' "no." ' " She also testified that when she then turned over onto her back, the defendant abruptly put his mouth on her vagina. (*Id.* at pp. 1296, 1301.)

The *Lyu* court concluded there was not substantial evidence to support a conviction under section 289, subdivision (d)(2) for the digital penetration or under section 288a, subdivision (f)(2)

for the oral copulation. (*Lyu*, *supra*, 203 Cal.App.4th at p. 1301.) The court reasoned the victim was not " ' "unconscious[ ] of the nature of the act [as required by the statutory language]." ' She instantly knew, perceived, and was cognizant that the act occurred. The instant [the defendant] penetrated her with his finger, she protested, clearly aware of the nature of the act, as her striking [the defendant] and saying no demonstrates. When [the defendant] subsequently put his mouth on her vagina, she was instantly aware" of the defendant's act. (*Ibid.*)

### D. Hanna's Writ Petition and Motion for a Declaration of Factual Innocence

In December 2013, Hanna filed a petition for a writ of error *coram vobis* on grounds not at issue in the present appeal.[3] In January 2014, we denied the writ. However, we added: "This denial is without prejudice to [Hanna's] seeking other relief that is appropriate. [¶] [Hanna] may wish to address the effect of [*Lyu*] on this case, if any." (*People v. Samir Hanna* (Jan. 22, 2014, B253275) (*Hanna III*).)

In November 2015, Hanna, relying on *Lyu*, filed a motion seeking a declaration of his factual innocence and vacation of his conviction on count 6 pursuant to sections 851.86 and 1385. In February 2016, the trial court denied the motion. Hanna appealed. We affirmed, concluding section 1203.4 was the exclusive method for a trial court to dismiss a conviction where the defendant had successfully completed probation. (*People v.*

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[3] Hanna had previously filed a petition for a writ of error *coram vobis* in 2011 on grounds not at issue in the present appeal. In August 2011, we denied the petition without prejudice to Hanna filing a petition in superior court. (*People v. Samir Hanna* (Aug. 25, 2011, B233950) (*Hanna II*).)

*Samir Hanna* (June 22, 2017, B271474) [nonpub. opn.] (*Hanna IV*).) We noted, however, that "in addition to section 1203.4, another statute may now provide an avenue of relief for Hanna. Effective January 1, 2017, section 1473.7 provides an explicit right for a person no longer imprisoned or restrained to prosecute a motion to vacate a conviction based on '[n]ewly discovered evidence of actual innocence . . . that requires vacation of the conviction . . . as a matter of law or in the interests of justice.' (§ 1473.7, subd. (a)(2).)" (*Hanna IV*, *supra*, at pp. 16-17, fn. 14.) As Hanna suggested his conviction on count 6 had immigration consequences, we added that "as long as a conviction is vacated based on a defect in the underlying criminal proceedings, the immigration consequences of that conviction should be eliminated." (*Id.* at p. 17, fn. 14.) We further made clear that our denial of Hanna's appeal "should not be interpreted as precluding Hanna from filing a section 1203.4 or 1473.7 motion with the trial court." (*Id.* at p. 17.)

**E. Hanna's Section 1473.7 Motion To Vacate His Conviction**

On February 5, 2018, Hanna filed a section 1473.7, subdivision (a)(2) motion, relying on *Lyu*. He stated that he "came to the United States from Egypt 20 years ago," and relief under the section would help him "resist[ ] deportation." He argued that at the time of his trial, section 289, subdivision (d) "had not been construed in any appellate court opinion, and the meaning of the term 'unconscious,' as used in the statute, was undefined. The statute was finally construed in [*Lyu*], which made it clear that the term 'unconscious' refers to someone who is *not immediately aware* of the defendant's act. Given that explication of the statute, it is now clear that defendant did not

violate . . . section 289, subdivision (d), since the named victim was immediately aware of his act and provided an immediate response. As the Court of Appeal has recognized, this 'new' statutory construction constitutes evidence that, as a matter of law, [Hanna] was not guilty of the charge of which he was convicted."

At a September 27, 2018 hearing on the motion, the People argued section 1473.7 allowed relief only where there was "new evidence." The People argued that *Lyu* "does not constitute new evidence. Any kind of change in the law or interpretation of the law does not constitute new evidence."

In considering the parties' arguments, the trial court noted that footnote 14 in *Hanna IV* "effectively suggested to defense counsel that he bring a petition pursuant to [section] 1473.7 . . . in light of . . . the new law" set forth in *Lyu*. The court further commented that *Hanna IV* "seem[ed] to construe [*Lyu*] as qualifying as new evidence under [section] 1473.7." The court concluded: "I think the [appellate] court suggested I consider this as new evidence. And I do think the *Lyu* case is totally on point. It is a case that was decided by this division of our Second District Court of Appeal. And this is what I think this court is bound by. So given that the *Lyu* case is on point, our facts are exactly the same as that in the *Lyu* case, the court is going to grant the motion pursuant [to section] 1473.7 and vacate the [penetration] conviction."

The People thereafter filed a timely notice of appeal.

## DISCUSSION

### A. Section 1473.7 and the Standard of Review

Section 1473.7, subdivision (a)(2) provides in pertinent part that "[a] person who is no longer in criminal custody may file a

motion to vacate a conviction" on the basis that "[n]ewly discovered evidence of actual innocence exists that requires vacation of the conviction or sentence as a matter of law or in the interests of justice." A motion based on newly discovered evidence must be filed "without undue delay from the date the moving party discovered, or could have discovered with the exercise of due diligence, the evidence that provides a basis for relief under this section." (*Id.*, subd. (c).)

Section 1473.7, subdivision (e)(1) provides in part that "[t]he court shall grant the motion to vacate the conviction . . . if the moving party establishes, by a preponderance of the evidence, the existence of any of the grounds for relief specified in subdivision (a)." Thus, the defendant has the burden to demonstrate entitlement to relief under section 1473.7. (*People v. Perez* (2018) 19 Cal.App.5th 818, 829.)

"There is no published decision addressing the applicable standard of review of an order denying a motion to vacate a conviction under section 1473.7." (*People v. Ogunmowo* (2018) 23 Cal.App.5th 67, 75.) In general, we review orders granting or denying motions to vacate convictions for abuse of discretion. (See *id.* at p. 76.) To the extent our decision rests on a question of statutory interpretation, however, our review is de novo. (Cf. *People v. Gonzalez* (2017) 2 Cal.5th 1138, 1141.)

**B. *Lyu* Was Not "Newly Discovered Evidence"**

Although section 1473.7 does not define the phrase "newly discovered evidence," the phrase has been defined elsewhere in the Penal Code. (See *Estate of Thomas* (2004) 124 Cal.App.4th 711, 720 ["consistent usage implies consistent meaning: 'A word or phrase, or its derivatives, accorded a particular meaning in one part or portion of a law, should be accorded the same

meaning in other parts or portions of the law' "]; accord, *Scottsdale Ins. Co. v. State Farm Mutual Automobile Ins. Co.* (2005) 130 Cal.App.4th 890, 899.) Those definitions consistently describe newly discovered evidence as testimony, writings and similar things described in Evidence Code section 140 (which defines "evidence"), discovered after trial or judgment, and that with reasonable diligence could not have been discovered earlier. (E.g., § 1181, subd. 8; § 1473, subd. (b)(3)(B); § 1473.6, subd. (b); see also Evid. Code, § 140.)

Hanna seeks to expand this definition by arguing *Lyu*'s interpretation of section 289, subdivision (d)(2) constituted newly discovered evidence. He asserts that "the advent of *Lyu*, and its revelation of the meaning of the charging statute, was a fact that changed everyone's understanding of the element of unconsciousness as used in . . . section 289, subdivision (d)." He argues this "fact" is "evidence" and urges that the word "evidence" should not be "define[d] . . . more narrowly." He cites no precedential authority in support of this novel proposition.

We disagree with Hanna's position, and interpret the term "[n]ewly discovered evidence" in section 1473.7, subdivision (a)(2) using its conventional, commonsense meaning. (*Heritage Residential Care, Inc. v. Division of Labor Standards Enforcement* (2011) 192 Cal.App.4th 75, 82 ["Where a statutory term 'is not defined, it can be assumed that the Legislature was referring to the conventional definition of that term' "].) The publication of a new appellate opinion interpreting the language of a different (albeit related) Penal Code statute is not newly discovered evidence as that term is used in section 1473.7,

subdivision (a)(2).[4] Hanna did not put forward any newly discovered evidence, and therefore has failed to demonstrate eligibility for relief under section 1473.7.[5]

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[4] We acknowledge, as do the People, that *People v. Stuedemann* (2007) 156 Cal.App.4th 1 reached a different result than *Hanna I* under similar facts involving digital penetration during a massage that was charged under section 289, subdivision (d)(3). Hanna, however, does not cite *Steudemann* nor claim that it applies here. In any event, given that it was decided over a decade ago, *Steudemann* can hardly be called "newly discovered."

[5] In light of our analysis, there is no need to reach the additional arguments raised by the People that (1) "section 1473.7, by its own terms, does not allow retroactive application of new judicial rules to final judgments" and (2) "assuming a proper procedural vehicle, only the Supreme Court, not the Courts of Appeal, may establish new judicial rules that apply retroactively to final judgments."

## DISPOSITION

The order granting Hanna's section 1473.7, subdivision (a)(2) motion is reversed, and the trial court is directed to enter a new order denying the motion.

NOT TO BE PUBLISHED

WEINGART, J.*

We concur:

ROTHSCHILD, P. J.

CHANEY, J.

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* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

# APPENDIX B

# Appellate Courts Case Information

## Supreme Court

Change court ▾

*Court data last updated: 06/01/2020 01:39 PM*

## Docket (Register of Actions)

**PEOPLE v. HANNA**
**Division SF**
**Case Number S259085**

| Date | Description | Notes |
|---|---|---|
| 11/12/2019 | Petition for review filed | Defendant and Respondent: Samir Hanna<br>Attorney: E. Thomas Dunn |
| 11/13/2019 | Record requested | Court of Appeal record has been imported and is available in electronic format. |
| 11/20/2019 | Received Court of Appeal record | One file jacket. |
| 01/02/2020 | Petition for review denied | |

**Click here** to request automatic e-mail notifications about this case.

# Appellate Courts Case Information

## Supreme Court

Change court ▾

*Court data last updated: 06/01/2020 01:39 PM*

## Case Summary

| | |
|---|---|
| Supreme Court Case: | **S259085** |
| Court of Appeal Case(s): | Second Appellate District, Div. 1<br>B293714 |
| Case Caption: | PEOPLE v. HANNA |
| Case Category: | Review - Criminal Appeal |
| Start Date: | 11/12/2019 |
| Case Status: | case closed |
| Issues: | none |
| Disposition Date: | 01/02/2020 |
| Case Citation: | none |

Cross Referenced Cases:
No Cross Referenced Cases Found

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# Appellate Courts Case Information

## Supreme Court

Change court ▼

*Court data last updated: 06/01/2020 01:39 PM*

## Parties and Attorneys

**PEOPLE v. HANNA**
**Division SF**
**Case Number S259085**

| Party | Attorney |
|---|---|
| The People : Plaintiff and Appellant<br>320 West Temple Street, Suite 540<br>Los Angeles, CA 90012 | Matthew Aaron Brown<br>District Attorney of Los Angeles County<br>320 West Temple Street, Suite 540<br>Los Angeles, CA 90012<br><br>Attorney General - Los Angeles Office<br>300 South Spring Street, Suite 5000<br>Los Angeles, CA 90013 |
| Samir Hanna : Defendant and Respondent<br>P.O. Box 1678<br>Glendora, CA 91740 | E. Thomas Dunn<br>Law Offices of E. Thomas Dunn, Jr.<br>1432 Edinger Avenue, Suite 240<br>Tustin, CA 92780-6293 |

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# Appellate Courts Case Information

## Supreme Court

Change court ▾

*Court data last updated: 06/01/2020 01:39 PM*

## Lower Court

**PEOPLE v. HANNA**
**Division SF**
**Case Number S259085**

| | |
|---|---|
| **Court of Appeal District/Division:** | Second Appellate District , Div. 1 |
| **Court of Appeal Case Number:** | B293714 |
| **Disposition:** | Reversed & Remanded to trial court w/directions |
| **Disposition Date:** | 09/30/2019 |

Click the above Court of Appeal Case Number link for further information.

| | |
|---|---|
| **Trial Court:** | Los Angeles County Superior Court |
| **Trial Court Case Number:** | GA046612 |

**Click here** to request automatic e-mail notifications about this case.

# Appellate Courts Case Information

## Supreme Court

Change court ▾

*Court data last updated: 06/01/2020 01:39 PM*

## Disposition

**PEOPLE v. HANNA**
**Division SF**
**Case Number S259085**

Only the following dispositions are displayed below: Orders Denying Petitions, Orders Granting Rehearing and Opinions. Go to the Docket Entries screen for information regarding orders granting review.

**Case Citation:**
**none**

| Date | Description |
|---|---|
| 01/02/2020 | Petition for review denied |

**Click here** to request automatic e-mail notifications about this case.

# APPENDIX C

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

| | |
|---|---|
| THE PEOPLE,<br><br>Plaintiff,<br><br>v.<br><br>SAMIR HANNA,<br><br>Defendant. | B253275<br><br>(L.A.S.C. No. GA046612)<br><br>(TERI SCHWARTZ, Judge)<br><br>ORDER |

THE COURT*:

The petition for writ of error *coram vobis*, filed December 23, 2013, has been read and considered. The petition is denied because petitioner did not state grounds for relief for *coram vobis*. (*People v. Shipman* (1965) 62 Cal.2d 226.)

This denial is without prejudice to petitioner's seeking other relief that is appropriate.

Petitioner may wish to address the effect of *People v. Lyu* (2012) 203 Cal.App.4th 1293 on this case, if any.

*MALLANO, P. J. CHANEY, J. JOHNSON, J.

# APPENDIX D

Filed 6/22/17

**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE



THE PEOPLE,

Plaintiff and Respondent,

v.

SAMIR HANNA,

Defendant and Appellant.

B271474

(Los Angeles County Super. Ct. No. GA046612)

APPEAL from an order of the Superior Court of Los Angeles County, Teri Schwartz, Judge. Affirmed.

Law Offices of E. Thomas Dunn, Jr., and E. Thomas Dunn, Jr., for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Paul M. Roadarmel, Jr.,

Supervising Deputy Attorney General, and Allison H. Chung, Deputy Attorney General, for Plaintiff and Respondent.

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In 2002, Samir Hanna (Hanna) was convicted of violating Penal Code section 289, subdivision (d), a felony offense.[1] Hanna has long since served his one-year jail term on that conviction and successfully completed probation in 2004. In 2012, this court handed down *People v. Lyu* (2012) 203 Cal.App.4th 1293 (*Lyu*). Based on *Lyu*, Hanna contended he was factually innocent of the section 289 offense and asked the trial court to set aside his conviction. Specifically, Hanna requested that the trial court dismiss his case in the interest of justice under section 1385. The trial court denied Hanna's motion. As section 1203.4 is the exclusive method for a trial court to dismiss the conviction of a defendant who has successfully completed probation, we affirm.

## BACKGROUND[2]

Hanna was employed by Physical Therapy Rehab Association in Pasadena as a physical therapy aide and office manager. In March 2001, Debra J. began receiving treatments at the clinic from Hanna. She developed a

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[1] All further statutory references are to the Penal Code unless otherwise indicated.

[2] We affirmed Hanna's conviction on May 28, 2003. (*People v. Hanna* (May 28, 2003, B161471) [nonpub. opn.].) The following facts are taken from our opinion in that case.

rapport with Hanna and discussed aspects of her personal life with him.

Ms. J. came to the clinic for treatment on May 25, 2001, complaining of pain in her back. Hanna told Ms. J. that he would give her a massage. He provided her with a gown and instructed her to leave on her underclothes. Ms. J. did so and got onto the massage table, lying facedown. Hanna entered the room and started to massage Ms. J., stating that sometimes back pain goes down into the legs and buttocks. Hanna asked Ms. J. for permission to massage her legs and asked her to spread her legs a little bit. He also had Ms. J. move to the edge of the table closest to him. As the massage progressed, Ms. J. could feel pressure from Hanna's penis against her leg and she began to sense that Hanna should not be as close to her as he was. The massage continued on Ms. J.'s legs and moved to her buttocks. Hanna then put his hand into Ms. J.'s underpants and inserted two of his fingers into her vagina. Ms. J. was shocked and "pushed [her] body up away from the table. Hanna asked if everything was all right, and Ms. J. said, "No." Hanna then said, "Good session," and left the room.

After Ms. J. got dressed and was preparing to leave the clinic, the receptionist asked her to exit through the back door. Although she normally went through the front, Ms. J. complied with this request. In defense, the clinic receptionist testified that Ms. J. did not appear nervous or agitated as she left the clinic that day. The receptionist asked where Ms. J. was parked. When Ms. J. said that she

was parked behind the office, the receptionist suggested that she leave through the back door. Following a bench trial, the trial court convicted Hanna of sexual penetration by a foreign object on an unconscious person (§ 289, subd. (d)), a felony offense. The trial court also convicted Hanna of misdemeanor battery (§ 242).[3] The trial court acquitted Hanna on the remaining counts and sentenced Hanna to one year in county jail followed by three years of formal probation.

On appeal, Hanna claimed the evidence was insufficient to establish the elements that Ms. J. was unconscious of the nature of the act and that he knew Ms. J. was not aware of its nature.[4] We affirmed. We first held

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[3] Our opinion affirming Hanna's conviction mistakenly stated that Hanna was convicted of misdemeanor sexual battery (§ 243.4, subd. (d)(1)). A review of the minute order shows that upon the court's own motion, the information was amended to change the count to misdemeanor battery instead.

[4] Section 289, subdivision (d), provides that "[a]ny person who commits an act of sexual penetration, and the victim is at the time unconscious of the nature of the act and this is known to the person committing the act or causing the act to be committed, shall be punished by imprisonment in the state prison for three, six, or eight years. As used in this subdivision, 'unconscious of the nature of the act' means incapable of resisting because the victim . . . : [¶] (1) [w]as unconscious or asleep. [¶] (2) [w]as not aware, knowing, perceiving, or cognizant that the act occurred. [¶] (3) [w]as not aware, knowing, perceiving, or cognizant of the essential

that Ms. J. was unconscious of the nature of Hanna's act because she was not aware of the essential characteristics of that act due to Hanna's fraudulent representation that he intended to give her a massage. We further held that Hanna knew full well that from her facedown position that Ms. J. could not see what he was doing and was unaware of the sexual assault he was about to perpetrate. Accordingly, we held, sufficient evidence was presented to convince a rational trier of fact beyond a reasonable doubt that Hanna had violated section 289, subdivision (d).

## SUBSEQUNT PROCEDURAL HISTORY

Hanna's probation ended on December 13, 2004. On June 24, 2011, Hanna filed a petition for writ of coram nobis with this court.[5] We denied the petition without prejudice,

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characteristics of the act due to the perpetrator's fraud in fact. [¶] (4) [w]as not aware, knowing, perceiving, or cognizant of the essential characteristics of the act due to the perpetrator's fraudulent representation that the sexual penetration served a professional purpose when it served no professional purpose."

[5] A writ of *coram nobis* permits the court which rendered judgment to reconsider it and give relief from errors of fact. However, the petitioner must establish that: (1) some fact existed which, without his fault or negligence, was not presented to the court at the trial and which would have prevented the rendition of the judgment; (2) the new evidence does not go to the merits of the issues of fact determined at trial; and (3) he did not know nor could he have, with due diligence, discovered the facts upon which he relies any sooner than the point at which he petitions for the

directing Hanna to refile the petition with the trial court. On October 25, 2011, Hanna filed a petition for writ of coram nobis with the trial court. The trial court denied the petition without prejudice on November 29, 2011.

On December 23, 2013, Hanna filed a second petition for writ of coram nobis with this court. We denied the petition because Hanna had failed to state grounds for relief. However, our denial order also stated that: "This denial is without prejudice to petitioner's seeking other relief that is appropriate. Petitioner may wish to address the effect of *People v. Lyu* (2012) 203 Cal.App.4th 1293 on this case, if any."[6]

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writ. (*People v. Soriano* (1987) 194 Cal.App.3d 1470, 1474.) Moreover, the petition will not lie for the correction of errors at law. (*People v. Kim* (2009) 45 Cal.4th 1078, 1093.)

[6] In *Lyu*, the defendant was convicted of sexual penetration by a foreign object on an unconscious person. The defendant worked as a massage therapist and inserted his fingers inside a female client's vagina while massaging her legs. The woman then hit the defendant, said no, and asked what he was doing. The defendant started to sexually assault the woman, but she resisted and left the room. The defendant later admitted he sexually touched the woman but claimed she wanted sex from him. (*Lyu*, *supra*, 203 Cal.App.4th at pp. 1295–1298.) The prosecution argued that the woman was unconscious because she was on her stomach when the defendant sexually assaulted her, and she was unaware and did not expect him to sexually assault her. (*Id.* at p. 1299.) We rejected the prosecution's unconsciousness argument because the woman was "instantly aware" that the

On November 16, 2015, Hanna filed a motion with the trial court entitled "Motion to Declare Defendant Samir Hanna Factually Innocent of Pen. Code § 289, subd. (d), Offense and to Set Aside His Conviction." Relying on *Lyu*, Hanna argued that he was factually innocent of unlawful penetration of an unconscious person and asked the trial court to set aside his conviction under sections 851.86 and 1385.[7] At the motion hearing, the trial court first asked

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defendant was committing a sexual assault. (*Id.* at p. 1301.) We also rejected the prosecution's argument to construe the statutory definition of unconsciousness to mean that "the victim 'did not see the attack coming and was not aware or cognizant of it until it had occurred.' " (*Ibid.*) We further noted that the facts of that case did not involve unconsciousness based on the statutory definition of "fraud in fact." (*Id.* at p. 1302, fn. 10.) Thus, we reversed the defendant's conviction because of insufficient evidence of unconsciousness. (*Id.* at p. 1299.)

[7] Section 851.86 provides that "[w]henever a person is convicted of a charge, and the conviction is set aside based upon a determination that the person was factually innocent of the charge, the judge shall order that the records in the case be sealed, including any record of arrest or detention." If such an order is made, the defendant may then "state he or she was not arrested for that charge and that he or she was not convicted of that charge, and that he or she was found innocent of that charge by the court." Section 1385, subdivision (a), provides that "[t]he judge or magistrate may, either of his or her own motion or upon the application of the prosecuting attorney, and in furtherance of justice, order an action to be dismissed." The effect of a dismissal under

Hanna's attorney, "How do I grant a factual innocence finding, counsel?" Hanna's attorney noted that he could not take the usual approach—filing a habeas petition—since Hanna was no longer in custody. Nevertheless, counsel contended, the trial court could dismiss the case in the interest of justice under section 1385 or "at the very least, reduce it and then set it for review down the road where perhaps the court could entertain a 1203.4 motion."[8]

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section 1385 is to wipe the slate clean as if the defendant never suffered the prior conviction in the initial instance. In other words, the defendant stands as if he had never been prosecuted for the charged offense. (*People v. Simpson* (1944) 66 Cal.App.2d 319, 329.)

[8] Section 1203.4, subdivision (a)(1) provides in relevant part that if "a defendant has fulfilled the conditions of probation for the entire period of probation" and "is not then serving a sentence for any offense, on probation for any offense, or charged with the commission of any offense," then the defendant shall "be permitted by the court to withdraw his or her guilty plea or, . . . if [the defendant] has been convicted after a plea of not guilty, the court shall set aside the verdict of guilty." However, the order "does not relieve the defendant of his or her obligation to disclose the conviction in response to any direct question contained in any questionnaire or application for public office, [or] for licensure by any state or local agency." Thus, dismissal under section 1203.4 does not erase a conviction; it "merely frees the convicted felon from certain 'penalties and disabilities' of a criminal or like nature." (*Adams v. County of Sacramento* (1991) 235 Cal.App.3d 872, 877–878.)

"I guess I'm in the same place I have been all along," the trial court observed. "I don't know what the remedy is for the change in the law. I really don't." Nevertheless, the court stated, "I don't think a finding of factual innocence is appropriate." "I don't know that [section] 1385 would be an appropriate vehicle either," the court noted. In the end, the trial court said, "I don't know frankly what the appropriate way to handle this would be. So I'm just going to leave it. It is above my pay grade quite frankly. I don't have an answer." With that, the trial court denied the motion. Hanna timely appealed.

## DISCUSSION

### I. Hanna Sought Relief Under the Incorrect Statute

At its core, the present appeal poses a seemingly straightforward question—what is the appropriate procedural vehicle for a defendant challenging his conviction after he has completed his probationary sentence? The Third District Court of Appeal recently answered this question, holding that section 1203.4 is the exclusive method for a trial court to dismiss the conviction of a defendant who has successfully completed probation. (*People v. Chavez* (2016) 5 Cal.App.5th 110, 113, review granted Mar. 1, 2017, S238929 (*Chavez*).)

In *Chavez*, *supra*, 5 Cal.App.5th 110, the defendant pleaded no contest to charges that he offered to sell a controlled substance and failed to appear. The trial court suspended imposition of sentence and placed the defendant on probation for four years. After the defendant successfully

completed his probation in 2009, he filed a motion pursuant to section 1385, asking the trial court to dismiss the action in the interests of justice based on ineffective assistance of counsel and asserted legal errors. The trial court concluded that because the motion was brought pursuant to section 1385 rather than section 1203.4, it did not have authority after probation ended to grant the requested relief and thus denied the motion to dismiss. (*Id.* at p. 113.) On appeal, the People contended that the trial court's denial was not an appealable order. The defendant maintained that the order was appealable and that the trial court erred in ruling it lacked authority to dismiss under section 1385. (*Ibid.*)

The appellate court concluded that while the denial was an appealable order, section 1203.4 is the exclusive method for a trial court to dismiss the conviction of a defendant who has successfully completed probation. (*Chavez*, *supra*, 5 Cal.App.5th at pp. 114–115, 122.) Accordingly, the trial court was without discretion to dismiss the defendant's conviction under section 1385. (*Id.* at p. 122.) With respect to the threshold issue—whether the denial was an appealable order—the appellate court noted that under section 1237, subdivisions (a) and (b), a defendant may appeal from a final judgment of conviction or from any order made after judgment that affects the substantial rights of the party.[9] (*Id.* at p. 114.) When a

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[9] Under section 1237, subdivision (a), an appeal may be taken by the defendant from a final judgment of conviction, except as provided in sections 1237.1, 1237.2, and 1237.5,

defendant is granted probation and the probationary period expires without revocation, the order granting probation is a final judgment within the meaning of section 1237, subdivision (a), and thus an appealable order.[10] (*Id.* at p. 114.)

Next, the court traced the legislative history of section 1385, noting that section 1203.4 was enacted after section 1385 and is more specific. (*Chavez*, *supra*, 5 Cal.App.5th at pp. 117–118.) While section 1383 is a general statute, relating to the broad scope of dismissal, section 1203.4 relates to the limited power of dismissal for purposes of probation—the very matter at issue. (*Id.* at p. 118.) The 1971 amendment of section 1203.4 supported the court's conclusion that 1203.4 is the exclusive method for a trial court to dismiss the conviction of a defendant who has successfully completed probation. (*Id.* at p. 119.) That year, the Legislature expanded the class of defendants who could obtain section 1203.4 relief to include those who had not

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which are not applicable here. Under section 1237, subdivision (b), an appeal may be taken by the defendant "[f]rom any order made after judgment, affecting the substantial rights of the party."

[10] The court also held that an order denying relief under section 1203.4 is an order made after judgment, affecting the substantial rights of the party under section 1237, subdivision (b), and thus an appealable order. (*Chavez*, *supra*, 5 Cal.App.5th at pp. 114–115.) As noted above, however, the defendant in *Chavez* did not seek relief under section 1203.4.

successfully completed probation but who should be granted relief in the court's discretion and in the interests of justice. "It would not have been necessary for the Legislature to amend section 1203.4 . . . if courts had retained authority to dismiss 'in furtherance of justice' under section 1385 after the Legislature enacted the original section 1203.4." (*Id.* at pp. 119–120.)

The court also noted that California Supreme Court cases supported its conclusion that section 1203.4, and not section 1385, governs dismissal in a case where the defendant is granted probation and seeks dismissal after the expiration of the probationary period. (*Chavez, supra,* 5 Cal.App.5th at p. 120.) For example, *In re Herron* (1933) 217 Cal. 400, 405, addressed whether a trial court could set aside a conviction and dismiss an action after expiration of the probation period. There, the Supreme Court held that the power to dismiss an action under that circumstance was found in the original version of section 1203.4. Likewise, in *In re Phillips* (1941) 17 Cal.2d 55, 59 and *People v. Banks* (1959) 53 Cal.2d 370, 384–388, 391, the Supreme Court reiterated that section 1203.4 established the authority of a trial court to set aside the verdict after satisfactory completion of probation. (See *People v. Barraza* (1994) 30 Cal.App.4th 114, 121 ["Section 1203.4 . . . is the only postconviction relief from the consequences of a valid criminal conviction available to a defendant"]; *People v. Picklesimer* (2010) 48 Cal.4th 330, 337, fn. 2 [§ 1203.4 motion is rare exception to rule precluding postjudgment

motions].) Moreover, subsequent amendments to section 1203.4 have only narrowed the applicability of the statute. (*Chavez*, at pp. 120–121.) As noted by the Third District, "it would nullify the restrictions imposed by the Legislature and interpreted by the courts if we were to construe the statutes as preserving a trial court's discretion under section 1385 to completely erase a probationer's conviction." (*Id.* at p. 121.)

The reasoning in *Chavez*, *supra*, 5 Cal.App.5th 110 is persuasive as is the supporting authority cited therein. While section 1385 has potentially broad application, the California Supreme Court has cautioned that a trial court's power "is by no means absolute." (*People v. Orin* (1975) 13 Cal.3d 937, 945.) Indeed, the Legislature can expressly restrict a trial court's discretion to dismiss under the statute. (*People v. Superior Court (Romero)* (1996) 13 Cal.4th 497, 518.) Moreover, "[a]lthough the discretion of a trial judge to dismiss a criminal action under . . . section 1385 in the interests of justice 'may be exercised at any time during the trial, including after a jury verdict of guilty' [citation], this statute has never been held to authorize dismissal of an action after the imposition of sentence and rendition of judgment." (*Barraza*, *supra*, 30 Cal.App.4th at p. 121, fn. 8.) "Use of section 1385 in that manner would be inconsistent with the Supreme Court's strict focus on the language of the statute." (*People v. Kim* (2012) 212 Cal.App.4th 117, 122.) While section 1203.4 specifically grants the trial court continuing jurisdiction to act after a defendant's conviction has become final, by service of his or her sentence, section

1385 does not grant the trial court this jurisdiction. (See *id.* at p. 125 [once defendant completed sentence, trial court could not dismiss action under § 1385].)

Here, as in *Chavez*, *supra*, 5 Cal.App.5th 110, the defendant sought relief under section 1385, not 1203.4.[11] Although Hanna's counsel alluded to filing a 1203.4 motion at a later date, the motion before the trial court sought a dismissal only under section 1385. Thus, the trial court was without discretion to dismiss Hanna's conviction.[12] (See *id.* at p. 122.)

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[11] Hanna, a native and citizen of Egypt, faces removal from the United States due to his conviction. (See *Hanna v. Mukasey* (9th Cir. 2008) 279 Fed.Appx. 584 [nonpub. opn.].) While an order granting a 1203.4 motion cannot eliminate the immigration consequences of a conviction (*Ramirez-Castro v. Immigration and Naturalization Service* (9th Cir. 2002) 287 F.3d 1172, 1173), a dismissal order under section 1385 can have such an effect as long as the conviction was vacated based on a defect in the underlying criminal proceedings. (*Matter of Pickering* (BIA 2003) 23 I & N Dec. 621, 624; *Cardoso-Tlaseca v. Gonzales* (9th Cir. 2006) 460 F.3d 1102, 1107.)

[12] As noted by Hanna's appellate counsel, the Supreme Court has granted review in *Chavez*, *supra*, 5 Cal.App.5th 110. By order issued March 2, 2017, review is limited to two issues: "(1) Does . . . section 1203.4 eliminate a trial court's discretion under . . . section 1385 to dismiss a matter in the interests of justice? (2) Do trial courts have authority to grant relief under . . . section 1385 after sentence has been imposed, judgment has been rendered, and any probation

## II. The People's Alternative Arguments

The People contends that nether section 851.86 nor section 1385 establish a right to seek relief in the trial court. We agree. As discussed above, the trial court was without discretion to dismiss the defendant's conviction under section 1385.[13] Section 851.86 is also an inappropriate vehicle for the relief sought by Hanna. The statute contains no language permitting a defendant to petition the court for a finding of factual innocence. Instead, it simply allows case records to be sealed *after* a conviction is set aside based on a determination of factual innocence. To the contrary, section 851.8 specifies who may petition the court for a finding of factual innocence and when. (§ 851.8, subds. (a)-(e).) However, establishing factual innocence under section 851.8 "entails establishing as a prima facie matter not necessarily just that the [defendant] had a viable substantive defense to the crime charged, but more fundamentally that there was no reasonable cause to arrest him in the first place." (*People*

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has been completed?" (See <http://appellatecases.courtinfo.ca.gov> (as of June 16, 2017).) The opening brief was filed on June 5, 2017. Until the Supreme Court issues its opinion, we will rely upon current and persuasive authority.

[13] The People also contends that because section 1385 must be invoked by a trial court or prosecutor, rather than the defendant, the trial court's denial is not an appealable order. However, we consider the final judgment, rather than the denial, to be the order appealed from. (See *Chavez*, *supra*, 5 Cal.App.5th at p. 114; *People v. Chandler* (1988) 203 Cal.App.3d 782, 787.)

*v. Matthews (*1992) 7 Cal.App.4th 1052, 1056.) Given that Hanna has based his factual innocence claim on a case decided a decade after his arrest and conviction, he cannot possibly satisfy this standard.

Lastly, the People contends, Hanna's present appeal must be dismissed because it is based on the same facts as his direct appeal and seeks to overrule our prior opinion affirming his conviction. The People correctly notes that the central issue raised in the instant appeal—whether sufficient evidence supported Hanna's section 289 conviction—was raised in the prior appeal. However, Hanna has cited new case law in support of the present claim, which means it cannot precisely duplicate the arguments on direct appeal. A habeas petitioner may raise "an issue previously rejected on direct appeal when there has been a change in the law affecting the petitioner." (*In re Harris* (1993) 5 Cal.4th 813, 841.) While Hanna is no longer in custody, neither the language of section 1203.4 nor the cases examining the statute prohibit a defendant from arguing that a change in law compels the requested relief. Once again, however, the problem is not with the basis of Hanna's claim but rather the procedural vehicle he employed when before the trial court.[14]

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[14] We note that in addition to section 1203.4, another statute may now provide an avenue of relief for Hanna. Effective January 1, 2017, section 1473.7 provides an explicit right for a person no longer imprisoned or restrained to prosecute a motion to vacate a conviction based on "[n]ewly

The trial court did not have an opportunity to evaluate the merits of Hanna's claim pursuant to section 1203.4 or 1473.7. Although Hanna asks this court to construe this appeal as a writ petition in order to prevent another round of motions and appeals, we decline to do so in the first instance. Nevertheless, our opinion should not be interpreted as precluding Hanna from filing a section 1203.4 or 1473.7 motion with the trial court.

**DISPOSITION**

The order is affirmed.

NOT TO BE PUBLISHED.

JOHNSON, J.

We concur:

CHANEY, Acting P. J.

LUI, J.

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discovered evidence of actual innocence . . . that requires vacation of the conviction . . . as a matter of law or in the interests of justice." (§ 1473.7, subd. (a)(2).) As noted above, as long as a conviction is vacated based on a defect in the underlying criminal proceedings, the immigration consequences of that conviction should be eliminated.

# APPENDIX E

**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE,

Plaintiff and Respondent,

v.

SAMIR HANNA,

Defendant and Appellant.

B161471

(Los Angeles County
Super. Ct. No. GA046612)



APPEAL from a judgment of the Superior Court of Los Angeles County, Teri Schwartz, Judge. Affirmed.

Daniel T. Huswit for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Margaret E. Maxwell, Supervising Deputy Attorney General, and Theresa A. Cochrane, Deputy Attorney General, for Plaintiff and Respondent.

Samir Hanna appeals from the judgment (order granting probation) entered following a bench trial in which he was convicted of penetration by a foreign object of a person unconscious of the nature of the act (Pen. Code, § 289, subd. (d)) and misdemeanor sexual battery (*id.*, § 243.4, subd. (d)(1)). He contends that his conviction of penetration by a foreign object was not supported by the evidence. We affirm.

## BACKGROUND

Defendant was employed by Physical Therapy Rehab Association in Pasadena as a physical therapy aide and office manager. In March 2001, Debra J. began receiving treatments at the clinic from defendant. She developed a rapport with defendant and discussed aspects of her personal life with him.

Ms. J. came to the clinic for treatment on May 25, 2001, complaining of pain in her back. Defendant told Ms. J. that he would give her a massage. He provided her with a gown and instructed her to leave on her underclothes. Ms. J. did so and got onto the massage table, lying facedown. Defendant entered the room and started to massage Ms. J., stating that sometimes back pain goes down into the legs and buttocks. Defendant asked Ms. J. for permission to massage her legs and asked her to spread her legs a little bit. He also had Ms. J. move to the edge of the table closest to him. As the massage progressed, Ms. J. could feel pressure from defendant's penis against her leg and she began to sense that defendant should not be as close to her as he was. The massage continued on Ms. J.'s legs and moved to her buttocks. Defendant then put his hand into Ms. J.'s underpants and inserted two of his fingers into her vagina. Ms. J. was shocked and "pushed [her] body up away from the table." Defendant asked if everything was all right, and Ms. J. said, "No." Defendant then said, "Good session," and left the room.

After Ms. J. got dressed and was preparing to leave the clinic, the receptionist asked her to exit through the back door. Although she normally went through the front, Ms. J. complied with this request.

In defense, the clinic receptionist testified that Ms. J. did not appear nervous or agitated as she left the clinic that day. The receptionist asked where Ms. J. was parked.

When Ms. J. said that she was parked behind the office, the receptionist suggested that she leave through the back door.[1]

## DISCUSSION

Penal Code section 289, subdivision (d) forbids an act of sexual penetration by a foreign object when "the victim is at the time unconscious of the nature of the act and this is known to the person committing the act . . . . '[U]nconscious of the nature of the act' means incapable of resisting because the victim meets one of the following conditions: [¶] (1) Was unconscious or asleep. [¶] (2) Was not aware, knowing, perceiving, or cognizant that the act occurred. [¶] (3) Was not aware, knowing, perceiving, or cognizant of the essential characteristics of the act due to the perpetrator's fraud in fact."[2]

Defendant contends that the evidence in this case was insufficient to establish the elements that Ms. J. was unconscious of the nature of the act and that he knew Ms. J. was not aware of its nature. We disagree.

Both defendant and the People rely principally on *People v. Ogunmola* (1987) 193 Cal.App.3d 274. There, an obstetrician and gynecologist conducted pelvic examinations of two women. After inserting his fingers in the vagina of each patient as part of the exam, he inserted his penis instead. The first patient testified she "became convinced the rape was in fact happening. . . 'when [the defendant] initially inserted his penis'" although it took her "'a few minutes to actually believe that this was taking place.'" (*Id.* at p. 277.) The second victim "realized [the defendant] had inserted his penis, rather than his fingers, into her vagina" after he had "moved his fingers in and out of her vagina a

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[1] Defendant does not raise any issues with respect to his conviction of misdemeanor sexual battery, which involved a separate victim on a different date. Accordingly, we do not discuss it in this opinion.

[2] In 2002, the statute was amended to add subdivision (d)(4), which provides: "Was not aware, knowing, perceiving, or cognizant of the essential characteristics of the act due to the perpetrator's fraudulent representation that the sexual penetration served a professional purpose when it served no professional purpose."

number of times, then pushed very hard on her abdomen and leaned forward." (*Id.* at p. 278.)

Based on this conduct, the defendant was convicted of two counts of rape "[w]here the person is at the time unconscious of the nature of the act, and this is known to the accused." (Former Pen. Code, §261, subd. (4).)[3] In finding the evidence sufficient to support the convictions, the *Ogunmola* court reasoned as follows: "[I]n the present case, the trier of fact could reasonably conclude from the testimony of the victim gynecological patients, who reposed great trust in their physician in placing themselves in positions of great vulnerability from which they could not readily perceive his conduct toward them, that neither was aware of the *nature* of the act, i.e., neither consciously perceived or recognized that defendant was not engaged in an examination, but rather in an act of sexual intercourse, until he had accomplished sexual penetration, and the crime had occurred. [Citation.] Each of the victims, who had consented to a pathological examination, with its concomitant manual and instrumental intrusions, was 'unconscious of the *nature* of the act' of sexual intercourse committed upon her by defendant, until the same was accomplished, and cannot be said to have consented thereto." (*People v. Ogunmola*, *supra*, 193 Cal.App.3d at pp. 280–281, fn. omitted.)

Defendant would distinguish *Ogunmola* on the basis that Ms. J. never consented to any type of penetration and was immediately aware that she had been violated. Concomitantly, argues defendant, he never had knowledge that Ms. J. was unconscious of the nature of his acts.

We reject this attempted distinction. Defendant gained Ms. J.'s trust over the course of prior physical therapy sessions and on the day in question had her assume a

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[3] Former Penal Code section 261, subdivision (4) is now section 261, subdivision (a)(4), which lists conditions (A) through (D). The language of section 261, subdivision (a)(4)(A) through (D) is parallel to the language of current section 289, subdivision (d)(1) through (4).

vulnerable position on the massage table, ostensibly for a massage. Ms. J. sensed that something was amiss when she felt defendant's penis against her leg. But, as was the situation in *Ogunmola*, Ms. J. was unaware that defendant had accomplished an act of digital penetration until the crime had occurred. Thus, Ms. J. was unconscious of the nature of defendant's act because she was not aware of the essential characteristics of that act due to defendant's fraudulent representation that he intended to give her a massage. (Pen. Code, § 289, subd. (d)(3).) And defendant knew full well that from her facedown position Ms. J. could not see what he was doing and was unaware of the sexual assault he was about to perpetrate. Accordingly, sufficient evidence was presented to convince a rational trier of fact beyond a reasonable doubt that defendant had violated Penal Code section 289, subdivision (d). (*People v. Johnson* (1980) 26 Cal.3d 557, 576; *People v. Ogunmola, supra,* 193 Cal.App.3d at pp. 281–282.)

**DISPOSITION**

The judgment is affirmed.

NOT TO BE PUBLISHED.

MALLANO, J.

We concur:

SPENCER, P. J.

VOGEL (MIRIAM A.), J.

# APPENDIX F

FILED

MAR 07 2011

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

**NOT FOR PUBLICATION**

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

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| SAMIR HANNA,<br><br>Petitioner,<br><br>v.<br><br>ERIC H. HOLDER, Jr., Attorney General,<br><br>Respondent. | No. 09-73676<br><br>Agency No. A078-031-602<br><br>MEMORANDUM* |

On Petition for Review of an Order of the
Board of Immigration Appeals

Submitted February 15, 2011**

Before: CANBY, FERNANDEZ, and M. SMITH, Circuit Judges.

Samir Hanna, a native and citizen of Egypt, petitions for review of the Board of Immigration Appeals' ("BIA") order denying his motion to reopen removal proceedings. We have jurisdiction under 8 U.S.C. § 1252. We deny the petition for review.

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* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

** The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

In his opening brief, Hanna fails to address, and therefore has waived any challenge to, the BIA's dispositive determination that he failed to establish due diligence to warrant equitable tolling of the filing deadline for his untimely motion to reopen. *See Martinez-Serrano v. INS*, 94 F.3d 1256, 1259-60 (9th Cir. 1996) (issues not specifically raised and argued in a party's opening brief are waived).

In light of this disposition, we do not reach Hanna's remaining contentions.

**PETITION FOR REVIEW DENIED.**

## PROOF OF SERVICE

I, E. Thomas Dunn, Jr., counsel for Petitioner and a member of the Bar of this Court, declare that on June 1, 2020, as required by Supreme Court Rule 29, I served copies of the Petitioner's MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS and PETITION FOR WRIT OF CERTIORARI in the above-entitled case by mail, first class postage prepaid, to each party to the above proceeding, including:

(1) Office of the Attorney General, 300 S. Spring Street, Los Angeles, California 90013-1230;

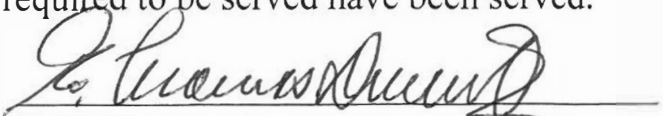
(2) Office of the District Attorney, 211 W. Temple Street, Suite 1200, Los Angeles, California 90012;

(3) Los Angeles County Superior Court, Attn: Hon. Teri Schwartz, 300 E. Walnut Street, Pasadena, California 91101;

(4) California Court of Appeal, Second District, Division One, 300 S. Spring Street, 2nd Floor, North Tower, Los Angeles, California 90013; and

(5) the California Supreme Court, 350 McAllister Street, San Francisco, California 94102-4797. I certify that all parties required to be served have been served.

Dated: June 1, 2020



E. THOMAS DUNN, JR.
ATTORNEY FOR PETITIONER