NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

ELJAROD LAWSON, PETITIONER

VS.

STATE OF CALIFORNIA, RESPONDENT

ON PETITION FOR WRIT OF CERTIORARI
TO THE CALIFORNIA COURT OF APPEAL,
FIRST APPELLATE DISTRICT, DIVISION THREE

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

A. Was the Sixth Amendment right of confrontation violated when the court allowed the use of the prior transcripted testimony of the complaining witness in this sexual assault case, who was physically available to testify, because her unprivileged refusal to testify was recognized as a type of witness "unavailability" under state law, or is Sixth Amendment "unavailability," which is sufficient to predicate the constitutional use of testimonial hearsay, confined to historic categories such as death, illness, insanity, or the contrivance of the defendant to render the witness unavailable, that were extant at common law at the time the Sixth Amendment was adopted?

B. Was the Sixth and Fourteenth Amendment violated by a state law that conferred immunity on the complaining witness in a sexual assault case against any power of the court to impose an incarceratory sanction for refusal to testify in a case in which the complaining witness, without privilege, refused to testify?

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

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PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

The decision of the California Court of Appeal, First Appellate District, Division Three, in *People* v. *Lawson*, 52 Cal.App.5th 1121, 267 Cal.Rptr.3rd 183 (2020), appears here in slip form as Appendix A. The decision was filed on August 4, 2020. A petition for rehearing to that Court was denied on September 3, 2020, a copy of which order is attached as Appendix B. The California Supreme Court denied discretionary review on October 14, 2020, and a copy of the order in this regard is attached as Appendix C.

JURISDICTION

A timely petition for discretionary review to the California Supreme Court from the Court of Appeal decision in this case was denied on October 14, 2020. This petition is timely filed within the time allotted by Supreme Court Rule 13.1 as modified by this Court's COVID order of March 19, 2020, in accord with which, the time to petition for certiorari in this case expires on March 15, 2021. (See

Supreme Court Rule 30.1). The jurisdiction of this Court is invoked pursuant 28 U.S.C. section 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. Federal Constitutional Provisions:

United States Constitution, Amendment 6: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . ."

United States Constitution, Amendment 14: "No State . . . shall . . . deprive any person of life, liberty, or property, without due process of law . . . ."

2. State Statutory Provisions:

California Evidence Code, section 240(a): (a) . . . " '[U]navailable as a witness' means that the declarant is any of the following: [¶] **(1)** Exempted or precluded on the ground of privilege from testifying concerning the matter to which his or her statement is relevant. **(2)** Disqualified from testifying to the matter. **(3)** Dead or unable to attend or to testify at the hearing because of then-existing physical or mental illness or infirmity. **(4)** Absent from the hearing and the court is unable to compel his or her attendance by its process. **(5)** Absent from the hearing and the proponent of his or her statement has exercised reasonable diligence but has been unable to procure his or her attendance by the court's

process. **(6)** Persistent in refusing to testify concerning the subject matter of the declarant's statement despite having been found in contempt for refusal to testify."

California Evidence Code section 1291(a): "**(a)** Evidence of former testimony is not made inadmissible by the hearsay rule if the declarant is unavailable as a witness and: [¶] . . . . [¶] **(2)** The party against whom the former testimony is offered was a party to the action or proceeding in which the testimony was given and had the right and opportunity to cross-examine the declarant with an interest and motive similar to that which he has at the hearing."

California Code of Civil Procedure, section 1218(a): "**(a)** Upon the answer and evidence taken, the court or judge shall determine whether the person proceeded against is guilty of the contempt charged; and if it be adjudged that he or she is guilty of the contempt, a fine may be imposed on him or her not exceeding one thousand dollars ($1000), payable to the court, or he or she may be imprisoned not exceeding five days, or both. . . . ."

California Code of Civil Procedure, section 1219, subdivisions (a) and (b): "**(a)** Except as provided in subdivisions (b) and (c), if the contempt consists of the omission to perform an act which is yet in the power of the person to perform, he or he may be imprisoned until he or she has performed it, and in that case the act shall be specified in the warrant of commitment. [¶] **(b)** Notwithstanding any other law, a court shall not imprison or otherwise confine or

place in custody the victim of a sexual assault or domestic violence crime for contempt if the contempt consists of refusing to testify concerning that sexual assault or domestic violence crime . . . .”

STATEMENT OF THE CASE

After petitioner’s first jury trial on sexual assault charges against multiple victims ended in mistrial, petitioner’s second jury trial proceeded, again on sexual assault charges against multiple victims. The second trial also ended in mistrial in regard to Jane Does 1 and 2, but petitioner was convicted in regard to Jane Doe 3 of one count of rape (Cal. Pen. Code, § 261(a)(2)), one count of forcible oral copulation (Cal. Pen. Code, § 288a(c)(2)(A)), and one count of forcible sodomy (Cal. Pen. Code, § 286(c)(2)(A).) (7RT 1527-1530; 3CT 819-821.) Petitioner was sentenced to an aggregate term of 22 years in prison. (4CT 916.) The judgment was appealed to the California Court of Appeal, First Appellate District, Division Three, which, on August 4, 2020, affirmed the judgment in full. (See Appendix A.) The court denied a petition for rehearing on September 3 (Appendix B), and the California Supreme Court denied discretionary review on October 14, 2020. (Appendix C.)

The issues presented in this petition were presented to the California Court of Appeal, and presented again to the California Supreme Court for its discretionary review. These are: **(A)** Whether the Sixth Amendment allows the

use of testimonial hearsay in a criminal trial when the witness is deemed "unavailable" because she refuses, without any privilege to do so, to testify about the charged crimes; and **(B)** Whether it is consistent with the Sixth Amendment and with Due Process to legislatively preclude a court from imposing any incarceratory sanction to coerce a witness who refuses, without privilege, to testify in a criminal case.

SUMMARY OF FACTS AND PROCEDURAL BACKGROUND

A very general factual background is set forth in the attached court of appeal decision in Appendix A (slip op., pp. 1-2), but the operative facts for the issues presented here are procedural. Although the state court gives an account of this procedure, a complementary account with more detail will provide a clearer context for the legal contentions made in this petition.

Doe 3 had testified at the preliminary hearing in December 2016 and at the first trial in March 2017. The jury hung 11-1 on the charges involving her, and the People made the decision to retry the case. A date for the second trial was set for January 2, 2018. Although in October 2017, Doe 3 had informed the prosecution she would not testify at a second trial, she was nonetheless served with a subpoena on December 14. At that time, she was advised by a sympathetic District Attorney Investigator to write the judge a letter explaining the trauma Doe 3 wished to avoid by not testifying. (2CT 567, 572; see also 6RT 1272-1277.)

The subpoena was for January 4, 2018, and Doe 3 did not appear that day. (2RT 40.) The day before, on January 3, the defense filed a request for an evidentiary hearing on Doe's refusal to testify, while the prosecution filed a motion to have her declared unavailable as a witness. (2CT 560-561, 566 *et seq*.) The prosecution's legal claim of unavailability was based on subdivision (a)(4) of Evidence Code section 240, that the declarant, Doe 3, would be "[a]bsent from the hearing and the court" would be "unable to compel his or her attendance by its process." (2CT 568; see above, p. 2.) The prosecution also took the position that Code of Civil Procedure section 1219, which granted to sexual assault victims immunity from incarceration as a sanction for contempt of court in refusing to testify, precluded the threat of incarceration as a sanction for Doe 3's refusal to come to court for a hearing on her unavailability *vel non.* (2CT 568, 569-570; see above, pp. 3-4.)

The issue was discussed *in limine* in court on January 8. There was back and forth discussion regarding whether Doe 3 should be issued an order to show cause for disobeying the subpoena, or whether she should be subpoenaed again to appear for an *in limine* hearing on whether or not she was available to testify. The defense preferred the stronger measure of an order to show cause. She had already disobeyed a subpoena, and the efficacy of a second subpoena was doubtful, "especially when your investigator says, 'Well that's great. We respect your

decision to disobey the law.' That's not proper. That's not right." (2RT 46.) The Court conceded the point, and stated, "Next time the inspector serves her, he doesn't have to say he respects it." (*Ibid.*) In any event, the Court agreed to sign an order to show cause to be served by the prosecution. The matter would then be heard on January 11. The Court intended to appoint an attorney for Doe 3, and was inclined to allow her to address the show-cause matter through her attorney only. (2RT 57-62.)

On January 11, Doe 3 did appear with her attorney Matthew Dalton. (2RT 110-111.) Dalton represented to the court that he had talked to his client and had himself reviewed some materials related to the case. "I think Ms. Doe the Third has," he said, "extremely strong feelings about not participating in this trial for a whole host of reasons. I don't believe based on my conversations with her and my review of the records, that there's going to be any change any time for any reason where she will testify in this case for the prosecution or on behalf of the defense." Dalton was willing to elucidate Doe 3's reasons, but it was a waste of time, in his opinion, to order her back to testify. (2RT 112.) The trial court expressed sympathy for Doe 3, but had to follow the law. " . . I believe I have no choice," stated the court, "but to issue an order that she appear to testify and to state that if she does not do so, the Court would have no alternative but to fine her in indirect

or constructive contempt for which she can be fined up to $1,000." (2RT 112-113; see above, p. 3.)

Ms. Chavez, the prosecutor, who represented the People and not Doe 3, objected to the threat of a fine. She had cited case law to the effect that trial courts do not have to take extreme action before declaring unavailability -- at which point defense counsel, Mr. Morris, interrupted to object. The Court itself noted that this argument was improper to make in front of Doe 3, who was still in the courtroom. (2RT 112-113.)

With Doe 3's exit from the courtroom, Ms. Chavez argued that she did not want to be "saddled" with a witness held in contempt, and further urged that holding her in contempt would be inconsistent with current law. Mr. Morris pointed out that section 240 in fact requires the witness to be held in contempt before a declaration of unavailability was possible. (2RT 113-114; above, p. 2.) Mr. Morris also objected on hearsay grounds that any attempt to obtain through her attorney alone Doe 3's reasons for not testifying was hearsay and improper. The Court insisted on its power to fine Doe 3 up to a $1000. However, the Court wanted to continue the matter to give Doe 3 an opportunity to change her mind. The Court discharged the order to show cause, but still ordered Doe 3 to return on January 24. (2RT 114-115, 119.)

On January 24, Doe 3 returned to court. Dalton reaffirmed her refusal to testify, but she did take the stand and answered the court's questions under oath:

> "THE COURT: . . . Ms. Doe, as I understand it, you have testified twice in this matter: Once at the preliminary hearing and once at a trial; is that correct?
>
> "MS. DOE 3: Yes.
>
> "THE COURT: Are you prepared to testify a third time?
>
> "MS. DOE 3: No.
>
> "THE COURT: If I ordered you to testify, would you testify?
>
> "MS. DOE 3: With all due respect, no, sir.
>
> "THE COURT: Do you understand that there will be a different jury than there was the last time that there was a trial in this matter?
>
> "MS. DOE 3: Yes.
>
> "THE COURT: Do you understand that the defense has a right to have that jury observe you face-to-face in order to judge your credibility in this case?
>
> "Do you understand the question?
>
> "MS. DOE 3: Yes. And I again, I don't want to partake in this hearing.
>
> "THE COURT: Why don't you want to partake?
>
> "MS. DOE 3: I just don't want to. I don't want to re-live the situation.

"THE COURT: How has the situation affected you?

"MS. DOE 3: In numerous ways.

"THE COURT: Would you be more specific.

"MS. DOE 3: I don't really want to speak about that.

"MR. MORRIS: I'm sorry. I can't hear her.

"THE COURT: Would you – Ms. Reporter, would you read that answer back?

"MS. DOE 3: I said I wouldn't want to speak about that. I don't want to bring it up.

"THE COURT: Do you understand that it is within my discretion to find you in contempt of court for not testifying, and as a result, to fine you a maximum of $1000?

"MS. DOE 3: Yes.

"THE COURT: Knowing that, is it still your decision not to testify?

"MS. DOE: Yes it is." (2RT 151-153.)

After Ms. Doe left the courtroom, the prosecution argued that Doe 3 was unavailable under subdivision (a)(4) of section 240 in that she was unamenable to the court's process, and unavailable under (a)(5) , i.e., the prosecution had "exercised reasonable diligence but [had] been unable to procure [her] attendance by the court's process." (Cal. Evid. Code, § 240(a)(5).) (2RT 154; above, p. 2.) Mr. Morris urged, to the contrary, that it was shocking how the prosecution has

been in fact encouraging Doe 3 not to testify. The Court, however, was of the view that even if the prosecution had "dropped the ball," the Court's own actions made up for it. (2RT 155-156.) When defense counsel pointed out that under (a)(6), Doe 3 had to actually be held in contempt before she could be found unavailable for persistent refusal to testify (above, p. 2), the Court's peremptory response to this was: "There is no such provision. There is a provision ['] is absent from the hearing and the proponent of his or her statement has been unable to procure his or her attendance from the Court's process.[']" (2RT 157.)[1]

The Court went on to rule. Initially, Doe 3 would not be found in contempt of court. "The witness has been respectful; has made all appearances that the Court has requested; has been respectful on the stand, and I do not feel I have a basis to find her in contempt of court, so I will not find her in contempt. (2RT 164.) As to unavailability, the Court found *People* v. *Cogswell*, 48 Cal.4th 467 (2010) and *People* v. *Smith*, 30 Cal.4th 581 (2003) to be dispositive, giving the Court the authority to declare a witness unavailable without first finding the

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[1] Subdivision (a)(6) regarding persistent refusal to testify was in fact a 2010 amendment to Evidence Code section 240 (Cal. Stats. 2010, ch. 537, §1), with which the trial court was, apparently, not familiar. Indeed, there have been no post-2010 cases construing California Evidence Code section 240(a)(6). The relative youth of the amendment may account for the trial court's ignorance. Further, as will be seen, the jurisprudence surrounding section 240 generally is somewhat cavalier about the need for the actual text of the statute. (See below pp. 14 *et seq.*)

witness in contempt or fining the witness. (2RT 164-167.) When asked for a specification of the section 240 category the Court was invoking, the Court stated it was subdivision (a)(4), "absent from the hearing and the Court is unable to compel his or her attendance by this process." (2RT 167.) The Court, addressing Mr. Dalton, extended the invitation to Doe 3 to change her mind at any time about testifying. (2RT 167-168.) After Doe 3 was released, Mr. Morris placed a formal objection on the record: " . . . . Simply put, I believe that when the Court declined to hold the witness in contempt for refusing to testify, that that was a violation of my client's right under the due process clause, and under the Sixth Amendment guarantee of a speedy trial and confrontation of witnesses." (2RT 169.)[2]

Six days later, after the commencement of trial, on January 30, 2018, Jane Doe 3's prior testimony from the preliminary hearing and from the first trial was read to the jurors. (3RT 428 *et seq*.)

2 The "speedy trial" objection was based on the defense position that pre-accusation delay in bringing the Doe 3 prosecution was the cause of Doe 3's refusal to testify.

REASONS FOR GRANTING CERTIORARI

A.

CERTIORARI SHOULD BE GRANTED TO DETERMINE WHETHER THE HISTORICAL APPROACH TO THE SIXTH AMENDMENT AS MANFEST IN *CRAWFORD* AND *GILES* APPLIES ALSO TO THE DETERMINATION OF TYPES OF UNAVAILABIITY SUFFICIENT, UNDER THE SIXTH AMENDMENT, TO ALLOW THE USE OF A DECLARANT'S TESTIMONIAL HEARSAY

Petitioner's federal constitutional claim, as it was advanced in state court, is simply stated. It has been established by this Court that in determining the various aspects of the Sixth Amendment right of confrontation, the scope of that right is based historically, on the understanding of the evidentiary practices prevalent at common law at the time the Amendment was adopted in 1791. (See *Crawford* v. *Washington*, 541 U.S. 36, 54, 68 (2004); see also *Giles* v. *California*, 554 U.S. 353, 366, 377 (2008).) The federal question presented by this case is whether the same historical approach applies to types of unavailability sufficient to predicate the use of testimonial hearsay or whether there is some other measure, such as the state's own definition of unavailability, or something in-between criterion that is not purely historical but not completely left to the freedom of legislatures or common law cases. Under the historical approach, whatever the full list of types of unavailabiity might be, the type at issue here – an unprivileged refusal by a physically present witness, to testify – is not a type of "unavailability" recognized

at common law. (See *West* v. *Louisiana*, 194 U.S. 258, 262 (1904) [The common law right to admit a declarant's deposition as evidence at trial depended on proof that the declarant, at the time of trial was "dead, insane, too ill ever to be expected to attend trial, or kept away by the connivance of the defendant."].)

But logically and legally prior to the federal claim, petitioner advanced a claim based on state statutory grounds. Although California's interpretation of its own Evidence Code section 240 is not subject to this Court's review, a brief summary of the interpretive history of section 240 will provide some contextual background to the federal claim, and, indeed, will take on some importance under the view that the states control the definition of "unavailability" in a Sixth Amendment context.

The Interpretative Background of Evidence Code section 240

Although California Evidence Code section 240 has, on the face of its language, the appearance of an exclusive definitional list, the California Supreme Court has departed from the language itself, treating the statute as suggestive rather than definitional, subject to a flexibility injected by judicially expansive interpretation. This began with *People* v. *Rojas*, 15 Cal.3rd 540 (1975), in which the California Supreme Court upheld the use of testimonial hearsay when a witness refused to testify out of fear of reprisal, which the trial court found, under section 240(a)(3) to be a "mental . . . infirmity." The Supreme Court found lexical support

for this surprising understanding of "mental infirmity" in Webster's, which defined the word "infirmity" to mean, *inter alia*, " 'a defect in personality or weakness of will." (*Rojas*, *id.* at pp. 550-551.) One supposes that a frightened witness might be seen as having the defective personality or weak will of a coward or of a person beset by some other form of timidity, but the motivating engine of the decision in *Rojas* was not dictionary definitions. It was the substantive need of judicial administration in the face of a contemptuous witness who, without privilege, refuses to testify, which does not slip easily into any of the listed categories of "unavailability" in section 240. (See *id.* at p. 551.)

This motive, unmoored as it was from the reasonable understanding of otherwise plain language, has been rationalized on its most general level by the proposition that "Evidence Code sections 240 and 1291" are to be interpreted broadly so as not "to preclude *unlisted variants* of unavailability." (*People* v. *Reed*, 13 Cal.4th 217, 226-227 (1995), emphasis added.) On a slightly less general level, case law subsequent to *Rojas*, eschewing verbal niceties of that case such as those applied to "mental infirmity," has simply held that the amalgamated thrust of section 240's list of forms of unavailability implies further a cognizable type based on a witness's unprivileged refusal to testify even after the court has taken reasonable measures to induce testimony. (*People* v. *Sul*, 122 Cal.App.3rd 355,

362-365 (1981); *People* v. *Francis*, 200 Cal.App.3rd 579, 581-582 (1988); *People* v. *Smith*, 30 Cal.4th 581, 624 (2003).)[3]

The state Court of Appeal in the instant case simply followed the *Sul*/*Francis*/*Smith* rationale, rejecting petitioner's further argument that the 2010 amendment to section 240 showed a legislative intent to re-assert the definitional nature of the statute. For in 2010, the Legislature added to the list of types of unavailability, "[p]ersistent in refusing to testify concerning the subject matter of the declarant's statement despite having been found in contempt for refusal to testify." This is spelled out in such specificity as to defy any notion that the list in section 240 can be expanded at judicial will. Thus, in this case, the trial court expressly declined to hold Doe 3 in contempt, and yet, according to the Court of Appeal, this was irrelevant under the expansive view of section 240 that the Court need only take reasonable measures. The Court not only rejected petitioner's inference of legislative intent as without evidentiary support, but found succor in cases recognizing that "reasonable measures," did not include contempt sanctions

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[3] In *Sul*, the Court could not resort to *Rojas*'s interpretation of "mental infirmity" because the witness in *Sul* gave no reason for his refusal to testify. (*Sul*, *id.*, at p. 363.) Moreover, the substantive principle enunciated in *Sul* was simply borrowed from *United States* v. *Mason*, 408 F.2nd 903 (10th Cir. 1969) and loosely tied to section 240. (*Sul*, *id* at pp. 364-365; *Francis*, *id.*, 581-582.) In *Smith*, the California Supreme Court depended on *Sul*, *Francis*, and *Mason*. (*People* v. *Smith*, *supra*, 30 Cal.4th at p. 624.)

against a witness, especially a sexual assault witness, who, under California Code of Civil Procedure, section 1219(a) had immunity against any sanction involving incarceration. (Slip op., pp. 7-10; see also *People* v. *Smith*, *supra*, 30 Cal.4th at p. 624; and *People* v. *Cogswell*, 48 Cal.4th 467, 476 *et seq*.((2010).) In sum, by the expansive reading of section 240, Jane Doe 3's unavailability was within (a)(6), in a persistent refusal to testify, or (a)(4) as "[a]bsent from the hearing and the court is unable to compel his or her attendance by its process," or (a)(5) as "[a]bsent from the hearing and the proponent of his or her statement has exercised reasonable diligence but has been unable to procure his or her attendance by the court's process." (See App. A, slip op., pp. 5-7.)

The Sixth Amendment Claim

Petitioner's federal constitutional claim was disposed of by the Court of Appeal in a single sentence: "The admission of Jane Doe 3's prior testimony did not violate Lawson's statutory or constitutional rights." (Slip op., p. 10, App. B.) This compact sentence is all there is regarding a rather detailed constitutional argument, and the omission of any reference to this argument was pointed out to the court in a petition for rehearing, which was denied. But before detailing that argument, one might draw out from the state court's single sentence the rationale for the broad constitutional claim pronouncement made so laconically. It seems that state court believed it sufficient that Doe 3 was *in a sense* absent from the

hearing because she refused to testify about the alleged assault; the state court also seemed to beliefe that this refusal *somehow* incapacitated court process (section 240(a)(4)), and *somehow* undermined the prosecution's due diligence (section 240(a)(5)), categories of unavailability that, *perhaps*, were federally sanctioned forms of unavailability. For this the State Court of Appeal could have, but did not, cite *Barber* v. *Page*, 390 U.S. 729 (1968) to give its ruling the color of dispositive United States Supreme Court precedent. In short, the Court's succinct pronouncement, taken in itself is vague and impressionistic, and, in petitioner's view, wrong in light of the argument he presented to the state court and with which he engaged a responsive Attorney General in those courts.

In its broadest formulation, the right guaranteed by the Confrontation Clause of the Sixth Amendment provides for "a personal examination and cross-examination . . . in which the accused has an opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand the manner in which he gives his testimony whether he is worthy of belief." (*Mattox* v. *United States*, 156 U.S. 237, 242 (1895).) Of the various aspects of this unified description of the Sixth Amendment right, the physical presence of the witness before the jury and the accused at trial takes precedence over the substance of the testimony whether on direct or cross-

examination, for it is a fundamental proposition of Sixth Amendment jurisprudence that physical presence is the irreducible core of the right (see *Coy* v. *Iowa*, 487 U.S. 1012, 1016-1017 (1988); see also *California* v. *Green*, 399 U.S. 149, 160-161 (maj.), and p. 174 (Harlan, J. conc.) (1970)), while the guarantee in regard to cross-examination is only for "an *opportunity* for effective cross-examination . . . ." (*United States* v. *Owens*, 484 U.S. 554, 559 ((1988), internal quotations marks omitted, emphasis in *Owens*.)

One may pause at the expression of these principles to see how they relate problematically to the state court's implied ruling on the constitutional issue. As one may see from the account of the procedure in this issue, Doe 3 was served by the prosecution with a subpoena in December 2017 for the retrial (above, p. 5), which in fact discharged any duty of due diligence on the part of the People. Although Doe 3 failed (with the connivance of the prosecution) to respond to this subpoena (pp. 5-6), she did respond to a court order to show cause, and physically appeared before the court on January 11. (Above, pp. 7-8) She was ordered back for January 24, when she in fact took the stand physically and gave testimony under oath affirming that she did not want to testify and would not testify about the alleged sexual assault. (Above, pp. 9-10.) That day, the first day of trial, the Court discharged her, excusing her from testifying and imposing no sanction. (Above, pp. 11-12.)

In the literal sense, Doe 3 was not physically absent from the proceedings at all. In the legal sense, she had no privilege not to testify. Further, in the constitutional sense, the State was not at the mercy of her subjective refusal to testify, because while she was on the stand, and physically present to respond or refuse to respond in the presence of the jurors, her hearsay statements, in whatever form they took, were admissible without restriction. (*Crawford*, *supra*, 541 U.S. 36, 59, fn. 9 ["Finally, we reiterate that, when the declarant appears for cross-examination at trial, the Confrontation Clause places no constraints at all on the use of his prior testimonial statements."].)[4]

The question then becomes whether, in the circumstances presented here – the unprivileged refusal of a physically present witness to answer questions ---, the Sixth Amendment allows the use of hearsay by the rule of necessity that allows the use of hearsay for a witness who is "unavailable." As noted at the beginning of this argument, petitioner's answer is that the matter is to be determined historically, and that, historically, there is no precedent for this type of unavailability as a predicate for the use of hearsay in a criminal trial.

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[4] It may be noted that a blanket refusal to testify cannot, as a matter of current California law, provide the basis for introduction of prior testimony as a prior inconsistent statement. (*People* v. *Rojas*, *supra*, 15 Cal.3rd at p. 548.) The point here, however, is that there is no constitutional impediment to a hearsay rule that allows the use of prior testimony when a physically present witness refuses to answer questions. (*Crawford*, *ibid*.)

In referring to the use of hearsay when a witness is physically absent, petitioner has not been rigorous in differentiating the type of hearsay at issue. In *Crawford* v. *Washington*, *supra*, 541 U.S. 36 this Court delimited the scope of the Sixth Amendment to remove from its purview all hearsay except testimonial hearsay. (*Id.*, at pp. 50-52.) This was derived from the premise that the Confrontation Clause was aimed at "the civil law mode of criminal procedure, and particularly its use of *ex parte* examinations against the accused," and "[t]he Sixth Amendment must be interpreted with this focus in mind." (*id.*, at p. 50.) Beyond this:

> "The historical record also supports a second proposition: that the Framers would not have allowed admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination. The text of the Sixth Amendment does not suggest any open-ended exceptions from the confrontation requirement to be developed by the courts. Rather, the 'right . . . to be confronted with the witnesses against him,' Amdt. 6, is most naturally read as a reference to the right of confrontation at common law, admitting only those exceptions established at the time of the founding. [Citation.] As the English authorities above reveal, the common law in 1791 conditioned admissibility of an absent witness's examination on unavailability and a prior opportunity to cross-examine. The Sixth Amendment therefore incorporates those limitations. The numerous early state decisions applying the same test confirm that these principles were received as part of the common law in this country." (*Crawford* v. *Washington*, *supra*, 541 U.S. at pp. 53-54.)

Toward the end of the opinion, the Court summed this up in a more concentrated form: "Where testimonial evidence is at issue . . . the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination." (*Id.* at p. 68.)

Thus in *Crawford*, this Court's analysis took the historical approach not only to establish dispositively that the Sixth Amendment applied only to testimonial hearsay, but also to establish the internal requirements for such hearsay: first, that it arose in a proceeding in which the declarant was subject to the opportunity for cross-examination; and secondly, that the declarant is unavailable to testify at the current trial or proceeding. While the approach in *Crawford* sanctions the general outline of the constitutional law governing the constitutional use of hearsay in a criminal trial, does this approach also apply to more specific questions such as what *type* of unavailability may predicate a constitutional use of testimonial hearsay?

An all but express answer seems to have been given by this Court in *Giles* v. *California*, *supra*, 554 U.S. 353. *Giles* came to this Court from the California Supreme Court's decision in *People* v. *Giles*, 40 Cal.4th 833 (2007). In *Crawford*, this Court made passing reference to forfeiture by wrong-doing, -- *viz.*, forfeiture of the right to confront an adverse witness when some wrong doing by the

defendant was responsible for the witness's absence from trial – as an "equitable principle" that did not violate the Sixth Amendment. (*Crawford*, *supra*, 541 U.S. at p. 62; see also *Davis* v. *Washington*, 547 U.S. 813, 833 (2006).) In the California Supreme Court's *Giles*, the Court emphasized this characterization of forfeiture by wrongdoing as an "equitable principle" outside the realm of the rules of hearsay (*id.* at pp. 841-842), which freed the Court, in its view, from the confinement of the historical inquiry to the common law extant in 1791. Thus freed from historical strictures, the California Supreme Court in *Giles* engaged in a wide-ranging examination of the evolving and continual common-law debate, both pre- and post-*Crawford* over the equitable scope of the forfeiture by wrong doing doctrine. (*Id.* at pp. 842-859.) Based on this examination, and its own contribution to the debate over equities, the Court found that the doctrine of forfeiture by wrongdoing applied even when the wrong doing was not committed with the intent to suppress the witness's testimony, even if the wrong doing itself was the crime for which the defendant was on trial. (*Id.* at p. 833.)

In *Giles* v. *California*, *supra*, 554 U.S. 353, this Court rejected this. A forfeiture by wrong doing sufficient to avoid the Sixth Amendment prohibition of unconfronted testimonial statements required that the wrongdoing be done with the intent to suppress the witness's live testimony, and that the wrongdoing be independent of the crime for which the defendant is on trial. (*Id.*, at pp. 361-365.)

The Court made it clear that this was not a question of an evolving equitable doctrine, but a question of the scope of an equitable doctrine consistent with the understanding of the law at or around the time the Sixth Amendment was adopted. The Court made this clear from the outset in a broad-based declaration of the analytical framework for the question:

> The Sixth Amendment provides that '[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him.' The Amendment contemplates that a witness who makes testimonial statements admitted against a defendant will ordinarily be present at trial for cross-examination, and that if the witness is unavailable, his prior testimony will be introduced only if the defendant had a prior opportunity to cross-examine him. *Crawford*, 541 U.S., at 68 . . . . The State does not dispute here, and we accept without deciding, that Avie's statements accusing Giles of assault were testimonial. But it maintains (as did the California Supreme Court) that the Sixth Amendment did not prohibit prosecutors from introducing the statements because an exception to the confrontation guarantee permits the use of a witness's unconfronted testimony if a judge finds, as the judge did in this case, that the defendant committed a wrongful act that rendered the witness unavailable to testify at trial. We held in *Crawford* the Confrontation Clause is 'most naturally read as a reference to the right of confrontation at common law, admitting only those exceptions established at the time of the founding.' *Id.*, at 54 . . . . *We therefore ask whether the theory of forfeiture by wrongdoing accepted by the California Supreme Court is a founding-era exception to the confrontation right*." (*Giles*, *supra*, at pp. 357-358, emphasis added.)

After an examination of the authorities that suggested the limits on the forfeiture doctrine at the time of the founding, the Court found that the doctrine of

forfeiture by wrongdoing was not understood or applied at that time in the broad and expansive manner urged by the State, and that "the State's proposed exception to the right of confrontation plainly was not an 'exception established at the time of the founding.'" (*Id.*, at p. 366.) In vacating the judgment of the California Supreme Court, this Court stated: "We decline to approve an exception to the Confrontation Clause unheard of at the time of the founding or for 200 years thereafter." (*Id.*, at p. 377.)

It is difficult to see how, if an historical analysis is required to determine the scope of a type of unavailability recognized as extant in 1791, such an historical analysis is not required to determine also which other types of unavailability were extant in 1791 and are thus cognizable under the Sixth Amendment as a predicate for the use of testimonial hearsay. What then does an historical analysis reveal as to a contemptuous refusal to testify?

Without plunging into a scholarly and far-reaching research project, the answer seems fairly simple. Petitioner has referenced and quoted *West* v. *Louisiana*, *supra*, 194 U.S. 258, and the full version of that pronouncement states: "At common law, the right existed to read a deposition upon the trial of the defendant, if such deposition had been taken when the defendant was present and when the defendant's counsel had had an opportunity to cross-examine, upon proof being made to the satisfaction of the court that the witness was at the time of the

trial dead, insane, too ill ever to be expected to attend the trial, or kept away by the connivance of the defendant." (*Id.* at p. 262.) It will be noted that the list here consists of narrow and strict categories of physical absence from the proceeding. The list does not include a witness's refusal to testify. It is also possible that absence from the jurisdiction of the court was also a cognizable common law category of unavailability (See *Barber* v. *Page*, *supra*, 390 U.S. 719, 722; see also *Government of Virgin Islands* v. *Aquino*, 378 F.2nd 540, 549-550 (3rd Cir. 1967)), but the refusal of a physically present witness to testify is not part of any traditional list, and was found to be a matter of first impression by the California Supreme Court in 1975 (*People* v. *Rojas*, *supra*, 15 Cal.3rd 540, 559-560), just short of 200 years after the adoption of the Sixth Amendment. One need not come up with a general theory from historical practice (see *California* v. *Green*, *supra*, 399 U.S. 149, 162 ["We have no occasion to map out a theory of the Confrontation Clause" to decide the issue in this case]) , or even establish the historical pedigree of each and every type of unavailability in order to conclude that an unprivileged refusal to testify is not, and was not, a form of legal unavailability recognized at common law in 1791. But if certiorari is granted, the matter can be examined in even greater detail.

Further, any perceived problems with petitioner's contention can also be aired and settled by this Court as the appropriate tribunal to settle important issues

of Sixth Amendment jurisprudence. Thus, in the state court proceedings, the Attorney General attacked the thesis that the core of the Sixth Amendment right is physical availability since privilege and insanity were types of cognizable unavailability in which there was still physical presence. Petitioner's answer was that privilege is the legal predicate that *excuses* the witness's physical presence, while insanity, which impedes the witness's *inherent* capacity to answer questions, destroys the opportunity for cross-examination even when the witness's body is capable of sitting on the stand. Moreover, even if there is some inconsistency shown in these instances, these instances may themselves be justified (or not) historically as following the rule of necessity. These matters can be elaborated in adversarial argument, again to be adjudicated in this, the appropriate tribunal. These matters also provide a further impetus for a grant of certiorari to settle them.

Finally, there is the problem of *Maryland* v. *Craig*, 497 U.S 836 (1990). Two years before *Craig*, in *Coy* v. *Iowa* (1988) 487 U.S. 1012, this Court declared that the use of a screen placed between the complaining witnesses, who were six-year-old girls, and the defendant violated the Confrontation Clause of the Sixth Amendment. The screen allowed defendant to dimly perceive the witnesses as they testified, but it completely blocked the witnesses' view of defendant. (*Id.*, at pp. 1014-1015.) This interference with the right to physical confrontation was *not* redeemed by the fact that the witnesses were under oath; were cross-examined;

and, as one learns from consulting the state court decision, were open to the judge and the jury's, if not the defendant's, view while they testified. (See *State* v. *Coy* 397 N.W.2nd 730, 734 (Ia.1986).) This Court's reversal of the Iowa statute in *Coy* was certainly in line with the treatment of physical presence as the ineluctable core of the Sixth Amendment right of Confrontation. In *Craig*, without overruling *Coy*, this Court upheld the procedure of using closed-circuit television to allow the examination and cross-examination of a witness from a room separate from the courtroom where the defendant and jury remained. (*Craig*, *supra*, 497 U.S., at pp. 840-842.) This court upheld the procedure on the condition that its use was to be predicated on a case-specific showing of need, a dispensation allowable under the Sixth Amendment because the procedure otherwise preserved all other incidents of the right of confrontation: the child must be competent to testify; must testify under oath; is subject to contemporaneous cross-examination; and can be seen (albeit through video monitor) by the jury and by the defendant. (*Id.* at p. 851.)

This is the one case from this Court in which the Court unambiguously discounts the importance of physical presence, but there are serious questions as to whether or not *Craig* in its liberality toward physical presence can be reconciled with *Crawford*, with its strictness in this regard. (See *United States* v. *Cox*, 871 F.3rd 479, 492-495, Sutton, J. conc. (6th Cir. 2017); see also *Coronado* v. *State* 351 S.W.3rd 315, 321, (Tex.Crim.App. 2011); see also *Maryland* v. *Craig*, *supra*, 497

U.S., at pp. *supra*, at pp. 860 to 870, Scalia, J., dissenting.) Whether or not *Craig* is withering on the vine, or whether or not perhaps it may stand to represent a separate line of Sixth Amendment jurisprudence governing courtroom arrangements, while *Crawford* rules over the use of testimony hearsay (see *United States* v. *Yates*, 438 F.3rd 1307, 1330, fn. 14, Tjoflat, J., dissenting (11th Cir. 2006)) would be, again, another major question for this Court to resolve.

The instant case presents important questions of Sixth Amendment jurisprudence that remain to be adjudicated by the one Court that can dispositively adjudicate them.

B.

CERTIORARI SHOULD BE GRANTED TO DETERMINE WHETHER THE IMMUNITY CALIFORNIA CONFERS ON THE COMPLAINING WITNESS IN A CRIMINAL SEXUAL ASSAULT CASE WHO COMMITS CONTEMPT OF COURT IN REFUSNG TO ANSWER QUESTIONS, IS IN VIOLATION OF THE SIXTH AND FOURTEENTH AMENDMENTS IN LEAVING THE TRIAL COURT WITH ONLY SUB-MINIMAL POWER TO INDUCE COMPLIANCE WITH CONSTITUTIONAL MANDATES OF CONFRONTATION AND DUE PROCESS

California's regimen of sanctions for contempt of court is set forth in its Code of Civil Procedure section 1218 and 1219, which are quoted above. (See pp. 3-4 above.) Under Code of Civil Procedure 1218(a), contempt can be punished by a fine of no more than one-thousand dollars ($1000). When the contempt consists of the refusal of a witness to answer questions, each question refused is not sanctionable by the $1000 fine, but the gross refusal is considered one sanctionable violation. (*In re Keller*, 49 Cal.App.3d 663, 669 (1975).) Although, under 1218(a), the length of incarceration for contempt cannot exceed five days, under 1219(a), "if the contempt consists of the omission to perform an act which is yet in the power of the person to perform, he or she may be imprisoned until he or she has performed it . . . ." But under subdivision (b), "[n]otwithstanding any other law, a court shall not imprison or otherwise confine or place in custody the victim

of a sexual assault or domestic violence crime for contempt if the contempt consists of refusing to testify concerning that sexual assault or domestic violence crime . . . .”

The power to punish for contempt is an inherently judicial power that traditionally consists of incarceration or fine or a combination of both. (*John Roe, Inc.* v. *United States*, 142 F.3rd 1416, 1424 (11th Cir. 1998).) The question presented in state court and renewed here is whether the complete preclusion of an incarceratory sanction for an unprivileged refusal to answer questions is consistent with the Sixth Amendment right to confront adverse witnesses in a criminal trial and to the right under the Fourteenth Amendment to due process of law.

The connection between a fundamental constitutional right and a court’s ability to enforce that right was stated succinctly by this Court in *Glasser* v. *United States*, 315 U.S 60 (1942), “[u]pon the trial judge rests the duty of seeing that the trial is conducted with solicitude for the essential rights of the accused.’” (*Id.* at p. 71.) In *People* v. *McKenzie*, 34 Cal.3rd 616, 626 (1983), the California Supreme Court elaborated further:

> “In order to implement this duty, the trial judge is vested with both the statutory and the inherent power to exercise reasonable control over all proceedings connected with the litigation before him. [Citations.] The court has the authority ‘to take whatever steps [are] necessary to see that no conduct on the part of any person [obstructs] the administration of justice’ [citation] to ‘maintain the dignity and

> authority of the court . . . and to summarily punish for acts committed in the immediate view and presence of the court when they impede, embarrass or obstruct it in the discharge of its duties . . . .' [Citation.] It has further been noted that the trial judge 'has the responsibility for safeguarding both the rights of the accused and the interest of the public in the administration of criminal justice. The adversary nature of the proceedings does not relieve the trial judge of the obligation of raising on his or her initiative, at all appropriate times and in an appropriate manner, matters which may significantly promote a just determination of the trial.' [Citations.]" (*Id.* at pp. 626-627.)

In the instant case, Doe 3 had no right to refuse her testimony. (See *People* v. *Smith*, *supra*, 30 Cal.4th at p. 624.) The question presented here, as a matter of state and federal constitutional law, is whether the statutory immunity of section 1219(b) improperly impeded the court from exercising its duty to prevent an undue encroachment of the essential right of the accused to confront adverse witnesses. In this regard, it should be noted that a $1000 fine is relatively nugatory while the absence of any power to incarcerate is deemed sufficiently drastic so as to extinguish the court's inherent power to punish contempt in an effective manner that induces it to end. (See *In re Michael G.*, 44 Cal.3rd 283, 295, fn. 10 (1988).) It is the removal of the incarceratory sanction that renders renders the immunity created in section 1219(b) unconstitutional under the Sixth and Fourteenth Amendments.

In *Brooks* v *Tennessee* (1972) 406 U.S. 605, this Court invalidated a Tennessee law that required the defendant, if he intended to testify, to be the first

witness in the defense case. The law was found to be an imposition on the defendant's right under the Fifth Amendment to testify or not, and an interference with defense counsel's ability to discharge his constitutional function under the Sixth Amendment determining when and whether defendant should testify. (*Id.*, at pp. 605-613.) California Code of Civil Procedure 1219(b) may not directly encroach on the Sixth Amendment right of confrontation since its operation must flow through the trial judge. But section 1219(b) enfeebles the trial judge in the discharge of his duty to enforce the Sixth Amendment right, and to that extent falls within the rationale by which the Tennessee statute in *Brooks* was declared unconstitutional.

It is true that in this case the trial court eschewed a finding of contempt, and the record suggests that at least part of the reason for this restraint was Doe 3's declaration that she would refuse to testify even if the court imposed a $1000 fine. (2RT 151-153.) Although the court might well have tested Doe 3's resolve by actually finding the contempt and sanctioning her the $1000, the court, in the simple warning of potential sanction, was severely hampered by the absence of any power of incarceration. The tack taken by the court and Doe's response might have been very different if it were not for Section 1219(b), under which Doe 3 had absolute immunity from incarceration. This record, and the issue that arises out it because of California's statutory regimen for punishing contempt, presents a novel

area of constitutional law, specifically under the Sixth Amendment right of confrontation, that should be explored by this Court under a grant of certiorari.

CONCLUSION

For either or for both of the above reasons presented in this petition, petition for writ of certiorari should be granted.

Dated: January 4, 2021

Respectfully submitted,

/s/ Mark D. Greenberg
Attorney for Petitioner
Eljarod Lawson

APPENDIX A

**DECISION OF THE CALIFORNIA COURT OF APPEAL,
FIRST APPELLATE DISTRICT, DIVISION 3, IN *PEOPLE* V. *LAWSON***
FILED ON AUGUST 4, 2020 (SLIP OPINION)
(CITATION: 52 Cal.App.5th 1121, 267 Cal.Rptr.3rd 183 (2020))

Filed 8/4/20

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. ELJAROD LAWSON, Defendant and Appellant.	A154481 (Alameda County Super. Ct. No. 619332)

Following a retrial, a jury convicted Eljarod Lawson of three felony counts relating to the sexual assault of Jane Doe 3. Lawson contends the trial court violated his state and federal rights to confrontation when it determined Jane Doe 3 was unavailable and admitted her testimony from his first trial and the preliminary hearing. Lawson further contends Code of Civil Procedure section 1219, subdivision (b), which prohibits the incarceration of sexual assault victims for their refusal to testify, also impaired his state and federal confrontation rights because the court had no sufficient means to compel Jane Doe 3's testimony. We affirm.

BACKGROUND[1]

In September 2007, Lawson forced Jane Doe 3 into his car, drove to a remote area, where he brutally raped and sodomized her, and forced her to orally copulate him. A little over a year later, in November 2008, Jane Doe 3

[1] Because the facts underlying the crimes are not relevant to the issues on appeal, we provide a general summary.

saw Lawson while she was driving in her car. She called the police, who came to her location and detained him. Jane Doe 3 participated in a field show-up and identified Lawson as the man who raped her.

Following this November 2008 field identification, Jane Doe 3 did not hear from the police again until 2016, when Lawson was arrested in connection with the rapes of Jane Doe 1 and Jane Doe 2. Jane Doe 3 participated in a photographic lineup, and she again identified Lawson.

Lawson was charged with 10 counts relating to separate incidents of sexual assault involving Jane Doe 1, Jane Doe 2, and Jane Doe 3. The jury acquitted Lawson of the counts involving Jane Doe 1. But it could not reach a verdict regarding any of the Jane Doe 2 and Jane Doe 3 counts. A mistrial was declared as to those counts.

Following the mistrial, Lawson was again charged with the counts of sexual assault involving Jane Doe 2 and Jane Doe 3 that were the subject of the first trial, as well as counts involving a new Jane Doe 1. Jane Doe 3 refused to testify in the second trial. The court found her unavailable as a witness and admitted her prior testimony from the preliminary hearing and the first trial into evidence.

The jury was unable to reach verdicts on the counts involving Jane Doe 1 and Jane Doe 2. The jury convicted Lawson of forcible rape (Pen. Code, § 261, subd. (a)(2)), forcible oral copulation (*id.*, former Pen. Code § 288a, subd.(c)(2)(A)), and forcible sodomy (*id.*, Pen. Code § 286, subd. (c)(2)(A)) committed against Jane Doe 3. The jury could not reach a verdict on the remaining counts and enhancement allegations. The court declared a mistrial, and, on the prosecution's motion, such counts and allegations were dismissed.

DISCUSSION

I. No Error in Finding Jane Doe 3 Was Unavailable to Testify

A. Background

Before the second trial, the prosecutor filed a motion seeking to declare Jane Doe 3 unavailable and admit her testimony from the preliminary hearing and first trial. According to the motion, when representatives from the district attorney's office visited Jane Doe 3 at her home, she was angry and adamant that she would not testify again. She expressed the need to protect her emotional well-being.

On a second visit to Jane Doe 3's home, representatives from the district attorney's office served her with a subpoena to testify in this case. After receiving it, Jane Doe 3 said she would not come to court to testify. When she was told a subpoena was a court order, she explained that "while she did not want to disrespect the court, she felt she could not come to court again." Jane Doe 3 wrote a letter to the court explaining she would "not attend court on this matter or partake [in] this case [d]ue to the trauma this has cause[d] by resurf[a]cing into [her] life." She continued, "After I testified I felt as if everything that happened was my fault, being ridiculed and shamed, has forced me to backslide in my life. I am trying to move forward not backwards."

At the behest of defense counsel, the trial court issued an order to show cause for Jane Doe 3's appearance, and appointed counsel for her. The prosecution served Jane Doe 3 with the order to show cause as directed.

On January 11, 2018, Jane Doe 3 appeared with her court-appointed attorney. The court expressed its "intention to order Jane Doe 3 back to testify in this trial[.]" Counsel stated that he had lengthy conversations with Jane Doe 3 and "reviewed some of the materials that have been presented

before [the court] about her desire [not] to participate" in the trial. According to counsel, Jane Doe 3 "ha[d] extremely strong feelings about not participating in this trial for a whole host of reasons." Counsel did not believe "that there's going to be any change any time for any reason where [Jane Doe 3] will testify in this case for the prosecution or on behalf of the defense." After hearing further argument, the court ordered Jane Doe 3 to return to court with her lawyer on January 24.

On January 24, Jane Doe 3, her lawyer, and the parties appeared for another hearing on her unwillingness to testify. Jane Doe 3 was sworn as a witness and said that she had previously testified at the preliminary hearing and at the prior trial, and that she was not "prepared to testify a third time." When the court asked her, "If I ordered you to testify, would you testify?" Jane Doe 3 replied, "With all due respect, no, sir." It was made clear to Jane Doe 3 that the case would be tried to a different jury and that the defense had a right to have that jury observe her to judge her credibility. Jane Doe 3 reiterated that she did not "want to partake in this hearing." The court asked her why, and Jane Doe 3 answered, "I just don't want to. I don't want to re-live the situation." When she was asked to specify how the situation affected her, Jane Doe 3 said "[i]n numerous ways" and that she did not "really want to speak about that." Jane Doe 3 understood that it was "within [the court's] discretion to find [her] in contempt of court for not testifying, and as a result, to fine [her] a maximum of $1,000."

After hearing argument, the court declined to find Jane Doe 3 in contempt of court, reasoning that she "has been respectful to the Court; has made all appearances that the Court has requested; has been respectful on the stand." The court relied on *People v. Cogswell* (2010) 48 Cal.4th 467 (*Cogswell*) to find Jane Doe 3 unavailable to testify. The court observed that

even if Jane Doe 3 was held in contempt, "under 1219(b) of the Code of Civil Procedure . . . [it] would not have been able to confine her." Relying on *People v. Smith* (2003) 30 Cal.4th 581 (*Smith*), the court determined that such a finding of contempt "is an extreme action [that] circumvents the spirit of 1219(b) of the Code of Civil Procedure." The court concluded that Jane Doe 3 was unavailable for trial under section 240, subdivision (a)(4), and her prior testimony was admissible.

B. Applicable Law and Standard of Review

"A criminal defendant has the right, guaranteed by the confrontation clauses of both the federal and state Constitutions, to confront the prosecution's witnesses." (*People v. Herrera* (2010) 49 Cal.4th 613, 620 (*Herrera*).) However, there is " ' "an exception to the confrontation requirement where a witness is unavailable and has given testimony at previous judicial proceedings against the same defendant [and] was subject to cross-examination . . . ." ' " (*Id.* at p. 621.) This exception "is codified in the California Evidence Code. [Citation.] Section 1291, subdivision (a)(2), provides that 'former testimony,' such as preliminary hearing testimony, is not made inadmissible by the hearsay rule if 'the declarant is unavailable as a witness,' and '[t]he party against whom the former testimony is offered was a party to the action or proceeding in which the testimony was given and had the right and opportunity to cross-examine the declarant with an interest and motive similar to that which he has at the hearing.' " (*Ibid.,* fns. omitted.)[2]

But not every witness absent from the proceedings is considered to be unavailable. "A witness who is absent from a trial is not 'unavailable' in the constitutional sense unless the prosecution has made a 'good faith effort' to

[2] Lawson does not contend he had insufficient prior opportunity to cross-examine Jane Doe 3.

obtain the witness's presence at the trial." (*Herrera, supra,* 49 Cal.4th at p. 622.) The "Evidence Code features a similar requirement for establishing a witness's unavailability. Under section 240, subdivision (a)(5) . . ., a witness is unavailable when he or she is '[a]bsent from the hearing and the proponent of his or her statement has exercised *reasonable diligence* but has been unable to procure his or her attendance by the court's process.' " (*Ibid*.)

Here, the trial court determined that Jane Doe 3 was unavailable under a similar provision; Evidence Code section 240, subdivision (a)(4) (section 240 (a)(4)), provides that a witness is unavailable when he or she is "[a]bsent from the hearing and the court is unable to compel his or her attendance by its process." In *Herrera*, our Supreme Court recognized that while unavailability under section 240 (a)(4) may not require a proponent's "reasonable diligence" to secure a witness's attendance at a hearing, "unavailability *in the constitutional sense* nonetheless requires a determination that the prosecution satisfied its obligation of good faith in attempting to obtain [the witness's] presence."
(*Herrera, supra,* 49 Cal.4th at pp. 622-623, italics added.) Thus, we must consider whether the prosecutor's efforts in producing Jane Doe 3 for trial "were reasonable under the circumstances presented," and whether the court was unable to compel her attendance by process. (*Id.* at p. 623.)

When a witness, like Jane Doe 3, has been the victim of sexual assault, the determination of reasonableness must take into account the import of Code of Civil Procedure section 1219, subdivision (b) (Section 1219(b)). It provides, in relevant part, "Notwithstanding any other law, no court may imprison or otherwise confine or place in custody the victim of a sexual assault . . . for contempt when the contempt consists of refusing to testify concerning that sexual assault . . . ." (Section 1219(b).) Our Supreme Court

has held this provision "reflects the Legislature's view that sexual assault victims generally should not be jailed for refusing to testify against the assailant." (*Cogswell, supra,* 48 Cal.4th at p. 478.)

"We review the trial court's resolution of disputed factual issues under the deferential substantial evidence standard [citation], and independently review whether the facts demonstrate prosecutorial good faith and due diligence [citation]." (*Herrera, supra,* 49 Cal.4th at p. 623.)

C. Analysis

Lawson contends the trial court erred when it found Jane Doe 3 was unavailable because her presence in court and her refusal to testify, without a finding of contempt, is not a circumstance described within Evidence Code section 240. According to Lawson, Evidence Code section 240 provides "an exclusive definitional list of the categories of unavailability cognizable under the Evidence Code."

Such a narrow construction of section 240 was rejected in *Smith* by the California Supreme Court. (*Smith, supra,* 30 Cal.4th at pp. 623-624.) There, a witness came to court but refused to testify unless she could tell jurors that she was against the death penalty. As relevant here, the court explained that "[t]he circumstance that Mary G. was physically present in the courtroom and merely refused to testify does not preclude a finding of unavailability. Evidence Code section 240, which defines when a witness is unavailable, does not specifically describe this situation, but that statute does not 'state the exclusive or exact circumstances under which a witness may be deemed legally unavailable for purposes of Evidence Code section 1291.' (*People v. Reed* (1996) 13 Cal.4th 217, 228.) Courts have admitted 'former testimony of a witness who is physically available but who refuses to testify (without making a claim of privilege) if the court makes a finding of unavailability

only after taking reasonable steps to induce the witness to testify unless it is obvious that such steps would be unavailing.' (*People v. Sul* (1981) 122 Cal.App.3d 355, 364-365 [(*Sul*)] (plur. opn.), citing *Mason v. United States* (10th Cir. 1969) 408 F.2d 903; accord, *People v. Francis* (1988) 200 Cal.App.3d 579, 584; *People v. Walker* (1983) 145 Cal.App.3d 886, 894.)" (*Smith, supra,* 30 Cal.4th at p. 624.)

The efforts to induce Jane Doe 3 to testify in this case appear reasonable under the circumstances. Members of the prosecution team spoke to Jane Doe 3 on at least two occasions to discuss her testimony at trial. Each time, she was adamant that she would refuse to testify. Even after the prosecution team served Jane Doe 3 with a subpoena and advised her of the consequences of ignoring it, she still refused to cooperate. Jane Doe 3 wrote a letter to the court stating that she did not want to testify. Thereafter, at the court's direction, the prosecution served Jane Doe 3 with an order to show cause. She appeared at two hearings with her court-appointed counsel, who advised the court of Jane Doe 3's steadfast desire not to testify. At one of the hearings, the court questioned Jane Doe 3 and asked whether finding her in contempt and imposing a $1,000 maximum fine would influence her to change her mind. She said it would not. Because Jane Doe 3 was being asked to testify about her rape and assault in 2008, section 1219(b) applied, and the court "had no power to incarcerate this victim of a sexual assault for refusing to testify concerning that assault. (Code Civ. Proc., § 1219, subd. (b).)" (*Smith, supra,* 30 Cal.4th at p. 624.)

Lawson argues that notwithstanding section 1219(b), the court was required to find Jane Doe 3 in contempt before it could deem her unavailable. We disagree. " 'Trial courts do not have to take extreme actions before making a finding of unavailability.' ([]*Sul, supra,* 122 Cal.App.3d at p. 369

[].)" (*Smith, supra,* 30 Cal.4th at p. 624.) Instead, *Smith* requires only that the court take "reasonable steps to induce the witness to testify unless it is obvious that such steps would be unavailing." (*Smith, supra,* 30 Cal.4th at p. 624.)

Although Lawson contends the trial court could have imposed a fine or otherwise done more to persuade Jane Doe 3 to testify, additional efforts are not required when "it is obvious that such steps would be unavailing." (*Smith, supra,* 30 Cal.4th at p. 624, quoting *Sul, supra,* 122 Cal.App.3d at pp. 364-365.) The trial court observed Jane Doe 3's demeanor, affect, and listened to her responses. After considering her apparent resolve, the court found that there was nothing further it could do to coerce her testimony. The record supports this conclusion, and we therefore affirm the finding. (*People v. Alcala* (1992) 4 Cal.4th 742, 778-780 [using substantial evidence standard to affirm trial court finding that witness was unavailable].) In the circumstances, a finding of contempt would be a symbolic gesture and without practical impact. "The law neither does nor requires idle acts." (Civil Code § 3532.)

Following and applying *Smith*, we conclude the trial court properly found Jane Doe 3 was unavailable to testify and did not err when it admitted her prior testimony into evidence.

We are not persuaded by Lawson's suggestion that *Smith* and similar cases were abrogated by the 2010 addition of subdivision (a)(6) to to Evidence Code section 240. Under subdivision (a)(6), a declarant who is "[p]ersistent in refusing to testify" about the subject of his or her out-of-court statement "despite having been found in contempt" for refusing to testify is "unavailable." (Evid. Code, § 240, subd. (a)(6).) The addition of this variant of refusal to testify to the statutory definition of unavailability is entirely

consistent with prior case law. (*Smith, supra,* 30 Cal.4th at p. 624; *People v. Reed, supra,* 13 Cal.4th at pp. 226-227; *People v. Francis, supra,* 200 Cal.App.3d at pp. 585-587.) It did not, as Lawson suggests, abrogate those holdings. His reliance on the maxim of statutory construction *expressio unius est exclusio alterius*—that is, "[t]he expression of some things in a statute necessarily means the exclusion of other things not expressed" (*Gikas v. Zolin* (1993) 6 Cal.4th 841, 852)—does not help him.

We presume the Legislature was aware of existing law when it added subdivision (a)(6) to Evidence Code 240. (*People v. Landry* (2016) 2 Cal.5th 52, 105; *People v. Childs* (2013) 220 Cal.App.4th 1079, 1104.) Included within our presumption is the Legislature's awareness that under *Smith* a witness may be unavailable even if he or she did "not fit neatly into one of the subdivisions of Evidence Code 240." (*People v. Francis, supra,* 200 Cal.App.3d at p. 587.) Had the Legislature wanted to so limit the concept of unavailability to an exclusive definitional list, it would have done so when it enacted subdivision (a)(6). It did not. If anything, the legislative history of the 2010 amendment to section 240 reflects an intent to *expand* the definition of unavailability. (Assem. Com. on Judiciary, Analysis of Assem. Bill No. 1723 (2009-2010 Reg. Sess.) p. 2; Sen. Com. on Public Safety, Analysis of Assem. Bill No. 1723 (2009-2010 Reg. Sess.) June 29, 2010, p. 12.)

The 2010 addition of subdivision (a)(6) to Evidence Code section 240 did not abrogate prior case law. Instead, this amendment expanded the statutory definition of unavailability and did not affect the trial court's ability to find Jane Doe 3 was unavailable.

The admission of Jane Doe 3's prior testimony did not violate Lawson's statutory or constitutional rights.

II. Code of Civil Procedure section 1219

Lawson argues that the effect of Code of Civil Procedure section 1219, subdivision (b) vitiates the power of the court to compel witness testimony and, as a result, unconstitutionally impairs his right to confront adverse witnesses. He says this is so because section 1219 (b) is, in effect, a grant of "immunity" and the court can no longer coerce a witness to testify by incarceration for contempt. Thus, he says, section 1219 (b) "vitiated the finding of unavailability[,]" thereby resulting in a deprivation of his right to confrontation.

"Code of Civil Procedure section 1219, originally enacted in 1872, provides that when a person has been found in contempt of court for refusal to perform an act that the person is capable of performing, the court may order the person jailed until that act is performed. (*In re Mark A.* (2007) 156 Cal.App.4th 1124, 1143.)" (*Cogswell, supra,* 48 Cal.4th p. 477.) Subdivision (b), was added to section 1219 in 1984 (*ibid.*), and proscribes the imprisonment of sexual assault victims who refuse to testify. "It is the intent of the Legislature that a victim of sexual assault shall be accorded special consideration because of the severity of the emotional harm resulting from this type of crime. It is the further intent of the Legislature that this act shall not be interpreted to excuse any person other than a victim of sexual assault from the prescribed penalties for contempt." (Stats. 1984, Ch. 1644, Sec.3)

Lawson correctly points out that courts have "inherent power to punish for contempts of court. [Citations]." (*In re McKinney* (1968) 70 Cal.2d 8, 10-11.) But the contempt power is not absolute. Rather, its exercise is regulated by statute, and the Legislature may place reasonable limitations on the court's contempt power. (*Id.* at p. 11.)

Although Lawson's briefs do not go so far as saying that standing alone section 1219 (b) is unconstitutional, his implicit argument is that punishment for contempt is an inherent power which the Legislature cannot curtail. But our Supreme Court has explained that legislative limits on the contempt power are unconstitutional when the Legislature "completely strip[s] the courts of power to treat or punish as contempt a class of offenses." (*McKinney, supra,* 70 Cal.2d at p. 12, citations omitted.)

Section 1219 (b) does not deprive the court of all power to punish a class of contempts. Indeed, the trial court may impose a fine and adjudge a recalcitrant sexual assault victim to be in contempt. (See Code Civ. Proc., § 1218, subd. (a).) Section 1219 (b) merely "prohibits a trial court from *jailing for contempt* a sexual assault victim who refuses to testify against the attacker." (*Cogswell, supra,* 48 Cal.4th at p. 478.) This limitation is reasonable in light of the unique circumstances faced by witnesses who are victims of sexual assault.

Cogswell, although virtually ignored by Lawson,[3] informs our decision. There, the California Supreme Court explained: "Although any crime victim may be traumatized by the experience, sexual assault victims are particularly likely to be traumatized because of the nature of the offense. To relive and to recount in a public courtroom the often personally embarrassing intimate details of a sexual assault far overshadows the usual discomforts of giving testimony as a witness. And the defense may, through rigorous cross-examination, try to portray the victim as a willing participant. (See

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[3] *In re Michael G.* (1988) 44 Cal.3d 283, superseded by statute as stated in *In re A.N.* (2020) 9 Cal.5th 343, 354, cited by Lawson, is inapposite as it did not involve contempt proceedings regarding a sexual assault victim. (*Id.* at p. 287.) Rather, the question before the court was whether the juvenile court could exercise its contempt power to detain a minor during non-school hours. (*Ibid.*)

generally, Berger, *Man's Trial, Woman's Tribulation: Rape Cases in the Courtroom* (1977) 77 Colum. L.Rev. 1.) Also, seeing the attacker again—this time in the courtroom—is for many sexual assault victims a visual reminder of the harrowing experience suffered, adding to their distress and discomfort on the witness stand. (See Ellison, The Adversarial Process and the Vulnerable Witness (2001) pp. 16–17.) It comes as no surprise, therefore, that often a victim of sexual assault is hesitant to report the crime. Even fewer such crimes would be reported if sexual assault victims could be jailed for refusing to testify against the assailant.

"Recognizing these concerns, the California Legislature in 1984 amended Code of Civil Procedure section 1219 to add subdivision (b). (Sen. Bill No. 1678 (1983–1984 Reg. Sess.) § 2.) That provision, as mentioned earlier, prohibits a trial court from *jailing for contempt* a sexual assault victim who refuses to testify against the attacker. As the author of that legislation explained to his fellow senators: 'The purpose of [section 1219 (b)] is not only to protect victims of sexual assault from further victimization resulting from imprisonment or threats of imprisonment by our judicial system, but also to begin to create a supportive environment in which more victims might come forward to report and prosecute [perpetrators of] sexual assault.' (Sen. Floor Statement by Sen. Dan McCorquodale on Sen. Bill No. 1678, May 1, 1984.) Enactment of section 1219 (b) reflects the Legislature's view that sexual assault victims generally should not be jailed for refusing to testify against the assailant." (*Cogswell, supra,* 48 Cal.4th at p. 478.)

Neither is the absence of confinement as a remedy for contempt a new or novel development in the trial courts. It has long been the case that a contempt finding may have little or no coercive effect for witnesses who are already incarcerated. (*People v. Walker* (1983) 145 Cal.App.3d 886, 894.)

Here, after inquiry, the trial court concluded that Jane Doe 3 was not willing to testify, and her testimony could not be coerced by threat of contempt or imposition of a fine. The conclusion that she was legally unavailable to testify and use of her prior testimony did not violate Lawson's right to confront adverse witnesses.

Code of Civil Procedure section 1219 (b) is a reasonable limit on the trial court's contempt power enacted to spare victims of sexual assault from further victimization. Accordingly, the admission of Jane Doe 3's prior testimony did not violate Lawson's state and federal confrontation rights.

DISPOSITION

The judgment is affirmed.

_____
Siggins, P.J.

WE CONCUR:

_____
Petrou, J.

_____
Jackson, J.

People v. Lawson, A154481

Trial Court: Alameda County Superior Court

Trial Judge: Hon. Allan D. Hymer

Counsel:

Mark David Greenberg, Second District Appellate Project, under appointment of the Court of Appeal, for Appellant.

Xavier Becerra, Attorney General, Jeffrey M. Laurence, Senior Assistant Attorney General, Donna M. Provenzano, Supervising Deputy Attorney General, Victoria Ratnikova, Deputy Attorney General, for Respondent.

APPENDIX B

ORDER DENYING APPELLANT'S PETITION FOR REHEARING IN THE CALIFORNIA COURT OF APPEAL, SEPTEMBER 3, 2020

COURT OF APPEAL, FIRST APPELLATE DISTRICT
350 MCALLISTER STREET
SAN FRANCISCO, CA 94102
DIVISION 3

THE PEOPLE,
Plaintiff and Respondent,
v.
ELJAROD LAWSON,
Defendant and Appellant.

A154481
Alameda County Super. Ct. No. 619332

BY THE COURT:

The petition for rehearing is denied.

Date: 09/03/2020

Siggins, P.J.
P.J.
PRESIDING JUSTICE

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AFFIDAVIT OF TRANSMITTAL

I am a citizen of the United States, over 18 years of age, and not a party to the within action; that my business address is 350 McAllister Street, San Francisco, CA 94102; that I electronically served a copy of the attached material to those persons noted below using the email addresses of record kept by this office.

Those persons without email addresses were served a copy of the attached material via U.S. Postal Service in envelopes addressed as noted below. Said envelopes were sealed and postage fully paid thereon, and thereafter sent from San Francisco, CA 94102 or, alternatively, served via inter-office mail.

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

Charles D. Johnson, Clerk of the Court

G. King — September 3, 2020

Deputy Clerk — Date

CASE NUMBER: A154481

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APPENDIX C

ORDER OF THE CALIFORNIA SUPREME COURT DENYING DISCRETIONARY REVIEW, OCTOBER 14, 2020

Court of Appeal, First Appellate District, Division Three - No. A154481

S264364

IN THE SUPREME COURT OF CALIFORNIA

En Banc

THE PEOPLE, Plaintiff and Respondent,

v.

ELJAROD LAWSON, Defendant and Appellant.

The petition for review is denied.

CANTIL-SAKAUYE

Chief Justice