No.____

IN THE
SUPREME COURT OF THE UNITED STATES

STEPHEN ROBERT DECK,
Petitioner,

v.

STATE OF CALIFORNIA,
Respondent.

On Petition For Writ of Certiorari
To The California Supreme Court
Petition for Writ of Certiorari

Charles M. Sevilla
* Counsel of Record
Law Offices
402 W. Broadway, #720
San Diego, CA 92101
(619) 232-2222
chuck@charlessevilla.com

Attorney for Petitioner Deck

QUESTIONS PRESENTED

1. Whether the temporal direct step element of an attempt offense may be changed by jury instructions to occur on the charged "on or about" dates, or the next day, or a date "reasonably close" to the charged dates without violating the Fourteenth Amendment due process right to a jury charge precisely stating the charged crime?

2. Whether the State can avoid the requirement of jury unanimity under Ramos v. Louisiana, __U.S.__, 140 S.Ct. 1390, 206 L.Ed.2d 583 (2020), by equating the direct step element of attempt with an overt act non-element of a conspiracy?

3. Whether Maryland v. Shatzer, 559 U.S. 98 (2010), permits an interview of a defendant in his home during the execution of a search warrant hours after his custodial arrest and invocation of the right to counsel?

TABLE OF CONTENTS

PETITION FOR A WRIT OF CERTIORARI

APPENDIX

A. May 12, 2020, unpublished opinion of California Court of Appeal, State of California v. Deck (Fourth Appellate District, Div. 3, No. G057168)

B. July 22, 2020, order denying petition for review by the California Supreme Court (No. S262783)

TABLE OF AUTHORITIES
CASES

STATUTES

MISCELLANY

PETITION FOR A WRIT OF CERTIORARI

Mr. Deck respectfully petitions for a writ of certiorari to review the judgment of the California Supreme Court.

OPINION BELOW

The May 12, 2020 decision of the California Court of Appeal is reprinted in the Appendix (App.) at 1-18. The July 22, 2020 order of the California Supreme Court denying review from that decision is reprinted at App. B.

JURISDICTION

The California Supreme Court issued its order on July 22, 2020. App. B-1. Jurisdiction of this Court is evoked pursuant to 28 U.S.C. Section 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fifth Amendment, as guaranteed via the Fourteenth Amendment to the United States Constitution, provides in relevant part that "[n]o person "shall be ...deprived of life, liberty, or property, without due process of law."

California Penal Code section 288(a) states:

> any person who willfully and lewdly commits any lewd or lascivious act, upon or with the body, or any part or member thereof, of a child who is under the age of 14 years, with the intent of arousing, appealing to, or gratifying the lust, passions, or sexual desires of that person or the child, is guilty of a felony and shall be punished by imprisonment in the state prison for three, six, or eight years.

California Penal Code section 664 states:

> every person who attempts to commit any crime, but fails, or is prevented or intercepted in its perpetration [is guilty of a crime]….

California Penal Code section 21a states:

> An attempt to commit a crime consists of two elements which must temporally co-exist: a specific intent to commit the crime, and a direct but ineffectual act done toward its commission.

I. INTRODUCTION AND SUMMARY OF ARGUMENT

Petitioner was arrested on February 18, 2006, for attempted child molestation as part of a sting operation in which a woman posing as a 13 year-old "Amy" engaged in a week of online chats with petitioner ending in petitioner being arrested at a public park on his way to a meeting. Petitioner defended that on the day of his arrest he made it plain to Amy in recording texts and phone calls that he was ill and did not want the meeting. Upon her importuning him to meet, he agreed, but stated it would have to be at a public location, that it would be brief, and that nothing was going to happen because he was ill.

Charged with one count of an attempted molest under Penal Code sections 288(a) and 664 occurring "on or about" February 18, 2006, the first jury had convicted after its difficulties with the temporal element were compounded by the prosecutor's errant description of the element. The conviction was affirmed by the California Court of Appeal on May 24, 2011. No. G043434; 2011 Cal.App. Unpub.LEXIS 3859. In affirming, however, the State opinion noted the prosecutor misstated the time requirements for an attempt by stating the attempt could be at some vague time in the future. However, it found the error harmless.

In federal court, the case was reversed. The Ninth Circuit found the prosecutor's misstatement on the temporal requirement of the attempt by expanding it to a time days or weeks after the charged date of "on or about

February 18, 2016," was a prejudicial denial of due process. Deck v. Jenkins, 814 F.3d 954, 986-986 (9th Cir. 2016).

To understand how the second trial court repeated the error of the first: in trial one, the prosecutor misstated California law by telling the jury that petitioner did not have to intend to commit a lewd act on "Amy," the fictitious minor, at their first meeting as long as he intended to commit it at a future date. Id. at 973, 974-75. Jury instructions did not inform that the prosecutor's interpretation of the law was incorrect. Id. at 983. The evidence regarding the temporal aspect of petitioner's intent was "not overwhelming," and the misstatement went to the heart of petitioner's defense that his conduct did not constitute attempt because he did not intend to commit a lewd act on the night of the meeting, if ever. Id. at 980.

The same thing occurred in the second trial by crafted jury instructions and prosecution argument. There, the trial court revised the jury instructions to continue the improperly elastic version of the temporal element of attempt. Petitioner made the common sense argument that he had to have committed the intentional direct act toward completion of the attempted molest by the time of his arrest. That was the defense and it was supported by evidence. The court refused that instruction and instead told the jury that the attempt could occur "on or about" February 18th or 19th during the meeting with Amy, or at a time "reasonably close" to those days. This again allowed petitioner to "be convicted even if the jury was not sure whether he intended to commit a lewd act on the night he met Amy" or at some "reasonably close" future time. Deck v. Jenkins, supra, 986; italics added.

The Constitution requires that elements of the offense be stated with clarity. This Court repeated this requirement in Apprendi v. New Jersey, 530 U.S. 466, 478 (2000), where it held: "[a]s a general rule, criminal proceedings were submitted to a jury after being initiated by an indictment containing 'all the facts and circumstances which constitute the offence, . . . stated with such certainty and precision, that the defendant . . . may be enabled to determine the species of offence they constitute....'" (quoting J. Archbold, Pleading and Evidence in Criminal Cases 44 (15th ed. 1862); italics added.

This petition also presents the issue of whether the "direct step" element of attempt when argued as supported by any one of ten steps requires the jury to be unanimous on the step under Ramos v. Louisiana, supra.

Finally, the petition presents the issue of whether under Maryland v. Shatzer, 559 U.S. 98 (2010), police may commence an interview of a defendant hours after his custodial arrest and his unequivocal invocation of the right to counsel. The Court of Appeal found that because following his arrest, petitioner had bailed out, that the interview by the officer before whom he had invoked his rights was at his home during a search a few hours after his invocation, it was permitted for lack of the element of custody. Petitioner submits the court erred in its cabining of Shatzer to custody cases, and also in not finding custody in petitioner's case.

II. STATEMENT OF THE CASE

On April 9, 2009, petitioner was charged by information with a one count violation of an attempted lewd act with a child under 14 in violation of Penal Code sections 664/288(a), occurring "on or about" February 18, 2006. 1CT 109.[1] The first jury trial took place on December 10, 2009, through to a guilty verdict on December 22, 2009. 1CT 60. On March 19, 2010, petitioner was sentenced to serve 365 days in jail, required to register for life as a sex offender (Calif. Penal Code section 290), placed on probation for five years, and with other conditions upon release. 1CT 65. This was followed by the subsequent unsuccessful state appeal, then the reversal in the federal court of appeals in Deck v. Jenkins, supra.

Following the federal reversal, the case went back to the Orange County Superior Court for retrial which commenced on December 11, 2018, and concluded the next day. 1CT 90, 103. During jury deliberations, the jury sent out a note for copies of an instruction on the elements of the offense and certain exhibits. 1CT 103. The following day the jury returned its guilty verdict. 1CT 104. Petitioner had by this time served the previous sentence, the only remaining part being life-time sex-registration which continues. 1CT 105.

The second conviction was affirmed by the Court of Appeal on May 12, 2020, in an unpublished opinion. State of California v. Deck, Fourth Appellate District, Div. 3, No. G057168, 2020 Cal.App.Unpub. LEXIS 2941. See App. A 1-18. On July

[1] CT represents the Superior Court clerk's transcript. RT represents citation to the reporter's transcript. Petitioner directs the Court to the Court of Appeal Opinion for more detailed facts of the case. Appendix A, pp. 3-6.

22, 2020, an order denying the petition for review was filed by the California Supreme Court, No. S262783, 2020 Cal.LEXIS 4894. See Appendix B.

III. STATEMENT OF FACTS

After five days of online chatting, on February 18, 2006, petitioner and "Amy" chatted on and off throughout the day. The conversation included topics of food, pizza and pie, but petitioner said, "I have a sore throat...Coming down with something. Exhibit 4, at 19. He asked what part of Laguna she lived in. Id., at 20. She said she lived in Club Laguna apartments, and asked if he was coming over. He said he wanted to, but "it ... would be [better] to meet someplace public." Ibid. He asked if she could walk to the park and meet him there. She wrote that it was a long way. Ibid. He says, "maybe if I feel better tomorrow and you don't go to your friends I can come by." Ibid.

At around 6:30 p.m. that evening, petitioner sent her a message saying he was "still a little under the weather" and that she should just "go ahead and eat that pizza. XOXO." Id., at 21. She says she's sorry he feels bad; he replies, "Just kinda drowsy and my throat is pretty sore. I'd hate to give it to you." Ibid.

Later, she writes, "come on over," and he responds, "I am so tempted to just swing by and at least say hi.... I'll come by and just say hi." She says, it is up to him and that he "can say hi n u can go...or eat pizza and cuddle." Id., at 22. They discussed him bringing some pie over. She told him she was "just nervous" and "sorta scared." Ibid. He replied that was why "I was hoping we can meet someplace public our first time... maybe on her way home from school." Ibid. (Which would not

have been on the evening of the arrest.) He suggested meeting someplace close to her house but not her house. Id., at 23.

She then wrote she was nervous about being his girlfriend and that she didn't "want you to think I am a dork." He then protested, "No way," and she wrote, "Well, I have never done much." He responded, "I wasn't even thinking we'd do anything. I just wanted to meet and get to know you a little better and see how it goes." Id., at 23.

The two exchanged statements that each really liked the other, and he wrote, "But doing more than hugging and kissing is a big step" and, "Like I said, I wasn't even thinking about that." Id., at 23.

Then "Amy" made two phone calls to petitioner that evening at 6:13 pm and another at 7:45 pm. 2RT 213-214; 3CT 465-469. In the first call, petitioner says he is driving over to her place and will pick up some pie for her on the way. 3CT 468. He says he would like her to come out to meet him in the front as he would hate to walk into an apartment where he didn't know who was there. Ibid. There was no discussion of sexual contact.

Back online, they continued to chat about his arrival and where she would be, but during that part of the chat, he again wrote he preferred not to meet because "my throat is throbbing again. Let's hold off for tonight." Ex. 4, at 26. He felt bad he was "bailing out." Ibid. She replied, "I want pie!!!" Id., 27. He said, "I feel bad so maybe in a couple of weeks." Ibid. He asks about a park to meet in and she says there's not one for about two miles from her place. Ibid. Then, when it appears no

meeting will occur, she reverses course and states there is indeed a park nearby where she could walk to and meet him. Id., at 28.

They arranged that she would call him in 45 minutes as he drove toward that location. Ex. 4, at 28. Just before signing off, he said, "Remember, I am sick so no kissing or nothing. Just bringing you your pie." Ibid.

In the second phone call made while he was driving to the Laguna location, petitioner repeated that he would come just to say hi and give her the pie and see what's on TV. 3CT 471. They would then "[s]ee how we get along and then, you know, if we like each other, then we can see each other again." 3CT 472. When discussing watching movies, he makes a number of statements indicating this will be a short meeting: "we'll see. I'm still kind of under the weather so, you know, I may not hang out too long either."... [¶] "Well, mainly I just want to meet you and say hi and, you know, just to break the ice and then go from there." [¶] "I mean just say hi and meet you and, uh, see how we get along." [¶] "That's all." When she replies, "That's cool," he states, "And then, you know, if you like me and I like you, then we can go out again on another weekend when there's more time and I'm feeling better." 3CT 474.

When petitioner arrived at the complex about 8:30 pm on February 18, 2006, he was arrested by the Laguna Beach Police Department when he was within fifteen to twenty feet of "Amy" after saying, "Amy?" 2RT 224, 225. He was in possession of key lime pie and a digital camera. 2RT 225. A search of his vehicle produced a MapQuest to the location and several condoms in the glove

compartment, with expired date of use notations set for January and October 2005. 2RT 263, 264. Although this incident had nothing to do with his work, petitioner was at the time an officer with the California Highway Patrol.

Upon his arrest, petitioner reported a medical condition and was taken to Saddleback Memorial Hospital for evaluation. 2RT 227. The hospital report, admitted into evidence as Exhibit B (3RT 289), reflects petitioner's complaints to medical personnel that he had been feeling ill with a sore throat and sinus congestion. Exhibit B, at p. 3. The doctor's impressions on the report are "anxiety" and "recent URI" [upper respiratory illness]. Id., at p. 4. The discharge instructions include a typewritten page of instructions on dealing with viral respiratory illness beginning with: "You have an Upper Respiratory Illness (URI) caused by a virus. Id., at p. 13. After he was cleared by the doctor for booking, he was returned to the scene for arrest, invoked his Miranda rights to counsel and silence, and was thereafter booked and processed. 2RT 227.

Arriving home at 2:20 am after bailing out of jail, he was met by Det. Lenyi who secured statements from him including that he thought there would be "intent issues," with the case and that he "thought it would be tough to convict a law enforcement officer in Orange County." RT 236.

REASONS FOR GRANTING CERTIORARI

I. DUE PROCESS OF LAW FORBIDS THE IMMEDIACY ELEMENT OF AN ATTEMPT OFFENSE TO BE STRETCHED TO DAYS AFTER A DEFENDANT'S ARREST.

"As a general rule... 'all the facts and circumstances which constitute the offence, . . .[must be] stated with such certainty and precision." Apprendi v. New Jersey, 530 U.S. 466, 478 (2000). The charge, instructions and evidence must clearly reflect the offense elements. "[T]o establish the intent, evidence of knowledge must be clear, not equivocal." Direct Sales Co. v. United States, 319 U.S. 703, 711 (1943). This established doctrine is guaranteed by 14th Amendment due process of law which demands the prosecution to bear the burden of proving all elements charged beyond a reasonable doubt. Sullivan v. Louisiana, 508 U.S. 275, 277-278 (1993).

Despite the reversal of the conviction based on the improper expansion of the temporal element of the attempt, the same flawed statement of the temporal element was recreated at the retrial. In the first trial, the prosecutor improperly expanded the time within which the jury could find the attempt to days or weeks after the arrest. Deck v. Jenkins, supra at 814 F.3d 975. At the second trial, the jury was instructed that the attempt could occur "on or about" February 18th or 19th during the meeting with Amy, or at a time "reasonably close" to those days.[2]

[2] This time expansion instruction read: "It is alleged that the crime occurred on or about February 18th, 2006. The People are not required to prove the crime took place exactly on that day, but only that it happened reasonably close to that day." 3RT 421. A second time expansion instruction read: "The People must prove that the defendant intended to commit a lewd act upon a (continued...)

These instructional enlargements to the time the jury could use to find an attempt and convict were not given in the first trial, but bolstered the improper arguments the prosecutor made in both the first trial and second trials.

The instructions strayed from the charged time of "on or about February 18th" by extending that time into the 19th, or some day "reasonably close" to the 18th or 19th. They undermined the attempt element's legal requirement of the immediacy of contemplated action. To be lawfully convicted of the attempt, the jury had to find that when petitioner was arrested on the 18th at 8:30pm, he was actually intending an immediate sexual molest and was taking direct steps to do so. That is unquestioned California law defining an attempt. But the expanded trial instructions did not come close to requiring an act "directed towards immediate consummation." People v. Dillon, 34 Cal.3d 441, 454 (1983).

Hornbook law states that acts in preparation for an offense conduct do not constitute an attempt because "there must be some appreciable fragment of the crime committed," and "it must be in such progress that it will be consummated unless interrupted by circumstances independent of the will of the attempter." People v. Buffum, 40 Cal.2d 709, 718 (1953), disapproved on another point in People v. Morante, 20 Cal.4th 403, 430 (1999); accord People v. Kipp, 18 Cal.4th 349, 376 (1998) (citing Dillon). "'[T]he act must reach far enough towards the accomplishment of the desired result to amount to the commencement of the

---

[2](...continued)
child under 14 on February 18, or 19th, 2006, during his meeting with, quote, 'Amy.'" 3RT 433.

consummation.' [Citation];" People v. Miller, 2 Cal.2d 527, 530 (1935); see also People v. Memro, 38 Cal.3d 658, 699 (1985) (noting that "the simple act of accompanying [the victim] up to [the defendant's] apartment probably fell within the 'zone of preparation'".) All these cases emphasize the requirement of immediacy between the direct step and intent to do the act. The instructions undermined this requirement of the "direct step" element.[3]

Certainly, the State is free to decide and define the elements of a crime. But once having decided upon them, it may not convict without proof beyond a reasonable doubt on every one of those elements. In re Winship, 397 U.S. 358, 364 (1970). Here, the "immediacy" element of the charge of attempt was judicially and unfairly expanded beyond due process limits.

What made these instructional expansions particularly prejudicial was the undisputed evidence showing that any intent to commit a lewd act on the 18th by petitioner was, at best, highly equivocal. He was virtually baited to come see "Amy," who demanded her pie. He told her he wanted not to come because he was feeling ill, did so at her insistence while qualifying that it would be a meet-and-greet type meeting at a public park. Thus, the jury could have convicted under the premise that even if he did not intend any act on the 18th, if he intended an act the next day or a day reasonably close to that day, he could be convicted of attempt.

[3] As Perkins puts it: "The time of intended perpetration is a factor to be considered, and may be controlling in certain situations." Perkins and Boyce, Criminal Law (3d ed. 1982) p. 619. Perkins illustrates the point with examples from case law, pointing out that if the defendant arranges everything to start a fire but plans to light the fire in the future, this is preparation; but if he plans to light it immediately, this is an attempt. Ibid.

Petitioner's counsel correctly argued against the time expansion of the instructions:

> And that "temporal," I think means, when he got there and when he was arrested, at that time, his intent and what he was going to do was to commit a lewd act…and I think that when we stretch it into the next night, then we're expanding what is the appropriate…he attempted to commit a lewd act on a child on February 18th of '06. I think that it is unnecessary to add the 19th. 1RT 141.

Further, defense counsel sought instructions stating: "In order to find the defendant guilty, the People must prove that he intended to actually commit a lewd act on Amy, on February 18th, '06, and was only prevented from committing such a lewd act by the intervention of law enforcement." 1RT 5. This instruction, in keeping with California cases defining the attempt element, would have required the jury to find that when he was arrested for the attempt, petitioner was actually intending to commit an immediate lewd act, and would have but for the intervention of the arrest. Petitioner's proposed instructions (see 3CT 403, 409, 410, 411), were denied. 2RT 278.

The given instructions were error. A reviewing court must determine "whether there is a reasonable likelihood that the jury has applied the challenged instruction" improperly. If so, it was erroneous. Boyde v. California, 494 U.S. 370 (1990). As instructional error on the critical temporal element it must be reviewed as federal constitutional error under Chapman v. California, 386 U.S. 18 (1966). The burden is on the State "to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." Id., at 24. "To say that an

error did not contribute to the verdict is ... to find that error unimportant in relation to everything else the jury considered on the issue in question, as revealed in the record." Yates v. Evatt, 501 U.S. 391, 403 (1991). The inquiry "is not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in this trial was surely unattributable to the error. That must be so, because to hypothesize a guilty verdict that was never in fact rendered – no matter how inescapable the findings to support that verdict might be – would violate the jury-trial guarantee." Sullivan v. Louisiana, 508 U.S. 275, 279 (1993).

"A conviction ought not to rest on an equivocal direction to the jury on a basic issue...." Bollenbach v. U.S., 326 U.S. 607, 612 (1946). As the federal court found in reversing the first trial, "the evidence concerning the temporal aspect of Deck's intent was not overwhelming." Deck v. Jenkins, supra at 814 F.3d 980. The repeated error in expanding the time of the alleged attempt to the next day or an undetermined "reasonably close" day was error. It was compounded by the prosecutor's argument that the attempt could occur even before petitioner drove 45 minutes to the meeting with "Amy."[4] It allowed the jury to find that an attempt did

[4] The prosecutor argued that the attempt required proof of intent plus direct steps toward an attempted molestation: "¶ What are his direct steps? ¶ He arranges the meeting with Amy during numerous chats. He confirms with Amy during telephone calls. He actually picks up the phone or has two phone calls with Amy. ¶ He leaves his house, gets in his car starts the ignition. All of those things. Walking to his car, opening the door, starting the ignition, pulling out of his driveway are all direct steps. ¶ He drives 45 miles, about an hour, to meet Amy. Up from Carlsbad in San Diego County, up Route 5, past Camp Pendleton, past the border patrol checkpoint. He goes through (continued...)

not occur on the 18th or the 19th, but rather would occur at some "reasonable" unstated time in the future after February 18th. For lack of the immediacy element, this is not an attempt under any circumstance. It resulted in actual prejudice in refuting petitioner's defense that he intended to do nothing that night but might meet Amy at an agreed date in the future.

II. IT IS UNCONSTITUTIONAL TO FAIL TO GIVE A UNANIMITY INSTRUCTION WHERE THE PROSECUTION OFFERS THE JURY TEN DIFFERENT ACTS WHICH COULD FORM THE "DIRECT STEP" ELEMENT OF THE ATTEMPT

This Court recently made clear in Ramos v. Louisiana, __U.S.__, 140 S.Ct. 1390, 206 L.Ed.2d 583 (2020), that the right to a unanimous jury is a federal constitutional right applicable to the States. This means unanimity on all elements of the offense. Apprendi v. New Jersey, 530 U.S. 466 (2000), held that the Sixth and Fourteenth Amendments require any fact, other than that of a prior conviction, "that increases the penalty for a crime beyond the prescribed statutory maximum [to] be submitted to a jury, and proved beyond a reasonable doubt." Id. at 490.

Due process "protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with

---

[4](...continued)
San Clemente, San Juan Capistrano, up into Orange County, over to the 73, and then over to Laguna Beach. ¶ He is sitting -- imagine that you're sitting in the car for an hour, driving, by yourself. You've got an hour to think about what you're doing. But he continues, he continues. He continues. ¶ And he gets to Amy's apartment complex. He parks the car. He gets out. He parks in the apartment complex. He walks over to the park. He approaches Amy, in a dark park on a Saturday night. He gets about 15 feet away, and asks, "Amy?", and that's when he is arrested. ¶ All those folks are direct steps. There is plenty of direct steps in this case. Any one of those is enough to be sufficient." 3RT 329-330; italics and bolding added.

which he is charged." In re Winship, 397 U.S. 358, 364 (1970). Consequently, any instruction or failure to instruct which would permit the state to circumvent the requirement that it prove every fact necessary for conviction beyond a reasonable doubt denies due process.

> But a state court is not free to define an element out of existence, or to ignore the element entirely when upholding a criminal conviction. Such a ruling is contrary to clearly established federal law, namely Jackson v. Virginia [443 U.S. 307 (1979)]. See 28 U.S.C. § 2254(d)(1). Indeed, the quintessence of a Jackson claim--the very meaning of In re Winship--is that every element of a crime must be proven beyond a reasonable doubt.

Goldyn v. Hayes, 444 F.3d 1062, 1070 (9th Cir. 2006).

Here, the charge was an attempt which has two elements: intent to molest and a direct act toward that goal. As the statute states: "An attempt to commit a crime consists of two elements which must temporally co-exist: a specific intent to commit the crime, and a direct but ineffectual act done toward its commission." Cal. Penal Code section 21a.

Those two elements, when temporally united, must be found by the jury unanimously. As seen from the previous argument, the prosecutor gave the jury ten choices for the direct act element stating that "any one" of them would suffice to convict. See quote at pp. 14-15, fn. 4 supra. In the face of petitioner's argument that, under the federal constitution, the jury had to be instructed that it must be unanimous on a direct act, the Opinion of the Court of Appeal stated that no unanimity instruction was required because there was only one meeting and thus only a single possible attempt: "Thus, there was only a single possible attempt.

Although there were several overt acts that could constitute the attempt, the jury need not decide on any one specific overt act as long as it unanimously found Deck committed an overt act that went beyond mere preparation." App. A, p. 18.

This analysis had two flaws of significance. First, while there was only one attempt charge, there were no overt acts alleged because the crime of attempt requires no "overt acts." Rather, the element requires a direct step. The State Opinion morphed two crimes, conspiracy which requires overt acts,[5] with the direct step element of attempt which does not. There is no unanimity required for overt acts in a conspiracy. Conspiracy "requires only an overt act, which might merely be preparatory to committing the crime and need not itself constitute a criminal attempt. [Citation]." People v. Juarez, 62 Cal.4th 1164, 1170 (2016); emphasis added.

---

[5] A conspiratorial overt act is some action showing that the conspiracy has progressed beyond a mere meeting of minds and "may be merely a part of the preliminary arrangements for commission of the ultimate crime." People v. Buono, 191 Cal.App.2d 203, 223 (1961). It is not the equivalent of a "direct step" in an attempt. The distinctions between conspiracy and attempt are manifest: "'As an inchoate crime, conspiracy fixes the point of legal intervention at [the time of] agreement to commit a crime," and "thus reaches further back into preparatory conduct than attempt….'" People v. Morante 20 Cal.4th 403, 417 (1999), citation omitted. Attempt does not require any agreement. It "requires the specific intent... and the commission of a direct but ineffectual act toward accomplishing the intended [conduct]." People v. Lee, 31 Cal.4th 613, 623 (2003). The two offenses do not possess analogous much less identical elements. While some attempt cases use "overt act" as a synonym for "direct step", they maintain the requirement of direct acts which are beyond "the preparatory stage and constituted direct and positive overt acts." People v. Watkins, 55 Cal.4th 999, 1021-22 (2012); People v. Dillon, supra at 454 (an overt act is a direct act towards immediate consummation). As noted, a conspiratorial overt act requires much less and include mere preparatory acts.

Second, the Opinion disregarded the prosecutor's misstatement that any one of ten direct acts could support a conviction.

"[W]here a unanimous verdict is required, the Courts of Appeals are in general agreement that '[u]nanimity . . . means more than a conclusory agreement that the defendant has violated the statute in question; there is a requirement of substantial agreement as to the principal factual elements underlying a specified offense.' [Citations]." McKoy v. North Carolina, 494 U.S. 433, 449 n.5 (1990) (Blackmun, J., concurring). A jury "cannot convict unless it unanimously finds that the Government has proved each element." Richardson v. United States, 526 U.S. 813, 817 (1999) (the jury must agree unanimously about which specific violations make up the continuing series of violations in a Continuing Criminal Enterprise prosecution, reasoning, "this Court has indicated that the Constitution itself limits a State's power to define crimes in ways that would permit juries to convict while disagreeing about means, at least where that definition risks serious unfairness and lacks support in history or tradition." Id. at 820.

The direct step for an attempt is a factual required element of the offense. Here, there were ten proposed such acts, as argued to the jury by the prosecutor, including ones before petitioner even got in his car; the jury was told: "[a]ny one of those is enough to be sufficient." 3RT 329-330. Those acts before getting in his car to drive to the park could not constitute direct acts. See Yates v. United States, 354 U.S. 298, 311, 312 (1957), where the trial submitted to the jury two overt acts to the jury, including an overt act barred by the statute of limitations. Since there was

no way of knowing if the jury based its verdict upon the barred act, the conviction was reversed.

In Schad v. Arizona, 501 U. S. 624 (1991) a plurality of the Court held that a first-degree murder conviction would be allowed under jury instructions that did not require agreement on whether the defendant was guilty of premeditated murder or felony murder. Even there, the Court suggested limits on a State's power to define crimes in ways that would permit juries to convict while disagreeing about means, at least where that definition risks serious unfairness and lacks support in history or tradition. Id. at 632-633 (plurality opinion).

Schad's plurality characterized the claim as "one of the permissible limits in defining criminal conduct, as reflected in the instructions to jurors applying the definitions [of elements of a crime], not one of juror unanimity." That is not the issue here given that the legislature's power to define criminal conduct is not questioned; rather, it revolves around the trial court's permission for the jury to find the direct act element non-unanimously.

Schad's opinion is questionable precedent given that is a plurality opinion and is pre-Ramos and pre-Apprendi. It cannot support the State court conclusion that unanimity was not required on one of the ten direct acts the prosecutor told the jury that could suffice to prove the element. Schad should be revisited by the Court.

Failure to give a unanimity instruction lowered the prosecution's burden to prove guilt beyond a reasonable doubt and violates the federal constitutional right to due process of law. Accordingly, under Chapman v. California 386 U.S. 18, 26

(1967), the State must show the error is harmless beyond a reasonable doubt, and the case should be remanded for consideration of prejudice.

III. UNDER MARYLAND V. SHATZER, 559 U.S. 98 (2010), AFTER AN INVOCATION OF THE RIGHT TO COUNSEL, POLICE MAY NOT INITIATE A CONVERSATION WITH A SUSPECT A FEW HOURS AFTERWARD AT HIS HOME DURING EXECUTION OF A SEARCH WARRANT.

A. The rule of Shatzer is that once a suspect invokes his right to counsel, he cannot be questioned for at least 14 days. This rule applies even when the suspect has been released from custody. Here, petitioner invoked his right to counsel and silence and then within a few hours, and without waiving his rights, was questioned again by the same officer before whom he invoked. The Court of Appeal found petitioner was not in custody at the time of questioning, therefore Shatzer does not apply. See App. A, 10, 11-12, fn. 3. This is a wrong interpretation of Shatzer. Such a ruling invites the gamesmanship Shatzer sought to avoid.

Shatzer does not support the Opinion's ruling. Shatzer ruled that Shatzer was not in "custody" for Miranda purposes during the renewed effort to speak with him. Holding that where a defendant/inmate is brought to an interview room in prison and asserts his right to counsel, and is then put back in the general prison population for years, he has been "released." Under these circumstances, a renewed effort to talk to him within 14 days of his invocation would run afoul of Edwards v. Arizona, 451 U.S. 477 (1981).[6] It was only the passage of several years

[6] Edwards v. Arizona held that once a suspect invokes his right to counsel, "a valid waiver of that right cannot be established by showing only that he responded to further police-initiated custodial interrogation." 451 U.S. pp. 484. The Court has recognized that Edwards is a bright-line rule. Davis v. (continued...)

between Shatzer's invocation and the renewed talk that permitted the second interrogation to be deemed non-violative of Edwards.

The two week period of post-invocation time, whether custody continues or not, "provides plenty of time for the suspect to get reacclimated to his normal life, to consult with friends and counsel, and to shake off any residual coercive effects of his prior custody." 559 U.S. 110. Shatzer makes no sense if, as here, a few hours after a night-time custodial invocation, the police can start up another conversation with the suspect outside a custody environment in the early morning hours following his arrest, invocation, and release on bail.

Ironically, the California Supreme Court appears to agree. In People v. Storm, 28 Cal.4th 1007, 1013 (2002), a pre-Shatzer case, the defendant invoked his right to counsel, was released from custody, and two days later was interrogated at his apartment. The California Supreme Court held that that the "two-day midweek hiatus ... was amply sufficient to dissipate custodial pressures and permit defendant to consult counsel. Storm, supra, 28 Cal.4th pp. 1024-1025. The two day break was deemed "minimally sufficient" for someone to contact counsel. (Petitioner had no such opportunity having been arrested at 8:30 pm, sent to the

[6](...continued)
United States, 512 U.S. 452, 461 (1994) ("The Edwards rule . . . provides a bright line that can be applied by officers in the real world of investigation and interrogation without unduly hampering the gathering of information."); Smith v. Illinois, 469 U.S. 91, 98 (1984) (per curiam) ("Edwards set forth a 'bright-line rule' that all questioning must cease after an accused requests counsel.") (emphasis in original); Solem v. Stumes, 465 U.S. 638, 646 (1984) ("Edwards established a bright-line rule to safeguard pre-existing rights[.]"); Michigan v. Jackson, 475 U.S. 625, 634 (1986) ("one of the characteristics of Edwards is its clear, 'bright-line' quality").

hospital, booked at jail, released on bail, then drove home, arrived at 2:30 am where thereafter he had his discussion with Det. Lenyi as his home was searched by multiple officers).

Storm involved a suspect out of custody. The Court would have found an Edwards violation if the break had been, as in this case, insufficient to contact counsel. While Storm's assumption that a break of two days could permit reinterviewing was in error given the subsequent ruling in Shatzer, Storm adopted the rule that with regard to a suspect recently released from custody:

> We conclude only that Edwards is not violated when the police recontact a suspect after a break in custody which gives the suspect reasonable time and opportunity, while free from coercive custodial pressures, to consult counsel if he or she wishes to do so. We do not suggest the police can avoid Edwards simply by allowing the suspect to step outside the station house at midnight on a Saturday, then promptly rearresting him without affording any realistic opportunity to seek counsel's assistance free of the coercive atmosphere of custody.
>
> We are persuaded, however, that the two-day midweek hiatus at issue here, from Tuesday, November 19, 1996, to Thursday, November 21, 1996, was amply sufficient to dissipate custodial pressures and permit defendant to consult counsel.

People v. Storm, supra at 1024-1025; italics added.

In People v. Bridgeford, 241 Cal.App.4th 887, 903 (2015), the court noted "appellant's second interview was conducted in violation of the Edwards rule, as interpreted by Shatzer, when the second interview occurred only hours after appellant invoked his right to counsel and was released from custody." As Bridgeford states:

> Under Shatzer, law enforcement must wait 14 days before it may resume questioning (absent initiation by the suspect or with the

> presence of counsel) after a suspect has invoked his or her right to counsel and is released from custody. Shatzer, at pp. 105, 110.

241 Cal.App.4th 890; emphasis added.

Bridgeford continues:

> Shatzer commented that the 14-day limitation avoided "gamesmanship" by law enforcement whereby a suspect could invoke his right to counsel, be released from custody briefly to end the Edwards presumption, and then be promptly brought back into custody for reinterrogation. (Id. at pp. 110–111.) Under its facts, Shatzer determined the defendant's return to the general prison population [for several years] was a break in custody of sufficient duration to end the Edwards presumption so that suppression of his statements was not warranted. Id. at p. 117.

241 Cal.App.4th 902.

While Bridgeford was released after his invocation and then shortly thereafter taken back to the police station for questioning, the fact that the renewed questioning occurred in the station rather than his home would not allow the suspect to "shake off any residual coercive effects of his prior custody." Shatzer, supra at 110.

Simply stated, a minimal break in custody does not present a principled basis upon which to restrict the scope of Edwards. Edwards found that asking for counsel is a significant event beyond deciding to remain silent: "additional safeguards are necessary when the accused asks for counsel." Edwards, 451 U.S. at 484. When a suspect being questioned by a police officer asks for an attorney, it is because the person wants help in dealing with the investigative authorities. Whether the person is released from the police station out onto the street, or is released to the general prison population, the fact of the release does not affect the validity of the request for counsel. Arizona v. Roberson, 486 U.S. 675, 683 (1988), recognized that "the

presumption raised by a suspect's request for counsel -- that he considers himself unable to deal with the pressures of custodial interrogation without legal assistance -- does not disappear simply because the police have approached the suspect, still in custody, still without counsel, about a separate investigation." A suspect who has requested counsel must, even if there has been a break in custody, be presumed to want to have counsel to assist him or her in dealing with a second interrogation regarding the same criminal allegations. Creation of a brief break in custody exception would permit or encourage the police to ignore a suspect's request for counsel in the hope that the suspect will change his or her mind after a few hours respite from custody. This Court should not permit police to reinitiate interrogation of a suspect concerning the very same offense as to which he invoked the right to counsel just hours before.

B. Alternatively, petitioner was in custody in that he was not free to move about during the subsequent talk with Detective Lenyi while a team of police searched his residence.

Shatzer applies to the case without a custody restraint, but alternatively even if custody is required, there was custody in this case because petitioner was not free to leave when Det. Lenyi was talking to him at his home. Cf., Opinion., p. 10, 11, where the Court of Appeal rules there was no custody during the second interview, and thus no Shatzer violation. Having just been arrested at 8:30 pm, taken to the hospital, then back to the arrest scene where he invoked his rights at 10:27 pm (1RT 48), and then booked into jail, bailed out, drove home, and a few

hours later is confronted by a number of law enforcement officers searching his home (1RT 49), is told his movements in his home were restricted with one officer keeping an eye on him, and then asked about images on his computer,[7] no reasonable person would feel free to get up and walk out. The fact that hours earlier an officer (Wiseman) told petitioner when he drove up in his car that he was free to leave due to the search, this was well before Det. Lenyi's talk with him in an entirely different environment. This was custody and the renewed interview by Lenyi prompted statements in violation of Miranda and progeny. Indeed, the judge handling the first trial found custodial interrogation and suppressed the statements as Miranda violative. 3CT 371-372.

Additional facts. Petitioner did not initiate the conversation in his home. Det. Lenyi came to him and sat next to him on the sofa after he and the team arrived to deliver and execute a search warrant. 1RT 50. Lenyi arrived at the home about 3 to 5 a.m. 1RT 49. Petitioner was being "monitored" by the officers already there "so that he wouldn't be able to interfere with or touch any items." Id. at 56. Lenyi's purpose was "to keep an eye" on petitioner. 1RT 50. Lenyi immediately started talking to petitioner out of concern for his well-being by downplaying the seriousness of the arrest and that he might not face much custody. 1RT 50, 57-58. Had petitioner tried to walk around, Lenyi would have followed him to make sure he didn't interrupt the search operation. Id. at 54. Lenyi told him, "We're going to

[7] The trial court was "more concerned about Lenyi's question of petitioner, 'What are we going to find on your computer.'" That is the functional equivalent to an interrogation, per Rhode Island v. Innis, 446 U.S. 291 (1980). Nevertheless, the court found no custody. 1RT 98.

seize your computer." Id. at 60. He added that petitioner need not worry so long as there was nothing incriminating on it. Petitioner replied with statements about deleted logs and girls who sent him naked pictures. Ibid. Lenyi said there wouldn't be a problem if the girls weren't underage. Id. at 61.

Lenyi did not recall the sequence of these topics in his discussion with petitioner. The discussion about the computer could have been in the beginning of his talk with petitioner. Id. at 61. Lenyi told petitioner if this event was a "stand alone" one, that "maybe things won't be so bad." Petitioner replied it was a stand alone event with "Amy." Id. at 65. Lenyi told petitioner the forensic people would look to find pictures on his computer. Id. at 66. After being told that if it was a stand-alone situation, things might not be so bad for him, petitioner replied he was concerned about his job. Id. at 66. They discussed retirement and the burden of proof in an internal affairs versus a criminal investigation. Id. at 67. It was around that time when they were discussing the burden of proof that petitioner said, "it's hard to convict a police officer in Orange County." Id. at 69. Lenyi didn't recall when in the sequence the comment about proof of intent came up but it was probably at the time they were discussing administrative versus criminal investigations. Id. at 69-70, 72. This was because in discussing the different standards, intent would be a more difficult issue of proof in a criminal case. Id. at 72-73.

On redirect examination, Lenyi said that it was after talk about the contents of the computer that the discussion about the difficulty of proof of intent arose as

well as the difficulty of convicting a law enforcement officer. Id. at 75. At the end of the conversation with petitioner, "the team left the residence." Id. at 53.[8]

Although not belligerent, the renewed contact with petitioner was an interrogative discussion about the case. Restricting the reach of Edwards rule only to discussions amounting to formal "interrogations" undermines the policy of deferring to a suspect's wishes of his right to counsel. As Shatzer, supra, at 104, noted, Edwards is based on the premise that a suspect who requests a lawyer has "indicate[d] that 'he is not capable of undergoing . . . questioning without advice of counsel.'"

In sum, Shatzer surely applies in this instance where the re-contact with petitioner occurred a few hours after his right to counsel invocation where the second contact involved "custody." Whatever the label of the discussion at petitioner's home, he was not free of the taint of the arrest, jailing and bonding out. The circumstances amounted to custody given the environment at the time of the discussion. The statements should have been suppressed.

As to prejudice, the elicited statements were used to effect by the prosecutor from the start of the case. In opening statement, he told the jurors:

> Now, the defendant went to his house for an execution of the search warrant. There was some small talk with some of the detectives there,

[8] The Opinion alternatively holds there was no interrogation at the home because petitioner made the statements to Lenyi after the other police left his home. App. A, p. 11, fn. 3. This is in error. As petitioner informed the Court of Appeal in his petition for rehearing, Lenyi testified that "at the end of your conversation, the team left the residence." 1RT 53, emphasis supplied. No correction was made.

> and he mentioned to one of the detectives, "you know, you're going to have intent issues on this case." He knows what the law is, because he is a police officer. He is a lieutenant in the Highway Patrol. And you will hear, even back on that day that he was arrested, he was already planting the seed; that he is going to have an intent defense, that the police are going to have intent issues with the case. ¶ And he also said "you know what, it's going to be hard to convict a cop, a law enforcement officer in Orange County." That's what he said, the day after he was arrested. RTAUG 4-5.

Then the evidence of the statements was brought out through the testimony of Det. Lenyi during trial.

> Q. Chief ... you were at the house while the search warrant was being executed?
> A. Yes.
> Q. So there were other detectives or officers there doing that?
> A. Yes, there were.
> Q. And you were hanging out with the defendant in the living room area?
> A. Correct.
> Q. During your conversation with the defendant in his house, did he make a comment that he thought there would be, quote/unquote, "intent issues," unquote, with the case?
> A. Yes, he did.
> Q. Did he also tell you that he thought it would be tough to convict a law enforcement officer in Orange County?
> A. Yes, he did. 2RT 236.

In final argument, the prosecutor used the statements to effect: "Look at the totality of the circumstances. The chat with Amy. The other chats with the two other girls. The phone calls. The defendant's statement with Detective Lenyi, where he said, "You're going to have intent issues in this case and it will be hard to convict a cop in Orange County...." 3RT 391. "Folks, it's not difficult to convict a law enforcement officer in Orange County.... Show the defendant that it's not difficult to convict a law enforcement in Orange County." 3RT 392.

In Yates v. Evatt, 500 U.S. 391, 402-403 (1991), the Court held "[t]he Chapman test is whether it appears 'beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.'" "To say that an error did not contribute to the verdict is . . . to find that error unimportant in relation to everything else the jury considered on the issue in question...." Id., 403.

This error is reversible because it was prejudicial given the manner in which the statements were used. This was not an error that was "unimportant." It was exploited in opening statement, in evidence and in final argument.

CONCLUSION

For all of the reasons stated above, the petitioner respectfully requests that this Court grant his writ of certiorari.

s/Charles M. Sevilla

CHARLES M. SEVILLA
Counsel for the Petitioner
Law Offices
402 W. Broadway, #720
San Diego, CA 92101
(619) 232-2222
chuck@charlessevilla.com

Appendix A

Court of Appeal, Fourth Appellate District, Division Three Kevin J. Lane,
Clerk/Executive Officer Electronically FILED on 5/12/2020 by Nettie De La Cruz, Deputy Clerk

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FOURTH APPELLATE DISTRICT
DIVISION THREE

THE PEOPLE,	) No. G057168
	)
	) (Super. Ct. No. 06HF0372)
Plaintiff-respondent,	)
v.	) O P I N I O N
	)
STEPHEN ROBERT DECK,	)
	) Orange County No.
Defendant-appellant	) 06 HF0372
	)

Appeal from a judgment of the Superior Court of Orange County, John Conley, Judge. Affirmed.

Charles M. Sevilla, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Lance E. Winters, Assistant Attorney General, Stephanie A. Miyoshi and David A. Wildman, Deputy Attorneys General, for Plaintiff and Respondent.

* * *

This case is before us for a second time. Previously, we affirmed appellant Stephen Deck's conviction for attempting to commit a lewd act on a child (Pen. Code, § 288, subd. (a); all further statutory citations are to the Penal Code unless otherwise stated). In our opinion, we concluded the prosecutor's misstatements about the law of attempt were harmless because the trial court correctly instructed the jury on the law. (People v. Deck (May 24, 2011, G043434) [nonpub. opn.].) The district court dismissed Deck's petition for federal habeas relief, but on September 29, 2014, the Ninth Circuit Court of Appeals found the prosecutorial error prejudicial and instructed the district court to grant the writ of habeas corpus unless the State granted a new trial to Deck within a reasonable time. (Deck v. Jenkins (9th Cir. 2014) 768 F.3d 1015.) On February 9, 2016, the Ninth Circuit denied the Attorney General's petition for rehearing and rehearing en banc.

Following retrial, a jury found Deck guilty of attempting to commit a lewd act on a child. The trial court reimposed the same five-year probation term Deck received after his first trial, with credit for serving one year in county jail.

Deck contends the trial court erred in denying his motion to suppress certain statements he made to a police officer during the search of his residence. We conclude there was no error because the statements were not elicited during a custodial interrogation.

Deck also raises several claims of instructional error. He contends the attempt instructions unduly expanded the temporal scope of an attempt because the jury could have misapplied the instructions to convict him for acts that occurred several days before the attempt. As explained below, we conclude there was no reasonable likelihood the jury misapplied the instructions in the manner suggested. Deck also contends the trial court erred in denying a proposed pinpoint instruction, but we find no error because the pinpoint instruction was duplicative and potentially confusing. Finally, he contends a unanimity instruction was required because the prosecutor argued several overt acts constituted the attempt. We

conclude no unanimity instruction was required because the evidence showed only a single attempt. Accordingly, we affirm the judgment.

I

FACTUAL AND PROCEDURAL BACKGROUND

Perverted Justice is a nonprofit corporation that uses trained volunteers to act as child decoys while participating in online conversations with adults who seek to arrange sexual liaisons with minors. Once an adult contacts a decoy online, raises the topic of sex and attempts to arrange a meeting with the fictitious minor, Perverted Justice provides law enforcement its computer logs or transcripts of the online conversations for further investigation.

In February 2006, the Laguna Beach Police Department worked with Perverted Justice volunteers on a sting operation to identify and arrest adults using the Internet to meet minors for sex. The operation followed a set protocol. After online conversations confirm the adult's intent, the decoys arrange a meeting between the adult and fictitious minor at an apartment in Laguna Beach. Perverted Justice volunteers arrange at least one phone conversation before meeting the adult to confirm the adult's identity. Police officers would then arrest the adult when he arrived at the apartment.

Carolyn Graham, a Perverted Justice volunteer, acted as a decoy for the sting operation. She created online profiles on Yahoo! and MySpace for a fictitious 13-year-old girl named "Amy." In creating the profiles, Graham used an actual 13-year-old girl's photograph taken from a database of preapproved minors. She used the Yahoo! screen name "Ima_beangirl2."

On February 12, 2006, Deck used the screen name "South_Calif_46M" to contact "Ima_beangirl2" in a Yahoo! chat room. He sent Graham a message saying, "Hi, Bean! Older for younger here." When Graham responded, the two proceeded to chat online privately.

During this initial conversation, Graham confirmed Deck realized her age by asking, "You know, I am 13?" Deck responded, "Yeah," and explained he reviewed "Amy's" Yahoo! and MySpace profiles. The two exchanged their first names and Deck sent Graham a photo of himself. He asked if she liked "older guys" and described himself as "available and looking." Deck explained dating would be "kinda hard though with the age difference" because he thought Graham's "mom would [not] like it much." Deck later stated: "I'd love to date you."

Deck suggested they could meet after school and get some ice cream or go for a walk on the beach. Deck also asked Graham whether her mother would be working the upcoming weekend, and proposed meeting in a public place "where it is safe" so Graham would feel more "comfortable." When Graham expressed concern someone might see them together in public, Deck suggested she tell anyone who saw them together he was her father. He volunteered he "wish[ed] he was your daddy" and "just like[d] that daughter-daddy thing."

Throughout the conversation, Deck referred to Graham as "hot" or a "hottie," and described her online profile picture as "sexy" and "a little slutty." Deck also told Graham he "loved [her] makeup" and thought she had "beautiful lips." They ended this initial conversation by exchanging virtual "hugs and kisses."

Following their initial conversation, Deck and Graham chatted online during five of the next six days. During the first of these conversations, Deck again asked Graham if her mother was working the upcoming weekend. When Graham stated her mother would be working, he suggested meeting on the upcoming Saturday. Deck stated they would go shopping at Fashion Island Mall and "holding each other, [with] passionate kisses, touching and caressing one another . . . ." He confessed he would "love to hold you and kiss you." When Graham stated Deck should bring some pie, Deck made a reference to oral sex, saying, "hehehe. I think you have all the pie I want to eat! LOL." Graham responded that she had never been given oral sex, and Deck stated, "No? I bet you'd really love it . . . I mean

REALLY love it." During the next few chats, Deck reiterated, "I want to kiss you so bad," and "I need your hugs."

On the day of their planned meeting, Deck and Graham chatted online several times. He told her he had a sore throat and might be unable to meet that day, but said, "I still love you." He asked for "Amy's" address so he could "check it out on Map Quest." Graham gave him the address of the apartment used for the sting operation.

Later in the day, the two conversed online again. Deck professed he really wanted to see "Amy," but did not feel well. Nonetheless, he promised to stop by her apartment "just [to] say hi" and promised to bring a piece of pie. He provided Graham a phone number and suggested she call him collect so the number would not appear on her mother's phone bill. Sara Oliver, another Perverted Justice volunteer, phoned Deck at 6:13 p.m. Deck told Oliver the drive from his house would take about an hour and asked "Amy" to meet him in front of her apartment complex. Deck explained he would "hate to walk into an apartment where I don't know — really know who's there" and he wanted to "make sure if it's real and you're there . . . ."

After the phone call, Deck and Graham resumed their chat online. He explained he still felt ill and asked to postpone their meeting until one day after school. When Graham explained she could not meet after school because she carpooled with another student, Deck asked to meet her in a public place close to her apartment. They finally agreed on a small park across the street from "Amy's" apartment complex. Before signing off his computer, Deck added, "Remember I am sick so no kissing or nothing. Just bringing you your pie." He stressed they would "hang out" and, if they liked each other, they would go out as "boyfriend and girlfriend" on another weekend when he felt better.

Deck made the 45 mile drive from his residence to "Amy's" apartment, arriving around 8:30 p.m. He parked in the apartment complex's parking lot and walked to the park for his rendezvous with "Amy." Spotting a female sitting at a

picnic table in the park, Deck approached and greeted her as "Amy." After she confirmed Deck was "Steve," the police arrested him.

Investigators searched Deck and found a digital camera and the piece of pie he promised to bring "Amy." They also searched Deck's car, where they found a map of "Amy's" apartment and six packaged condoms past the listed expiration date. After he was booked, Deck was released on bail and went home.

The following morning Detective Darin Lenyi and other investigators searched Deck's residence. Deck, a California Highway Patrol officer, was present and told Lenyi he thought there would be "intent issues" with the case and it would be tough to convict a law enforcement officer in Orange County.

Investigators seized Deck's computer and found partial chat logs of Deck's online conversations with Graham. His internet browser history showed he visited a website for people interested in "daughter-daddy" relationships a few hours before he met "Amy." Deck's computer also had full logs of November 2005 chats he had with two other persons who identified as 13-year-old girls — Allison and Kirstin. These logs revealed Deck's online chats with these girls were similar to the chats he had with Graham. He made references to these girls being "hot" and "sexy" and he discussed sexual acts with them. Deck also attempted to arrange meetings with the girls.

II

DISCUSSION

A. The Trial Court Properly Denied the Motion to Suppress

Before trial, defense counsel moved to suppress Deck's statements to Detective Lenyi during the search of his home, arguing they were obtained in violation of Miranda.[1] The trial court denied the motion after finding that Deck had not invoked his right to counsel and he was not in custody when he spoke to Lenyi. Deck challenges both findings. In reviewing the trial court's ruling on a motion to suppress, we defer to the trial court's findings of fact, both express

[1] Miranda v. Arizona (1966) 384 U.S. 436.

and implied, if supported by substantial evidence, but independently apply the pertinent legal principles to those facts to determine whether the motion should have been granted. (People v. Carter (2005) 36 Cal.4th 1114, 1140.)

1. Factual Background

At the hearing on Deck's suppression motion, Lenyi testified that after Deck was arrested, he read Deck his Miranda rights and Deck invoked his right to remain silent. The transcript of the rights advisal reflects that after Lenyi read the Miranda advisements, Deck stated "I don't wish to waive my rights." When asked whether he wanted to speak with Lenyi, Deck responded, "No."

Investigator Wiseman testified that, on February 18, 2006, after Deck was arrested, he and other officers went to Deck's home to "secure it for a search warrant." When Deck arrived at his residence early the next morning after being released from police custody, Wiseman "told [Deck], he was not under arrest. He was free to leave." At around 7:30 a.m., Lenyi arrived with the search warrant. Deck, who was lying on his couch, was not handcuffed or restrained while the officers conducted the search.

Lenyi, who was afraid Deck might harm himself after the officers left, asked Deck, "when we leave, are you going to be okay? Is there anyone that you can talk to?" Deck expressed concern about retaining his employment with the California Highway Patrol and talked about retirement. He volunteered it was difficult to convict a law enforcement official in Orange County. He also said there might be "intent issues" based on the sting operation.

Lenyi informed Deck they were going to seize Deck's computer but Deck did not have anything to worry about unless investigators found something incriminating. Deck replied, "Well, there might be some logs that were deleted six months or a year ago," referring to girls who had sent him naked pictures of themselves. Lenyi said, "[Y]ou don't have anything – you shouldn't worry, unless you have something to worry about, about what's on your computer." Deck responded, "Well, there might be some pictures of naked girls" or "pictures of girls

who are naked, who sent those pictures to me." Lenyi replied, "It wouldn't be a problem, as long as they are not underage." Deck said, "Well, they weren't underage" or "I don't believe they were underage."

The trial court denied the suppression motion, explaining Deck invoked his right to silence, not his right to an attorney, when given Miranda warnings after his arrest and while in custody. The court found Deck's comments about difficulty convicting law enforcement officers and problems with intent were volunteered and therefore not made in response to any interrogation. But the court found Deck did not volunteer statements about what was on the computer because these comments were elicited after the "functional equivalent of an interrogation." The court, however, did not suppress those statements because it found Deck was not in custody at the time.[2]

2. Analysis

Under Miranda, statements obtained during custodial interrogation can be used at trial only if law enforcement gave the defendant certain advisements. (Miranda, supra, 384 U.S. at p. 444.) "In determining whether a person is in custody . . . , the initial step is to ascertain whether, in light of 'the objective circumstances of the interrogation,' [citation], a 'reasonable person [would] have felt he or she was not at liberty to terminate the interrogation and leave.'" (Howes v. Fields (2012) 565 U.S. 499, 509 (Howes).) "Relevant factors include the location of the questioning, [citation], its duration, [citation], statements made during the interview, [citations], the presence or absence of physical restraints during the questioning, [citation], and the release of the interviewee at the end of the questioning, [citation]." (Ibid.) However, "[n]ot all restraints on freedom of movement amount to custody for purposes of Miranda. We have 'decline[d] to accord talismanic power' to the freedom-of-movement inquiry, [citation], and have instead asked the additional question whether the relevant environment presents the same

[2] Deck's statements about the contents on his computer were not introduced at trial.

inherently coercive pressures as the type of station house questioning at issue in Miranda." (Ibid.)

Once a suspect invokes the Miranda right to counsel for interrogation regarding one offense, he may not be interrogated regarding any offense unless counsel is present. (McNeil v. Wisconsin (1991) 501 U.S. 171, 177, citing Edwards v. Arizona (1981) 451 U.S. 477, 484 (Edwards).) Whether a suspect has actually invoked his right to counsel is an objective inquiry. (Davis v. United States (1994) 512 U.S. 452, 458.) A suspect must unambiguously request counsel, that is, "he must articulate his desire to have counsel present sufficiently clearly that a reasonable police officer in the circumstances would understand the statement to be a request for an attorney." (Id. at p. 459.) "In every case involving Edwards, the courts must determine whether the suspect was in custody when he requested counsel and when he later made the statements he seeks to suppress. Now, in cases where there is an alleged break in custody, they simply have to repeat the inquiry for the time between the initial invocation and reinterrogation. In most cases, that determination will be easy. And when it is determined that the defendant pleading Edwards has been out of custody for two weeks before the contested interrogation, the court is spared the fact-intensive inquiry into whether he ever, anywhere, asserted his Miranda right to counsel." (Maryland v. Shatzer (2010) 559 U.S. 98, 111-112 (Shatzer).)

Here, the trial court determined Deck had not invoked his Miranda right to counsel. The record, however, shows Deck told the arresting officer, "I don't wish to waive my rights." Those rights include the right to counsel. Deck's statement therefore constituted an unambiguous invocation of his Miranda right to counsel. Nevertheless, the initial invocation does not resolve whether his later statements to Lenyi during the police search of his home were elicited improperly. Rather, because there was a break in custody that did not last more than 14 days, we must determine whether those statements

were obtained during a second custodial interrogation. (Shatzer, supra, 559 U.S. at p. 111.)

When Lenyi asked Deck about his well-being once the other officers left, the questioning occurred in Deck's living room while Deck was lying on his couch. (Cf. U.S. v. Craighead (9th Cir. 2008) 539 F.3d 1073, 1086 (Craighead) [suspect was escorted to a back storage room and the door was closed behind him].) The questioning was brief, consisting of four statements by Lenyi. Deck was not handcuffed or physically restrained. Wiseman had informed Deck he was not under arrest and therefore Deck was free to leave. Nothing suggests Wiseman's statement to Deck lacked credibility. (Cf. Craighead, at p. 1088 [presence of agents from three different law enforcement agencies left suspect with doubt as to whether officer had the authority to pronounce him free to leave].) Although Deck was not free to walk about his home unescorted, this constraint on his freedom of movement, by itself, did not amount to custody. (Howes, supra, 565 U.S. at p. 509.) "[W]hen law enforcement agents conduct an in-home interrogation while conducting a lawful search of the home, physical control of the suspect will be necessary to preserve evidence and protect the safety of the agents." (Craighead, supra, 539 F.3d at p. 1086.) Deck thus was not in custody when Lenyi questioned him. The trial court therefore properly denied Deck's motion to suppress.[3]

---

[3] Citing Shatzer, supra, 559 U.S. 98, and People v. Bridgeford (2015) 241 Cal.App.4th 887 (Bridgeford), Deck contends even a noncustodial interrogation would violate Edwards. In support, Deck quotes Bridgeford's holding that "appellant's second interview was conducted in violation of the Edwards rule, as interpreted by Shatzer, when the second interview occurred only hours after appellant invoked his right to counsel and was released from custody." (Bridgeford, 241 Cal.App.4th at p. 902, italics added.) Deck misreads Shatzer and Bridgeford.

In Shatzer, the U.S. Supreme Court created a break-in-custody exception to the Edwards rule, and established a bright-line rule that there is no Edwards violation where the break-in-custody period is 14 days or more. (See Shatzer, supra, 559 U.S. at pp. 108-111.) The Supreme Court never suggested there can be an Edwards violation if the second interrogation is noncustodial. Rather, it affirmed that the "only logical endpoint of Edwards

(continued...)

B. There Is No Reasonable Likelihood the Jury Misapplied the Attempt Instructions

Deck contends the attempt instructions unduly expanded the temporal scope of an attempt, "allow[ing] a conviction based on a speculative future intent/attempt which could have occurred sometime on the 19th or reasonably close to that date." We independently review whether a jury instruction correctly states the law. (People v. Posey (2004) 32 Cal.4th 193, 218.) Where "the claim is that the instruction is ambiguous and therefore subject to an erroneous interpretation," "the proper inquiry in such a case is

---

[3](...continued)

disability is termination of Miranda custody and any of its lingering effects. Without that limitation—and barring some purely arbitrary time limit —every Edwards prohibition of custodial interrogation of a particular suspect would be eternal." (Id. at pp. 108-109, italics added and footnote omitted.) As noted above, the Court instructed that "[i]n every case involving Edwards, the courts must determine whether the suspect was in custody when he requested counsel and when he later made the statements he seeks to suppress." (Id. at p. 111, italics added.) Thus, there cannot be an Edwards violation if the second interrogation is noncustodial. Because Bridgeford, supra, 241 Cal.App.4th 887, merely applied Shatzer, its holding cannot be interpreted to the contrary. Additionally, Bridgeford is factually distinguishable because the second interrogation there was custodial. (See Bridgeford, supra, 241 Cal.App.4th at p. 899 [trial court determined appellant was out of custody between the first and second interviews, both of which occurred at the sheriff's substation, for a period no less than two hours and no more than three and a half hours].) Thus, neither Shatzer nor Bridgeford supports Deck's contention that the Edwards rule applies to noncustodial interrogations.

Moreover, the prosecution introduced only Deck's statements following Lenyi's initial questions about Deck's well-being after the police left. These questions were not prohibited by Miranda because they were not reasonably calculated to elicit an incriminating statement. (See Rhode Island v. Innis (1980) 446 U.S. 291, 301 ["'interrogation' under Miranda refers not only to express questioning, but also to any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect"].) The absence of an interrogation seeking an incriminating response constitutes a separate and independent ground for the trial court to deny Deck's motion to suppress.

whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence." (Boyde v. California (1990) 494 U.S. 370, 380.)

1. Relevant background

The information charged Deck with a single count of attempted lewd act with a child under 14 years old "on or about" February 18, 2006. Before trial, the parties discussed the temporal requirement for an attempt crime. The trial court expressed concern that instructing the jury the proposed meeting with "Amy" occurred "on or about" February 18, 2006, would preclude an attempt charge if the proposed meeting did not occur until past midnight. To address the court's concern, defense counsel suggested the court could modify the instruction to state "on 2/18 or 2/19," and the prosecutor and the court agreed with this suggestion. Later, during the trial, defense counsel asked the court to "reconsider . . . adding the 19th" to the instructions because "then I think it expands it beyond the time and place when he got arrested." The prosecutor noted Deck had talked about watching television with "Amy" so the lewd act could have occurred past midnight. The trial court did not make a ruling on the instructions.

Toward the end of trial, defense counsel asked the trial court to modify the attempt instruction (CALCRIM No. 460) to state the prosecution must prove the defendant intended to commit a lewd act on a child under 14 "during the proposed February 18th meeting." The trial court denied the requested modification.

Ultimately, the trial court gave the following modified version of CALCRIM No. 460:

"The defendant is charged with attempted lewd act on a child under 14.

"To prove that the defendant [is] guilty of this crime, the People must prove that:

"1. The defendant took a direct, but ineffective step toward committing a lewd act on a child under 14.

" 2. The defendant intended to commit a lewd act upon a child under 14.

"A direct step requires more than merely planning or preparing to commit a lewd act on a child under 14, or obtaining or arranging for something needed to commit a lewd act upon a child under 14. A direct step is one that goes beyond planning or preparation and shows that a person is putting his or her plan into action.

"A direct step indicates a definite and unambiguous intent to commit a lewd act upon a child under 14. It's a direct movement toward the commission of a crime, after preparations are made. It's an immediate step that puts the plan in motion, so the plan would have been completed if some circumstance outside of the plan had not interrupted the attempt.

. . .

"The People must prove that the defendant intended to commit a lewd act upon a child under 14 on February 18th, or 19th, 2006, during his meeting with, quote, Amy."

Before giving CALCRIM No. 460, the trial court gave preliminary instructions, including CALCRIM No. 207, which provides: "It is alleged that the crime occurred [on] or about February 18th, 2006. The People are not required to prove the crime took place exactly on that day, but only that it happened reasonably close to that day."

The jury also was instructed with a modified version of CALCRIM No. 251, which provided: "The crime charged in this case requires proof of the union, or joint operation, of act and wrongful intent. For you to find a person guilty in this case, that person must not only intentionally commit the prohibited act, but must do so with a specific intent."

During closing argument, defense counsel urged the jury to focus on whether Deck intended to commit a lewd act with a 13-year-old child "sometime in the future" or "during this meeting." Counsel argued the jury should decide "But for the intervention of the police, would this have happened on this day?" Later, counsel

argued the evidence showed "that when [Deck] is talking to her, particularly on the 18th, he is not intending to do it that day."

In rebuttal, the prosecutor argued:

"[Defense counsel] said that I have to prove to you that he was going to commit a lewd act on February 18, 2006. [¶] Folks, he doesn't -- the defendant doesn't turn into a pumpkin at midnight. Let me tell you what the law says. There are two relevant instructions on this. [¶] First, it's alleged that the crime occurred on or about February 18th, 2006. [¶] The People are not required to prove that the crime took place exactly on that day, but only that it happened reasonably close to that day. [¶] The second relevant instruction is the intent instruction. And the last sentence of that says:

[¶] 'The People must prove that the defendant intended to commit a lewd act upon a child, under 14, on February 18th or 19th, 2006, during his meeting with Amy.' [¶] So the actual day, February 18th, doesn't have any significance, in the sense that if the alleged lewd conduct didn't happen before midnight, it's not a crime. He doesn't turn into a pumpkin at midnight. It's any time that evening, early the next morning, during that meeting he had with Amy, that he was going to commit a lewd act."

2. Analysis

"An attempt to commit a lewd act upon a child requires both an intent to arouse, appeal to, or gratify 'the lust, passions, or sexual desires of [the defendant] or the child' [citations] 'and . . . a direct if possibly ineffectual step toward that goal — in other words, he attempted to violate section 288.' [Citation.]" (People v. Crabtree (2009) 169 Cal.App.4th 1293, 1322.) As our Supreme Court has explained, to establish an attempt the defendant's overt act "must go beyond mere preparation and show that the [defendant] is putting his or her plan into action." (People v. Superior Court (Decker) (2007) 41 Cal.4th 1, 8 (Decker).) Indeed, "'the acts of the defendant must go so far that they would result in the accomplishment of the crime unless frustrated by extraneous circumstances. [Citations.]' [Citations.]" (People v.

Memro (1985) 38 Cal.3d 658, 698 (Memro), overruled on other grounds in People v. Gaines (2009) 46 Cal.4th 172, 181.) A speculative possibility of a potential future rendezvous is inconsistent with the inevitable nature of an attempt, where the offense will be accomplished "'unless frustrated by extraneous circumstances'" (Memro, supra, 38 Cal.3d at p. 698) or "'absent an intervening force'" (Decker, supra, 41 Cal.4th at p. 9).

Deck contends the modified versions of CALCRIM Nos. 207 and 460 permitted the jury to convict him based on "an unduly elastic concept of the time frame [for attempt,] including days before the 18th during the many chats between [him] and Amy." We disagree.

"CALCRIM No. 207 accurately states the general rule that when a crime is alleged to have occurred 'on or about' a certain date, it is not necessary for the prosecution to prove the offense was committed on that precise date, but only that it happened reasonably close to that date." (People v. Rojas (2015) 237 Cal.App.4th 1298, 1304].) The modified CALCRIM No. 460 also correctly instructed the jury "The People must prove that the defendant intended to commit a lewd act upon a child, under 14, on February 18th or 19th, 2006, during his meeting with 'Amy.'" (Italics added.)

The instructions did not unduly expand the temporal limitation on an attempt. They did not suggest there was more than one meeting between Deck and "Amy." Rather, as the prosecutor argued, the evidence showed only one meeting, but the meeting might have continued from the late evening of February 18th into the early morning of February 19th, and thus the attempted lewd act might have occurred either on February 18th or February 19th during that single continuous meeting.

As to Deck's argument the jury may have convicted him based on chats before February 18th, the court instructed the jury the necessary "direct step" to constitute an attempt "requires more than merely planning or preparing to commit" the target offense, but instead "goes beyond planning or preparation" with a "direct movement

towards the commission of the crime after preparations are made." (CALCRIM No. 460, italics added.) In addition, the court instructed the jury an attempt requires proof of the union, or joint operation, of act and wrongful intent and it could find Deck guilty only if he specifically intended to commit the prohibited act. (CALCRIM No. 251.) When the instructions are viewed as a whole, there is no reasonable likelihood the jury misapplied the instructions to convict Deck based on overt acts that occurred before February 18th or after the meeting between Deck and "Amy." Therefore, there was no instructional error or erroneous prosecutorial argument on the temporal scope of the charged attempt.

C. The Trial Court Properly Denied the Proposed Defense Instruction

Deck argues the trial court erred in denying his request to modify CALCRIM No 460 and instruct the jury that "'[i]n order to find the defendant guilty, the People must prove that he intended to actually commit the lewd act on Amy, on February 18th, [2006], and was only prevented from committing such a lewd act by the intervention of law enforcement.'" (CALCRIM No. 460, italics added.) We disagree.

A court may "properly refuse an instruction offered by the defendant if it incorrectly states the law, is argumentative, duplicative, or potentially confusing [citation], or if it is not supported by substantial evidence [citation]." (People v. Moon (2005) 37 Cal.4th 1, 30.) Here, the proposed instruction is duplicative or potentially confusing. The trial court instructed the jury with CALCRIM No. 460, which informed them that "the People must prove . . . the defendant intended to commit a lewd act upon a child under 14." We discern no substantive difference between "intended to commit" and "actually intended to commit." As to the request for modification with the phrase "was only prevented from committing such lewd act by the intervention of law enforcement," the jury instead was instructed the necessary "direct step" for an attempt is "an immediate step that puts the plan in motion, so the plan would have been completed if some circumstance outside the plan had not interrupted the attempt." (Italics added.) The

proposed instruction may have confused the jurors because the attempt here did not involve an actual person, and thus the interruption of the plan was not solely because of police intervention. In sum, we independently conclude the trial court did not err in denying the requested pinpoint instruction.

D. No Unanimity Instruction Was Required

Finally, Deck contends a unanimity instruction was required because the prosecutor argued there were numerous acts that could have been the "direct steps" to constitute the attempt. We disagree. People v. Russo (2001) 25 Cal.4th 1124 (Russo), is instructive. There, our Supreme Court addressed whether a unanimity instruction was required in a case involving a conspiracy charge. (Russo, 25 Cal.4th at p. 1133.) The Court reaffirmed "the unanimity instruction is appropriate 'when conviction on a single count could be based on two or more discrete criminal events,' but not 'where multiple theories or acts may form the basis of a guilty verdict on one discrete criminal event.'" (Id. at p. 1135, quoting People v. Perez (1993) 21 Cal.App.4th 214, 223.) Because the evidence showed only one agreement and thus one conspiracy, the court concluded no unanimity instruction was required. (Russo, 25 Cal.4th at p. 1135.)

Here, the evidence showed only one meeting between Deck and "Amy." Thus, there was only a single possible attempt. Although there were several overt acts that could constitute the attempt, the jury need not decide on any one specific overt act as long as it unanimously found Deck committed an overt act that went beyond mere preparation. (Decker, supra, 41 Cal. 4th at p. 8; cf. Russo, 25 Cal.4th at p. 1128 ["the jury need not agree on a specific overt act as long as it unanimously finds beyond a reasonable doubt that some conspirator committed an overt act in furtherance of the conspiracy."]) No unanimity instruction was required.

III

DISPOSITION

The judgment is affirmed.

ARONSON, J.

WE CONCUR:

O'LEARY, P. J.

FYBEL, J.

APPENDIX B

SUPREME COURT

FILED

July 22, 2020

Jorge Navarrete Clerk

_____

Deputy

Court of Appeal, Fourth Appellate District, Division Three- No. 0057168

IN THE SUPREME COURT OF CALIFORNIA

En Banc

THE PEOPLE, Plaintiff and Respondent,

v.

STEPHEN ROBERT DECK, Defendant and Appellant.

The petition for review is denied.

CANTIL-SAKAUYE

Chief Justice