IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, vs. JONIS CENTENO, Defendant and Appellant.	No. S209957

Fourth District Court of Appeal, Division Two, Case No. E054600
San Bernardino Superior Court Case No. FVA801798
Honorable Cara D. Hutson, Judge Presiding

DEFENDANT'S OPENING BRIEF ON THE MERITS

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By Appointment of the Supreme Court of California

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ISSUE PRESENTED

Did the prosecutor commit misconduct during closing argument by misstating the state's burden of proof?

SUMMARY OF DEFENDANT'S ARGUMENT

The prosecutor committed misconduct in rebuttal closing argument by misstating the state's burden of proof in the following particulars:

(1) Flawed iconic image. The "What state is this?" hypothetical, using a map of California with incomplete and inaccurate information, was not a fair example of the beyond a reasonable doubt standard of proof. Using this immediately recognizable iconic image to describe reasonable doubt diminished the state's burden of proof because it undermined the presumption of innocence as the starting point from which the prosecution was required to prove defendant's guilt beyond a reasonable doubt. Immediate recognition of an iconic image is not the quantum of proof needed for a conviction. The puzzle and visual aid encouraged the jury to jump to an immediate conclusion (if it looks like California, then it is California) and to assess the evidence from that starting point, rather than from the blank canvas of the presumption of innocence. The example treated the jury's serious task like a game, trivializing the state's burden of proof.

(2) "Your decision has to be in the middle" improperly quantified reasonable doubt. Telling the jury that in "a world of possibilities," including the impossible, the unreasonable, and the reasonable possibilities, its decision had to be "in the middle," likened the beyond a reasonable doubt standard to

a specific quantitative measure – about 50% – a far lesser standard than proof beyond a reasonable doubt.

(3) Deciding what is reasonable is not a decision of guilt beyond a reasonable doubt. The prosecutor's argument that "with reasonable doubt, you need to accept the reasonable and reject the unreasonable" and that its decision "in the middle" between the impossible and the reasonable "has to be based on reason. It has to be a reasonable account," suggested the jury could convict if it merely believed it "reasonable" that defendant committed the charged offenses, while still having a reasonable doubt as to guilt. A decision as to what is reasonable is not a decision beyond a reasonable doubt.

(4) The argument confused reasonable doubt with the rules for considering circumstantial evidence. Telling the jury it had to "reject the unreasonable and accept the reasonable" confused the rules for considering circumstantial evidence with proof beyond a reasonable doubt. This case did not turn on circumstantial evidence and the argument misstated the law.

(5) The arguments were not mere ineloquencies or poorly worded redundancies of correct instructions. Rather, they suggested a standard of proof far less than the beyond a reasonable doubt standard which proceeds from the initial presumption of innocence, and constitute "misconduct" regardless of any prosecutorial intent or bad faith.

STATEMENT OF THE CASE

Defendant Jonis Centeno was charged with two felony counts of committing lewd acts with a minor under the age of 14 (Pen.Code, § 288, subd. (a), counts 1 and 2)[1] , and one misdemeanor count of molesting a child under the age of 18 (§ 647.6, subd. (a)(1), count 3) between September 1, 2007 and March 24, 2008. (1CT 90-93) He pleaded not guilty to the charges. (1CT 7, 94) A doubt was declared as to his age and criminal proceedings were suspended and later reinstated. (1RT 1-2; 1CT 33; 1ART 1-3)[2] A jury found defendant guilty on all counts. (1CT 173-175) He was sentenced to a five-year state prison sentence, consisting of the lower term of three years on count 1 and a consecutive two years on count 2. (4RT 848; 2CT 306-308) Defendant filed a timely notice of appeal. (2CT 302) The judgment was affirmed by the Fourth District Court of Appeal, Division Two, in a published opinion on March 3, 2013 in *People v. Centeno*, Case No. E054600.

This Court granted review on June 26, 2013.

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[1]Further unspecified statutory references are to the Penal Code.

[2]The reporter's transcript is referred to as "RT," the clerk's transcript as "CT," the augmented reporter's transcript as "ART," and the supplemental clerk's transcripts as "1SCT" (filed 2/15/2011), "2SCT" (filed 4/5/2011), "3SCT" (filed 5/16/2011), and "4SCT" (filed 5/22/2011).

STATEMENT OF FACTS

Defendant Jonis Centeno rented living space in the garage at the home of his aunt, Esmerita Centeno. (2RT 418, 422) The garage was divided into two rooms by a thin wall divider. Defendant occupied one room, the complainant, referred to as Jane Doe at trial, lived in the other room with her father, Augustin Rosal, and her younger brother Jese. (1RT 121-122, 149; 2RT 392) Jane Doe was seven years old at the time of the charged offenses. (1RT 129) There was a factual dispute whether defendant was a minor at the time of the offenses. The trial court accepted as authentic a Nicaraguan birth certificate offered to show defendant was a minor, but held there was insufficient evidence that defendant was the person named on the certificate. (1CT 32-33; 2SCT 2-3; 3SCT 1-7; 4SCT 2-4; 4RT 724-836; 1ART 1-3; 2ART 365-366)

Defendant's part of the garage was an open room with no door. Rosal and his children had to walk through defendant's living space to get to their part of the garage. (2RT 435-436) Esmerita lived in the house and rented out bedroom space to five men, ranging in age from 25 to 60. (1RT 143, 149, 154-155; 2RT 420-423; 3RT 387, 453-454) There was conflicting evidence whether Rosal's 16-year-old son Victor also lived in Esmerita's house. (1RT 127, 155; 2RT 225; 2CT 327, 329)

Defendant worked two jobs, one at night. (2RT 433-434) He came home late and bothered Rosal with his loud music and other noisy activities. (1RT 167-168; 2RT 433-435; 3RT 390, 392) Rosal was a single father with a multitude of problems. (1RT 127, 155-156) He was financially unstable and did not work due to a physical disability and because he provided full time care for his children. He received financial support and food and clothing from his church, of which defendant's father, Denis, was the pastor. (1RT 126-127, 144-145, 156) When he moved into Esmerita's house, Rosal was unaware so many men were living there, and he was concerned when he saw that his children would go into the men's rooms. (1RT 128, 143, 150; 2RT 381) He was sick, felt like he wanted to "go crazy," did not accept other people, and was angry at his wife and hated men. (1RT 168)

Denis did not live at Esmerita's house. He had very limited contact with defendant and did not know where he lived. (2RT 362, 371-373, 419) He had met defendant's mother on only two occasions in Honduras or Nicaragua; they were not married. (2RT 356-359) Rosal was active in Denis's church, but Denis denied that his church and/or congregation provided support to Rosal and his family. (2RT 364-366) Denis provided transportation for Rosal's children to school, and he transported Rosal and Jane Doe to court during the trial in this case. (2RT 361, 366-367)

On March 24, 2008, Sheriff's deputies Garcia and Ruiz were dispatched to Esmerita's house to investigate an anonymous report to Children's Protective Services of possible sexual abuse of Jane Doe by someone named Johnny or Centeno, and general neglect by her father. (2RT 232-236, 248, 298) Rosal told the deputies that one day (he could not recall the exact date), he walked by defendant's room and saw defendant on top of his daughter. Rosal entered the room and defendant quickly jumped off of Jane Doe, who got up from the bed where she was lying and quickly ran out of the room. Later, Rosal and Esmerita confronted defendant, asking if anything inappropriate happened between defendant and Jane Doe. The result of the meeting was an agreement that defendant would have no contact with Jane Doe and her brother. (2RT 238-239)

After speaking with Jane Doe, the deputies interviewed defendant. (2RT 239-242) Defendant said he did not do anything, he did not touch Jane Doe inappropriately, and he did not know why Jane Doe was lying. (2RT 243) He explained he was playing ball with Jane Doe's little brother, the girl came in and joined them, she threw the ball at him, gave him a hug, knocked him off balance, he momentarily rolled on top of her, and Rosal walked in at that moment. (2RT 243-244, 284-286)

In a forensic interview at the Children's Assessment Center, Jane Doe stated that Johnny touched her four times. (2CT 328, 330) She said, "He, he didn't really touch me, he just got on me." (2CT 330) The first, second and third times were in his room. He just got on top of her, and she had her clothes on. (2CT 331-332) The fourth time was in another room, but she could not remember what room. (2CT 330, 339-340) While they were both clothed, defendant exposed his penis and placed it on Jane Doe's genitals. He was not moving. (2CT 330, 332-334, 337, 340) She did not see or feel defendant's penis, but she knew it was touching her clothing because she heard his zipper going down. (2CT 338-339) Her genitals were not touched or hurt in any way. (2CT 342) Defendant did not touch her breasts or bottom. (2CT 342) He did not do anything with his hands or mouth. (2CT 342-343) The incident lasted less than a minute. (2CT 335) While this was happening, her father was in the kitchen reading the Bible with his friend. (2CT 335) She did not know where her little brother was. (2CT 335) She thought her older brother, Victor, who also lived at the house, was at church when defendant touched her. She stated that Victor helps the pastor (Denis) with work at the church. (2CT 352-353)

At trial, Jane Doe initially testified that defendant did not lay on top of her, touch her, or try to touch her in any inappropriate way. (1RT 182-184, 186-187) She did not remember the CAC interview or remember saying that

defendant laid on top of her. (1RT 182, 186) She did not remember talking to a police officer, and she did not tell a police officer that defendant touched her inappropriately. (1RT 183, 186) In her trial testimony the next day, Jane Doe testified that defendant did lay on top of her and she was previously too embarrassed to talk about it. (2RT 194) She testified to two incidents in which defendant touched her. (2RT 196, 219-220) In the first incident, in someone else's room, defendant exposed his penis and placed it on her clothed genitals. (2RT 198, 200-211) She did not tell anyone about the incident because a friend at school told her the same thing happened to her, and that "if you talk about that, he might get in trouble." (2RT 221-223) She did not tell this friend about what happened, and did not know how the subject came up for her friend to tell her not to talk about it. (2RT 223) During the second incident, in defendant's room, she laid on the floor on her stomach and defendant laid on his stomach on top of her. They were both fully clothed. Defendant did not expose his penis and she could not feel it on her. Her father saw them on as he passed by, but he did not say anything to defendant. (2RT 218)

Jane Doe testified she had gone into the room of another adult male tenant at Esmerita's house on one occasion, and her younger brother frequented that room to play with the man's video games. (2RT 228)

At trial, Jane Doe's father, Rosal, testified that when he walked by defendant's room, he did not see him lying on his daughter. Jane Doe, her younger brother, and defendant were all down on the floor playing, grabbing for a ball or maybe a piece of candy. (1RT 129-131) They were all fully clothed. (1RT 150) He sensed or imagined danger because he was bad off emotionally and because there were so many men living at the house; he felt "any human being that came here was going to harm myself or my children." (1RT 131, 143) He was very stressed at the time and did not like having his children going into the men's rooms. (1RT 143, 154) He was not at peace and saw problems everywhere, not just at Esmerita's house. (1RT 156) He did not see defendant touching Jane Doe at all or see him on top of his daughter. (1RT 132, 138-139) He did not call law enforcement, and he had no reason to, because he did not see anything that compromised anybody. (1RT 165)

Rosal testified the deputies did not speak to him at all when they came to the house on March 24, 2008. (1RT 132) He gave the deputies the names of the people who lived at the house, but he did not tell them there was an incident between Jane Doe and defendant. (1RT 134) He did not tell the deputies that he saw defendant jump off from on top of his daughter. (1RT 135) Rosal testified that when he talked to Esmerita, it was to tell her he was going to move, because he did not like having his children go into the other

people's rooms. He did not have a meeting with Esmerita and defendant to discuss anything he had seen in defendant's room. (1RT 135) He did not tell defendant not to have any contact with his daughter, and he did not tell the deputies that he had done so. (1RT 135-136)

The people at his church did not speak to him about any incident. He did not know what defendant was charged with, but Pastor (Denis) Centeno told him that defendant was charged with trying to rape Jane Doe. (1RT 138-141) Pastor Centeno did not try to influence his testimony in any way, and his relationship with the church had no bearing on his testimony. (1RT 165-166)

Defendant testified he was in his room doing push-ups when Jane Doe's little brother came into the room with a ball and they started to play. Jane Doe came into the room and joined in the game. They were bouncing the ball against the wall and catching it. (2RT 424-425) They all went after the ball and were down on the floor trying to get it when Rosal passed by. (2RT 425-426, 473-476) They all had their clothes on. Defendant never got on top of Jane Doe and never laid on top of her. (2RT 477) He may have touched her with his hands or elbow while they were going after the ball, but there was nothing sexual going on. (3RT 509-512) Rosal called for his children to come out of the room and defendant went back to doing his push-ups. (2RT 427, 477) Rosal did not say anything to defendant. (2RT 427-428, 478)

That night, Esmerita and Rosal called defendant into Esmerita's room. (2RT 429) Esmerita asked defendant what he was doing in his room when Rosal saw him; he explained they were playing ball. Esmerita did not accuse him of anything or blame him for anything. Rosal did not say anything. (2RT 430-432; 3RT 521-524) Defendant continued to live at the house and there was no further discussion of the incident. (2RT 432, 436) He was not told to stop playing with Rosal's children, but he stopped because he saw that Rosal was bothered by it. (2RT 433) The children would go into his room, which had no door for privacy, and would also go into Lester's room to play. (2RT 435)

Several months later, two deputies came to Esmerita's house and took defendant away in their patrol car. (2RT 437, 454-455) The deputies drove him around and Deputy Ruiz repeatedly asked him if he had touched Jane Doe. (2RT 459-461) They told him to admit it and plead guilty. Defendant repeatedly told them he had not touched her. (2RT 464-465) He told them about playing with the ball with the children. (3RT 514-515) After they read him his rights, he chose to remain silent, and the deputies dropped him off in a deserted area and he had to walk home. (2RT 468-472)

Defendant continued to live at Esmerita's house for several months, and then moved to Los Angeles to live by himself. (2RT 436-437, 473) He was arrested about a year later when he was pulled over while driving. (2RT 473;

3RT 480) He never talked to his father, Denis Centeno, or anyone in his family, about the reason for his arrest. (3RT 480-482)

Defendant's former neighbor, Maria Robledo, who had no connection to Denis Centeno or his church, testified to defendant's good character. (2RT 395-399, 407-408) Robledo had watched defendant play with her five-year-old daughter. She did not believe defendant would do the things he was charged with, and did not believe he was guilty of the charges. (2RT 404, 407)

JURISDICTION

The Court of Appeal decided the prosecutorial misconduct issue on the merits. The issue is properly before this Court for review. (*Victor v. Nebraska* (1994) 511 U.S. 1, 19 [114 S.Ct. 1239, 127 L.Ed.2d 583].)

STANDARD OF REVIEW

This court reviews prosecutorial argument de novo to determine whether there is a reasonable likelihood the jury misconstrued or misapplied the prosecutor's remarks in an objectionable fashion or in an unconstitutional manner. (*People v. Sanders* (1995) 11 Cal.4th 475, 526; *Victor v. Nebraska, supra,* 511 U.S. 1, 5.)

ARGUMENT

I. The Prosecutor's Closing Argument, Comparing the Beyond a Reasonable Doubt Standard of Proof to Recognition of a Flawed Iconic Image of California, and Telling the Jury its Decision "Has to Be in the Middle" and "Has to Be a Reasonable Account," Trivialized and Misstated the State's Burden to Prove Guilt Beyond a Reasonable Doubt and Undermined the Presumption of Innocence, Constituting Prejudicial Prosecutorial Misconduct.

A. Procedural History.

(1) The prosecutor's rebuttal closing argument.

Defense counsel's closing argument focused on the prosecutor's burden to prove the case beyond a reasonable doubt (3RT 599-602, 606, 609, 614), arguing the inconsistencies and gaps in the evidence raised "a mountain of doubt" as to defendant's guilt (3RT 606). In response, the prosecutor commenced rebuttal closing argument with the following:

> All right. Mr. [defense counsel] spoke quite a bit about reasonable doubt. Basically, *with reasonable doubt, you need to accept the reasonable and reject the unreasonable*, and your decision cannot be based on sympathy, prejudice, or speculation. It has to be based on the evidence in this case.
>
> Now, [defense counsel] said there is missing evidence so, therefore, there is reasonable doubt. You can't possibly make a decision because there is missing evidence, and the only missing evidence he is referring to is an interview with Jane Doe at school.
>
> Let me give you a hypothetical. Suppose for me that there is a trial, and in a criminal trial, the issue is what state is this on the Elmo [using a visual aid]. Say you have one witness that comes in and this witness says, hey, I have been to that state, and right next to this state there is a great place where you can go gamble, and have fun, and lose your money. The second

> witness comes in and says, I have been to this state as well, and there is this great town, it is kind of like on the water, it has got cable cars, a beautiful bridge, and it is called Fran-something, but it is a great little town. You have another witness that comes in and says, I have been to that state, I went to Los Angeles, I went to Hollywood, I saw the Hollywood sign, I saw the Walk of Fame, I put my hands in Clark Gable's handprints in the cement. You have a fourth witness who comes in and says, I have been to that state.
>
> What you have is you have incomplete information, accurate information, wrong information, San Diego in the north of the state, and missing information, San Bernardino has not even been talked about, *but is there a reasonable doubt that this is California?* No. You can have missing evidence, you can have questions, you can have inaccurate information and still reach a decision beyond a reasonable doubt. *What you are looking at when you are looking at reasonable doubt is you are looking at a world of possibilities.* There is the impossible, which you must reject, the impossible [sic] but unreasonable, which you must also reject, and the reasonable possibilities, and *your decision has to be in the middle. It has to be based on reason. It has to be a reasonable account.* And make no mistake about it, we talked about this in jury selection, you need to look at the entire picture, not one piece of evidence, not one witness. You don't want to look at the tree and ignore the forest. You look at the entire picture to determine if the case has been proven beyond a reasonable doubt.

(3RT 615-616, emphasis added.)

The prosecutor then discussed the evidence and the lesser included offenses and argued what was reasonable and unreasonable for the jury to believe. At the close of argument, she repeated that, "When you look at the world of possibilities, when you look at what is reasonable and unreasonable in the facts of this case, the defense theory is almost to the impossible, but it

is certainly far from reasonable, and you must reject the unreasonable and accept the reasonable." (3RT 620-621, emphasis added.)

(2) The appellate court's opinion.

The Court of Appeal in this case held the prosecutor's argument did not constitute misconduct, for several reasons.

First, the Court found the description of the reasonable doubt standard, while "not eloquent," did not constitute a misstatement of law, but was merely a "roundabout" way of explaining the "spectrum of possibilities" supported by the evidence, including the impossible, the unreasonable, and the reasonable and possible. (Slip opn., p. 8.) The Court found that telling the jury its decision "has to be in the middle, "has to be based on reason," and "has to be a reasonable account" were proper arguments that "the jury needed to reject the impossible, the unreasonable, and the mere possibilities in favor of a reasonable factual scenario that was supported by the evidence." (Slip opn., pp. 8-9.) The Court held the argument did not lower the state's burden of proof, but merely took a "circuitous path in telling the jury that reasonable doubt requires the jury to be reasonable"; this did not misstate the law, but was no more than a "poorly worded redundancy of the reasonable doubt instruction" and did not constitute misconduct. (Slip opn., p. 9.)

Second, insofar as the prosecutor argued that some evidence might be inaccurate or incomplete, the Court of Appeal ruled this argument was "yet another redundancy" of correct instructions given by the trial court, because "the overall point" of the argument was that "the evidence may not be perfect, but that does not mean the case is over" and the trial court "gave the jury the same information in a more complete and specific manner" by instructing with CALCRIM No. 226, telling the jury how to consider testimony when it concludes a witness has lied, and CALCRIM No. 302, regarding the evaluation of conflicting evidence. (Slip opn., p. 9.)

Third, the appellate court presumed that to the extent the prosecutor's argument confused the jury, it disregarded any part of the argument that conflicted with the standard jury instructions on reasonable doubt, and therefore ruled there was no prejudice from the argument. (Slip opn., p. 10.)

Fourth, the appellate court disagreed with *People v. Otero* (2012) 210 Cal.App.4th 865. The Court of Appeal held that (1) using a puzzle analogy to imply that reasonable doubt can be met by only a few pieces of evidence is "not problematic" and "is not a misstatement of the law"; and (2) the "What state is this?" puzzle presentation did not ask the jury to guess or speculate, but to look at all of the information presented – including not only the outline

shape, but also the city names and the geographical inaccuracies – and then come to a reasonable conclusion. (Slip opn., pp. 11-12.)

The Court of Appeal's opinion must be reversed because it is contrary to established law as shown herein.

B. Standards for Finding Prosecutorial Misconduct.

(1) Federal standard: denial of due process.

Under the federal Constitution, prosecutorial misconduct in closing argument violates the Fourteenth Amendment and constitutes reversible error when it infects the trial with such "unfairness as to make the resulting conviction a denial of due process." (U.S. Const., Amend. 14; *Darden v. Wainwright* (1986) 477 U.S. 168, 181 [106 S.Ct. 2464, 91 L.Ed.2d 144]; *People v. Martinez* (2010) 47 Cal.4th 911, 955.) Under *Darden*, the first issue is whether the prosecutor's remarks were improper; if so, the next question is whether such conduct infected the trial with unfairness. (*Tan v. Runnels* (9th Cir. 2005) 413 F.3d 1101, 1112.)

(2) State standard: use of "deceptive or reprehensible" methods to persuade the jury.

Under state law, prosecutorial comment that falls short of rendering the trial fundamentally unfair is misconduct when it involves "the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury." (*People v. Cash* (2002) 28 Cal.4th 703, 733; *People v. Katzen-berger* (2009)

178 Cal.App.4th 1260, 1266.) The question of prejudice from misconduct is separate from the question whether prosecutorial comment constitutes "misconduct." (*People v. Mendoza* (2007) 42 Cal.4th 686, 703.)

Despite the strong and morally freighted language, "deceptive or reprehensible," the concept of prosecutorial misconduct is somewhat of a misnomer to the extent that it suggests a prosecutor must act with a culpable state of mind. Neither bad faith nor intentionality are required under California law for a prosecutor's actions to constitute misconduct. (*People v. Hill* (1998) 17 Cal.4th 800, 822-823, overruled on another ground in *Price v. Superior Court* (2001) 25 Cal.4th 1046, 1069, fn. 13.) *People v. Bolton* (1979) 23 Cal.3d 208, overruled prior cases holding that a prosecutor's bad faith was a prerequisite to appellate relief for prosecutorial misconduct, explaining that "this emphasis on intentionality is misplaced. '[I]njury to appellant is nonetheless an injury because it was committed inadvertently rather than intentionally.'" (*Id.* at pp. 213-214.) Given that a prosecutor does not have to act in bad faith, "[a] more apt description of the transgression is prosecutorial error." (*People v. Hill, supra,* 17 Cal.4th 800, 823, fn. 1 (*Hill*); and see, *People v. Jasso* (2012) 211 Cal.App.4th 1354, 1362.)

C. The Presumption of Innocence Accorded to a Criminal Defendant and the State's Burden to Prove Guilt Beyond a Reasonable Doubt.

Proof at a criminal trial involves two interrelated principles, namely, the defendant's presumption of innocence and the prosecution's burden of proving guilt beyond a reasonable doubt. (*People v. Aranda* (2012) 55 Cal.4th 342, 355.) The presumption of innocence in favor of the accused is the "bedrock, 'axiomatic and elementary' principle whose 'enforcement lies at the foundation of the administration of our criminal law.' " (*Taylor v. Kentucky* (1978) 436 U.S. 478, 483 [98 S.Ct. 1930, 56 L.Ed.2d 468]; *In re Winship* (1970) 397 U.S. 358, 363 [90 S.Ct. 1068, 25 L.Ed.2d 368] (*Winship*).) The presumption of innocence is preserved "up and until unanimous agreement is reached." (*People v. Goldberg* (1984) 161 Cal.App.3d 170, 190.)

Proof of guilt "beyond a reasonable doubt" is the standard that provides concrete substance for the presumption of innocence. The due process clauses of the Fifth and Fourteenth Amendments and established state law require that both the presumption of innocence, and the state's burden to prove guilt beyond a reasonable doubt, be clearly conveyed to the jury. (U.S. Const., Amends. 5 & 14; *Winship, supra,* 397 U.S. 358, 362-364; *Victor v. Nebraska, supra,* 511 U.S. 1, 5; *People v. Aranda* (2012) 55 Cal.4th 342, 354; *People v. Vann* (1974) 12 Cal.3d 220, 225.)

The United States Supreme Court has stated that the beyond a reasonable doubt standard requires the jury to reach a "subjective state of near certitude" on the facts in issue. (*Jackson v. Virginia* (1979) 443 U.S. 307, 315 [99 S.Ct. 2781, 61 L.Ed.2d 560]; *Winship, supra,* 397 U.S. 358, 364.)

In California, the state's burden of proof is codified in section 1096, which defines reasonable doubt as follows:

> 'It is not a mere possible doubt; because everything relating to human affairs is open to some possible or imaginary doubt. It is that state of the case, which, after the entire comparison and consideration of all the evidence, leaves the minds of jurors in that condition that they cannot say they feel an abiding conviction of the truth of the charge.' (§ 1096.)

Reasonable doubt and the presumption of innocence need not be explained to the jury in the exact language of section 1096 or the standard jury instructions (CALJIC No. 2.90 or CALCRIM No. 220), so long as the concepts are otherwise accurately explained. (*People v. Aranda, supra*, 55 Cal.4th 342, 354; *People v. Vann* (1974) 12 Cal.3d 220, 225.) However, to insure that juries understand the state's burden correctly, trial courts and prosecutors have long and consistently been warned not to experiment with new definitions of reasonable doubt that stray from or embellish on either the *Winship* standard (a subjective state of near certitude) or the statutory definition (an abiding conviction of the truth of the charge). (*Victor v. Nebraska, supra,* 511 U.S. 1, 16-17; *People v. Medina* (1995) 11 Cal.4th 694,

745; *People v. Freeman* (1994) 8 Cal.4th 450, 503.) The statutory language of the reasonable doubt standard "has with near, if not complete, universality been accepted as the best definition of the concept of proof beyond a reasonable doubt. Well intentioned efforts to 'clarify' and 'explain' these criteria have had the result of creating confusion and uncertainty, and have repeatedly been struck down by the courts of review of this state." (*People v. Garcia* (1975) 54 Cal.App.3d 61, 63.)

D. The Unique Role of the Prosecutor.

As an officer of the state, the prosecutor is held to a high standard. His or her interest is not to win the case, but to see that justice is done. (*Berger v. United States* (1935) 295 U.S. 78, 88 [55 S.Ct. 629, 79 L.Ed. 1314]; *Viereck v. United States* (1943) 318 U.S. 236, [63 S.Ct. 561, 87 L.Ed. 734]; *People v. Talle* (1952) 111 Cal.App.2d 650, 677.)

A prosecutor's closing argument is an especially critical period of trial. (*People v. Alverson* (1964) 60 Cal.2d 803, 805.) Since it comes from an official representative of the state, it carries great weight. (*People v. Pitts* (1990) 223 Cal.App.3d 606, 694; *People v. Talle, supra,* 111 Cal.App.2d 650, 677.) "Defense counsel and the prosecuting officials do not stand as equals before the jury. Defense counsel are known to be advocates for the defense. The prosecuting attorneys are government officials and clothed with the

dignity and prestige of their office. What they say to the jury is necessarily weighted with that prestige." (*Ibid.*) The prosecuting attorney "may prosecute with earnestness and vigor—indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one." (*Berger v. United States, supra,* 295 U.S. 78, 88.)

The prosecutor's duties are further stated in the Rules of Professional Conduct: "In presenting a matter to a tribunal, a member: [¶] (A) Shall employ, for the purpose of maintaining the causes confided to the member such means only as are consistent with truth; [and] [¶] (B) Shall not seek to mislead the judge, judicial officer, or jury by an artifice or false statement of fact or law; ...." (Rules Prof. Conduct, rule 5-200.) The Business and Professions Code further requires all attorneys "[t]o employ, for the purpose of maintaining the causes confided to him or her those means only as are consistent with truth...." (Bus. & Prof. Code, § 6068, subd. (d).)

Juxtaposed against these rules, prosecutors have wide latitude in closing argument to vigorously argue the facts favorable to their case, to draw available inferences from the evidence, and to argue the law. (*People v. Mendoza* (2007) 42 Cal.4th 686, 702; *Hill, supra,* 17 Cal.4th 800, 823.)

Despite this wide latitude, vigorous argument that crosses the line between permissible and impermissible constitutes prosecutorial misconduct. (*Ibid.*)

E. It Is Misconduct for the Prosecutor to Misstate the Law in Closing Argument, and Especially to Misrepresent the Prosecution's Burden to Prove Guilt Beyond a Reasonable Doubt.

State law establishes that it is misconduct for the prosecutor to misstate the law in closing argument.[3] (*People v. Mendoza* (2007) 42 Cal.4th 686, 702 [statements appearing to encourage jurors to impose their own subjective judgment in place of applying an objective "reasonable man" standard misstate law and constitute prosecutorial misconduct], quoting *People v. Bell* (1989) 49 Cal.3d 502, 538 [statements that it was defense counsel's job to "throw sand in your eyes," to "get his man off," and to confuse the jury, were improper to the extent they might be understood to suggest defense counsel was obligated or permitted to present a defense dishonestly].)

In particular, it is misconduct when the prosecutor's arguments misrepresent the prosecution's prima facie obligation to overcome the

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[3]A 2010 study by the Northern California Innocence Project found that prosecutorial misconduct is more prevalent at the argument stage of trial than at all other stages combined, and discusses the high cost of prosecutorial misconduct to the legal system. (See Kathleen M. Ridolfi & Maurice Possley, "Preventable Error: A Report on Prosecutorial Misconduct in California 1997-2009"(Oct. 2010) at pp. 25, 67-70, and see Study's Annual Updates, 2010 & 2011.

presumption of innocence and to prove all elements of the offense beyond a reasonable doubt. (*Hill, supra,* 17 Cal.4th 800, 831-832 [misconduct for prosecutor to argue that "[t]here has to be some evidence on which to base a doubt," which suggested it was the defendant who had the burden of producing evidence to demonstrate a reasonable doubt of his guilt]; *People v. Nguyen* (1995) 40 Cal.App.4th 28, 35-36 [argument that reasonable doubt is "a very reachable standard that you use every day in your lives when you make important decisions," including whether to get married or to change lanes when driving, was misconduct which trivialized reasonable doubt]; see also, *People v. Medina, supra,* 11 Cal.4th 694, 744-745 [prosecutors cautioned not to derogate reasonable doubt standard by quantifying it on a line graph during voir dire].)

When a prosecutor's argument concerning reasonable doubt is arguably ambiguous, i.e., the argument properly stated the law if interpreted one way, but misstated the law if interpreted another way, the test for misconduct is whether there is a reasonable likelihood the jury misconstrued or misapplied any of the complained-of remarks in an objectionable fashion or in violation of the federal Constitution. (*People v. Morales* (2001) 25 Cal.4th 34, 44; *Hill, supra,* 17 Cal.4th 800, 831-832; *People v. Sanders* (1995) 11 Cal.4th 475, 526; *Victor v. Nebraska, supra,* 511 U.S. 1, 5.)

F. The Prosecutor's Use of the "What State Is This?" Puzzle and Immediately Recognizable Iconic Image of California to Describe Reasonable Doubt, Combined with an Improper Suggestion That Reasonable Doubt Is Met "In the Middle" Between the Impossible and the Reasonable, Misstated and Improperly Quantified the State's Burden of Proof, and Constitutes Prosecutorial Misconduct.

Arguments analogizing reasonable doubt to the jury's ability to recognize a puzzle or iconic image misstate the prosecution's burden to prove guilt beyond a reasonable doubt, because they encourage the jury to jump to a conclusion rather than commencing its deliberations from the constitutionally required starting point of the presumption of innocence, and convey an impression of a lesser standard than the constitutionally required standard of proof beyond a reasonable doubt.

(1) The California Cases: *Katzenberger* and *Otero.*

In *People v. Katzenberger* (2009) 178 Cal.App.4th 1260, the prosecutor addressed proof beyond a reasonable doubt in closing argument. First, she quoted a portion of the reasonable doubt jury instruction that states: "Proof beyond a reasonable doubt is proof that leaves you with an abiding conviction that the charge is true. The evidence need not eliminate all possible doubt because everything in life is open to some possible or imaginary doubt." (CALCRIM No. 220.) The prosecutor then told the jury a picture was going to come up on the screen relating to the jury instruction just quoted, and said:

"We know [what] this picture is beyond a reasonable doubt without looking at all the pieces of that picture." (*Katzenberger, supra,* 178 Cal.App.4th 1260, 1264.) The prosecutor then started a PowerPoint program in which six puzzle pieces of a picture – the Statue of Liberty – came onto the screen sequentially. (*Ibid.*) The slide show stopped when the sixth piece was in place, leaving two pieces missing – one in the center of the image, which included the statue's face, and one in the upper left hand corner of the image. (*Ibid.*) The defense objected to the argument and use of the PowerPoint presentation because it demeaned the reasonable doubt instruction. (*Id.* at pp. 1264–1265.)

Given the dearth of California authority directly on point, the Third District Court of Appeal in *Katzenberger* reviewed several cases from other jurisdictions. First, the court found instructive a New York case, *People v. Wilds* (1988) 529 N.Y.S.2d 325 [141 A.D.2d 395] (N.Y.App.Div.). In *Wilds*, the trial judge used the analogy of a jigsaw puzzle of Abraham Lincoln to illustrate the judge's point that the jury need not have all of its questions answered in order to convict the defendant. The court in *Wilds* told the jury:

> ... If [the prosecution] makes out its case beyond a reasonable doubt even though some questions are unanswered, even though there [are] some blank spaces in the jigsaw puzzle you will say so you are convinced beyond a reasonable doubt that this is a portrate [sic] of Abraham Lincoln. Prove it. Guilty. And if you can't tell what the picture is, too many blank spaces then you say not proven. Not guilty. (*Id.*, 141 A.D.2d 395, 398.)

The New York appellate court found the trial court's explanation was error because "the average American juror would recognize a jigsaw puzzle of Abraham Lincoln long before all the pieces are in place. Obviously, this is not the quantum of proof required in a criminal case. " (*Ibid.*) The court reversed and remanded because these statements by the trial court "diminished the People's burden of proof and permitted the conviction of the defendant, based upon a standard less than that of beyond a reasonable doubt." (*Ibid.*)

The appellate court in *Katzenberger* concluded that, just as the average juror in *Wilds* would recognize the picture of Abraham Lincoln before all the pieces of the puzzle were in place, the Statute of Liberty would be recognized by most jurors "well before the initial six pieces are in place." (*Katzenberger, supra,* 178 Cal.App.4th 1260, 1267.) *Katzenberger* concluded:

> The presentation, with the prosecutor's accompanying argument, leaves the distinct impression that the reasonable doubt standard may be met by a few pieces of evidence. It invites the jury to guess or jump to a conclusion, a process completely at odds with the jury's serious task of assessing whether the prosecution has submitted proof beyond a reasonable doubt. (*Ibid.*)

Katzenberger found an additional problem with the prosecutor's use of the puzzle. (*Ibid.*) After reviewing two more appellate decisions from other jurisdictions, *United States v. Pungitore* (3d Cir. 1990) 910 F.2d 1084 (*Pungitore*) and *Lord v. Nevada* (Nev. 1991) 107 Nev. 28, 806 P.2d 548 (*Lord*), *Katzenberger* found the prosecutor's argument contained an improper

quantitative component. (*Katzenberger, supra,* 178 Cal.App.4th 1260, 1267-1268.)

In *Pungitore*, the prosecutor in opening statement analogized the unfolding of evidence at trial to a jigsaw puzzle. In closing argument, defense counsel adopted the analogy, arguing that many of the puzzle pieces were missing and others were not genuine. In rebuttal, the prosecutor conceded some "puzzle pieces" were missing, but argued that the puzzle as a whole was sufficiently complete to preclude any reasonable doubt as to the picture's subject matter, analogizing the prosecution's case to a 500 piece jigsaw puzzle with eight pieces missing. (*Pungitore, supra,* 910 F.2d 1084, 1128.) The appellate court found the prosecutor's argument "improperly suggested a quantitative measure of reasonable doubt," but found no prejudice in that the rebuttal argument was fair reply to defense counsel's argument and the trial court promptly gave a curative instruction at defense counsel's request. (*Ibid.*)

Lord, supra, 107 Nev. 28, the Nevada case examined in *Katzenberger*, also involved improper quantification of the concept of reasonable doubt. In *Lord*, the Nevada Supreme Court held that the prosecutor improperly suggested during closing argument that having 90 to 95 percent of the pieces of a puzzle suffices to convict beyond a reasonable doubt. (*Id.* at p. 35.) The *Lord* court found the comment improper under *McCullough v. Nevada* (Nev.

1983) 99 Nev. 72 [657 P.2d 1157], in which the district judge, during voir dire, attempted to illustrate the concept of reasonable doubt on a numerical scale of zero to ten, placing the preliminary hearing standard at about one, the burden of persuasion in civil trials at just over five, and reasonable doubt at about seven and a half. (*Id.* at pp. 1157-1158.)

The Nevada Supreme Court in *McCullough* held that because the concept of reasonable doubt is inherently *qualitative*, "[a]ny attempt to quantify it may impermissibly lower the prosecution's burden of proof, and is likely to confuse rather than clarify." (*Id.* at p. 1159.) The *McCullough* Court reversed and remanded because the illustration may have led the jury to believe that the prosecution satisfied the *Winship* standard (a subjective state of near certitude) "if the proof reached a score of 7.5 on a scale of zero to ten. Alternatively, the jury may improperly have concluded that anything more than a 75% chance of each fact being true was constitutionally sufficient" to find the defendant guilty. (*Ibid.*)

The appellate court in *Katzenberger, supra,* 178 Cal.App.4th 1260, held that the prosecutor's PowerPoint presentation, with two pieces missing from an eight-piece puzzle of the Statue of Liberty, contained an improper quantitative component similar to those present in *Pungitore, supra,* 910 F.2d 1084, and *Lord, supra,* 107 Nev. 28. (*Katzenberger, supra,* 178 Cal. App.4th

1260, 1267.) Specifically, the prosecutor's statement in *Katzenberger* that, "this picture is beyond a reasonable doubt" when six of eight puzzle pieces were in place, "inappropriately suggest[ed] a specific quantitative measure of reasonable doubt, i.e., 75 percent." (*Id.* at 1268.) *Katzenberger* concluded:

> The prosecutor's use of an easily recognizable iconic image along with the suggestion of a quantitative measure of reasonable doubt combined to convey an impression of a lesser standard of proof than the constitutionally required standard of proof beyond a reasonable doubt. The prosecutor committed misconduct.

(*Ibid.*)

Three years after *Katzenberger,* the Fourth District Court of Appeal, Division Three, decided *People v. Otero* (2012) 210 Cal.App.4th 865, in which the prosecutor used a PowerPoint diagram entitled, "No Reasonable Doubt," which consisted of the outlines of California and Nevada. "Ocean" was printed to the left of California; "San Diego" was printed in the northern part of the state, below San Diego was a star and the letters "Sac," and below that was San Francisco. Los Angeles was labeled in the southern part of the state. At the bottom of the diagram was the statement: "Even with incomplete and incorrect information, no reasonable doubt that this is California." (*Id.* at p. 869.) Using the diagram, the prosecutor argued to the jury, "I'm thinking of a state" with a city called San Francisco "right in the center of the state," a capital called "Sac-something," a city in the north called San Diego, and a city

in the south called Los Angeles. The prosecutor then argued, " 'Is there any doubt in your mind ... that state is California? Okay. Yes, there's inaccurate information. I know San Diego is not at the northern part of California, and I know Los Angeles isn't at the southern. Okay. But my point to you in this—.' " (*Id.* at p. 870.)

At that point, defense counsel objected. The trial court told the prosecutor to not use the diagram and instructed the jury to disregard it, explaining that "people try to explain reasonable doubt in different ways, and nobody has done anything wrong, but I've defined for you what reasonable doubt is in the instruction, and you're to decide what reasonable doubt is following that instruction." (*Ibid.*)

In deciding whether the diagram and "What state is this?" puzzle misstated the prosecution's burden to prove guilt beyond a reasonable doubt, the *Otero* court reviewed both *Katzenberger, supra,* 178 Cal.App.4th 1260 and *Wilds, supra,* 141 A.D.2d 395. (*Otero, supra,* 210 Cal.App.4th 865, 871.) The *Otero* court decided that the prosecutor's use of an immediately recognizable iconic image – the shape of California – which contained inaccurate information the jury was encouraged to ignore, made the error more egregious than the error in *Katzenberger*, because it encouraged the jury to simply ignore evidence that was demonstrably false. (*Id.* at p. 873.) From the start of the

PowerPoint presentation, "every juror knew the state was California," without considering any information other than the map's shape. (*Id.* at 872.)

As in *Katzenberger*, the presentation invited the jury to "guess or jump to a conclusion, a process completely at odds with the jury's serious task of assessing whether the prosecution has submitted proof beyond a reasonable doubt." (*Otero, supra,* 210 Cal.App.4th 865, 872, quoting *Katzenberger, supra,* 178 Cal.App.4th 1260, 1268.)

Furthermore, while the presentation in *Otero* demeaned the reasonable doubt standard regardless whether it included a quantitative aspect, because the jurors needed only one component of the diagram to recognize the state – the readily recognized outline of California – and could ignore the remaining correct and incorrect pieces of information (the city names and placements), the presentation was more egregious than that in *Katzenberger*, because the diagram was identifiable with but one of eight pieces of information (12.5 percent of the information supplied). Thus, the presentation informed the jury that reasonable doubt may be reached "on such slight proof even when some of the evidence is demonstrably false. [¶] The prosecutor committed misconduct." (*Otero, supra,* 210 Cal.App.4th 865, 873.)

(2) The Washington and Kansas Cases.

Two states, Washington and Kansas, have analyzed in a number of cases concerning prosecutorial misconduct in arguments using puzzles and iconic images to describe the prosecution's burden of proving guilt beyond a reasonable doubt.

In *Washington v. Warren* (2008) 165 Wash.2d 17, 26 [195 P.3d 940, 945], the Washington Supreme Court strongly cautioned against prosecutorial arguments that misdefine reasonable doubt, because such arguments can dilute or even wash away the presumption of innocence, the "bedrock" upon which the criminal justice system stands. Nevertheless, the Washington courts decide on a case-by-case basis whether the prosecutor's use of a jigsaw puzzle or other analogy at closing argument constitutes misconduct, recognizing that a problem arises when the analogy is used to trivialize the state's burden under the reasonable doubt standard, but thus far declining to outlaw the use of analogies altogether. (*Washington v. Fuller* (2012) 169 Wash.App. 797, 825 [282 P.3d 126, 141]; *Washington v. Berube* (2012) 171 Wash.App. 103, 122 [286 P.3d 402, 412].)

Washington v. Johnson (2010) 158 Wash.App. 677 [243 P.3d 936], found a puzzle analogy improper where the prosecutor argued in closing:

> I like to look at abiding belief and use a puzzle to analogize that. You start putting together a puzzle and putting together a few

> pieces, and you get one part solved. So with this one piece, you probably recognize there's a freeway sign. You can see I-5. You can see the word 'Portland' from looking in the background. You may or may not be able to see which city that is, but it is probably near one that is on the I-5 corridor.
>
> You add another piece of the puzzle, and suddenly you have a narrower view. It has to be a city that has Mount Rainier in the background. You can see it. It can still be Seattle or Tacoma, or if you weren't familiar, you might think that mountain might be Mt. Hood, and it could be Portland.
>
> You add a third piece of the puzzle, and at this point *even being able to see only half*, you can be assured beyond a reasonable doubt that this is going to be a picture of Tacoma.

(243 P.3d 936, 939, emphasis added.)

The defendant in *Washington v. Johnson, supra,* 243 P.3d 936, argued the prosecutor misstated the law by stating that arriving at an abiding belief to satisfy the reasonable doubt standard was the same as intuiting the subject of a partially completed puzzle. The Washington appellate court agreed, stating that, "the prosecutor's arguments discussing the reasonable doubt standard in the context of making an affirmative decision based on a partially completed puzzle trivialized the State's burden" and improperly focused on a quantitative degree of certainty ("even being able to see only half") the jurors needed to act. (*Id.* at 941.) Further, the argument was "flagrant and ill-intentioned" regardless whether there was a published opinion directly on point at the time of trial, and required reversal despite defense counsel's failure to object

because the "misstatement of the reasonable doubt standard and the presumption of innocence due Johnson" violated his due process rights and the appellate court could not conclude they did not affect the jury's verdict. (*Id.* at 940-941.)

In *Washington v. Lindsay* (2012) 171 Wash.App. 808 [288 P.3d 641] the prosecutor used a similar puzzle analogy to describe the experience of a person who begins a puzzle not knowing what picture it will make, but who eventually knows beyond a reasonable doubt that the picture is of Seattle. The prosecutor described for the jury, "[Y]ou put in about 10 more pieces and see this picture ... you can be halfway done with that puzzle.... You could have 50 percent of those puzzle pieces missing and you know it's Seattle." The Washington appellate court again held the analogy improperly "quantified the number of puzzle pieces (and the percentage of missing pieces) with a degree of certainty purporting to be equivalent to the beyond-a-reasonable-doubt standard." (288 P.3d 641, 652.) This improper analogy, combined with an argument comparing "beyond a reasonable doubt" to everyday decision-making, such as the confidence a person feels walking with the "walk sign" at a crosswalk on a busy street without fear of being hit by a car, "minimized and trivialized the gravity of the standard and the jury's role." (*Ibid.*)

In contrast, the Washington courts distinguish prosecutorial arguments using jigsaw puzzle analogies that do not encourage jurors to jump to a conclusion about an iconic image, but rather, to properly wait and analyze all of the evidence. For example, in *Washington v. Fuller* (2012) 169 Wash.App. 797 [282 P.3d 126], the prosecutor initially said he was going to use a jigsaw puzzle showing a picture of the city of Tacoma to illustrate the concept of beyond a reasonable doubt, but concluded the presentation by saying the *trial* (not the reasonable doubt standard) is very much like a jigsaw puzzle. (282 P.3d 126, 140-141.) The prosecutor impressed on the jury that with just a few pieces of the puzzle, "we might think it looks like Tacoma, *but we don't know*." (*Id.* at 140, emphasis added.) The prosecutor continued adding pieces to the puzzle, always reminding the jurors that they still did "not have enough pieces or enough evidence beyond a reasonable doubt that it's pieces of Tacoma." Then, with more pieces, the evidence *might suggest* the puzzle is Tacoma, but the jury still "may not have enough pieces, enough evidence to know beyond a reasonable doubt that it's Tacoma," until finally it may have enough evidence to see beyond a reasonable doubt that the puzzle was a picture of Tacoma. (*Id.* at 140-141.) The prosecutor concluded by saying that a trial is "very much like a jigsaw puzzle," and what is important is:

> Do you have enough evidence to believe beyond a reasonable doubt that the defendant is guilty? [¶] Beyond a reasonable

> doubt, you just need enough pieces of the puzzle, enough evidence to have *an abiding belief in the truth of the charge....*

(*Id.* at 141, emphasis added.)

This puzzle analogy, held the Washington appellate court in *Fuller, supra,* 282 P.3d 126, did not improperly quantify the level of certainty required to satisfy the beyond a reasonable doubt standard but, rather, "discussed identifying a puzzle *with certainty* before it was complete without purporting to quantify the degree of certainty required or equating identifying the image with making a mundane choice." (*Id.* at 142, emphasis added.) (See also, *Washington v. Berube, supra,* 286 P.3d 402, 412 [while puzzle analogy may aptly describe a trial, a "problem arises when the analogy is used to trivialize the State's burden under the reasonable doubt standard"]; *Washington v. Curtiss* (2011) 161 Wash.App. 673, 250 P.3d 496, 509 [holding, without analysis, that puzzle analogy to describe reasonable doubt did not shift the state's burden of proof, nor constitute flagrant or ill intentional prosecutorial misconduct].)

In contrast to *Washington v. Fuller, supra,* 282 P.3d 126, the Washington appellate court in *Washington v. Jones* (2011) 163 Wash.App. 354 [266 P.3d 886] held that a prosecutor's analogy discussing the reasonable doubt standard in the context of a game show was improper. The prosecutor described the game "Wheel of Fortune," where letters "pop up" and "words

start spelling out in front of you, at some point there's enough letters up there where you can guess the word. You know what the word is. [¶] ... not every letter is lit up; not every letter is turned over. You don't know what the word is yet. [¶] That's proof beyond all doubt. I don't need to turn over every single one of those letters. What I need to do is I need to keep turning them over until we all know what the word is. Right?" The prosecutor continued, asking the jury to look at all of the pieces of evidence together, "And when you start stacking them on top of one another, I've turned over enough letters for you to know what the word is. The word is guilty." (*Washington v. Jones, supra,* 266 P.3d 886, unpublished text at ¶27.)[4]

The Washington appellate court in *Jones* held the analogy was improper because "a game show contestant, and by analogy, a juror, is encouraged to guess the solution before he is certain beyond a reasonable doubt." Further, asking the jury to make an affirmative decision of guilt based on a game show, like analogizing the reasonable doubt standard to a partially completed puzzle, trivializes the State's burden. (266 P.3d 886, unpublished text at ¶29.)

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[4]The relevant portion of this case is unpublished; however, Cal. Rules of Court, rule 8.1115 applies only to California opinions, and opinions from other jurisdictions can be cited without regard to their publication status. (*Lebrilla v. Farmers Group, Inc.* (2004) 119 Cal.App.4th 1070, 1077, citing 9 Witkin, Cal.Procedure (4th ed. 1997) Appeal, § 940, p. 980).

* * *

The Kansas courts also distinguish between analogies that encourage juries to jump to a conclusion and those that remind the jury they must commence their deliberations starting from a presumption of innocence. In *Kansas v. Crawford* (2011) 46 Kan.App.2d 401 [262 P.3d 1070], during voir dire the prosecutor talked to the jury about a big jigsaw puzzle depicting a lighthouse, an ocean with waves crashing against the rocks, and a couple of seagulls flying around. The prosecutor asked whether, even with some pieces of the lighthouse and ocean missing, "Are you ... able to say that looks like a lighthouse and ocean?" The prosecutor likened the example to reasonable doubt. (*Kansas v. Crawford, supra,* 262 P.3d 1070, 1079.) During closing argument, the prosecutor revisited the puzzle analogy, saying, "[T]here are always going to be pieces of the puzzle missing," and that, "The question you got to ask yourself is just because a piece of the puzzle – pieces of the puzzle are missing, does that mean you can't see the whole picture? Are those questions reasonable in your mind?" (*Ibid.*)

The Kansas court turned for guidance to *Katzenberger, supra,* 178 Cal.App.4th 1260, and the out-of-state cases cited therein, *People v. Wilds, supra,* 141 A.D.2d 395, and *Lord v. Nevada, supra,* 806 P.2d 548, as well as *Washington v. Johnson, supra,* 243 P.3d 936. (*Kansas v. Crawford, supra,* 262

P.3d 1070, 1079-1080.) The court concluded the prosecutor's argument that "even though there's some pieces missing, you're able to say that looks like a lighthouse and an ocean," improperly implied the jury could find the defendant guilty even if some evidence was missing if it "looked like" he committed the crimes. Therefore, the comments went beyond the wide latitude afforded prosecutors and constituted misconduct. (*Id.* at 1080.)

In *Kansas v. Jackson* (July 12, 2013) 2013 WL 3483808 (*Jackson*)[5], the Kansas Supreme Court distinguished the improper argument in *Kansas v. Crawford, supra,* 262 P.3d 1070, from an argument using an analogy that reminds the jury it must commence its deliberations from the presumption of innocence. In *Jackson,* the prosecutor during voir dire talked to jurors about the state's responsibility to prove defendant's guilt beyond a reasonable doubt, and asked the jury to think about the presumption of innocence as the blank canvas a painter has when he starts to create a painting. (2013 WL 3483808, slip opn. at p. 5.) The prosecutor stated, "We don't know what is going to be painted but you got to presume that he's innocent. And then we put on evidence, as the trial progresses.... Eventually, a picture will start to form. And ... your job then at the end of the trial is to sit back and determine has the State shown me a picture that I know what it is beyond a reasonable doubt?" (*Ibid.*)

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[5]At the time of this writing, only the Westlaw citation is available to defendant.

The prosecutor then talked about a famous painting of George Washington that has no paint at the very bottom, but is still entirely recognizable as depicting George Washington "beyond a reasonable doubt." The prosecutor used the analogy to explain the state's burden was not to prove guilt beyond "all doubt" and stated: "When the Judge says we have to prove our case beyond a reasonable doubt, you realize that not every little corner of the painting has to have paint on it." (*Ibid.*)

Ruling that the argument was not prosecutorial misconduct, the Kansas Supreme Court pointed out that (1) the prosecutor stressed that defendant was presumed innocent, that it was the State's burden to put paint on that "blank canvas of innocence," (2) that it was the jury's responsibility to decide whether the picture the State painted was identifiable beyond a reasonable doubt, not beyond "all doubt," (3) that the prosecutor made no quantitative argument related to how much paint versus blank space might rise to the level of beyond a reasonable doubt, and (4) that the prosecutor never mentioned the painting analogy after voir dire. (*Id.*, slip opn. at pp. 7, 9.)

The Kansas Supreme Court in *Kansas v. Stevenson* (2013) 297 Kan.___ [262 P.3d 303], found a "Wheel of Fortune" analogy used in voir dire acceptable, distinguishing the improper lighthouse jigsaw puzzle analogy used in *Kansas v. Crawford, supra,* 262 P.3d 1070. The prosecutor used a sign

displaying the words "Wheel of Fortune" with only one letter missing, to explain the difference between beyond a reasonable doubt and beyond all possible doubt. Yet, while reluctantly finding the game show analogy did not per se misstate the law, the Kansas Supreme Court said that the "prosecutor's comments scuffed the line of misconduct without actually crossing it. Nevertheless, only a slight difference in wording would have resulted in error, and use of this analogy seems fraught with possibilities for stepping over the line of error. Especially troubling is the potential for quantifying reasonable doubt by discussing the difference between missing one letter as compared to more. Consequently, we discourage use of the 'Wheel of Fortune' analogy." (262 P.3d 303, 308.)

G. The Prosecutor's Argument in this Case Was Misconduct Because it Improperly Encouraged Deliberations from a Starting Point of Guilt and Implied That 50% Certainty of Guilt (A Decision That "Has to Be in the Middle" Between the Impossible and the Reasonable) was Enough to Satisfy the State's Burden of Proof.

The Court of Appeal in this case found the prosecutor's argument was "nearly identical" to the example used in *Otero, supra,* 210 Cal.App.4th 865 (slip opn., p. 10),[6] but found the presentation did not constitute misconduct.

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[5]The prosecutor's visual aid was not a trial exhibit and is not part of the appellate record, but the prosecutor's comments during the presentation demonstrate without dispute that an image of California was placed on the monitor. (3RT 615) The appellate court evaluated the presentation assuming

Under *Katzenberger*, *Otero*, and the Kansas and Washington cases cited above, the appellate court's conclusion must be reversed.

First, the appellate court incorrectly concluded that the argument was "not problematic" because implying the evidentiary standard "can be met by only a few pieces of evidence ... is not a misstatement of the law." (Slip opn., p. 11.) This finding is misplaced because the prosecutor's presentation was explicitly geared toward explaining reasonable doubt, not the sufficiency-of-evidence rule that the testimony of a single witness can be sufficient to support a conviction. (*People v. Canizalez* (197 Cal.App.4th 832, 845.) The presentation specifically focused on "reasonable doubt," and improperly conveyed to the jury that it need not fully consider the missing and incorrect information on the map before concluding that the state was California beyond a reasonable doubt. (3RT 615)

Second, in disagreeing with *Otero*'s conclusion that the map puzzle "invites the jury to guess or jump to a conclusion, a process completely at odds with the jury's serious task of assessing whether the prosecution has submitted proof beyond a reasonable doubt" (*Otero, supra,* 210 Cal.App.4th at p. 871),

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the visual aid was "nearly identical" to the example used in *People v. Otero, supra,* 210 Cal.App.4th 865. (Slip opn., p. 10.) Defendant has requested this Court take judicial notice of the PowerPoint slide used by the prosecutor herein and direct the prosecution to provide the Court and parties with a copy of it.

the appellate court in this case improperly used its own interpretation of the prosecutor's argument (that the prosecutor asked the jury to look at all of the information presented, including the city names, the outline shape, and the inaccuracies in the geography, and then reach an answer, slip opn. pp. 11-12), rather than asking the critical question: is it reasonably likely one or more jurors construed or applied the complained-of remarks in an objectionable fashion? (*People v. Morales, supra,* 25 Cal.4th 34, 44; *Victor v. Nebraska, supra,* 511 U.S. 1, 5; and see, slip opn., pp. 11-12.) The question is not whether the appellate court could construe the prosecutor's argument as proper argument, but rather, whether there is a reasonable likelihood one or more members of the jury could interpret it as suggesting a lesser burden than proof beyond a reasonable doubt.

The argument using the map of California, which was immediately recognizable regardless of the incorrect and incomplete city names and placements, encouraged the jurors to begin their deliberations from a starting point of guilt rather than from the presumption of innocence. (*Otero, supra,* 210 Cal.App.4th 865, 872; cf., *Kansas v. Jackson, supra* (July 12, 2013) 2013 WL 3483808 [prosecutor reminded the jury to start with the "blank canvas" of the presumption of innocence before talking about an almost-completed painting of George Washington, which was incomplete only because of some

blank white space at the bottom of the painting, and left no reasonable doubt as to the painting's subject].) Here, the "What state is this?" puzzle invited the jury not to start from the blank canvas of the presumption of innocence, but to come to an immediate conclusion before considering all of the evidence and the conflicting testimony, a process completely at odds with the deliberative contemplation and weighing of evidence the jury is required to undertake and which is necessary to protect the integrity of the trial. (See, *People v. Engelman* (2002) 28 Cal.4th 436, 449 [discussing standard instructions that inform the jury of its solemn duties during deliberations].)

The presentation was "not an accurate analogy to a prosecutor's burden to prove beyond a reasonable doubt each and every element of a charged offense." (*Otero, supra,* 210 Cal.App.4th 865, 873.) The jury's solemn duty to deliberate is not a guessing game, and the prosecutor should not encourage the jury to guess as if they were solving a "What state is this?" puzzle.

The inapt California map analogy was compounded by the prosecution's argument to the jury that its decision had to be "in the middle" between the impossible and the reasonable possibilities. (3RT 615) This improperly quantified the degree of certainty required to determine guilt beyond a reasonable doubt at 50 percent and lowered the state's burden of proof to even less than that required for a preponderance of evidence, the standard of proof

applicable in a civil trial. (*Id.* at 1157-1158; and see, *Schumacher v. Bedford Truck Lines* (1957) 153 Cal.App.3d 287, 297-298 [all that a party is required to do to prove his case by a preponderance of evidence is to tip the scales]; *People v. Garcia* (1975) 54 Cal.App.3d 61, 69 [weighing the evidence in the scales is "wholly foreign to the concept of proof beyond a reasonable doubt"].) This kind of quantification of reasonable doubt misstates the law. (See, *Katzenberger, supra*, 178 Cal.App.4th 1260, 1267-1268 [telling jury that reasonable doubt was met when six pieces of eight-piece Statue of Liberty puzzle were in place improperly quantified reasonable doubt at 75 percent]; *Otero, supra,* 210 Cal.App.4th 865, 872-873 [prosecutor's argument implied jury could decide the case based on one of eight components of the map presentation]; *McCullough v. Nevada, supra,* 657 P.2d 1157, 1157-1158 [court improperly used numerical scale of zero to ten to illustrate reasonable doubt, placing the preliminary hearing standard at about one, preponderance of evidence at just over five, and reasonable doubt at about 7.5].)

Under the established case law, the prosecutor's use of the inapt "What state is this?" analogy, combined with the argument that the jury's decision had to be "in the middle" between the impossible and the reasonable, misstated the state's burden of proof and constitutes misconduct.

H. Telling the Jury That "With Reasonable Doubt, You Have to Accept the Reasonable and Reject the Unreasonable," and That its Decision "Has to Be Based on Reason; It Has to Be a Reasonable Account," Misstates the Jury's Duty to Decide Guilt Beyond a Reasonable Doubt and Constitutes Prosecutorial Misconduct.

The prosecutor started her rebuttal closing argument by saying:

> All right. [Defense counsel] spoke quite a bit about reasonable doubt. *Basically, with reasonable doubt, you need to accept the reasonable and reject the unreasonable*, and your decision cannot be based on sympathy, prejudice, or speculation."

(3RT 614, emphasis added.)

After presenting the "What state is this?" analogy, the prosecutor continued:

> *What you are looking at when you are looking at reasonable doubt is you are looking at a world of possibilities*. There is the impossible, which you must reject, the impossible [sic] but unreasonable, which you must also reject, and the reasonable possibilities, and *your decision has to be in the middle. It has to be based on reason. It has to be a reasonable account.*

(3RT 615, emphasis added.)

The argument misstated the law. First, the argument erroneously diluted the "beyond a reasonable doubt" standard by equating it with a "reasonable account" or reasonable explanation. To convict a defendant of a crime, the jury must find that it has no reasonable doubt as to the truth of all elements of the criminal charges. (*People v. Riel* (2000) 22 Cal.4th1153, 1182; *In re Peterson*

(2007) 156 Cal.App.4th 676, 692.) Deciding whether the prosecution has made out "a reasonable account" falls far short of proof beyond a reasonable doubt.

Defendant has found no California case law directly on point, but the Kansas Supreme Court addressed this issue in *Kansas v. Sappington* (2007) 285 Kan. 176 [169 P.3d 1107] (*Sappington*). In *Sappington*, the prosecutor discussed reasonable doubt in rebuttal argument, saying that the standard does not require proof "beyond all doubt" or "beyond any doubt," and that: "Remember our test is beyond a reasonable doubt. *And is it reasonable given that evidence that we have that Marc Sappington is the one that did this? And I suggest to you the answer is, yes, it is.*" (*Sappington, supra,* 169 P.3d 1107, 1113, emphasis the court's.) In deciding the argument was improper, the *Sappington* court reviewed prior case law, including *Kansas v. Finley* (2002) 273 Kan. 237 [42 P.3d 723], where the prosecutor improperly argued:

> I would submit to you that a *reasonable doubt is really nothing more than a fair doubt that's based on reason* and common sense and arises from the status of the evidence It's impossible for me to prove everything to you by an absolute certainty. At the same time, a defendant should not be convicted just on speculation and conjecture, but you have much more than that in this case. You don't just have speculation or conjecture that [defendant] is guilty.

(*Kansas v. Finley, supra,* 42 P.3d 723, 732, emphasis added.)

The Kansas Supreme Court in *Finley* noted the risk that the argument gave the jury the impression that "something slightly more than suspicion or

conjecture is sufficient to reach reasonable doubt." (*Ibid.*) In *Sappington*, the Kansas high court held that the prosecutor's query, "Is it reasonable?" was more serious than the prosecutor's improper argument in *Finley*, because to convict a defendant of a crime, the jury must find that it has "no reasonable doubt" as to the truth of each claim the State must prove. Yet, the prosecutor's statement suggests that a jury may convict "if the jury believes that it is merely "reasonable" that he committed the crime. (*Sappington, supra,* 169 P.3d 1107, 1115.) The court concluded:

> We conclude that this misstatement dilutes the State's burden because a jury could convict due to its reasonable belief that a defendant committed a crime while still having a reasonable doubt as to guilt. Accordingly, the comment is outside the wide latitude afforded a prosecutor.

(*Ibid.*)

The prosecutor's argument in the present case was to the same effect, i.e., telling the jury that its decision "has to be a reasonable account." (3RT 615) Here, as in *Sappington*, the misstatement improperly suggested the jury could convict if it decided the prosecution's evidence was a "reasonable account," and thus diluted the jury's obligation to convict only if it found it had no reasonable doubt of the truth of the criminal charges.

The appellate court here incorrectly approved the prosecutor's argument on grounds it was merely an ineloquent, roundabout, and circuitous explanation

of reasonable doubt which did not misstate the law but was merely a "poorly worded redundancy of the reasonable doubt instruction" that did not ask the jury to guess or speculate, but only to "look at the information presented and come to a reasonable conclusion." (Slip opn., p. 12.)

The appellate court's conclusion is incorrect because telling the jury its decision "has to be based on reason" and has to be a "reasonable account" is not just a "poorly worded redundancy" of the beyond a reasonable doubt standard of proof; it misstates the standard. Being reasonable and coming to a reasonable conclusion are not the same as finding that there is no reasonable doubt as to the truth of the charges, i.e., that the prosecution has proved its case not to a reasonable doubt but beyond a reasonable doubt. Given the entire argument, it is reasonably likely the jury misinterpreted the prosecutor's argument as suggesting that its decision need only be "reasonable," a standard far less than the constitutionally required beyond a reasonable doubt standard of proof. (*People v. Hill, supra,* 17 Cal.4th 800, 831-832 [when prosecutor's comments are ambiguous, the question whether prosecutor misstated the burden of proof is whether it is reasonably likely the jury misunderstood it].) The argument therefore misstated the law and constitutes prosecutorial misconduct. (*Ibid.*)

Second, telling the jury it has to "accept the reasonable and reject the unreasonable" (3RT 614) confuses the beyond a reasonable doubt standard of proof with the rules for considering circumstantial evidence. (See, CALCRIM No. 224 ["...when considering circumstantial evidence, you must accept only reasonable conclusions and reject any that are unreasonable"].) While this Court has repeatedly rejected contentions that the standard circumstantial evidence instructions (CALJIC Nos. 2.01 and 8.83; CALCRIM No. 224) demean the beyond a reasonable doubt standard of proof (see, *People v. Myles* (2012) 53 Cal.4th 1181, 1216), the prosecutor's argument in this case was not directed at how the jury should consider circumstantial evidence, but to the entirely separate question of how the jury reaches a decision beyond a reasonable doubt. (See, *Otero, supra,* 210 Cal.App.4th 865, 873, fn.3, noting that the propriety of using the map of California PowerPoint presentation to address how circumstantial evidence works is a separate question from its use to explain the beyond a reasonable doubt standard of proof.) In fact, this case did not involve circumstantial evidence, and no circumstantial evidence instruction was given. (See, 1CT 105-162)

Instructing the jury on how to evaluate circumstantial evidence – that it must accept only reasonable conclusions and reject the unreasonable – is proper only when the prosecution relies either wholly or substantially upon

circumstantial evidence. (*People v. Thompson* (1957) 147 Cal.App.2d 543, 547-548; *People v. Monge* (1952) 109 Cal.App.2d 141, 144.) The prosecutor's argument here was not explaining the jury's evaluation of circumstantial evidence, but rather, the concept of proof beyond a reasonable doubt. The argument misstated the law and likely confused the jury on the state's burden of proof.

Third, the appellate court in this case improperly concluded there was no misconduct, because the "whole point" of the prosecutor's argument was that "the evidence may not be perfect, but that does not mean the case is over" and this same information was given by the trial court "in a more complete and specific manner" by instructing with CALCRIM No. 226, telling the jury how to consider testimony when it concludes a witness has lied, and CALCRIM No. 302, regarding the evaluation of conflicting evidence. (Slip opn., p. 9.)

But this is not what the prosecutor told the jury. She did not say, "The evidence may not be perfect, but that does not mean the case is over." (Compare slip opn., p. 9 to prosecutor's argument at 3RT 614-615.) The prosecutor's remarks were highly susceptible to an incorrect interpretation by the jury, that so long as their decision was "based on reason" and was a "reasonable account," then they had correctly applied the applicable standard of proof. The prosecutor's statements were not mere ineloquent, roundabout,

circuitous, or redundant statements of correct jury instructions. The statements improperly told the jury it need only decide what was "reasonable," and confused the evaluation of circumstantial evidence with deciding guilt beyond a reasonable doubt. It is reasonably likely the argument caused the jury to misunderstand the burden of proof. As such, they misstated the law and constitute prosecutorial misconduct. (*Hill, supra,* 17 Cal.4th 800, 831-832.)

I. The Argument Misstating the State's Burden of Proof Constitutes Misconduct under State Law and is Reviewed for Prejudice under *Chapman v. California* Because the Misconduct Infringed Defendant's Federal Due Process Rights.

The appellate court decided there was no prejudice from the prosecutor's argument because, to the extent the argument led to jury confusion concerning the reasonable doubt standard, the jury disregarded any part of the argument that conflicted with the standard jury instruction on reasonable doubt. (Slip opn., p. 10, citing CALCRIM Nos. 103, 200, and *People v. Stanley* (1995) 10 Cal.4th 764, 836-837.)

As shown above, the prosecutor's argument infringed upon defendant's federal constitutional due process right to the presumption of innocence and proof of guilt beyond a reasonable doubt. (*Winship, supra,* 397 U.S. 358, 364; U.S. Const., 14th Amend.) Therefore, the error is evaluated under *Chapman v. California* (1967) 386 U.S. 18, 24 [87 S.Ct. 824, 17 L.Ed.2d 705], requiring

reversal unless the prosecution proves the misconduct was harmless beyond a reasonable doubt. (*People v. Herring* (1993) 20 Cal.App.4th 1066, 1077; *Katzenberger, supra,* 178 Cal.App.4th 1260, 1269.) The prosecution cannot meet this burden here; indeed, it cannot meet the lesser standard for state law error under *People v. Watson* (1956) 46 Cal.2d 818, 836, requiring reversal where it is reasonably probable, i.e., where there is more than an abstract possibility, that the defendant would have obtained a more favorable result absent the error (*People v. Wilkins* (2013) 56 Cal.4th 333, 351).

(1) The likelihood the prosecutor's misstatements prejudicially influenced the jury's deliberations was not dispelled by an objection, admonition, or restatement of the reasonable doubt instruction.

One way prejudice from a prosecutor's misstatement of law can be dispelled is through a sustained objection and admonition to the jury, explicitly directing the jurors on the correct applicable law, or at least referring them to the jury instructions. (*People v. Redd* (2010) 48 Cal.4th 691, 750-751; *Katzenberger, supra,* 178 Cal.App.4th 1260, 1268-1269 [although trial court overruled defendant's objection to Statue of Liberty PowerPoint slide, it later told the jury that it would "clarify" the issue by reading the jury instruction on reasonable doubt to the jury, and then instructed the jury with the correct definition of reasonable doubt]; *Otero, supra,* 210 Cal.App.4th 865, 873 [trial court ordered prosecutor's diagram of California taken down as soon as defense

counsel objected, and admonished the jury to disregard it].) That did not happen in this case. There was no objection, due to ineffective assistance of counsel, discussed *infra*, and the trial court did not independently step in and admonish the jury or re-read the reasonable doubt instruction at the close of argument. (See, 3RT 621-629 [trial court's concluding instructions].) Instead, the prosecutor's argument was the last word on the subject of reasonable doubt.

Our courts have also found that a prosecutor's misstatements of law in closing argument are dispelled by the correct instructions the jury takes into the jury room with them. "[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, supra*, 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.)

But these cases ignore that the prosecutor's argument is an especially critical period of trial, and that it carries great weight with the jury because it comes from a representative of the state. (*People v. Pitts, supra,* 223 Cal.App.3d 690, 694.) Here, the prosecutor's use of an immediately recognizable iconic image, the map of California, and the "What state is this?" puzzle were particularly prejudicial because the prosecutor offered them not to "counter" the jury instructions, but to help "explain" what it takes to arrive at a decision beyond a reasonable doubt in a way that was easier for them to understand than the written jury instruction they would be allowed to take into deliberations with them. (See CALCRIM No. 220, see 1CT 124.) This easier-to-understand quality of the map analogy and the accompanying argument that the jury's decision had to be "in the middle" between the impossible and the reasonable and had to be a "reasonable account," means many jurors were likely to rely on the prosecutor's argument as a plain-language interpretation that could stand in for the more obscure language of the actual instruction.

Therefore, it is reasonably likely that at least some jurors erroneously understood proof beyond a reasonable doubt as "knowing what you're looking at" despite the existence of incorrect or inaccurate information – a standard that invited the jurors to come to quick conclusion without fulfilling their duty to examine all of the evidence.

(2) The failure to object and obtain an admonition was due to ineffective assistance of counsel.

Generally, a case will not be reversed for prosecutorial misconduct in closing argument absent an objection and a request that the jury be admonished to disregard the improper argument. (*People v. Fierro* (1991) 1 Cal.4th 173, 207; *People v. Herring* (1993) 20 Cal.App.4th 1066, 1074.) However, a defendant is entitled under the federal Constitution to effective assistance of counsel, and here, counsel's inaction violated that right because the failure to object (1) fell below an objective standard of reasonableness and constituted deficient performance, and (2) resulted in prejudice. (U.S. Const., 6th & 14th Amends.; *Strickland v. Washington* (1984) 466 U.S. 668, 693-694 [104 S.Ct. 2052, 80 L.Ed.2d 674] (*Strickland*); *People v. Turner* (2004) 34 Cal.4th 406, 427; *People v. Ledesma* (1987) 43 Cal.3d 171, 215-216.)

Trial counsel's failure to object to any aspect of the prosecutor's improper rebuttal closing argument fell below an objective standard of reasonableness and constitutes deficient performance. (*Strickland, supra,* 466 U.S. at 687-688.) Although a reviewing court must be "highly deferential" when scrutinizing an attorney's performance, an action is not objectively reasonable unless it "might be considered sound trial strategy." (*Id.* at 689.) Here, the failure to object could not be considered sound trial strategy.

Decisions not to object to inadmissible evidence already heard by the jury can in many cases be classified as part of a deliberate strategy to avoid calling the jury's attention to that evidence. (*People v. Riel* (2000) 22 Cal.4th 1153, 1187.) Even so, where an objection to clearly inadmissible evidence has substantial merit, reviewing courts have found no imaginable reasonable tactical explanation for failure to object and have found prejudicial ineffective assistance of counsel. (See, e.g., *People v. Roberts* (2011) 195 Cal.App.4th 1106, 1131-1132; *People v. Lopez* (2005) 129 Cal.App.4th 1508, 1523-1524.) By contrast, a failure to object to a prosecutor's rebuttal closing argument which misstates the state's burden of proof and tells the jury its decision must be "in the middle" and a "reasonable account" is much less susceptible to the argument that it could be considered reasonable trial strategy. Accepting any and all of a lawyer's doubts about the effectiveness of objections and curative instructions would preclude ineffectiveness claims in every case such as this, no matter how outrageous the prosecutorial misconduct might be.

The prosecutor's complained-of statements were harmful to defendant's case because they were misleading on the standard the jury had to apply to find defendant guilty. At minimum, they warranted an objection at bench following the conclusion of the prosecutor's rebuttal argument. There is no sound professional reason why defense counsel did not object to the misconduct, and

the failure to object was "outside the wide range of professionally competent assistance." (*Strickland, supra,* 466 U.S. 668, 690.) Accordingly, the performance prong of *Strickland's* ineffectiveness test is satisfied.

As well, *Strickland*'s prejudice test is met because had counsel acted as a competent professional, an objection and admonition from the court could have corrected the prosecutor's misstatements of the burden of proof. The second prong of *Strickland* requires a showing that but for counsel's ineffective assistance, there is a reasonable chance, more than an abstract possibility, the result would have been different. (*Strickland, supra,* 466 U.S. 668, 693-694; *People v. Ledesma, supra,* 43 Cal.3d 171, 217-218; *People v. Wilkins, supra,* 56 Cal.4th 333, 351.) Here, had counsel objected, it is likely the trial court would have admonished the jury in order to correct any jury misunderstanding, as occurred in the *Katzenberger* and *Otero* cases.

In *Katzenberger, supra,* 178 Cal.App.4th 1260, although defendant's objection to the Statue of Liberty PowerPoint presentation was overruled and the presentation went forward, the misconduct occurred during the prosecutor's initial closing remarks, and the defense attorney had an opportunity in his closing argument to tell the jurors the PowerPoint slide was a "travesty" and did not represent reasonable doubt at all, to describe the high standard required for beyond a reasonable doubt, and argue it was not met in the case. After rebuttal

by the prosecution, the trial court told the jury that to "clarify things" it would read the instructions on reasonable doubt, it told the jurors they would have the instructions in the jury room, and read the reasonable doubt instruction. Under the circumstances, the jurors were alerted to the dispute regarding the PowerPoint presentation, they were told by the court to rely on the jury instruction, and the appellate court presumed that they did so. (*Id.*, at p. 1265.)

In *Otero, supra,* 210 Cal.App.4th 865, 870, defense counsel interrupted the "What state is this?" argument with an objection, and after a discussion outside the jury's presence, the trial court immediately instructed the jury to disregard the diagram and instead follow the jury instruction on reasonable doubt. The error was harmless because the reviewing court presumed the jury abided by the admonishment and the trial court's proper reinstruction on reasonable doubt. (*Id.* at 873.)

Katzenberger and *Otero* thus demonstrate that an objection, admonition, and correct reinstruction on the law may cure the error from the prosecutor's misconduct. That did not happen here. Defense counsel made no objection and there was no admonition or final instruction on reasonable doubt to mitigate or correct the prosecutor's misstatements, which were the last word the jury heard on reasonable doubt. Counsel's ineffective assistance resulted in prejudice.

(3) The likelihood the prosecutor's misstatements prejudicially influenced the jury's deliberations was not dispelled by the strength of the prosecution's case.

Darden v. Wainwright, supra, 477 U.S. 168, 181-182, measured what makes the defendant's trial so unfair "as to make the resulting conviction a denial of due process by considering (1) whether the prosecutor's comments manipulated or misstated the evidence, (2) whether the trial court gave a curative instruction, and (3) the weight of the evidence against the accused. (See also, *Tak Sun Tan v. Runnels* (9th Cir. 2005) 413 F.3d 1101, 1115.) The same elements were addressed in the prejudice analyses by the *Katzenberger* and *Otero* courts, both of which found that, although the prosecutor committed misconduct, the misconduct was not prejudicial because there was an objection and admonition, and the cases were not close. (*Katzenberger, supra,* 178 Cal.App.4th 1260, 1268; *Otero, supra,* 210 Cal.App.4th 865, 873-874.)

Unlike the present case, the evidence in *Katzenberger* was without conflict. Katzenberger was convicted of inflicting corporal injury on the mother of his child in violation of section 273.5, subdivision (a). (*Katzenberger, supra,* 178 Cal.App.4th 1260, 1262.) The victim Esquivel testified defendant punched her in the ribs. She immediately called the police and reported the incident, showing the responding officers her left side where she claimed to have been hit. The failure of the responding officers to see any

mark on Esquivel was readily explained by their examination under dim light and the short amount of time elapsed since Esquivel claimed defendant inflicted the injury. Esquivel testified the bruise developed later, a plausible claim. She promptly sought medical attention. The failure of the X-ray taken the next day to reveal the broken ribs was readily explained by the fact the X-ray was taken of Esquivel's chest, not of her left side. The X-ray taken later of her left side revealed two broken ribs.

In *Katzenberger*, there was no conflicting evidence. The sole witness called to dispute Esquivel's version of events admitted she was not watching the entire time. That she did not "hear" a blow from her position inside defendant's SUV, parked on the driveway with the windows rolled up, did not conflict with the evidence that a blow did occur. Another witness, Rudy, who was in a position to have observed the entire confrontation, was not called, again providing no conflict in the evidence. (*Id.* at 1269.) In other words, Katzenberger was convicted based on the uncontradicted direct testimony of the victim, who immediately called the police after she was hit, and injuries she suffered consistent with her description of the assault. As the appellate court said, that was "not a close case." (*Ibid.*)

Similarly, *Otero, supra,* 210 Cal.App.4th 865, was not a close case. Otero, charged with four sex offenses against a child, not only admitted one of

the charged offenses in his statement to the police, the paperwork found in his wallet also demonstrated his sexual interest in young girls. (*Id.* at 873-874.)

In contrast, in this case there was conflicting evidence in the prosecution's case in chief as to whether the charged offenses occurred at all. The complainant's father, Rosal, testified at trial that he saw nothing untoward going on between defendant and his daughter and denied telling law enforcement that he had (1RT 129-135, 138-139, 150, 165), in direct conflict with the investigating deputy's testimony about the statements Rosal gave to law enforcement (2RT 238-239). The complainant also provided inconsistent, conflicting testimony. She initially testified at trial that nothing happened (1RT 182-187), but the next day she changed her testimony and described two incidents in which defendant touched her over her clothing (2RT 238-239). In contrast, she told the forensic interviewer about four incidents. (2CT 328, 330)

There were additional unexplained internal inconsistencies in the prosecution's case. The complainant testified her friend at school told her not to talk about the incident, but she also testified that she did not tell her friend about the incident, and then could not explain how the topic came up with her friend. (2RT 221-223) There were contradictions about Rosal's meeting with the landlady, Esmerita, about who was there, and what was said. (2CT 343, 348-349) There were contradictions about where the alleged incidents occurred

– in defendant's room where there was no bed, or in another adult male tenant's room where there was a bed. (2RT 198, 238) It was undisputed that five other adult males lived in Esmerita's rooming house, possibly including the complainant's 16-year-old brother Victor, and there were unexplained contradictions about where Victor was when the alleged incidents occurred – the complainant testified he was at church helping the pastor (defendant's father), but the pastor testified that Victor had no involvement with his church. (2CT 327, 329, 351-353; 1RT 155, 2RT 225, 364)

In contrast to the prosecution's confusing and conflicting evidence, defendant steadfastly denied any wrongdoing, both in his statements to the investigating deputies and at trial, and he continued to live in the same house with the complainant after the deputies investigated the anonymous call to CPS that instigated the investigation. (2RT 424-426, 436-437, 464-465, 468-477, 509-515)

Against this backdrop, the prosecutor's argument left the jury with the mistaken impression that it could convict defendant by finding the prosecution had provided a "reasonable account" that defendant was guilty, that their decision had to be "in the middle" between the impossible and the reasonable, and that their decision-making process was like recognizing a map of California regardless of incorrect and inaccurate information. The question of prejudice

from the argument is not the same as deciding sufficiency of the evidence, where the reviewing court resolves neither credibility nor evidentiary conflicts and the testimony of a single witness can be enough to support a conviction. (*People v. Young* (2005) 34 Cal.4th 1149, 1181.) Rather, there are two questions: first, is there a reasonable likelihood the prosecutor's argument caused one or more jurors to misunderstand the burden of proof and, second, can the prosecution show beyond a reasonable doubt that the misconduct did not contribute to the verdict? (*Hill, supra,* 17 Cal.4th 800, 831-832; *Katzenberger, supra,* 178 Cal.App.4th 1260, 1269, citing *Chapman v. California, supra,* 386 U.S. 18, 24.)

Given the conflicting evidence in this case and defendant's steadfast denial of any wrongdoing, the prosecution cannot show beyond a reasonable doubt that the prosecutor's misstatements of the burden of proof did not contribute to the verdict. (*Chapman, supra,* 386 U.S. 18, 24.) A perfectly reasonable juror could have applied the reasonable doubt standard exactly as explained by the prosecutor, and decided defendant was guilty because that seemed to be a "reasonable account" and somewhere "in the middle" between the impossible and the reasonable. Even under the standard for state law error, the misconduct was prejudicial, because there is a reasonable chance, more than an abstract possibility, that if the jury had not been left with the distinct

misimpressions left by the prosecutor's argument, at least one juror would have believed there was a reasonable doubt as to defendant's guilt. (*People v. Wilkins, supra,* 56 Cal.4th 333, 351; and see *People v. Soojian* (2010) 190 Cal.App.4th 491, 521 [hung jury is a more favorable result than a guilty verdict].)

J. The Misconduct Requires Reversal under the Federal Law Standard for Finding Prosecutorial Misconduct Because the Argument Infected the Trial with Such Unfairness as to Make the Resulting Conviction a Denial of Due Process.

The prosecutor's argument so diminished the state's burden of proof that it infected the trial with "such unfairness as to make the resulting conviction a denial of due process." (*Darden v. Wainwright, supra,* 477 U.S. 168, 181.) The question under federal law is not whether the error was prejudicial, but whether it violated the federal Constitution. (*Id.* at p. 183, fn. 15.) *Darden v. Wainwright* measured what makes the defendant's trial so unfair "as to make the resulting conviction a denial of due process by considering (1) whether the prosecutor's comments manipulated or misstated the evidence, (2) whether the trial court gave a curative instruction, and (3) the weight of the evidence against the accused. (*Id.* at 181-182.) Just as these elements demonstrate prejudice, as shown above, so also they show a denial of due process.

The Due Process Clause protects the criminal defendant's fundamental right to an initial presumption of innocence and the requirement that guilt of a

criminal charge be established only by proof beyond a reasonable doubt. (*In re Winship, supra,* 397 U.S. 358, 361, 364; U.S. Const., 14th Amend.) In this case, the prosecutor's argument gave the jury a definition of reasonable doubt that was far less than, and fundamentally incompatible with, the "subjective state of near certitude" which is "indispensable" to federal due process. (*Id.* at p. 364.)

The prosecutor's arguments here did not just misstate the law, they defined reasonable doubt in a way that is fundamentally incompatible with the jury's solemn duty to commence deliberations starting at a presumption of innocence, and to diligently deliberate, considering and weighing all of the evidence, in order to come to that subjective state of near certitude required by the federal Constitution. As such, the arguments affected the fundamental fairness of trial and violated federal due process. The error requires reversal.

CONCLUSION

Every criminal case is subject to the overriding rule that the prosecution bears the burden of proving guilt beyond a reasonable doubt, meaning that the jury has no doubt of the truth of the charges. This standard is incompatible with a jury decision that the prosecution's case is "a reasonable account" or "in the

middle" between the impossible and the reasonable, and is greatly trivialized by comparing it to solving a puzzle or recognizing an iconic image.

Every day, prosecutors argue criminal cases without trivializing or demeaning this constitutionally required standard. Yet, despite the well-established California law warning prosecutors not to stray beyond the statutory definition in explaining the prosecution's burden of proof, some prosecutors still look for different and creative ways to "explain" the standard. In this case, the prosecutor's argument misstated and greatly lessened the state's burden of proof. The argument constitutes prejudicial misconduct under both state and federal standards and requires reversal.

Dated: September 26, 2013

By: Jean Ballantine

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By appointment of the Supreme Court
Under the Appellate Defenders, Inc.
Independent Case System.

CERTIFICATE OF WORD COUNT

I certify that the word count for Appellant's Opening Brief herein is 16,261 words, as counted by the WordPerfect computer program which was used to produce this brief.

Jean Ballantine

Jean Ballantine, Attorney for Appellant.

PROOF OF SERVICE

I, Jean Ballantine, declare and say that:

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is 12228 Venice Boulevard, #152, Los Angeles, CA 90066-3814.

On September 26, 2013, I served the foregoing document described as DEFENDANT'S OPENING BRIEF ON THE MERITS, on the interested parties in this action by placing a true copy thereof enclosed in a sealed envelope, postage prepaid, first class mail, with the U.S. Postal Service, addressed as follows:

Office of the Attorney General
PO BOX 85266
San Diego, CA 92186-5266

Robert Von Schlichting, Esq.
(Defense Trial Counsel)
5755 Oberlin Drive, Suite 301
San Diego, CA 92121

San Bernardino Public Defender
(Defense Trial Counsel)
DPD William E. Drake
17830 Arrow Boulevard
Fontana, CA 92335

San Bernardino District Attorney
(Attn: DDA Vicki Hightower)
3960 Orange Street
Riverside, CA 92501

San Bernardino Superior Court
For: Hon. Cara D. Hutson, Judge
17780 Arrow Highway
Fontana, CA 92335

Jonis Centeno, CDC #AI9565
per rule 8.360(d)(2), appellant has requested in writing that no copy be sent.

Clerk, Court of Appeal
Fourth Appellate District, Div. 2
3389 - 12th Street
Riverside, CA 92501

And by electronic service to:

Appellate Defenders, Inc., eservice-criminal@adi-sandiego.com
Office of the Attorney General, ADIEService@doj.ca.gov
Fourth District Court of Appeal, Div. 2, at www.courts.ca.gov

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

Executed September 26, 2013 at Los Angeles, California.

Jean Ballantine

Jean Ballantine