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In the Supreme Court of the State of California

THE 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

OPENING BRIEF ON THE MERITS

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ISSUES

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?

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?

STATEMENT OF THE CASE AND FACTS

A. Evidence at the Trial

On March 18, 2010, a jury found that defendant was a sexually violent predator (SVP), and the court committed him to the Department of Mental Health (DMH) for an indeterminate term. (3 CT 685-686.)[1]

At trial, the prosecution presented evidence of defendant's long history of sexual assaults against teenage boys, and evidence that defendant suffered the requisite convictions for commitment as an SVP.

In September 1987, defendant approached several teenage boys at a youth center, offered to give them karate lessons, and befriended them. (5 RT 305.) Soon after, defendant attempted to sexually assault one boy. (5 RT 305.) Defendant was arrested, but the charges were dismissed. (5 RT 305.)

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[1] This was defendant's third trial. The first trial resulted in a hung jury. A second trial resulted in an SVP commitment that was reversed on appeal for prosecutorial misconduct. (Slip Opn. at p. 2, fn. 1; *People v. Shazier* (May 8, 2006, H028674), review dism. in light of *People v. Lopez* (2008) 42 Cal.4th 960, (May 14, 2008, S144419).

In July 1988, defendant met a 17-year-old boy, befriended him, discussed karate, provided him alcohol, and drove him to an isolated place. Defendant then fondled the boy's penis. (5 RT 306-307.) Defendant was arrested, but the charges were dismissed. (5 RT 307.)

In October 1988, defendant approached and befriended Lee, a 16-year-old boy. (5 RT 308.) When defendant was alone with Lee, he forcibly sodomized him. (5 RT 308.) When arrested for the assault, defendant was giving a 15-year-old boy a massage. (5 RT 314.) Defendant was convicted of molesting Lee and sentenced to prison. (5 RT 314.)

In 1990, defendant was released on parole. (5 RT 314.) Within four months, he approached several teenage boys and offered them karate lessons. (5 RT 315.) Defendant's parole was revoked for contact with teenage boys. (5 RT 315.)

In November 1991, defendant was rereleased on parole. (5 RT 318.) Five weeks later, defendant met a 15-year-old boy, offered him karate lessons, grabbed the boy's groin area during a lesson, and called it a secret karate stretch. (5 RT 318-319.) The boy reported the incident to the police, and defendant's parole was revoked. (5 RT 321.)

In December 1992, defendant was paroled a third time. (5 RT 321.) Soon after, he befriended several teenage boys and offered to give them karate lessons. (5 RT 321-322.) He developed a "cult-like following" among the boys. (5 RT 322.) During this time, defendant kissed several boys, and grabbed their genitals. (5 RT 322, 328.)

In March 1994, defendant met and offered a ride to William, a 14-year-old boy. (5 RT 325-326.) Defendant took William to his home, pushed him against the wall, and forcibly sodomized him. (5 RT 326.)

Three weeks later, defendant approached 17-year-old Douglas, saying that he was a talent scout and the boy could make big money. (5 RT 324.)

Eventually, defendant took Douglas to his home, gave him alcohol, and forcibly sodomized him twice. (5 RT 324-325.)

Dr. Craig Updegrove and Dr. Carolyn Murphy evaluated defendant as meeting the criteria for an SVP commitment. Based on the evaluations, the district attorney filed a petition to commit defendant as an SVP.

Dr. Updegrove testified that he diagnosed defendant with paraphilia not otherwise specified (NOS) with a sexual attraction to pubescent boys, sometimes called hebephilia. (5 RT 297.) Dr. Updegrove also diagnosed defendant with personality disorder NOS with antisocial and narcissistic traits. (5 RT 299.)

Dr. Murphy diagnosed defendant with paraphilia NOS, specifically nonconsenting persons or minors. (7 RT 521.) Dr Murphy also diagnosed defendant with personality disorder NOS with antisocial and narcissistic traits. (7 RT 549.) She did not diagnose hebephilia, which is not listed as a disorder in the Diagnostic and Statistical Manual (DSM), but she recognized literature that recognizes hebephilia as its own disorder. (7 RT 523.)

Both doctors believed that defendant's mental disorders impaired his volitional and emotional control and that defendant was likely to engage in sexually predatory violent criminal acts as a result of his diagnosed mental disorders. (5 RT 342, 347, 350; 7 RT 516, 564, 580.) Drs. Updegrove and Murphy evaluated defendant's risk of reoffense using a revised actuarial tool, the Static 99-R. (6 RT 394; 7 RT 567.) Both doctors gave defendant a score of 5 on the Static 99-R, and found him to be comparable with other high-risk subject sample groups that had recidivism rates ranging from 10 to 23 percent over five years, and 12 to 32 percent over 10 years. (6 RT 394-397; 7 RT 574.) Dr. Updegrove also evaluated defendant as scoring 6 on an updated actuarial tool, the Static 2002, which placed him in the medium-high risk group. (6 RT 402, 406.)

Both doctors recognized that defendant had been actively participating in the sex offender treatment program at the state hospital, but had only completed two of the five phases. (6 RT 419-425; 7 RT 582.) Both doctors found that defendant's participation was a positive factor affecting his likelihood of reoffense, but believed that he needed more treatment in a secure facility before it would be safe to release him. (6 425-431; 7 RT 583.) Dr. Updegrove pointed out defendant had a history of quickly reoffending even when released with parole conditions. (6 RT 430.)

Defendant testified that he used to be attracted to teenage boys, but that, like an alcoholic, he had learned in therapy to manage his behaviors so that he would not molest anyone again. (8 RT 703-706, 777.) Defendant testified that if he were released, he would live with his mother near Washington D.C. (8 RT 778.) Defendant denied having a mental disorder, but planned to continue voluntary outpatient sex offender therapy if released. (8 RT 788, 805-808; 9 RT 1089-1090, 1095.)

Dr. Theodore Donaldson evaluated defendant for the defense. (9 RT 915.) Dr. Donaldson found no evidence defendant suffered from paraphilia. (9 RT 920.) Dr. Donaldson opined that diagnosing paraphilia is difficult because the criteria are not well defined. (9 RT 924.) Dr. Donaldson found no evidence that defendant was aroused by the nonconsent of his victims, that he had a sexual preference for pubescent boys, or that he was disturbed by any such sexual preference. (9 RT 928, 940.) Dr. Donaldson also did not find defendant had serious difficulty controlling his behavior, because there was no evidence defendant had ever wanted to, or tried, to control his behavior. (9 RT 944.) Also, there was no evidence that defendant was "tormented" by the commission of his offenses. (9 RT 946.) Dr. Donaldson explained, "I think that's what we'll eventually come up with for a legitimate diagnosis of pedophilia, that they

have to be bothered by the behavior. If they're just doing it because they want to, that's just criminal behavior." (9 RT 945.) Dr. Donaldson also criticized the use of the Static 99 and Static 99-R for purposes of predicting the likelihood of reoffense. (9 RT 957-968.) Dr. Donaldson viewed the Static 99 as the best tool available, but estimated defendant's risk of reoffense was five to six percent over five years. (9 RT 968, 1101.)

Ex-SVP's David Litmon, Joseph Johnson, and Fred Grant testified that they had lived with defendant at the state hospital, and that he was always respectful and positive. Defendant stood up for other patients, helped solve conflicts, and was a representative in the governing of the living units. (8 RT 819-825, 833-837, 842-849.)

Michael Ross, a psychiatric technician, had worked at Atascadero State Hospital (ASH). He testified that defendant was ward representative and was not involved in any inappropriate conduct while housed at ASH. (8 RT 858-859, 868-869.)

Angelo Arrendondo and Phillip Morales, hospital police officers at Coalinga State Hospital, testified that defendant was well-behaved. (8 RT 881-882, 87-888.) Defendant acted as a liaison between the patients and the officers, and defendant would often help with difficult patients. (8 RT 882, 888-890.)

Defendant's sister, Crystal Bozeman, testified that she lives in Waldorf, Maryland. (10 RT 1105.) She testified defendant would live with their mother in the same area if he was released. (10 RT 1125.) Bozeman, along with their mother, would be part of his support system to ensure that he succeeded in the community. (10 RT 1125-1126.) Bozeman had been helping defendant find a therapist in the area, and she was willing to help defendant financially if he needed it. (10 RT 1124-1125.)

B. Court of Appeal Decision

Defendant appealed the commitment. On December 27, 2012, the Court of Appeal for the Sixth Appellate District, in an opinion by Presiding Justice Rushing, held that the prosecutor had committed 10 instances of prosecutorial misconduct in trial. (Slip Opn. at pp. 7-18.) The Court of Appeal found the incidents constituted a "pervasive pattern of inappropriate questions, comments, and argument." (*Id.* at p. 18.) The Court of Appeal concluded that the "aggregate prejudicial effect of the prosecutor's misconduct therefore requires reversal." (*Id.* at p. 20.)

SUMMARY OF ARGUMENT

In SVP cases, argument about the defendant's living situation and lack of parole restrictions if released from custody does not constitute improper comment on the consequences of the jury's verdict. The jury must decide whether the defendant poses a future danger, and the prosecution must prove that confinement in a secure facility is necessary to protect the public from that danger. The Court of Appeal erroneously concluded that the prosecutor committed prejudicial misconduct by arguing evidence on issues properly before the jury.

The Court of Appeal also misapplied this Court's waiver and misconduct precedents. It improperly assumed the inference most damaging to the defendant from the challenged remarks by the prosecutor. And it ignored facts in the record that plainly supported the prosecutor's questions and arguments. In so doing, the Court of Appeal erroneously found eight instances of misconduct.[2] Five of these were forfeited by

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[2] The court found two additional instances of misconduct which we did not specifically challenge in our petition for review. We address those instances in relation to our argument that any misconduct was not reasonably likely to have affected the verdict.

defendant's failure to object. None of them were improper when viewed in context of the entire trial.

Moreover, even assuming two additional instances of misconduct, none of the prosecutor's actions, alone or in combination, "so infected the trial with unfairness as to make the resulting conviction a denial of due process. [Citations.]" (Slip Opn. at p. 20, internal quotation marks omitted.) Thus, any error was harmless.

ARGUMENT

I. QUESTIONING AND ARGUMENT BY THE PROSECUTOR REGARDING THE DEFENDANT'S RELEASE PLANS IN AN SVP PROCEEDING DOES NOT CONSTITUTE MISCONDUCT

Defendant testified that if released, he would live with his mother outside the District of Columbia. (8 RT 778.) Referring to the area surrounding his mother's home reflected in a map, defense counsel asked how defendant would handle his proximity to shopping malls and parks nearby. (9 RT 1076.) Defendant answered:

> Well, there isn't really a reason for me to go to a park, so I wouldn't go to a park, especially when I know that they are frequented by minors. I wouldn't put myself in a high-risk situation like that given my background.
>
> So as far as a mall is concerned, I feel safe. I feel confident in my own ability to go to a mall. However, though, what I've learned, and what I believe from group, this is what I would do. I wouldn't go by myself. I would have a support team member with me or somebody, a person like me so there'll always be checks and balances.

(9 RT 1077.)

With reference to the map of his mother's home, the prosecutor asked defendant if there were two elementary schools very close to where he would be living. (9 RT 1099.) Defendant said, "I don't believe so." (9 RT 1099.) The prosecutor then showed him two elementary schools on the

map, and confirmed there was also a nearby park, shopping mall, and a fast-food outlet of a hamburger chain. (9 RT 1099-1100.)

During closing argument, the prosecutor discussed defendant's criminal history, then argued:

> These are the facts that—that Mr. Shazier is a convicted child molester over and over and over. Remember, when [defense counsel] gets up and starts to argue to you, remember that notwithstanding what Mr. Shazier has done for people at Coalinga State Hospital, please remember that ever since he has been an adult, whenever he has been out of a secure facility he has always gone back to commit crimes after he said that he was sorry, after he said that he wouldn't do it again. After he said I never want to see a cell again, ever. What did he do, the opposite of what he said. You cannot and should not ignore that.
>
> [¶] . . . [¶]
>
> 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. That is just, there is no other guarantee wherever he is going to live outside of where he currently lives is not a secured facility.

(10 RT 1228-1230.)

The Court of Appeal held the "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." (Slip Opn. at p. 11.) To support its conclusion, the Court of Appeal cited the general rule that "potential punishment or lack thereof

is not a proper matter for juror consideration." (Slip Opn. at p. 12.)[3] However, the general rule in criminal cases that considerations of punishment or other consequences of the verdict are irrelevant is not applicable to SVP proceedings. This is so because juries in SVP proceedings are not determining guilt, innocence, or past insanity. (See *United States v. Shannon* (1994) 512 U.S. 573.) The jury determines whether a defendant poses a future danger to the public if released. (See *People v. McKee* (2010) 47 Cal.4th 1172, 1195 ["In the case of the SVP Act at issue here, although the trigger for eligibility is a certain type of past criminal conduct, the commitment cannot be effectuated without a determination of a current mental disorder and future dangerousness"]; *Cooley v. Superior Court* (2002) 29 Cal.4th 228, 254 ["the determination of likelihood of future dangerousness was an element that must be proved in addition to the existence of mental disorder in order to commit an individual as an SVP"]; *People v. Superior Court* (*Ghilotti*) (2002) 27 Cal.4th 888, 920-921.)

In an SVP case, the prosecutor must prove that the respondent is likely to reoffend "unless confined in a secure facility." (CALCRIM No. 3454; *People v. Grassini* (2003) 113 Cal.App.4th 765, 777-778.) That defendant's likelihood of reoffense was serious enough to require confinement in a secure facility was an element on which the prosecution had the burden of proof. Likewise, in conducting evaluations of defendant, the experts were required to assess whether or not he was amenable to *voluntary* treatment without any additional involuntary restrictions. (*People v. Superior Court* (*Ghilotti*), *supra*, 27 Cal.4th at pp. 927-929.)

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[3] There was no objection to the questioning or argument by the prosecutor. The Court of Appeal's failure to consider the lack of objection is addressed in Argument II, *post*.

The fact that defendant would not be under any parole conditions requiring outpatient treatment was relevant to the experts' conclusions about the necessity of confinement in a secure facility. In addition, the jury had to consider whether defendant's living situation upon release would affect his amenability to voluntary treatment and the risk of his reoffending.

Defendant's plans for release were the crux of his case. The location and surroundings of his mother's residence, his plan to enroll in treatment in his mother's community, and the existence of a support system were integral to defendant's prevention plan against relapse. (See 9 RT 1077-1081.) It was defense counsel who presented defendant with the map and questioned him on his strategies for avoiding high-risk areas like parks and shopping malls. It was both logical and wholly permissible to cross-examine defendant on his plan for avoiding those areas, to question him about his actual knowledge of the surroundings in which he would be living, and to comment with reasonable inferences from that evidence.

In SVP cases, evidence regarding both defendant's release plans and his lack of conditions requiring outpatient treatment is relevant to his amenability to voluntary treatment, and to his ultimate risk of reoffense if released into the community. It was not misconduct to elicit such evidence and to argue it to the jury.

II. NONE OF THE CHALLENGED COMMENTS CONSTITUTED PREJUDICIAL MISCONDUCT

In finding multiple instances of prosecutorial misconduct, the Court of Appeal ignored facts in the record and misapplied this Court's misconduct and/or waiver jurisprudence. That led directly to its erroneous conclusion that there was a "pervasive pattern" of misconduct and that the misconduct was prejudicial. (Slip Opn. at p. 18.)

A. Defendant Waived His Prosecutorial Misconduct Claim in Half of the Alleged Instances of Misconduct

"To preserve a claim of prosecutorial misconduct for appeal, a criminal defendant must make a timely objection, make known the basis of his objection, and ask the trial court to admonish the jury." (*People v. Brown* (2003) 31 Cal.4th 518, 553.) Here, the Court of Appeal said "defense counsel objected to all of the prosecutor's improper questions, statements and arguments. We observe that not one of counsel's well-taken objections was sustained by the court." (Slip Opn. at pp. 18-19.) This is contradicted by the record. Defense counsel did not object to the prosecutor's questioning of defendant's release plans or the mention of parole during closing argument. (See IIB.1, IIB.2, *post*). Moreover, three additional alleged instances of misconduct were not objected to on any grounds. (See IIB.5 [references to defense expert], IIB.6 [references to "grooming"], IIB.7 [references to defense counsel], *post.*) Thus, none of those claims are cognizable on appeal. (*People v. Brown*, *supra*, 31 Cal.4th at p. 553.)

B. None of the Challenged Statements or Questions, When Viewed in Context, Constituted Misconduct

In assessing a claim of prosecutorial misconduct, the defendant must show a reasonable likelihood the jury understood or applied the complained-of comments in an improper or erroneous manner. (*People v. Berryman* (1993) 6 Cal. 4th 1048, 1072, disapproved on other grounds in *People v. Hill* (1998) 17 Cal.4th 800, 823.) Moreover, "the standard in accordance with which his conduct is evaluated is objective." (*People v. Berryman*, *supra*, 6 Cal.4th at p. 1072.)

The Court of Appeal incorrectly asserted the foregoing principle is only relevant to assessing prejudice once misconduct has been established. (Slip Opn. at p. 6 ["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. . . .'"].)

The Court of Appeal conflated harmless error analysis with the defendant's burden required to establish misconduct. As a consequence, the Court of Appeal erroneously assumed the most damaging meaning from ambiguous comments during the prosecutor's cross-examination and closing argument when it decided misconduct had occurred. In addition, the Court of Appeal ignored facts in the record which gave context to the prosecutor's alleged improper questioning and arguments. By ignoring the facts and inferring the most damaging meaning, the Court of Appeal's conclusions contravened settled rules of this Court and the United States Supreme Court with respect to the various allegations of misconduct. (See *Donnelly v. De Christoforo* (1974) 416 U.S. 637, 647 ["a court should not lightly infer that a prosecutor intends an ambiguous remark to have its most damaging meaning or that a jury, sitting through lengthy exhortation, will draw that meaning from a plethora of less damaging interpretations"]; *People v. Howard* (1992) 1 Cal.4th 1132, 1192 ["we do not lightly infer that the prosecutor intended his remarks to have their most damaging meaning or that the jury drew that meaning rather than the less damaging one"].)

As detailed *post*, when read in context, and applying the proper legal principles, none of the challenged statements constituted misconduct.

1. Questioning about defendant's release plans

As shown in Argument I, the Court of Appeal erroneously found the prosecutor's questions regarding defendant's release plans were improper references to the consequences of the jury's verdict. The location of defendant's residence and its surrounding environs was relevant to prove that defendant posed a substantial danger of reoffense if not confined in a

secure facility. Neither the examination nor the argument on these points was misconduct.

2. Discussion of parole

During in limine motions, defendant moved to exclude evidence of his parole status if released. (2 CT 359.) The trial court denied the motion. (4 RT 175.) On appeal, defendant did not seek review of that ruling nor did he challenge the admission of the evidence. As discussed above, the fact that defendant would not be on parole if released was properly admitted as relevant to defendant's risk of reoffense, and the prosecutor's reliance on that evidence during closing argument was not misconduct.

However, even if the parole evidence was improperly admitted, there would not be a basis for a finding of misconduct. "Regardless of whether an appellate court may later conclude that a piece of evidence was erroneously admitted, argument directed to the evidence does not become misconduct by hindsight. Such references may be considered in determining the prejudicial effect of the error in admitting evidence, but are not misconduct." (*People v. Visciotti* (1992) 2 Cal.4th 1, 82.) The prosecutor's mention of defendant's parole status, whether properly or improperly admitted, did not constitute misconduct.

3. Questioning of Dr. Donaldson

During cross examination of Dr. Donaldson, the following colloquy occurred:

> Q. [The prosecutor]: Do you remember an individual who was going through the process of determination whether or not he was an SVP by the name of Ronald Ward?
>
> [Defense Counsel]: Objection. Relevance.
>
> THE COURT: Overruled.
>
> THE WITNESS: I recognize the name. I don't remember anything about the case.

Q. [The prosecutor]: All right. If I told you that Mr. Ward was an individual who was charged with a variety of sexual assaults, the first being forcible rape where he picked up a hitchhiker and raped her—

[Defense Counsel]: Your Honor, I'm going to object to this. If he's going to get into diagnosis, he needs all the information before him that Dr. Donaldson and the other evaluators relied on. I don't think he can get into this without knowing anything more about those cases than just an inflammatory recital.

THE COURT: Stop for a moment. I think that he's trying to refresh his recollection, if I understand this correctly.

At this point the objection is overruled.

Q. [The Prosecutor]: Dr. Donaldson, Mr. Ward was charged with forcible rape for picking up a hitchhiker and raped her. He served a sentence for that. He got back out and then tried to rape an 11-year-old girl who was watching her house for her mother while the mother was out. He went to prison for that. He got back out of prison and committed five counts of child molestation because he met a woman and married her and within two weeks he began molesting her two children.

Do you have any recollection of the case of Ronald Ward?

A. No.

[Defense counsel]: Your Honor, I'm going to object. Inflammatory. We don't know anything about this case. We don't have any records, any psychological records.

THE COURT: The objection is overruled.

THE WITNESS: What year was that?

[The prosecutor]: That was in the late 1990s.

A. Okay.

Q. I believe it was Riverside County. Does that refresh your recollection at all?

A. Yes, Riverside County. Okay. That was before Crane. Okay. Go ahead.

Q. And you determined that Mr. Ward, based on those facts, was not a sexually violent predator, correct?

[Defense Counsel]: Objection. We don't know what he determined that based on. He doesn't have sufficient information to refresh his recollection.

THE COURT: He hasn't stated that. The objection is overruled.

Q. You were testifying in court on the Ward case, correct?

A. Yes.

Q. And because you were testifying in court, you had determined that he was not a sexually violent predator, correct?

A. I determined he didn't meet one of the criteria, but I don't know which one it was, whether it was a mental disorder or predisposition.

[Defense Counsel]: Again, I'm going to object and move to strike all this testimony. This is a continuing objection, just for the record.

THE COURT: The objection's overruled at this point.

Q. You determined Mr. Ward was not a sexually violent predator, as you offered, because he failed to meet at least one or more of the three criteria, correct?

A. Correct.

Q. I just have a few more examples that I want to discuss with you.

[Defense counsel]: Your Honor, I'm going to object.

May we approach?

THE COURT: Is it different than what we talked about initially?

[Defense Counsel]: We.

THE COURT: Just yes or no.

[Defense Counsel]: More information that I'd like to convey to the Court.

(9 RT 987-990.)

After the lunch break, the prosecutor asked similar questions, over defense counsel's relevance objections, regarding four other cases in which Dr. Donaldson testified. After the prosecutor related some of the facts of the cases to refresh Dr. Donaldson's recollection, Dr. Donaldson testified that he did not recall the other four cases. (9 RT 991-994.)

During redirect examination of Dr. Updegrove, the prosecutor asked:

> If I describe to you an individual who is charged with a variety of sexual assaults, charged with forcibly raping a hitchhiker that he picked up, sent to prison, and got out, and then assaulted an 11-year-old girl with intent to rape the 11-year-old girl while she was minding the house for her mother, and then he got prison for that and then got out.
>
> And then after getting out he married a woman. And within two weeks of meeting the woman began molesting her two children and was ultimately convicted of five counts of child molestation.
>
> Given this hypothetical, would it be unreasonable to find the absence of a mental disorder under those bare-bone facts as describe to you?

(10 RT 1184-1185.) Defense counsel's objection to the question as an improper hypothetical was overruled. (10 RT 1185.) Dr. Updegrove answered:

> I believe so. You would certainly be—it would be unreasonable not to consider the possibility of the mental disorder.

(10 RT 1185.)

The Court of Appeal cited *People v. Buffington* (2007) 152 Cal.App.4th 446, and said "the prosecutor's recitation of facts in other SVP cases was not designed to elicit relevant evidence in this case. . . . As a result, there was nothing to be gained from the prosecutor's questions other than to put egregious and incendiary facts of SVP cases to inflame the passion and prejudice of the jury." (Slip Opn. at p. 14.)

The prosecutor's questioning of Dr. Donaldson was not misconduct. *Buffington* found improper questioning of a defense witness in an SVP case about the details of three other SVP cases on which he had worked:

> Eliciting Dr. Donaldson's opinion about those three cases only had a tendency in reason to suggest bias if the jury had some other basis for concluding that the given facts reasonably should have led to a different opinion. If the state had put on an expert witness who offered an opinion that under the bare bones facts described, regardless of anything else, it would not be reasonable to find the absence of a mental disorder, then it might have been permissible to elicit testimony that Dr. Donaldson reached the opposite conclusion under those facts. That would go, not so much to show bias, but to undercut the value of Dr. Donaldson's opinion in this case. In other words, if the jury credited the testimony of the People's expert witness, then it could reasonably discredit Dr. Donaldson's contrary conclusion in the earlier cases, and by extension in this case. (If his opinion was not reliable three times before, why should the jury believe it is now?)

(152 Cal.App.4th at p. 455.)

The prosecutor here presented the exact evidence missing in *Buffington*. He asked Dr. Updegrove whether it would be unreasonable, on the barebone facts of Mr. Ward's case, to find no mental disorder.[4] Dr.

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[4] Presumably, the prosecutor only asked Dr. Updegrove about Mr. Ward's case because Dr. Donaldson only testified that he recalled Mr. Ward's case. (9 RT 989.) Even after hearing some details of the other cases involving Badura, Flick, Rawls, and Hubbart (all of which were asked (continued...)

Donaldson had testified that he could not diagnose a mental disorder without evidence of some internal conflict about the behavior, i.e., repetitive criminal behavior is not enough to establish a mental disorder. Dr. Updegrove's testimony that it was unreasonable not to even consider the possibility of a mental disorder on the bare bones facts of Ward's case demonstrated the unreasonableness of Dr. Donaldson's testimony.

The Court of Appeal ignored the relevancy of the questions of Dr. Donaldson that the prosecutor established through the additional questions posed to the prosecution's expert. (Slip Opn. at pp. 12-14.) The relevancy of that inquiry undermines the conclusion by the Court of Appeal that the prosecutor's goal in interrogating Dr. Donaldson was "'for the purpose of getting before the jury the facts inferred therein . . . .'" (Slip Opn. at p. 14.)

Moreover, assuming the questioning of Dr. Donaldson was irrelevant and improperly permitted over the defendant's relevance objection, the questions to the witness were not prosecutorial misconduct. As discussed above, even where evidence is erroneously admitted, the prosecutor's reliance on that evidence does not become misconduct "by hindsight." (*People v. Visciotti*, *supra*, 2 Cal.4th at p. 82.) *Buffington* held that the challenged questions and answers were irrelevant, not that the prosecutor committed misconduct. (152 Cal.App.4th at pp. 454-456.) Similarly here, the prosecutor's questions, even if improper, were permitted by the court over defendant's objections. That the prosecutor relied on the trial court's ruling in proceeding with the questioning does not establish prosecutorial misconduct.

(...continued)
about after the lunch break), Dr. Donaldson did not remember anything about those cases.

4. Questioning of Michael Ross

The prosecutor cross-examined Michael Ross as follows:

Q. Do you know how long Mr. Shazier has been at Coalinga?

A. Yes, sir.

Q. How long?

A. I would say approximately three years, two months.

Q. Longer than that. Isn't it a lot longer than that?

A. When they disappear, I have no emotional attachment. He left. I don't know what day he left. I didn't care what day he left.

Q. How long did you know him at Atascadero?

A. At least six. I would say six years.

Q. Six years at Atascadero, and then you believe he's been at Coalinga three years. Is that what you're saying?

A. I would think he's been there three years, at least three years.

Q. So you believe he's been in the state hospital system since 2001 at least?

A. That's what I believe.

Q. Now, what are his prior sexual offenses?

A. I cannot recollect. I believe they were offenses against—I would just say child pedophilia or something. I work with too many of these guys to remember those things.

Q. You're just here to help Mr. Shazier, though, correct?

A. No. I'm just here to tell the truth. I mean, if it helps, it helps him. I don't know. I'm not emotionally attached to the man, so whatever happens to him happens.

Q. Mr. Ross, you don't know what you're talking about, do you?

[Defense Counsel]: Objection. Vague question. Over-broad. Argumentative.

The Court: Overruled.

Q. [The prosecutor]: You don't know what you're talking about, do you?

A. I do know what I'm talking about. Now if you want to make it into exact dates, times, months, well then you can make me look stupid. But I know I had treated him as a patient, and I know I observed him for a lengthy time. And I know that I don't have any emotional attachment to him, and I know he was a good patient. Now that's all I'm here to explain.

(8 RT 870-871.)

After further questioning, the following colloquy took place:

Q. [The prosecutor]: Mr. Ross, do you know that Mr. Shazier was actually in Mule Creek State Prison in March of 2003?

A. I don't have recollection of that. I might have known it at some time, but I don't have a recollection of that today.

Q. When I asked you, "You don't know what you're talking about, Mr. Ross," it's that one thing you don't know about is when Mr. Shazier was in prison, when he was at ASH, and when he was at Coalinga, correct?

A. Correct.

(8 RT 873.)

Later during cross examination, the prosecutor asked:

Q. And you personally don't have a fear that Mr. Shazier would reoffend?

A. I personally don't.

Q. And would you let him take care of your 13- or 14-year-old-son?

A. Oh, now we're going a little further. First of all, I have a 15-year-old son, and I don't trust anybody. I don't understand how these kids get in the hands of other people. My 15 year old is barely out of her sight and my sight, and we meet everybody that they—they don't just get to run around. I don't trust—

Q. Mr. Ross, I don't know whether you have any children at all or what their ages are. I picked a 13-year-old son as a hypothetical to ask you a question about your feelings about Mr. Shazier.

A. I wouldn't—I don't trust anybody, so I wouldn't trust—I mean, I wouldn't say, Hey go. Why would a 13 year old be with him? So that's not something I wouldn't allow to happen. My son's allowed to hang around with children his age, not grown adults, male or female.

Q. 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?

[Defense Counsel]: Objection. Beyond the scope. 352. Irrelevant.

The Court: Overruled.

The witness: I believe parents should supervise their children and keep maximum amount of supervision. I don't think children should hang around with adults unless they're on a football team, a basketball team, some type of activity.

(8 RT 877-879.)

The Court of Appeal held the "prosecutor's questions" to Mr. Ross were not designed to "glean actual evidence," but were "rhetorical attempts to degrade and disparage the witness." (Slip Opn. at p. 15.)

To the contrary, it is clear, viewed in context, that the question about whether Ross knew what he was talking about referred to the fact that Ross could not have known defendant as long as he claimed. That was a garden-variety inquiry into witness bias, lack of knowledge of matters about which

the witness testified, and contradiction of fact, all proper subjects of cross-examination. Lest there be any doubt, the prosecutor later clarified, asking Ross specifically if knew what he was talking about vis-à-vis the dates and location of defendant's custody. Ross admitted that he did not know the relevant dates. The Court of Appeal did not mention this follow-up question in its opinion.

Likewise, there was nothing improper in asking, in response to Ross's testimony that he personally did not fear that defendant would reoffend, whether Ross would leave a teenage boy in the care of defendant. Whether Ross blamed the parents of child molestation victims was plainly relevant to bias. Ross responded by explaining that, as a parent, he would not let his child hang out with an adult. The prosecutor's question reasonably went to Ross's minimization of defendant's crimes, and to his credibility. The prosecutor's questions of Michael Ross were not misconduct, let alone part of a pattern of prejudicial misconduct.

5. References to the defense expert

During closing argument, the prosecutor stated:

> You heard from a defense expert. He has got a streak that would make Cal Ripkin jealous. Cal Ripken the baseball player and the Iron Man that played in something like 4,000 straight games. Dr. Donaldson's streak of 289, 289 straight times of testifying exclusively for the defense.
>
> Now, he would like to tell you that is not his fault, because he offered to teach the State of California all his wisdom. His brilliance has yet to be fully appreciated by this society. It is appreciated by defense attorneys who pay him and he comes in, and 289 straight times testified for the defense.

(10 RT 1233-1234.)

The prosecutor later indicated that Dr. Donaldson was "completely biased and not helpful." (10 RT 1239.) In describing the criteria for finding a mental diagnosis of paraphilia, the prosecutor stated:

> This is what a paraphilia is, over a period of at least six months, someone has recurrent intense sexually arousing fantasies, urges, or behaviors involving the suffering or humiliation of children being the under the age of 18 or nonconsenting persons, meaning people that he has raped. Not surprisingly Mr. Shazier did not take the stand and say, why am I aroused by teen-age boys. That's how I am able to get an erection. That is how I am able to molest them, because I fantasize about teen-age boys the way that other people fantasize about appropriate people. That's what he does with his victims. And that is what leads to the behavior.
>
> And then for the diagnosis, the person has acted on these urges, and it causes marked distress or interpersonal difficulty. This is more of a laughable assertion of Dr. Donaldson. Dr. Donaldson tried to tell you, well, he did tell you he wants you to believe that because Mr. Shazier didn't really ever change, therefore he doesn't really have a mental disorder. . . . He doesn't suffer any distress or interpersonal difficulty. Really? Going back to prison, he said that he hated prison. It makes sense. You heard—you heard about how child molesters are regarded in prison, but he kept going back. That's distress or interpersonal difficulty.

(10 RT 1239-1240.)

During rebuttal argument, the prosecutor described Dr. Donaldson as "truly not independent," and "incredible." (10 RT 1284.)

The Court of Appeal said that, standing alone, this argument would not be prejudicial, implicitly treating the prosecutor's statements as misconduct. (Slip Opn. at p. 17.) However, "[h]arsh and vivid attacks on the credibility of opposing witnesses are permitted, and counsel can argue from the evidence that a witness's testimony is unsound, unbelievable, or even a patent lie." (*People v. Dennis* (1998) 17 Cal.4th 468, 522.)

The comments by the prosecutor were supported by the evidence. It demonstrated that Dr. Donaldson had testified 289 times for the defense. (9 RT 996.) The doctor had offered his services to the Department of Mental Health because he felt he was ahead of his time on the relevant science

involved in SVP evaluations. (9 RT 985.) He opined he could not diagnose a mental disorder without some evidence of internal distress. (9 RT 940-946.)

Based on the evidence, the prosecutor was entitled to characterize Dr. Donaldson's testimony as laughable and incredible, and to suggest that he was biased because he only testified and was paid by the defense. Those comments were not misconduct.

6. References to "grooming" by defendant

After discussing defendant's criminal history and his failure to comply with parole conditions, the prosecutor stated:

> You have been groomed. Now, you have been groomed through the testimony of Mr. Shazier trying to say everything that he could say, trying to play on emotions, trying to show that everything is different now. The grooming behavior, the manipulation, it still continues. You heard what Mr. Shazier was saying in 1988. You heard what he said in 1994. You heard what he said six years ago in court. You heard what he said two months ago to his own expert about his plans two months ago, and now you heard what he said in court.
>
> This is a person who is manipulative. That was how he accomplished many of his crimes, one of his risks is quote, unquote being slick. . . .

(10 RT 1230-1231.)

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." (Slip Opn. at p. 16.)

However, the Court of Appeal failed to assess whether there was a reasonable likelihood that the jury understood or applied the complained-of comments in an improper or erroneous manner. (*People v. Samayoa* (1997) 15 Cal.4th 795, 841.) When read in context, it is reasonable to infer that the prosecutor referred to evidence that defendant had groomed and

manipulated his victims to argue that defendant continued to be manipulative and was not truly amenable to voluntary treatment. Viewed objectively and in context of the evidence, there is no reasonable likelihood the jury interpreted the prosecutor as asking the jurors to put themselves in the shoes of the victims in deciding the allegations of the petition. To the contrary, the prosecutor simply pointed out evidence that defendant continued to manipulate, i.e., groom, people into believing what he wanted them to believe.

The court reasoned that the "prosecutor was improperly appealing to the passions of the jury by implying they were also defendant's victims." (Slip Opn. at p. 16.) The Court of Appeal was not free to reject the objectively reasonable interpretation of the complained-of comments in favor of its most damaging meaning. Had the Court of Appeal properly applied the holdings of *Donnelly v. De Christoforo* (1974) 416 U.S. 637, 647 and *People v. Howard* (1992) 1 Cal.4th 1132, 1192, it would have necessarily found that the prosecutor's comments, in context, did not constitute misconduct.

7. References to defendant's witnesses

In closing argument, the prosecutor pointed out that defendant had not presented testimony by any of his treating doctors that he was amenable to voluntary treatment in the community. The prosecutor continued:

> . . . The defense does not have to prove anything, and yet you may consider what they tried to show. So what did they do. They brought in two serial rapists and a child molester to say that Mr. Shazier has good character.

(10 RT 1232.)

The Court of Appeal quoted this portion of the argument under a separate heading of its opinion. Apart from quoting the passage, however,

the court provided no analysis as to why the statements constituted a "clear instance[] of misconduct." (Slip Opn. at p. 17.)

The argument was based squarely on the evidence. Defendant's three character witnesses had suffered multiple prior convictions for sex offenses and were properly characterized. Johnson had been convicted of two rapes and one attempted rape. (8 RT 836-837.) Grant had been convicted of 45 counts of child molestation. (8 RT 849, 851.) Litmon had been convicted of two rapes, three counts of forced oral copulation, and one count of child molestation. (8 RT 825, 827.) The witnesses admitted the prior crimes and the evidence of moral turpitude was plainly admissible to impeach their testimony.

The Court of Appeal, again, failed to explain the impropriety of arguing this properly admitted evidence. Indeed, it failed to refer to the record, or to perform an actual legal analysis. There was no misconduct in this instance. As discussed above, even had the evidence been improperly admitted, it would not constitute misconduct for the prosecutor to rely on the evidence in closing argument. (*People v. Visciotti, supra*, 2 Cal.4th at p. 82.)

8. References to defense counsel

During rebuttal argument, the prosecutor stated that defense counsel "left something off one of his charts. Frankly it was deceptive." (10 RT 1278.) Defense counsel objected, and the court overruled the objection. The prosecutor continued:

> [Defense counsel] showed you an instruction, "a person is likely to engage in sexually violent predatory criminal behavior if there is a serious and well-founded risk that the person will engage in such conduct if released in the community." That is what he showed you and that is accurate. Part of that very same paragraph and the most important jury instruction you are going to get from the judge, is 3454, that is the number, and part of this same paragraph it says, "The likelihood that the person will

> engage in such conduct does not have to be greater than 50 percent." Why didn't he put that up there? Because [defense counsel] objected in my closing argument when I talked about five percent chance, let alone a 29 percent chance, but the instruction, the law says it doesn't need to be greater than 50 percent.

(10 RT 1278.) Defense counsel objected again, and moved to strike. The court overruled the objection. (10 RT 1279.)

The Court of Appeal found that "the prosecutor's denigration of defense counsel's veracity was misconduct." (Slip Opn. at p. 18.) It again improperly inferred the most damaging meaning from the challenged statement in order to find misconduct. The prosecutor characterized as deceptive an argumentative omission by defense counsel of the critical defining portion of an element committed to the jury's decision. In context, the prosecutor merely was reminding the jury of its duty to apply the whole of the instructions, rather than any isolated part thereof. (*People v. Howard*, *supra*, 1 Cal.4th at p. 1192.) There was no misconduct.

III. ANY ERROR WAS HARMLESS

Finally, even if the prosecutor committed misconduct, reversal is not required because it is not "'reasonably probable that a result more favorable to the defendant would have occurred' absent the misconduct. [Citation.]" (*People v. Welch* (1999) 20 Cal.4th 701, 753.) The Court of Appeal found two additional instances of misconduct not discussed above. (Slip Opn. at pp. 7-10.) Although we do not concede that those instances were improper, we will assume the possibility that the prosecutor's statements may have been imprecise enough to cause some jury confusion.

"[A]rguments of counsel 'generally carry less weight with a jury than do instructions from the court. The former are usually billed in advance to the jury as matters of argument, not evidence [citation], and are likely viewed as the statements of advocates; the latter, we have often recognized,

are viewed as definitive and binding statements of the law.' [Citation.]" (*People v. Mendoza* (2007) 42 Cal.4th 686, 703.) "When argument runs counter to instructions given a jury, we will ordinarily conclude that the jury followed the latter and disregarded the former, for '[w]e presume that jurors treat the court's instructions as a statement of the law by a judge, and the prosecutor's comments as words spoken by an advocate in an attempt to persuade.' [Citation.]" (*People v. Osband* (1996) 13 Cal.4th 622, 717.)

Here, the trial court repeatedly admonished the jurors that the attorney's statements were not evidence to be considered in their determination. (5 RT 232; 10 RT 1289.) The court also instructed the jury:

> [The attorneys'] questions are not evidence. Only the witnesses' answers are evidence. The attorneys' questions are significant only if they helped you to understand the witnesses' answers. Do not assume that something is true just because one of the attorneys asked the question that suggested it was true.

(10 RT 1289.)

As discussed below, the two additional instances of misconduct were marginal and, in the context of the entire trial, would have had little effect on the verdict.

A. References to Uncharged Crimes

The prosecutor argued:

> And 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 [*sic*] I am. That is a prolific child molester. All the experts testified that sex crimes go unreported. People don't tell. They are ashamed. They are afraid.

(10 RT 1241-1242.)

Defense counsel objected, stating, "There is no evidence whatsoever he committed unreported crimes. You can't argue from lack of evidence." (10 RT 1242.) The court overruled the objection. (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 other crimes." (Slip. Opn. at p. 10.) However, when read in context, the prosecutor drew a reasonable inference from the trial testimony. "A prosecutor engages in misconduct by misstating facts, but enjoys wide latitude in commenting on the evidence, including the reasonable inferences and deductions that can be drawn therefrom. [Citation.]" (*People v. Hamilton* (2009) 45 Cal. 4th 863, 928.)

The statement that defendant was a "prolific child molester" was based on defendant's admission at trial that he had molested the 12 charged victims. (8 RT 693-695; 10 RT 1227.) Similarly, the statement that sex crimes go unreported was direct evidence from the prosecution experts. (5 RT 354; 7 RT 575.) The mention of defendant's "luck" may have been unnecessarily sarcastic, but attacking defendant's credibility was not unreasonable. Based on the testimony of the experts and defendant, the prosecutor could argue that defendant lacked credibility about his pedophilia. Moreover, challenging defendant's testimony on that particular point was relevant to defendant's overall credibility. As noted, defendant's plans for release were the crux of his defense. His credibility regarding his plans, e.g., whether he actually intended to continue sex offender therapy if released, was material to the jury's decision in this case. The prosecutor could attack defendant's credibility by drawing reasonable inferences from the evidence presented at trial. While the instant comment may have had the effect of suggesting evidence outside the record, in context, the

prosecutor's statement was not so prejudicial as to warrant reversal of the commitment.

B. References to the Jurors' Friends and Families

During rebuttal argument, the prosecutor stated:

> So soon, the oath, the promise that you make to the judge every time you go out on a recess, and every time you are at recess since elementary school, 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, where 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 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. You might start out by saying this was quite a journey. I sometimes feel I went to the moon and came back, and 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 not to be 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 not to be true. Oh, wow. That is interesting. Did the person—
>
> [Defense counsel]: I am going to object. This is improper consideration, take the jurors outside of their role as jurors.
>
> The Court: My sense that it wasn't that. So I am going to allow it. Just my sense.
>
> [The prosecutor]: Thank you.
>
> What I am getting at ladies and gentlemen, is that you have something very important to do here, and you need to feel 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, 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. 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 to 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 a word 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. 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 1282-1284.)

Defense counsel objected again, stating that the prosecutor was asking the jurors to consider what other people might think of them. (10 RT 1285.) The court overruled the objection, stating, "On the surface that's what it sounds like. Again my sense that it's more than that. As it progressed I am more confident now than I was earlier." (10 RT 1285.)

The Court of Appeal found that the prosecutor's argument constituted misconduct because he asked the "jury to consider the reactions of their friends and family, fearing reproval should they find for the defendant." (Slip. Opn. at p. 9.) That reading assumes the most damaging inference from the prosecutor's comments. According to the Court of Appeal, the prosecutor's statement was *no different* than telling the jury "'your friends and neighbors will condemn you if you release him.'" (Slip. Opn. at p. 9.) Not so. As the trial court recognized, although the prosecutor mentioned discussing the case with friends and family, his argument was "more than that." (10 RT 1285.)

When read in context, the prosecutor asserted that the various holes in defendant's defense should lead the jury to sustain the petition. The prosecutor directly referenced the evidence in the case, arguing that defendant's claim that he did not have a mental disorder was based on an unbelievable witness, and that his argument that he had changed because he had not molested anyone in 16 years was, in truth, based on his only on his lack of opportunity.

It might well have been more appropriate advocacy to challenge defendant's evidence directly without interposing a hypothetical posttrial discussion between the jurors and a third party. But reference to "friends" and "family," in context, involved a discussion of the burden of proof, in terms of "how can you explain it to yourself?"—in other words, to the juror's own satisfaction. Read as a whole and in the context of the entire trial (*Donnelley*, *supra*, 416 U.S. at p. 647; *People v. Howard*, *supra*, 1 Cal.4th at p. 1192), it would be apparent to a rational juror that the prosecutor's point subsisted whether the hypothetical discussion in the juror's mind was with a friend, a visitor from Mars, or another juror. It was not prejudicial for the prosecutor to argue weaknesses in defense evidence and assert that the evidence as a whole proved the allegations of the petition beyond a reasonable doubt.

C. None of the 10 Alleged Instances of Misconduct Were Prejudicial In Light of the Overwhelming Evidence Against Defendant

The evidence that defendant was an SVP was overwhelming. Two independent experts testified that defendant met the criteria of an SVP, in that he had a mental disorder that made him likely to reoffend if released. The Court of Appeal noted that the diagnosis of hebephilia "does not exist as a diagnosis of a mental disorder in the DSM-IV." (Slip Opn. at p. 19.) However, both doctors, in fact, diagnosed defendant with paraphilia NOS, a

diagnosis found in the DSM-IV. (5 RT 297; 7 RT 517-518; 549.)[5] Dr. Updegrove explained that defendant's paraphilia manifested as an attraction to pubescent boys, sometimes called hebephilia. (5 RT 297.) Dr. Murphy agreed that the literature recognized hebephilia as an attraction to pubescent boys, but that the proper diagnostic category to classify that attraction was Paraphilia NOS. (7 RT 523.) Neither expert suggested that defendant suffered from a mental disorder not generally accepted by the psychiatric community.

Defendant presented a contradictory defense—according to Dr. Donaldson there was no evidence defendant ever suffered from a diagnosed mental disorder, despite the uncontradicted fact that defendant had been undergoing mental health treatment at the state hospital. Indeed, defendant claimed he did not suffer from a mental disorder, but also maintained he would nevertheless continue sex offender treatment and implement his relapse prevention plan if released. The prosecution experts agreed that defendant had been making good progress in treatment at the state hospital, but believed that he needed to complete the phases as the hospital to ensure he would not relapse if living in the community.

As discussed above, defendant's expert had been removed from the SVP panel because he believed he was ahead of his time with regard to SVP evaluations. (9 RT 984-985) The defense evidence that defendant "followed the rules, was a leader and was a friend to many other [hospital] residents," (slip opn. at p. 20) was irrelevant to whether defendant suffered from a mental disorder making him likely to reoffend in a sexually violent predatory manner. Similarly, the fact that defendant had not reoffended at

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[5] Nor is there any legal requirement under the SVPA that the defendant's mental disorder be defined in the DSM-IV. (See 7 RT 517-518.)

the state hospital where "there were vulnerable teenage boys housed with him" (slip opn. at p. 19), was minimally relevant as to whether he would reoffend when not under constant supervision in a locked state facility.

The Court of Appeal also noted that the fact that "first trial ended in a hung jury demonstrates how close the case really was." (Slip Opn. at p. 19.) However, the record does not reflect the evidence presented at the prior jury trial, which occurred over five years before this one. There is no indication whether the same experts testified at the first trial. Moreover, the issue at an SVP trial is whether the defendant *currently* suffers from a mental disorder that makes him likely to reoffend. Without any information about the first trial, the fact of the hung jury in the earlier trial does not demonstrate that the evidence *in this case* was close.

Based on the overwhelming evidence, it is not reasonably probable that the jury would have found the petition not true absent the challenged statements. Consequently, any prosecutorial misconduct was harmless.

CONCLUSION

Accordingly, respondent respectfully requests that the judgment of the Court of Appeal be reversed.

Dated: June 12, 2013

Respectfully submitted,

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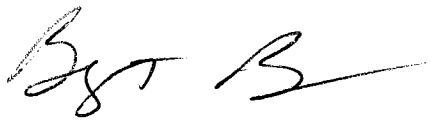

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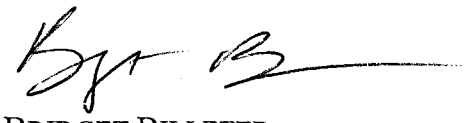
CERTIFICATE OF COMPLIANCE

I certify that the attached OPENING BRIEF ON THE MERITS uses a 13 point Times New Roman font and contains 10,011 words.

Dated: June 12, 2013

KAMALA D. HARRIS
Attorney General of California



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DECLARATION OF SERVICE BY U.S. MAIL

Case Name: ***People v. Dariel Shazier***
No.: **S208398**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service with postage thereon fully prepaid that same day in the ordinary course of business.

On June 17, 2013, I served the attached **OPENING BRIEF ON THE MERITS** by placing a true copy thereof enclosed in a sealed envelope in the internal mail collection system at the Office of the Attorney General at 455 Golden Gate Avenue, Suite 11000, San Francisco, CA 94102-7004, addressed as follows:

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I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on June 17, 2013, at San Francisco, California.

Tan Nguyen
Declarant

Signature

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