IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. DARIEL SHAZIER, Defendant and Appellant.	Case No. S208398

Sixth Appellate District Case No. H035423
Santa Clara County Superior Court, Case No. 210813
The Honorable Alfonso Fernandez, Judge Presiding

ANSWER TO PETITION FOR REVIEW

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ANSWER TO PETITION FOR REVIEW

TO: The Honorable Tani Cantil-Sakauye, Chief Justice, and the Associate Justices of the California Supreme Court:

Appellant Dariel Shazier answers the Petition for Review filed by respondent to the decision of the court of appeal filed on December 27, 2012, and requests that this Court deny review.

STATEMENT OF THE CASE AND FACTS

Appellant hereby adopts the Factual and Procedural Background in the opinion of the court of appeal (Opn., at pp. 1-5.) The court of appeal concluded that the prosecutor committed multiple instances of misconduct that prejudiced the defendant and reversed the judgment (Opn. at 20.) No petition for rehearing was filed by either party. Respondent filed a petition for review on February 1, 2013.

BRIEF IN SUPPORT OF ANSWER

Respondent seeks review in this case where the court of appeal held that there was a pervasive pattern of prosecutorial misconduct. Review should be denied because this case presents no issue of statewide importance and does not purport to create a conflict of authority. The court of appeal correctly applied established principles of law on a fact-intensive issue. Further, some of respondent's arguments for granting review are based on an inaccurate reading of the court of appeal's decision.

The court of appeal found that there was misconduct in this case because the prosecutor:

-asked the jury to consider the proximity of elementary schools in the neighborhood appellant would live if released and the fact that he would not be on parole;

-questioned the defense expert about five other sex offenders he evaluated and recited the heinous details of their crimes;

-mocked the defense expert in closing argument;

-impugned the character of defense counsel by calling him "deceptive" in closing argument;

-conducted argumentative, improper questioning of a defense witness;

-made inflammatory remarks to the jury during closing argument that they had been "groomed" by defendant after eliciting expert testimony that appellant had "groomed" his victims;

-referred to defense witnesses in closing argument as serial rapists and child molesters;

-referred to appellant in closing argument as the "unluckiest child molester in the world" and implied that he had committed many more crimes for which he wasn't caught; and

-asked the jury to consider how it would explain a verdict of "not true" to their friends and family.

In its discussion of the case, the court of appeal first held that the prosecutor committed "blatant misconduct" by "asking the jury to consider the reactions of their friends and family, fearing reproval should they find for the defendant." (Opn. at 9.) The court of appeal also found misconduct in the prosecutor's implication in closing argument that defendant had committed many other crimes. (Op. at 9.) Standing alone, each of these was an instance of prejudicial misconduct. Each had an appropriate objection on appropriate grounds. Each were properly analyzed under state and federal law. Neither of these instances are mentioned in Petition for Review, and both independently justify the opinion of the court of appeal.

The issues raised below do not present any departure from well-settled law and do not change the result in this case.

ISSUE #1: May the prosecutor examine witnesses in a civil commitment trial under the Sexually Violent Predators Act about the defendant's plans for release, including where he would live, the surrounding environs, and whether he would be under any form of supervision?

1. **The Court of Appeal Applied Well-Settled Law When it Held That it Was Misconduct to Ask the Jury to Consider the Consequences Its Verdict**

The court of appeal held that: "[t]he prosecutor's reference to the proximity of schools to defendant's mother's house, as well as the fact that if released defendant would be living with his mother and would not be under the supervision of parole were improper references to the consequences of the jury's verdict." (Op. at 11).

It is well-settled in both criminal and civil commitment cases that a jury should not consider what will happen as a result of its verdict. *(People v. Calderon* (2005) 124 Cal. App. 4th 80, *99,* citing *People v. Rains (1999)* 75 Cal. App. 4th 1165). In *People v. Rains,* the court of appeal held that it is error to admit evidence about the consequences of a true finding in an SVPA case because such evidence is irrelevant to the question of whether the defendant met the criteria of the SVPA. (5 Cal. App. 4th at 1170).

The prosecutor herein asked the jury to consider the consequences of their verdict, namely, that if released, appellant would be living near two elementary schools and a big park without the safeguard of parole. The court of appeal properly applied the rule of law that inviting a jury to consider speculative matters beyond the evidence and appealing to its fear

at the guilt phase of a trial is prosecutorial misconduct. (*People v. Kirkes* (1952) 39 Cal.2d 719, 724; *People v. Pensinger* (1991) 52 Cal.3d 1210, 1250.)

Telling the jury that appellant would be living near schools and not on parole was not only improper because it asked jurors to consider matters after the verdict, it also appealed to the jurors' passions, prejudices and fears by appealing to them to render a true finding in order to insure the safety of the community. (*In re Brian J.* (2007) 150 Cal. App. 4th 97).

2. The Court of Appeal Did Not Rule on The Issue Posed by Respondent, So It is Not Properly Before This Court

The court of appeal did not hold that the prosecutor cannot examine witnesses in a civil commitment trial under the Sexually Violent Predators Act about the defendant's plans for release. Instead, it found prosecutorial misconduct when the prosecutor asked the defendant to look at elementary schools "very close to where [he'd] be living" on a map, and then argue to the jury that he would not be on parole if released, and that there "was no stopping him." (9 RT 1099-1100, 10 RT 1229-30).

The court of appeal held that:

> "A defendant's potential punishment or lack thereof is not a proper matter for juror consideration. (citations omitted). There is no question *the prosecutor's comments regarding the schools and lack of parole* were designed to make the jury

consider the consequences of its decision in this case. Such considerations are wholly improper, and cast doubt on the jury's ability to properly consider the evidence in this case." (Opn. at 12; emphasis added).

This is a limited ruling and is significantly different than the issue set forth by respondent. Respondent's claim that this decision is a "profoundly disruptive precedent for the prosecution of SVP cases statewide" is unfounded. (PFR at 6). The court did not hold that it is misconduct for the prosecutor to examine witnesses about the defendant's plans for release. The court did not hold that the prosecutor may not ask about a defendant's "living circumstances upon release." The court did not hold "inadmissible the defendant's proposed community and lack of parole restrictions if released." (PFR at 6).

Although respondent endeavors to make this case about admissibility of evidence and the appropriateness of questioning about a defendant's release plan in SVP cases, these were not issues relevant to this case, nor part of the opinion. The court did not make any sweeping statements that a prosecutor may not ask about a defendant's release plan. The opinion refers specifically to the argument made by the prosecutor in closing argument with regard to appellant living near schools and not being on parole.

3. Respondent Has Mischaracterized the Manner in Which "Necessity for Confinement in a Secure Facility" is Proven in SVP Cases

The determination of whether or not a defendant in an SVP case is likely to reoffend "unless confined in a secure facility" does not require a jury to consider where the defendant would be living when he is released. The determination of whether or not a defendant is likely to reoffend is obtained through expert testimony, not by analyzing the risks that exist in his proposed neighborhood.

Respondent cites to *People v. Grassini* (2003) 113 Cal. App. 4th 765 and *People v. Superior Court (Ghilotti)* (2002) 27 Cal.4th 888, for the proposition that: "Because confinement in a secure facility is an element that must be proved by the prosecution, the jury had to consider whether the circumstances surrounding release affects defendant's amenability to voluntary treatment, or otherwise affects his risk of reoffense." (PFR at 9). *Grassini, Ghilotti* and the statute itself do not support this erroneous statement of the law.

In *Grassini*, the court held that, when a defendant claims that treatment can take place in an outpatient facility, the jury must be instructed that the prosecution has to prove that treatment in a secure facility is necessary to protect the public. (*Id.* at 777). That determination does not require or allow the jury to consider where the defendant will be living if released. Indeed, it would run in severe contravention to long-standing

principles of both criminal and SVPA law if the prosecutor were allowed to counter a *Grassini* defense by introducing evidence of all the potential dangers in the neighborhood where the defendant planned to reside.

Respondent claims that "[b]y holding such an examination and argument improper, the court of appeal impermissibly burdens the prosecution's ability to prove its case and hobbles the factfinder in SVP trial from considering relevant evidence on the central issues allocated to it for decision." (PFR at 10). The court of appeal did not make any such limitation on the ability of the prosecution to prove its case. The evidence of schools in the neighborhood has no reasonable application to any "central issue" in an SVP case. The prosecutor herein asked no questions of the defendant about how he would avoid reoffending in the proximity of schools. He merely pointed out all the places where children would be in the area of his mother's home and then he used that to argue to the jury that appellant would be near children and not on parole. This is distinctly different from the issue presented by respondent.

Review should be denied because: (1) the court of appeal applied the longstanding rule in both criminal and SVP cases that the jury cannot be asked to consider the consequences of its verdict; (2) the court of appeal did not decide that the prosecutor could not ask questions and make argument regarding defendant's "release plans"; and (3) the court of appeal in no way

limited the ability of the prosecutor to prove the necessity for secure confinement.

ISSUE #2: Did the Court of Appeal Err in Finding Misconduct as to Questions and Argument to Which There Was No Objection, Failing to Consider the Remarks in the Entire Context of Trial, and in Relying on Unpreserved Claims and Proper Prosecutorial Conduct to Find Prejudice?

As is detailed below, there were multiple objections made by defense counsel in this case, including:

-multiple objections regarding questioning of defense expert about five other sex offenders he evaluated and listing the heinous details of their crimes (9 RT 987-90, 991-94);

-objection to calling defense counsel "deceptive" in closing argument (10 RT 1278-79);

-objection to argumentative, improper questioning of defense witness Michael Ross (8 RT 870-71, 878);

-objections to calling appellant as the "unluckiest child molester in the world" and implying that he had committed many more crimes for which he wasn't caught in closing argument (10 RT 1242); and

-multiple objections regarding asking the jury to consider how it would explain a verdict of "not true" to their friends and family. (10 RT 1283-1284).

The record reveals that defense counsel objected to each instance of misconduct except for the questioning of appellant about the map of his

neighborhood, and the remarks made in closing argument about "grooming," appellant's witnesses being "two serial rapist and a child molester," and the disparaging of Dr. Donaldson. (Appellant also made a motion in limine asking that it not be mentioned that appellant would not be on parole if released, which was denied.) (4 RT 174, 2 CT 359.)

Respondent alleges that the court of appeal's consideration of the conduct for which there was not an objection, in conjunction with the conduct for which there was an objection, puts at risk this Court's contemporaneous objection rule. First, as is apparent from the record, most of the instances of misconduct were objected to. Second, the court of appeal applied the well-settled rule that when misconduct is part of a pattern and multiple objections are made, it is proper for a reviewing court to consider it in evaluating the pattern of impropriety. (*People v. Estrada* (1998) 63 Cal. App. 4th 1090.)

Further, it must be noted that, while nearly all the conduct was objected to, not one objection was sustained. As held in *People v. Hill*, "a defendant will be excused from the necessity of either a timely objection and/or a request for admonition if either would be futile. In addition, failure to request the jury be admonished does not forfeit the issue for appeal if 'an admonition would not have cured the harm caused by the misconduct.'" [citations omitted]. (*People v. Hill* (1998) 17 Cal.4th 800, 820-21).

At the outset of its opinion, the court of appeal recited the appropriate standards for analyzing misconduct as follows:

> "Under federal constitutional standards, a prosecutor's 'intemperate behavior' constitutes misconduct if it is so 'egregious' as to render the trial 'fundamentally unfair' under due process principles. [*People v. Samayoa* (1997) 15 Cal.4th 795, 841]. Under state law, a prosecutor commits misconduct by engaging in deceptive or reprehensible methods of persuasion. Where a prosecutor has engaged in misconduct, the reviewing court considers the record as a whole to determine if the alleged harm resulted in a miscarriage of justice. (*People v. Duncan* (1991) 53 Cal.3d 955, 976-77). In considering prejudice, 'when the claim focuses upon comments made by the prosecutor before the jury, the question is whether there is a reasonable likelihood that the jury construed or applied any of the complained-of remarks in an objectionable fashion.'(*Samayoa, supra*, 15 Cal.4th at. P. 841).
>
> "Our Supreme Court in *Samayoa* stated that a prosecutor commits misconduct by using deceptive and reprehensible means of persuasion. (*Samayoa, supra*, 15 Cal.4th at. P. 841).

A review of the record reveals that the court correctly applied the standards for prosecutorial misconduct, and the prosecutor's comments

were generally unambiguous and not subject to a wide variety of interpretation. There was no risk of the comments being construed out of context. The court of appeal properly considered the record as whole. In applying the above principles to this case, the court of appeal concluded that:

> "[t]his is not a case in which the prosecutor engaged in a few minor incidents of improper conduct. Rather, the prosecutor engaged in a pervasive pattern of inappropriate questions, comments and argument, throughout the entire trial, each one building on the next, to such a degree as to undermine the fairness of the proceedings. The misconduct culminated in the prosecutor flagrantly violating the law in closing argument, telling the jury to consider the reaction of their friends and family to their verdict implying they would be subject to ridicule and condemnation if they found in favor of defendant. The cumulative effect of all the prosecutor's misconduct requires reversal. (See *People v. Riggs* (2008) 44 Cal.4th 248, 298.)"

Below, appellant responds to the categories of misconduct as set forth by respondent in the Petition for Review.

1. Questioning About Defendant's "Release Plans"

As indicated above, the court of appeal herein never ruled that the prosecutor may not ask about "release plans," so there is no necessity for

review of this issue. Instead, the court of appeal applied the well-settled standard that it is improper to ask the jury to consider the consequences of its verdict. It held that the prosecutor committed misconduct by showing appellant a map of the area he intended to live if released and pointing out two elementary schools, a park, a McDonald's, and a shopping center nearby, and then telling the jury that, if released, appellant would be near schools and not on parole. This asked the jury to improperly consider what would happen if appellant is released – the specific consequences of their verdict.

2. Discussion of Parole

Inviting a jury to consider speculative matters beyond the evidence and appealing to its fear at the guilt phase of a trial is prosecutorial misconduct. (*People v. Kirkes* (1952) 39 Cal.2d 719, 724; *People v. Pensinger* (1991) 52 Cal.3d 1210, 1250.)

During closing argument, the prosecutor stated:

> "And so there is really no stopping Mr. Shazier, not even when he was on parole. And now of course, you know, he is not on parole. So when Mr. Shazier tells you that he is going to go live in Maryland with his mother, the only thing you have to go – the only thing that you have to believe that is what Mr. Shazier said." (10 RT 1229-30).

The prosecutor continued:

"When you deal with a case like this and the facts are so ugly, and they are so distinct from the things that you deal with in your normal daily lives, you may think, you just may want to understandably put it out of your minds as though this sort of thing doesn't happen, and just give this man who can be quite eloquent at times an unjust benefit of the doubt, and just think it is going to be somebody else's problem now. We will let his sister, we will let his mother deal with this. I submit to you that would be an abdication of your responsibilities here, because your service here presents an opportunity." (10 RT 1230).

Telling the jury that appellant was not on parole was not only improper because it asked jurors to consider matters after the verdict, it also appealed to the jurors' passions, prejudices and fears by appealing to them to render a true finding in order to insure the safety of the community. (*In re Brian J.* (2007) 150 Cal. App. 4th 97). This is especially true, given that the prosecutor questioned appellant about all of the schools, parks and fast food restaurants he would be living around if released.

The fact that appellant would not be on parole was the subject of an in limine motion, and therefore, any objection during closing argument would have been futile. (4 RT 174, 2 CT 359). Respondent's reliance of *People v. Visciotti* (1992) 2 Cal.4th 1, 82) is misplaced. This was not a circumstance of erroneously admitted evidence argued in good faith by the

prosecutor. The misconduct is in the argument to the jury that they should consider the fact that appellant would not be on parole and would be living near elementary schools if they did not find that he was an SVP. This specifically asked the jury to consider the consequences of their verdict.

3. Questioning of Dr. Donaldson

The prosecutor asked Dr. Donaldson about five sex offenders who he previously found did not have a diagnosed mental disorder. Defense counsel objected multiple times to the district attorney's "inflammatory recital" and asked that all of the testimony be stricken. (9 RT 987-90) Although Dr. Donaldson had no files and could not remember the individual defendants, the prosecutor recited for the jury the terrible facts of each of these men's crimes. In so doing, he not only impugned Dr. Donaldson, he also inflamed the jury by giving the detailed recitations.

Respondent contends that, since the prosecutor elicited a contrary opinion from an opposing expert (Dr. Updegrove), it was permissible under *People v. Buffington* (2007) 152 Cal. App. 4th 446, to ask about the facts of Dr. Donaldson's previous cases. In *Buffington*, the prosecutor elicited testimony from the same Dr. Donaldson about three other cases wherein he testified for the defendant. All three had egregious facts, much like the five cases testified about in this case. The court held that the evidence regarding the other SVPA cases was not relevant to show Dr. Donaldson's bias or

prejudice because there was no effort to elicit contrary testimony from a prosecution expert.

Respondent only cites one instance of the prosecutor asking his own expert about one of the five cases (the Ward case). Respondent states that this is because the Ward case was the only case Dr. Donaldson said he remembered. This is not accurate. Dr. Donaldson testified that he did not remember the Ward case, or any of the other cases the prosecutor asked about. (9 RT 991-94). In addition, Dr. Updegrove did not actually counter Dr. Donaldson's opinion that Ward did not have a mental disorder; rather, he testified that, based on the facts of the Ward case, it would be "unreasonable not to *consider* the possibility of the mental disorder." (10 RT 1185). This is not contrary to Dr. Donaldson's ultimate conclusion that Ward did not have a mental disorder. It merely states that it would be unreasonable not to consider one.

In the Petition for Review, respondent included the questioning that occurred up until the point where defense counsel asked to approach. After counsel approached the bench, the prosecutor continued as follows:

"Q: Do you remember handling an SVP evaluation involving a man named Mr. Badura...?

A: How long ago was that?

Q: Back in the late 1990's, early part of this decade.

A: I remember the name.

Q: Would it refresh your recollection if I told you that he was accused of molesting every child in his apartment complex, including his own three-and-a-half year old son.

Mr. Hoopes: I'm going to object, your Honor. This will be a continuing objection.

The Court: It will be noted

The Witness: I don't recall the specifics of that case. I mean, I've done hundreds of these. I don't really remember.

Mr. Boyarsky: Do you remember an individual by the name of Richard Flick?

A: That doesn't seen sound familiar to me. [sic]

Q: If I told you that Mr. Flick was an older gentleman who used one child to hold down another child in order to molest her, does that factual pattern and the name Richard Flick refresh your recollection?

A: No.

Q: Just two more hypothetical situations that I'm wondering if you remember. Do you remember the name Marcus Rawls?

A: I remember the name, yes. I don't recall anything about him.

Q: If I told you that that involved a forcible rape where several weapons were used, including a baseball bat that he shoved up a victim's rectum, that he used guns, he pistol-whipped a victim, there were several

victims, several convictions, and his name was Marcus Rawls, do you recall that case?

A: No.

Q: Do you remember the case of Mr. Hubbart here in Santa Clara County?

A: Hubbart was a very big case. It went up to the California Supreme Court at one time. I remember about the case, but I don't recall the details of it.

Q: You were a defense expert in the Hubbart case, I believe.

A: Okay. I don't remember.

Q: You don't remember if you were?

A: Well, I worked on the case, I know. It would have been for the defense, but I don't remember anything about the man.

Q: So you were a defense expert on the Hubbart case?

A: Yes.

Q: And it was kind of a high-profile case, correct?

A: Yes.

Q: Do you remember anything at all about the facts of that case?

A: No, I don't.

Q: Even though you know it made case law, and I know you try to follow the case law, you still don't remember anything about the Hubbart case?

A: No.

Q: Would it refresh your recollection if I told you some stand out factors from the Hubbart case?

A: It might.

Q: He admitted to more than 50 burglaries with the intent to commit rape where he would rape a lone female after gagging and binding her, and in some cases he gave her an enema and he threatened to kill her if she didn't cooperate. He was deemed an MDSO, mentally disordered sex offender, after being caught as a serial rapist in L.A. He did seven years in Atascadero State Hospital as an MDSO, and then he was released from the hospital.

Is this refreshing your recollection at all about Mr. Hubbart yet?

A: No. I know it was a high-profile case with a long legal and clinical history, but I don't recall any of the specifics."

(9 RT 991-94).

This was misconduct for two reasons. First, the questions were asked solely to inflame the jury. There was nothing to be learned as to whether defendant was an SVP from reciting the facts of these other cases and stating that Dr. Donaldson did not find them to be SVPs. Second, the questioning was intended to impugn Dr. Donaldson in a way that was improper.

Dr. Donaldson was asked about five other cases, each containing particularly heinous crimes: a man who committed rape and child molestation after being incarcerated and released multiple times (Ward); a man who molested every child in his apartment complex, including his own three and a half year old son (Badura); a man who used one child to hold down another child in order to molest her (Flick); a man who raped several victims with weapons, including a baseball bat that he shoved up a victim's rectum (Rawls); and a man who admitted to committing more than 50 burglaries where he would rape his victims after binding and gagging them, in some cases giving them and enema, and threatening to kill them (Hubbart).

If the prosecutor's intent was truly to call into credibility the opinions of Dr. Donaldson, then you would expect him to ask his own expert about Dr. Donaldson's opinion in each of these cases. He did not do so, most likely because the recitation of the facts was more about the facts themselves and to show the jury that Dr. Donaldson found that, despite the horrific facts, each of those men did not meet the criteria as an SVP.

People v. Visciotti, supra, is also inapplicable here as this was not "misconduct by hindsight" brought on by evidence that was erroneously admitted. Defense counsel specifically objected to the prosecutor's "inflammatory recital," in questioning Dr. Donaldson and was overruled. The prosecutor continued to list all the horrible facts of Dr. Donaldson's

other cases, elicited testimony that the expert didn't remember the specific facts in any of them, and then pointed out that the expert didn't find that any of them to have a mental disorder.

4. Improper, Argumentative Questioning of Michael Ross

The prosecutor's questions as to whether Ross knew what he was talking about, whether he'd let his children be around appellant, and finally, the inflammatory comment that "parents who have teenage children who end up being victimized by child molesters they really have themselves to blame" were argumentative and not designed to elicit actual evidence. Respondent maintains that the prosecutor asked Ross what he was talking about because he was clarifying that Ross did not know appellant as long as he'd claimed and that it was designed to show bias and lack of knowledge. (PFR at 21). Respondent further maintains that asking Ross about whether he blamed the parents of child molestation victims was "plainly relevant to bias" and "reasonably went to Ross's minimization of defendant's crimes, and to his credibility." (PFR at 21).

First, there is no real answer to the question "You don't know what you're talking about, do you?" in any context. Second, the question which respondent claims "reasonably went to Ross's minimization of defendant's crimes and to his credibility" was: "So parents who have teenage children who end up being victimized by child molesters, they really have themselves to blame by leaving their children out of their care at some

period of time." (8 RT 879). This was not a designed to elicit testimony that would demonstrate a "minimization of appellant's crimes." It was argumentative, improper, and inflammatory, without the potential to elicit any reasonable evidence.

5. References to Defense Expert

The court of appeal concluded that the prosecutor's derogation of the defense expert was "close to the line, and standing, alone would not necessarily be prejudicial to defendant." (Op. at 17). Respondent states that this holding indicates that it was "implicitly treating the prosecutor's statements as misconduct" and that it erroneously relied on the prosecutor's argument to bolster the prejudicial 'pattern' of misconduct it incorrectly perceived." (Op. at 22-23). However, that is not what the opinion states. The court of appeal clearly stated that, standing alone, the comments about the expert were not misconduct; however, they were considered when assessing overall fairness due to the multiple instances of misconduct in the case.

6. References to "Grooming" by Defendant

The court of appeal held that:

> "The prosecutor's argument that defendant was 'grooming' the jury, thus placing them in the same position as the defendant's victims was clearly improper. A prosecutor may not appeal to the passions or prejudices of the jury by asking it

to view the crime through the victim's eyes. (citation omitted) Here, by arguing that defendant had 'groomed' them during trial, and that he had similarly 'groomed' his victims by a 'slow, steady manipulation to get [them] in a compromising position or violate boundaries without awareness,' the prosecutor was improperly appealing to the passions of the jury by implying they were also defendant's victims." (Op. at 16.)

Respondent maintains that the court of appeal rejected an "objectively reasonable interpretation of the complained-of comments in favor of its most damaging meaning" and that, in context, it was reasonable to infer these comments to mean only that defendant "was not truly amenable to voluntary treatment." (PFR at 24). If that is the case, the prosecutor could have argued "defendant is not truly amenable to voluntary treatment" and articulated the reasons why based on the testimony of the two experts. Instead, after hearing detailed testimony from the expert witnesses as to how appellant groomed his victims, the prosecutor then told the jury members that appellant had groomed them as well, which is a form of victimization. This put the jurors in the exact role of the victims in this case and, hence, was inflammatory and improper.

Respondent also contends that there was no objection to these remarks made in closing argument. As discussed above, when there is pervasive misconduct, an objection is not necessary. Additionally, it was

demonstrated in this case that objection was futile. As noted by the court of appeal, "not one of counsel's well-taken objections was sustained by the court." (Op. at 19).

7. References to Defendant's Witnesses

The prosecutor argued that the defense "brought in two serial rapists and a child molester to say that Mr. Shazier has good character. It was surreal. It was surreal, but telling." (10 RT 1232). Respondent contends that this was proper because the witnesses were actually rapists and child molesters and that it was "based squarely on the evidence". (PFR at 25). While it may have been proper to point out that the witnesses had been convicted of crimes of moral turpitude, the prosecutor crossed into different territory when he mocked the defense as "surreal" for bringing in witnesses who were "rapists and child molesters." He didn't call into question their credibility to truthfully testify. He used inflammatory epithets to categorize them, which was improper argument. The court of appeal properly found this to be an instance of misconduct.

8. References to Defense Counsel

During closing argument, the prosecutor argued that defense counsel "left something off of one of his charts. Frankly it was deceptive." (10 RT 1278). Defense counsel objected and moved to strike the comment and it was overruled. (10 RT 1278). The prosecutor continued by noting that only part of jury instruction 3454 was put on the chart and that defense counsel

didn't put it up essentially because he didn't want them to see it. Defense counsel again objected and moved to strike and he was again overruled. (10 RT 1278-79).

The court of appeal did not find this to be prejudicial misconduct in and of itself. Rather, it put the offensive remarks about defense counsel in the category of statements made that were "close to the line, and standing, alone, would not necessarily be prejudicial to defendant." (Op. at 17.)

Respondent maintains that the court of appeal "again improperly inferred the most damaging meaning from the challenged statement in order to find misconduct" and that the prosecutor was "merely reminding the jury of its duty to apply the whole of the instructions, rather than a part thereof." (PFR at 26-27.) The statements made by the prosecutor in his closing argument were unambiguous. He told the jury that defense counsel was "deceptive" and that he intentionally misled them by leaving out a portion of an instruction. The statement cannot be construed as simply a reminder to the jury of its duty to apply the whole of the instruction.

9. Asking the Jury to Consider What Its Friends and Family Would Think if They Returned a Verdict of Not True

The Petition for Review does not reference the two most egregious instances of misconduct, both of which independently justify the decision of the court of appeal. These instances are articulated in this section and in section 10 below.

At the end of his closing argument, the prosecutor said:

"So soon, the oath, the promise that you make to the judge every time you ...leave the courtroom, you are told don't talk about this with anyone unless you are deliberating. The time is going to come very soon, however you will be lifted from that obligation. You can talk to your family. You can talk to your friends. You can talk to who you choose. You may choose not to talk, but *you are going to have to explain* if you choose what you have been doing for the last two and a half or three weeks....your friends might say, was it a criminal case? No, it was a civil case. It dealt with commitment of someone to a state hospital. Oh, really. Wow. What kind of case was it? Well, it involved a case of someone who was accused of being a sexually violent predator. So, take this out, *imagine if you found the petition to be not true in this case. And you explain this to people that you work with, or friends, or neighbors. What did you do?* Well, we found the petition to be not true. Oh, wow. That is interesting. Did the person—" (10 RT 1283).

Defense counsel broke in and objected that it was improper consideration, taking them outside of their role as jurors. (10 RT 1283). The court overruled the objection and the prosecutor continued:

"What I am getting at ladies and gentlemen, is that you have something very important to do here, and you need to feel very comfortable with it. The burden is on the People. It is beyond a reasonable doubt, and to feel comfortable with it is how you explain it to yourself, perhaps how you explain it to others. What they say, did you find the petition to be not true, you would do that, did the person, the person had never acted out sexually in the past [sic]. Oh, no, no, no. No, far from it. In fact, the person has repeated, repeatedly acted out, had multiple convictions, went to prison.

"Well, I guess, you found the petition not be true because you heard from a psychologist that was really top notch, really credible and believable. Well, actually we heard from this guy named Donaldson. He just, well, he was truly not independent. He was just – there is word [sic] for Dr. Donaldson, the word is incredible. So I am not sure how that would play out.

"And then perhaps people would say, well, the person that was allegedly a sexually violent predator they hadn't molested anyone for a long time, right I mean, they knew they were a changed person, assuming that people can change the way they are wired, their sexual preferences, the evidence is

that they cannot. So you might be asked haven't molested anyone for a long time [sic]. That's right. It has been 16 years. Oh, that is really good. But there haven't been any teenagers around for the 16 years." (10 RT 1283-84).

Defense counsel again objected. (10 RT 1284). He stated that asking the jurors to consider what other people might think of them is improper consideration. (10 RT 1285). The trial court agreed that "[o]n the surface that's what it sounds like," but again overruled the objection. (10 RT 1285).

In finding that this was misconduct, the court of appeal stated:

"We see no difference between the prosecutor's proposal here that a juror or jurors conduct a conversation with an imaginary friend explaining that by their verdict they loosed a dangerous predator on the public than saying directly to the jury, 'your friends and neighbors will condemn you if you release him.' Both are flagrant misconduct. Public opinion is not a proper consideration for a jury. This reasoning has been condemned as faulty since the time of ancient Greece." (Opn. at 9.)

The court of appeal properly applied well-settled law in finding that the prosecutor's argument constituted "flagrant misconduct."

10. Implying that Appellant Had Committed Other Crimes

In closing argument, the prosecutor stated:

"...throughout the trial you have heard that Mr. Shazier may just be the unluckiest child molester in the world, because every single boy he molested he got caught for. Isn't that amazing? Isn't that amazing? Of course, I am being sarcastic. That is know I am [sic]. That is a prolific child molester. All the experts testified that sex crimes go unreported."

Defense counsel objected and stated that there is no evidence that appellant committed unreported crimes and that you cannot argue from lack of evidence (10 RT 1242). The objection was overruled. (10 RT 1242). The court of appeal held that:

"The prosecutor's statements regarding defendant being a 'prolific child molester,' and that most child molestations go unreported, coupled with defendant's 'luck' was a deliberate misstatement of the evidence intended to mislead the jury to believe defendant committed crimes. There was nothing in the evidence to suggest this conclusion. In reference to the prosecutor referring to facts not in evidence in her closing argument, our Supreme Court in *Hill* stated: '[s]tatements of supposed facts not in evidence...are a highly prejudicial form of misconduct, and a frequent basis for reversal.'" (Op. at 10.)

The court of appeal correctly applied the law in finding misconduct.

CONCLUSION

The court of appeal carefully reviewed the multiple instances of misconduct, applied the appropriate tests of both state and federal law, and addressed the arguments raised by respondent. It issued a carefully reasoned opinion, consistent with the holdings of state and federal law.

The court of appeal did not limit the prosecutor's ability to ask about an SVP defendant's "release plans." This was not even an issue in the case.

The court of appeal did not misapply this Court's waiver and misconduct precedents. Rather, it followed the well-settled principle that in cases of pervasive misconduct, an objection is not always necessary. It also noted that although there were multiple objections made in this case, the trial court failed to sustain one. This case does not present any unique issue as to waiver.

The court of appeal did not improperly fail to "consider the statements in context," fail to "infer the less damaging meaning from the challenged statements", and "ignore facts in the record that plainly supported the prosecutor's questions and arguments." The record in this case reveals that these were not intermittent or isolated statements that can be justified by looking at a particular context. In fact, it is by looking at the entirety of this trial and examining the context of the remarks and questioning that the misconduct becomes even more flagrant.

The jury watched the prosecutor point to elementary schools on a map and ask appellant about living in proximity to them. It listened to as the prosecutor reminded them that, if released, the appellant would be living in the proximity of schools, that he wouldn't be on parole, essentially asking them to consider what would happen if they found the verdict to be not true. The jurors listened to the prosecutor tell them that it would be an "abdication of their responsibilities" to allow appellant to be released into the care of his mother and sister. (10 RT 1230).

The jury listened as the prosecutor presented the horrific facts of five other SVP cases, noting that the defense expert had found that, in each of those cases, as in this case, he did not find a mental disorder. It then listened as the prosecutor mocked the credibility of the expert during closing argument in what amounted to a personal attack.

The jury heard the prosecutor's argumentative questioning of appellant's witness, Michael Ross, who, he suggested, lay blame for child molestation at the feet of parents who failed to properly supervise their children.

In closing argument, the jurors listened as the prosecutor told them they were "groomed" by the defendant, just like the victims in the case, that his character witnesses were child molesters and serial rapists, and implied that appellant committed many more crimes than those with which he'd been charged. The jury was told that defense counsel was deceptive and

that they were only given a partial instruction because defense counsel didn't want them to see the whole one. Finally, the jury was led through the exercise of imagining how they'd explain their verdict to friends and neighbors in the event they came back with a verdict of not true.

Finally, as indicated above, respondent didn't include in the Petition for Review the two most egregious instances of misconduct, both of which occurred in closing argument and both of which were objected to by defense counsel. The prosecutor asked the jury to consider what their friends and family would think if they returned a verdict of untrue in contravention of the long-standing rule that public opinion is not a proper consideration for a jury. In addition, the prosecutor's statements in closing argument "regarding defendant being a 'prolific child molester,' and that most child molestations go unreported, coupled with defendant's 'luck' was a deliberate misstatement of the evidence intended to mislead the jury to believe defendant committed other crimes." (Op. at 10).

The court of appeal properly concluded that the prosecutor's improper conduct so infected the trial with unfairness as to make the resulting conviction a denial of due process.

Accordingly, appellant Dariel Shazier requests that this Court deny respondent's petition for review.

DATED: February 15, 2013

Respectfully submitted,

Jill A. Fordyce
Attorney for Appellant,
Dariel Shazier

CERTIFICATE OF COUNSEL

I, Jill A. Fordyce, counsel for Appellant herein, certify that the Answer to Petition for Review contains 7299 words.

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

Dated: February 15, 2013

Jill A. Fordyce

PEOPLE V. SHAZIER
CASE NO. S208398

I, Jill A. Fordyce, certify:

I am employed in the Town of Los Gatos, County of Santa Clara, State of California. I am over the age of eighteen years and not a party to the within action. My business address is P.O. Box 2058, Los Gatos, CA 95031.

I served the Answer to Petition for Review in the above-entitled action on February 15, 2013, by depositing a copy of the document in the U.S. mail at Los Gatos, Santa Clara County, California, in a sealed envelope, with postage fully prepaid, addressed as follows:

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