IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

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

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

ANSWER BRIEF ON THE MERITS

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STATEMENT OF THE CASE AND FACTS

A. Procedural History

This case returned to the Sixth District Court of Appeal after defendant Dariel Shazier's third trial on a petition to commit him as a sexually violent predator ("SVP"). In 1994, defendant was sentenced to 17 years in prison for multiple sex offenses involving teenage boys. In April 2003, before he was released from prison, the district attorney filed a petition to commit him as a sexually violent predator. In the first trial, the jury was deadlocked, unable to decide whether or not he met the criteria to be deemed an SVP. After the second trial, defendant's commitment was reversed by the Sixth District Court of Appeal in *People v. Shazier* (2006) 139 Cal. App. 4th 294.

After defendant's fifteen-day third trial, the jury found that defendant was an SVP. (3 CT 685). On March 18, 2010, the trial court committed defendant to an indeterminate term. (3 CT 690). On December 27, 2012,

the Sixth District Court of Appeal reversed this judgment based on multiple instances of prejudicial prosecutorial misconduct. (The court did not reach the five other issues raised in the appeal.) No petition for rehearing was filed by either party. This court granted the Attorney General's Petition for Review on April 17, 2013, which presented the following issues:

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

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

B. Evidence at Trial

1. Predicate Offenses

In March 1994, defendant approached a 14 year-old boy and asked him to hand out flyers about karate lessons. The boy said no, but took a ride from him, and he and his brother helped him move furniture. Defendant sodomized him at his house. (5 RT 326-27).

In April 1994, defendant met a 17 year-old boy and said he was a talent scout and that he could make him money. He took the boy to his house, gave him a liquid drink and wine and the boy became intoxicated. Defendant sodomized him and the boy passed out and wasn't sure what happened. (5 RT 325). Afterward, they played basketball together and went

back to defendant's home, where he again sodomized the boy. The boy said he was fearful because defendant was a karate expert and didn't resist. (5 RT 325).

2. Nonpredicate Offenses

In 1987, defendant offered to teach karate to boys he met at a youth center. One boy pulled a muscle and defendant began massaging him with oil near his groin area. The boy told him to stop, which he did. Defendant was arrested for molestation and the charges were dismissed. (5 RT 305).

In 1988, defendant met a 17 year-old boy involved in a karate class, took him in his car, gave him beer and parked in an isolated area with him. He began to massage him, rubbed his penis, and tried to straddle him. The boy asked him to stop and defendant offered him $60.00. The boy declined and reported the incident. Defendant was arrested and charged with lewd act on a minor and the charges were dismissed. (5 RT 306-07).

Later that year, defendant met a 16 year-old boy and told him he was a movie star and that he could offer him a part in a movie. They went to a hot tub resort and then back to defendant's room, where he had the boy undress to teach him yoga. Defendant sodomized the boy and brought him home about 8:30 that night. (5 RT 308). Defendant was subsequently arrested at the same hot springs with a 14 year-old boy, sent to prison, and paroled in 1990. (5 RT 314).

In April 1991, defendant violated parole by having contact with several minors, offering free karate classes at his home. Defendant was sent back to state prison. (5 RT 315). He was paroled again in November 1991 with the same parole conditions. He was arrested five weeks later when he invited a 15 year-old boy to his house to give him karate lessons. (5 RT 318). The boy reported defendant touching him all over his body. (5 RT 319).

Defendant was released in December 1992 with the same conditions, and in April 1993, he met a fifteen year-old boy through church and offered to teach karate to him. (5 RT 321). In 1993, the pastor confronted him about touching boys and his association with the church ended. Also in 1993, defendant taught karate to a "cult-like" following of boys. He kissed several of the boys. (5 RT 322). Defendant was convicted of annoy and molest charges as to four boys (aged 13-16).

3. Mental Disorder

Testimony of Dr. Updegrove

Dr. Craig Updegrove, a clinical psychologist, testified that he believed defendant met the criteria as an SVP. (5 RT 293-94). Dr. Updegrove concluded that defendant had paraphilia n.o.s., or more specifically "hebephilia", which is a sexual attraction to teenage boys who have attained puberty. (5 RT 297). Dr. Updegrove stated that defendant has a strong interest in sex with minors, that he was willing to risk his freedom

repeatedly, and that he had gone back to prison each time for immediately violating parole. (5 RT 320).

Dr. Updegrove testified that paraphilia is life-long and chronic and cannot be cured. (2 RT 336, 338). Although defendant was participating in treatment, Dr. Updegrove believed that he was likely to engage in sexually violent criminal behavior as a result of his paraphilia n.o.s. and his antisocial personality disorder for the rest of his life. (5 RT 347-48).

Dr. Updegrove acknowledged that defendant was not highly psychopathic and also was not a pedophile. (10 RT 1156, 1158). He also agreed that there are people who offend against teenage boys who don't have a mental disorder and that a mental disorder can turn on what society deems good, bad or forbidden. (10 RT 1151, 1153).

Dr. Updegrove conceded that his diagnosis was part of a template that is applicable to defendant only because his victims were minors, and therefore, legally not able to consent. (10 RT 1143). He also conceded that the same language in his reports about defendant volitional capacity were cut and pasted from a template from a DMH form—and that the language presumes that the victims protest and assumes the perpetrator doesn't respond to fear, protest and resistance. (10 RT 1145-46).

Dr. Updegrove conceded that there was no evidence that defendant is aroused by pain, use of force or any kind of sadism. (10 RT 1139). He also conceded that hebephilia and paraphilia n.o.s. nonconsent are

controversial diagnoses and that they were not widely used until the advent of civil commitment proceedings. (10 RT 1149). Dr. Updegrove admitted that he plugged in a score and got one out of four possible opinions on www.static99.org and that he didn't revise it at all. (10 RT 1166). He admitted that he probably had his mind already made up when he recently interviewed defendant. (10 RT 1178).

Testimony of Dr. Murphy

Dr. Carolyn Murphy also concluded that defendant qualifies as an SVP under the statute. (6 RT 516-18). She testified that defendant has a pattern of offenses against 14-17 year old males, whereby they are manipulated and groomed so that they would engage in behavior that they otherwise wouldn't. (6 RT 521). She testified that defendant groomed boys with karate and massage and that "grooming" is defined as a slow, steady manipulation to get a person in a compromising position or violate boundaries without awareness. (6 RT 528).

It was Dr. Murphy's opinion that defendant has paraphilia n.o.s. – sex with nonconsenting persons/minors. (6 RT 521). She testified that hebephilia is understood like a psychopathy related to offending in a predatory way with victims aged 14-17. (6 RT 523). Dr. Murphy acknowledged that hebephilia is not in the DSM and officially "doesn't exist" as a diagnosis. (6 RT 634).

Dr. Murphy testified that there is nothing in defendant's behavior that indicates a specific arousal to nonconsent, although his specific diagnosis is paraphilia n.o.s. nonconsenting persons or minors. (6 RT 641, 643). She couldn't say whether defendant is attracted to the fact that the victims are inebriated and can't resist or if he was just trying to make them more amenable to sex. (6 RT 647).

4. Risk to Reoffend

Defendant scored a 4 on the Static 99R, a 5 on the Static 99, and a 6 on the Static 2002-R, which placed him in the moderate to moderate-high risk category. (6 RT 394).

At the time of trial, defendant had been in treatment for seven years. (6 RT 449). He had completed Phase 2 of the five-phase program and was awaiting staffing for Phase 3. (6 RT 425). Dr. Updegrove spoke to a psychologist working with defendant who reported that he had completed Phase 2, had a good understanding of treatment principles involved, and that he was giving good feedback to newer patients and was helpful to them. (6 RT 428). Defendant attended treatment two times a week for 1.5 hours and has complained that it was not enough. (6 RT 450). He was participating in treatment of his own accord. (7 RT 586-87). Despite these facts, Dr. Updegrove believed that if defendant were released at this time without supervision and monitoring, his involvement in treatment was not sufficient to allow him to be safely treated in the community. (6 RT 430)

Dr. Murphy agreed that it is reasonable to assume that defendant would participate in voluntary outpatient treatment upon release, but believes that he needs all four phases of treatment. (7 RT 587, 590).

5. Defendant's Testimony

Defendant was called by the prosecution and admitted all of his prior offenses. (8 RT 694-97). He further admitted to an attraction to teenage boys. (8 RT 703). He hasn't offended in the sixteen years he's been incarcerated, even though there are 17-year old boys in prison and numerous youthful offenders at Atascadero, as well as many who commit crimes at Atascadero. (8 RT 703, 813). He has not, and he believes that, because he is much older today than when he committed the sex offenses, he will not offend again. (9 RT 1045).

Defendant volunteered for the Phase treatment. Most offenders do not participate, but he wanted to address his behavior and work on it. (9 RT 1065). While at Coalinga, he has taken many classes, joined groups, and enrolled in school. (9 RT 1088). He wants to continue his vocational skill training, education, and sex offender treatment if released. (9 RT 1089). While at Coalinga, defendant started the newspaper "The Ally" and started a group called "Friends to the End" to provide support for people dying in the medical ward. (9 RT 1096).

If released, he would move to Maryland to live near his mother and sister and would seek out a therapist, get a job, and make sure his support

team is solid. (9 RT 1080). He has saved money to pay for the move and therapy because he has worked every day. (9 RT 1080).

6. Defense Case

Diagnosable Mental Disorder

Theodore Donaldson, the defense expert, testified that defendant does not have a diagnosable mental disorder because he does not have a diagnosis that would predispose him to sexual violence. (9 RT 920). He testified that defendant does not have paraphilia because he doesn't have a diagnosable mental disorder, combined with difficulty controlling his behavior. (9 RT 920-21).

According to Dr. Donaldson, there is no such diagnosis as "paraphilia n.o.s. nonconsent." (9 RT 925). Rather, that particular diagnosis was created to fit rapists into a civil commitment because there is no rapist diagnosis in the DSM. (9 RT 925). In terms of DSM diagnostic criteria, there would need to be a specific arousal caused by nonconsent to qualify. (9 RT 926). For paraphilia, there must be an object of the paraphilia, i.e., a particular object that causes the person to be aroused. (9 RT 925-26). Paraphilia nonconsent means that the object for arousal is nonconsent. This is not in the DSM IV – it is very rare that someone is aroused by nonconsent. (9 RT 926).

Dr. Donaldson testified that defendant is not aroused by nonconsent. (9 RT 928). In all of his relations, the boys went along with it. Only one

told him to stop and that was after penetration. (9 RT 928). There is no evidence that nonconsent is what defendant liked. He was "horny" and they were "available." (9 RT 928).

Dr. Donaldson pointed out that diagnosis of a mental disorder does not turn on what is socially acceptable. (9 RT 928-29). There must be a dysfunction within the person—not a conflict between the person and society. (9 RT 930). There is no real literature to back up hebephilia as a diagnosis; it is not in the DSM IV. (9 RT 935). Dr. Donaldson confirmed that homosexuality was taken out of the DSM because it is not considered to be a mental illness anymore and the fact that it was in the DSM was a representation of social feelings about morality. (9 RT 937-38).

Dr. Donaldson did not diagnose defendant with hebephilia because literature does not reflect that sex with minors indicates mental illness, and because he saw no evidence that defendant ever tried to control his behavior and was unable to. (9 RT 939-40, 944). Defendant thought it was consensual; he wanted sex and it was easy, but now that he is older, he reflects back and sees it differently. (9 RT 945). Defendant understands that they couldn't legally consent and that he manipulated them, but that is "grossly insufficient" evidence for the diagnosis. (9 RT 952).

Dr. Donaldson testified that, because defendant doesn't have a diagnosable mental disorder, he can't be dangerous due to it – and there is a fairly low probability of reoffending. (9 RT 955).

System of Categorizing SVP's

Dr. Donaldson explained that the Static 99 has a base rate problem, which is the rate of reconviction over some time period. (9 RT 962). He testified that defendant's risk of reoffense is 5-6% in 5 years because that is the best estimate of base rates right now. (9 RT 973).

Dr. Donaldson testified that it is not fair to put defendant in a "high risk, high need" group simply because he's been previously incarcerated. (9 RT 74). The sample group contained people who had no sex offender treatment and were severely antisocial and psychopathic. (9 RT 974). Defendant doesn't even meet the criteria for antisocial personality disorder and he's been in treatment. (9 RT 974). Dr. Donaldson has no confidence in the Static 99 and does not believe defendant is an SVP because he doesn't have a diagnosed mental disorder. (9 RT 975).

Dr. Donaldson acknowledged that his conclusions are not consistent with the vast majority of evaluators on the panel and that in all cases where he has testified, he determined that the defendant was not an SVP. (9 RT 984-5).

Defendant's Behavior and Treatment at Atascadero

Defendant introduced testimony from various character witnesses who have lived or worked with him while he was in Atascadero.

David Litmon, who had been housed at Atascadero as an SVP, testified that he never observed any problems with defendant at Atascadero.

He stated that defendant was diligent, always trying to improve himself, cordial, thoughtful, articulate and positive. (8 RT 820, 822, 824).

Joseph Johnson knew defendant for 6-7 years at Atascadero and slept in the same room with him. (8 RT 833-43). He described defendant as someone who got along with everyone, including staff, and who was mild-mannered and interested in the well-being of others. (8 RT 834-35). Johnson testified that there is "all kinds of inappropriate behavior" going on at Atascadero and that defendant was not involved in any of it. (8 RT 837).

Fred Grant lived at Atascadero for 6 years and was on the same unit as defendant. (8 RT 843). He described defendant as positive and always respectful to staff and patients. (8 RT 844). He testified that defendant did not do anything illegal at Atascadero, despite the fact that many others do so. (8 RT 849). He is aware of defendant's crimes and believes that through years of treatment, he sees a changed person from the one who made those choices. (8 RT 851). Grant testified that only 20% of the inmates are in treatment and that those who are not in treatment often act out against those who are, and that treatment takes a lot of work physically and emotionally. (8 RT 846). He stated that defendant stood up for the rights of others, was assertive and positive. (8 RT 648).

Michael Wayne Ross worked at Atascadero from March 1999 to March 2010 as a psychiatric technician. (8 RT 854). He worked with defendant for 6-7 years. (8 RT 857). At one time, he was his sponsor, which

required documentation of any deviant behavior and he never observed any and never wrote a bad note on him. (8 RT 857). Ross noted that deviant behavior goes on at state hospital and that there are 19 year-olds there functioning at a 9-10 year old level and susceptible of being preyed upon. (8 RT 858). Defendant was not involved in any of it. (6 RT 859). He followed the policies of the hospital, didn't engage in deviant sexual behavior, was devoted to his faith and very compliant. (8 RT 868).

Angelo Arredondo testified that he works at Coalinga State Hospital as a police officer and that he has known defendant for 2-4 years. (8 RT 881). Defendant was a unit liaison and helped with difficult patients because he is soft-spoken and easy to befriend. (8 RT 882). Defendant has never been a threat to anybody there. (8 RT 883).

Phillip Morales is a police officer at Coalinga State Hospital and has known defendant for approximately 4 years. (8 RT 887). He testified that patients look up to defendant because "he can talk you down" and bring you to look at positive things. (8 RT 888). Defendant is intelligent, an effective communicator, and a good representative for other patients. (8 RT 888). He tried to help other patients do their program and treatment. (8 RT 888). Morales never had any problem with defendant. (8 RT 889).

Support System

Defendant's younger sister, Crystal Bozeman, testified that she grew up with defendant and that they have the same mother and different fathers.

(10 RT 1108). She wants defendant to come home and she would assist him and do her best to make sure he avoided situations that would put him at risk of reoffending. (10 RT 1131). She has a strong, supportive family around who would be positive in defendant's life. (10 RT 1131). She is helping to connect defendant with a therapist in the D.C. area and will provide financial assistance to him. (10 RT 1124).

SUMMARY OF ARGUMENT

In this case, the court of appeal found that the prosecutor engaged in a pervasive pattern of prejudicial misconduct.

Petitioner's first issue asks this Court to decide a side question, something never addressed by the court of appeal—whether a prosecutor may examine witnesses in an SVP trial about his plans for release. This issue was not reached (or even discussed) by the court of appeal. It also must be noted that any ruling on this issue does not change the result of this case. This case was reversed by the court of appeal due to pervasive misconduct.

Petitioner's second issue asks this Court to conclude that the court of appeal improperly relied on both "unpreserved claims" and "proper prosecutorial conduct" in its finding of prejudicial misconduct. Analysis of the court of appeal's Opinion makes it clear that: (1) there were multiple instances of misconduct that were the subject of repeated objections; and (2) the court of appeal properly found prejudicial prosecutorial misconduct.

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

A. The Court of Appeal Did Not Conclude That it Was Improper to Examine Witnesses in a Civil Commitment Trial Under the SVPA About Defendant's Plans for Release

Petitioner has miscast this issue as a limitation on a prosecutor's ability to ask questions in an SVP trial, when this was never addressed by the court of appeal. The court of appeal found only that "[t]he prosecutor's reference to the proximity of schools to defendant's mother's house, as well as the fact that if released defendant would be living with his mother and would not be under the supervision of parole were improper references to the consequences of the jury's verdict." (Opn. at 11). The court held that these were improper references because "the prosecutor's comments regarding the schools and lack of parole were designed to make the jury consider the consequences of its decision in this case. Such considerations are wholly improper, and cast doubt on the jury's ability to properly consider the evidence in this case." (Opn. at 12).

This is a limited ruling and significantly different than the issue set forth by petitioner. The court of appeal did not hold that it is misconduct for the prosecutor to examine witnesses about the defendant's plans for release. In fact, although defendant argued that the questioning about the map was improper and inflammatory, the court of appeal did not address this issue.

(See Opn. at 10-11). The court of appeal only discussed the map to give context to the argument the prosecutor made that defendant would not be on parole and that there "was no stopping" him. Although petitioner endeavors to make this case about admissibility of evidence and the appropriateness of questioning about a defendant's release plan in SVP cases, these were not issues relevant to this case, nor even part of the Opinion. The court did not make any sweeping statements that a prosecutor may not ask about a defendant's release plan. The Opinion refers specifically to the *argument made by the prosecutor* in closing argument with regard to Defendant living near schools and not being on parole.

This issue is a red herring, has little legal significance, and does not determine the outcome of the appeal because the pervasive misconduct addressed in Issue #2 nonetheless mandates reversal.

B. Proof That Defendant Required Confinement in a Secure Facility Does Not Involve Analysis of Where He Intends to Live or His Parole Status

Petitioner alleges that, because the prosecutor must prove that the defendant is likely to reoffend unless confined to a secure facility, "[t]he fact that defendant would not be under any parole conditions requiring outpatient treatment was relevant to the experts' conclusions about the necessity of confinement in a secure facility. In addition, the jury had to consider whether defendant's living situation upon release would affect his

amenability to voluntary treatment and the risk of his reoffending." (OBM at 10).

Petitioner has incorrectly characterized the manner in which "necessity for confinement in a secure facility" is proven in SVP cases. The determination of whether or not a defendant in an SVP case is likely to reoffend "unless confined in a secure facility" does not require a jury to consider where the defendant would be living when he is released or by analyzing the risks that exist in his proposed neighborhood. Rather, the determination is made by eliciting expert testimony that the defendant has a diagnosable mental disorder, that the disorder makes it likely he would engage in sexually violent criminal conduct if released, and that this sexually violent criminal conduct would be predatory in nature. (Section 6600(a)(1)).

Respondent cites to *People v. Grassini* (2003) 113 Cal. App. 4th 765 and *People v. Superior Court (Ghilotti)* (2002) 27 Cal.4th 888, for the proposition that "the experts were required to assess whether or not he was amenable to *voluntary* treatment without any additional involuntary restrictions." (Opn. at 9). *Grassini, Ghilotti* and the statute itself do not support this erroneous statement of the law.

In *Grassini*, the court held that, when a defendant claims that treatment can take place in an outpatient facility, the jury must be instructed that the prosecution has to prove that treatment in a secure facility is

necessary to protect the public. (*Id.* at 777). That determination does not require or allow the jury to consider where the defendant will be living if released. Indeed, it would run in severe contravention to long-standing principles of both criminal and SVPA law if the prosecutor were allowed to counter a *Grassini* defense by introducing evidence of all the potential dangers in the neighborhood where the defendant planned to reside.

There is no valid connection to be made between the proximity of a particular defendant to schools and shopping centers and the danger of reoffending. If there were, this type of evidence would become an inflammatory staple in SVP trials, i.e., a specific request that the jury consider where the defendant would be residing upon release. It is difficult to imagine that any defendant would ever be released once the jury is shown a particular neighborhood and asked to consider it in assessing risk to reoffend.

In *Ghilotti*, this Court specifically defined the factors evaluators must weigh when considering the possibility of voluntary treatment. It did not find that the evaluators should look into the specific area where the committed person would potentially reside if released. In fact, this Court found no subject of inquiry that was necessary or appropriate that involved defendant's surroundings. (*Ghilotti, supra* at 929).

People v. Krah (2003) 114 Cal. App. 4th 534, concluded that it was inappropriate for there to be inquiry as to whether a defendant would be on

parole if released. In *Krah*, defendant argued: "[c]ommon sense suggests that the terms and conditions by which [he] will have to abide when he is on parole will affect the likelihood that he will engage in the commission of sexual criminal acts." (*Krah, supra* at 544).

Rejecting this contention, the court held:

> "Krah's theory of relevance reflects a *fundamental misunderstanding* of section 6600(a)(1). This statutory provision directs the trier of fact to determine whether the defendant has a "diagnosed medical disorder" that predisposes him to engage in sexually violent criminal behavior. *Evidence of the terms and conditions of a parole release is simply not relevant to the determination whether the defendant has the type of medical condition that is an element of the definition of a sexually violent predator.*" (*Krah, supra* at 544.) (emphasis added).

Krah further held:

> "[e]vidence that the defendant would be required to comply with terms and conditions of parole would not be relevant. Such evidence has no bearing on the determination whether the defendant has a disorder which makes it likely he will reoffend; it does not relate to the nature of the defendant's disorder or reflect in any way his willingness or ability to pursue treatment voluntarily." (*Id.* at 546)

Pursuant to *Ghilotti* and *Krah*, evidence of schools in the neighborhood where defendant planned to reside, or whether or not he is on parole, has no reasonable application to the issues in an SVP case. The proper subject of inquiry is whether appellant is amenable to treatment without regard to the setting. Where he lives is and whether he is on parole

not relevant to whether the defendant has a diagnosis that defines him as sexually violent predator.

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

A. Claims of Prosecutorial Misconduct Were Not Waived

There are multiple categories of misconduct, each detailed below to help define: (a) whether the court of appeal defined it as misconduct; and (b) whether there was a defense objection.

Prosecutorial Misconduct With Objection

It is undisputed that the following four instances of misconduct were the subject of defense objections and that all such objections were overruled: (1) asking the jury to consider how it would explain a verdict of "not true" to their friends and family. (10 RT 1283-1284); (2) referring to defendant as the "unluckiest child molester in the world" and implying that he had committed many more crimes for which he wasn't caught (10 RT 1242); (3) questioning of defense expert about five other sex offenders he evaluated and listing the heinous details of their crimes (9 RT 987-90, 991-94); and (4) argumentative, improper questioning of defense witness Michael Ross (8 RT 870-71, 878).

Questionable Conduct With Objection

The defense objected to the prosecutor referring to him as "deceptive." The court of appeal found the prosecutor's statements fell short of misconduct. (Opn. at 17). (It should be noted that Petitioner incorrectly states that the references to defense counsel "were not objected to on any grounds." (OBM at 11).There were two objections, both overruled, to the prosecutor referring to defense counsel as "deceptive." (See 10 RT 1278-79).)

Prosecutorial Misconduct With Motion in Limine, But No Objection

Although defense counsel did not object to the argument that defendant would not be on parole and would be living near schools if released, whether or not defendant's parole status could be revealed was the subject of a motion in limine which was denied. (4 RT 174, 2 CT 359). Any objection would, therefore, have been futile.

Prosecutorial Misconduct With No Objection

The following instances of misconduct were not the subject of an objection: (1) remarks made by the prosecutor in closing argument about the defendant "grooming" the jury; (2) remarks made by the prosecutor in closing argument that defendant's witnesses were "two serial rapists and a child molester"; and (3) asking defendant to point out schools on a map.

Questionable Conduct With No Objection

The disparaging remarks about Dr. Donaldson were not objected to, but the court found that this was merely "questionable conduct," that fell short of misconduct standing alone. (Opn. at 17).

Petitioner alleges that the court of appeal's consideration of the conduct for which there was not an objection, in conjunction with the conduct for which there was an objection, puts at risk this Court's contemporaneous objection rule. First, as indicated above, there are at least four egregious instances of misconduct, each with appropriate objections. Second, when misconduct is part of a pattern and multiple objections are made, it is proper for a reviewing court to consider it in evaluating the pattern of impropriety. (*People v. Estrada* (1998) 63 Cal. App. 4th 1090.)

It is also critical component of this case that, despite counsel's multiple objections, not one of his objections was sustained. As held in *People v. Hill*, "a defendant will be excused from the necessity of either a timely objection and/or a request for admonition if either would be futile. In addition, failure to request the jury be admonished does not forfeit the issue for appeal if 'an admonition would not have cured the harm caused by the misconduct.'" [citations omitted]. (*People v. Hill* (1998) 17 Cal.4th 800, 820-21). Additionally, this Court "has recognized exceptions to the forfeiture rule in cases of pervasive prejudicial prosecutorial misconduct." (*People v. Dykes* (2009) 46 Cal.4th 731, 775.)

Finally, even assuming *arguendo* that this Court finds that all instances of misconduct/questionable conduct except for the four that the court of appeal found were both objected to and constituted misconduct were waived, those four instances are a sufficient reason to warrant reversal in this case.

B. The Court of Appeal Properly Found That the Prosecutor Committed Misconduct

"A prosecutor's conduct violates the Fourteenth Amendment to the federal Constitution when it infects the trial with such unfairness as to make the conviction a denial of due process"]; *People v. Hill* (1998) 17 Cal.4th 800, 819 [prosecutor's intemperate behavior violates the federal Constitution when it comprises a pattern of conduct so egregious that it infects the trial with such unfairness as to make the conviction a denial of due process]; accord, *Darden v. Wainwright* (1986) 477 U.S. 168, 181 [106 S.Ct. 2464]; *Donnelly v. DeChristoforo* (1974) 416 U.S. 637, 643 [94 S.Ct. 1868].

According to *People v. Samayoa* (1997) 15 Cal. 4th 795:

> "'A prosecutor's ... intemperate behavior violates the federal Constitution when it comprises a pattern of conduct "so egregious that it infects the trial with such unfairness as to make the conviction a denial of due process." ' "(*People v. Gionis* (1995) 9 Cal.4th 1196, 1214); Conduct by a prosecutor that does not render a criminal trial fundamentally unfair is prosecutorial misconduct under state law only if it involves " 'the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury.' " (*People v. Espinoza, supra,* 3 Cal.4th at p. 820.)" (*Id.* at 841.)

Samayoa also recites the general rule that there must be an objection to the misconduct, and that, "when the claim focuses upon comments made by the prosecutor before the jury, the question is whether there is a reasonable likelihood that the jury construed or applied any of the complained-of remarks in an objectionable fashion. (*Ibid.*)" Petitioner alleges that the court of appeal failed to apply this final standard in its analysis of alleged misconduct. (OBM at 11).

At the outset of its Opinion, the court of appeal set forth essentially the exact criteria from *Samayoa*, and more importantly, it *applied the law in accordance* with those criteria. (See Opn. at 6-7). Despite the fact that the Opinion includes the words "in considering prejudice," with regard to the jury's interpretation of the statements, it is clear that the court of appeal assessed whether or not the jury construed or applied any of the remarks in an improper fashion as part of the primary analysis in ascertaining misconduct. It is only after making that assessment, in a separate portion of the Opinion that the court considered whether the misconduct was prejudicial. In so doing, it specifically considered the context of the comments and questions, noting in its conclusion that misconduct occurred throughout the trial and that each incident built on the next, which undermined the fairness of the trial.

Below, each category of misconduct/questionable conduct as set forth by the Opinion of the Court of Appeal is addressed.

Prosecutorial Misconduct With Objection

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

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

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

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

> "What I am getting at ladies and gentlemen, is that you have something very important to do here, and you need to feel very comfortable with it. The burden is on the People. It is beyond a reasonable doubt, and to feel comfortable with it is how you explain it to yourself, perhaps how you explain it to others. When they say, did you find the petition to be not true, you would do that, did the person, the person had never acted

> out sexually in the past [sic]. Oh, no, no, no. No, far from it. In fact, the person has repeated, repeatedly acted out, had multiple convictions, went to prison.
>
> "Well, I guess, you found the petition not be true because you heard from a psychologist that was really top notch, really credible and believable. Well, actually we heard from this guy named Donaldson. He just, well, he was truly not independent. He was just – there is word [sic] for Dr. Donaldson, the word is incredible. So I am not sure how that would play out.
>
> "And then perhaps people would say, well, the person that was allegedly a sexually violent predator they hadn't molested anyone for a long time, right I mean, they knew they were a changed person, assuming that people can change the way they are wired, their sexual preferences, the evidence is that they cannot. So you might be asked haven't molested anyone for a long time [sic]. That's right. It has been 16 years. Oh, that is really good. But there haven't been any teenagers around for the 16 years." (10 RT 1283-84).

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

It is misconduct for a prosecutor to suggest that jurors disregard instructions and consider public opinion in determining the guilt phase of a criminal trial. (*People v. Morales* (1992) 5 Cal. App. 4th 917, 928). Moreover, it is improper to ask the jury to consider the opinions others would hold about the job that they did as jurors, as this is arguably an appeal to the juror's self-interest, and suggested to the jurors that they had a personal stake in a certain outcome. (*People ex rel. Dept. of Public Works*

v. Graziadio (1964) 231 Cal. App.2d 525, 533-34). Further, statements of facts not in evidence by the prosecuting attorney in his argument to the jury constitute misconduct. (*People v. Kirkes* (1952) 39 Cal.2d 719; see also *People v. Taylor* (1961) 197 Cal. App. 2d 372, 381-84.)

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

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

Petitioner concedes that it might have been "more appropriate advocacy to challenge defendant's evidence directly without interposing a hypothetical posttrial [sic] discussion between the jurors and a third party. But reference to 'friends' and 'family,' in context, involved a discussion of the burden of proof, in terms of 'how can you explain it to yourself?'" (OBM at 32). By this statement, petitioner appears to agree that, as articulated, the prosecutor's argument constituted misconduct, and its only disagreement is with regard to how these comments were interpreted by jury. In other words, its argument concedes the statements were misconduct unless this court accepts the interpretation offered by the government.

Petitioner argues that the court of appeal's conclusion "assumes the most damaging inference from the prosecutor's comments," and that, when

read in context, the prosecutor was really just asserting various holes in the defense arguing the evidence. (OBM at 31). Petitioner's arguments ignore the context of the prosecutor's soliloquy to the jury and presents an unrealistic interpretation of what the jury heard. The prosecutor was not referring to holes in the defense, nor was he asking the jury to make an assessment of the evidence themselves when he said: "*The time is going to come very soon, however you will be lifted from that obligation. You can talk to your family. You can talk to your friends. You can talk to who you choose. You may choose not to talk, but you are going to have to explain if you choose what you have been doing for the last two and a half or three weeks.*" (10 RT 1283).

The prosecutor links his hypothetical conversation explaining the verdict with the lifting of the obligation to refrain from discussing the case. He says, in essence, soon you'll be able to talk about this case, and if you choose to do so, "you are going to have to explain." In fact, he says it again before he launches into the argument that defendant had multiple past convictions, that Dr. Donaldson was "incredible," and that defendant hasn't reoffended only because he was incarcerated. He told the jury they had to "feel comfortable" with "how you explain it to others." (10 RT 1283).

Petitioner's interpretation of what the prosecutor said is not reasonable. There is really no other context or meaning that can be derived from the prosecutor's argument. He specifically, repeatedly, and at length

conducted a hypothetical conversation wherein a juror attempts to explain a verdict of not true to a third person. Further, the argument is delivered in a sarcastic, mocking tone, as if finding for the defendant would subject the juror to complete ridicule. [e.g., "did the person, the person had never acted out sexually in the past [sic]. Oh, no, no, no. No, far from it."... "Well, I guess, you found the petition not be true because you heard from a psychologist that was really top notch, really credible and believable. Well, actually we heard from this guy named Donaldson....He was just – there is word [sic] for Dr. Donaldson, the word is incredible"... "So you might be asked haven't molested anyone for a long time [sic]. That's right. It has been 16 years. Oh, that is really good. But there haven't been any teenagers around for the 16 years." (10 RT 1283-84)].

Petitioner's argument that a "rational juror" would understand that this was the prosecutor merely pointing out weaknesses in the defense case must be rejected. The prosecutor explicitly, and in contravention of well-settled law, asked the jury to consider how it would explain a verdict of not true to the community. This alone constituted prejudicial misconduct.

2. Implying that Defendant Had Committed Other Crimes

In closing argument, the prosecutor stated:

> "...throughout the trial you have heard that Defendant may just be the unluckiest child molester in the world, because every single boy he molested he got caught for. Isn't that amazing? Isn't that amazing? Of course, I am being sarcastic. That is know

> I am [sic]. That is a prolific child molester. All the experts testified that sex crimes go unreported." (10 RT 1241-42).

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

At the outset, petitioner again concedes that the comment "may have had the effect of suggesting evidence outside of the record," essentially agreeing that the statement constitutes misconduct. (OBM at 29-30).

The court of appeal held that:

> "The prosecutor's statements regarding defendant being a 'prolific child molester,' and that most child molestations go unreported, coupled with defendant's 'luck' was a deliberate misstatement of the evidence intended to mislead the jury to believe defendant committed crimes. There was nothing in the evidence to suggest this conclusion. ... '[s]tatements of supposed facts not in evidence...are a highly prejudicial form of misconduct, and a frequent basis for reversal.'" (Opn. at 10.)

An argument by the prosecution that appeals to the passion or prejudice of the jury is improper. (*People v. Haskett* (1982) 30 Cal.3d 841, 866). Reference to evidence outside the record is also prosecutorial misconduct. (*People v. Frye* (1998) 18 Cal.4th 894, 976). In addition, because the prosecutor referenced facts not in evidence, it was also a violation of the Sixth Amendment right to confrontation. (*Douglas v. Alabama* (1965) 380 U.S. 415).

It is well settled that it is "clearly misconduct" for a prosecutor to make arguments based on facts that are not in evidence that are not matters of common knowledge. (*People v. Pinholster* (1992) 1 Cal.4th 865, 948; see also *People v. Cunningham* (2001) 25 Cal.4th 926, 1026).

> "[S]uch statements 'tend [ ] to make the prosecutor his own witness-offering unsworn testimony not subject to cross-examination. It has been recognized that such testimony, "although worthless as a matter of law, can be 'dynamite' to the jury because of the special regard the jury has for the prosecutor, thereby effectively circumventing the rules of evidence." 'Statements of supposed facts not in evidence ... are a highly prejudicial form of misconduct, and a frequent basis for reversal.' [Citation.]" (*People v. Hill, supra,* 17 Cal.4th at pp. 827–828).

In *People v. Fuiava* (2012) 53 Cal.4th 622, this Court condemned the prosecutor's improper suggestion that the jury speculate regarding defendant's criminal history that was not part of the trial.

> "—by describing defendant as a "killing machine" (although there was no evidence that defendant had killed anyone other than Deputy Blair), and then, with regard to defendant's victims, asking that the jury speculate "How many others are there?" (See *People v. Yeoman* (2003) 31 Cal.4th 93, 149 ["[c]ertainly a prosecutor should not invite the jury to speculate"]; *People v. Bolton* (1979) 23 Cal.3d 208, 212 [the prosecutor engaged in misconduct by "invit[ing] the jury to speculate about—and possibly base a verdict upon—'evidence' never presented at trial"].)

(Fuiava, supra at 728-29).

This is exactly what happened herein. The "killing machine" comment is very similar to alleging that defendant was a "prolific child molester" based on unreported crimes.

Petitioner argues that "when read in context, the prosecutor drew a reasonable inference from the trial testimony." (OBM at 29). According to petitioner, the statement that defendant was a "prolific child molester" was based on "defendant's admission at trial that he had molested the 12 charged victims." (OBM at 29). That, however, is not what the prosecutor argued. Rather, the prosecutor argued: "defendant may just be the unluckiest child molester in the world, because every single boy he molested he got caught for."(10 RT 1241). Then, he added, in an admittedly sarcastic tone, "Isn't that amazing? Isn't that amazing?" (10 RT 1241). And then finally, he stated, "That is a prolific child molester. All the experts testified that sex crimes go unreported." (10 RT 1242). The prosecutor was not arguing that defendant was a prolific child molester because of the 12 charged acts; he was specifically arguing that there were more than those 12 charged acts. Two of his statements make this clear—the sarcastic characterization of defendant as the "unluckiest child molester in the world," implying that most assuredly there must have been more victims; and the statement that "all the experts testified that sex crimes go unreported." This was an invitation to the jury to consider the possibility

that defendant had committed many more crimes than those with which he was charged.

Petitioner further argues that the argument properly challenged defendant's credibility about his pedophilia. First, none of the experts testified that defendant was a pedophile. His specific diagnosis by Drs. Murphy and Updegrove was "hebephilia," a disorder not recognized in the DSM. Second, this argument cannot reasonably be said to be just a proper attack on defendant's credibility. It went well beyond that when it implied that he committed many more crimes than those with which he was charged.

3. Questioning of Dr. Donaldson About Other SVP Trials

The prosecutor asked Dr. Donaldson about five sex offenders who he previously found did not have a diagnosed mental disorder, each containing particularly heinous crimes: a man who committed rape and child molestation after being incarcerated and released multiple times (Ward); a man who molested every child in his apartment complex, including his own three and a half year old son (Badura); a man who used one child to hold down another child in order to molest her (Flick); a man who raped several victims with weapons, including a baseball bat that he shoved up a victim's rectum (Rawls); and a man who admitted to committing more than 50 burglaries where he would rape his victims after

binding and gagging them, in some cases giving them and enema, and threatening to kill them (Hubbart).

Defense counsel objected multiple times to the district attorney's "inflammatory recital" and asked that all of the testimony be stricken. (9 RT 987-90). Although Dr. Donaldson had no files and could not remember the individual defendants, the prosecutor continued to recite for the jury the terrible facts of each of these men's crimes.

In *People v. Buffington* (2007) 152 Cal. App. 4th 446, the court held that the evidence regarding the other SVPA cases was not relevant to show the expert's bias or prejudice because there was no effort to elicit contrary testimony from a prosecution expert. (*Id.* at 455).

In the Opening Brief on the Merits (pp. 13-16), petitioner included the questioning that occurred only up until the point where defense counsel asked to approach. After counsel approached the bench, the prosecutor continued as follows:

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

A: How long ago was that?

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

A: I remember the name.

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

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

The Court: It will be noted

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

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

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

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

A: No.

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

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

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

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

A: No.

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

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

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

A: Okay. I don't remember.

Q: You don't remember if you were?

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

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

A: Yes.

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

A: Yes.

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

A: No, I don't.

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

A: No.

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

A: It might.

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

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

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

(9 RT 991-94).

The court of appeal held that:

> "Here, like *Buffington*, the prosecutor's recitation of facts of other SVP cases was not designed to elicit relevant evidence in this case. Indeed, it appears the prosecutor intentionally chose these cases not to impeach the witness, but to present facts to the jury much worse than those alleged here. Dr. Donaldson did not have his files to properly refresh his recollection about his diagnosis of the individuals to whom the prosecutor referred. As a result, there was nothing relevant to be gained from the prosecutor's questions other than to put egregious and incendiary facts of SVP cases to inflame the passion and prejudice of the jury." (Opn. at 14).

Petitioner maintains that the prosecutor's questioning of Dr. Donaldson was not misconduct because it "presented the exact evidence missing in *Buffington*. (OBM at 17). This is not accurate because the prosecutor did not provide the necessary information concerning diagnosis and risk assessment; he only recited the facts, and Dr. Donaldson didn't remember the cases.

After lengthy testimony regarding details of five separate SVPs' crimes, the following is the only exchange with Dr. Updegrove about other SVP cases:

"Q: If I describe to you an individual who is charged with a variety of sexual assaults, charged with forcibly raping a hitchhiker that he picked up, sent to prison, and got out and then assaulted an 11-year old girl with intent to rape the 11-year old girl while she was minding the house for her mother, and then he got prison for that and then got out.

And then after getting out he married a woman. And within two weeks of meeting the woman began molesting her two children and was ultimately convicted of five counts of child molestation.

Given this hypothetical, would it be unreasonable to find the absence of a mental disorder under those bare-bone facts as described to you?

Mr. Hoopes: Objection. Improper hypothetical.

The Court: May I see you both at the bench, please?

(Discussion was had at the bench.)

The Court: The objection is overruled.

Q: (By Mr. Boyarsky) Let me re-ask the question. Would it be unreasonable to find the absence of a mental disorder under those bare-bone facts as described to you?

A: I believe so. You would certainly be – it would be unreasonable to not consider the possibility of the mental disorder.

Q: Now is it the offensive nature of those facts that I described to you called the "yuck" factor that leads you – leads you to the opinion, to that opinion, or is it something else?

A: No. It would – what would be relevant is really the repetitive nature of the offending despite sanctions and quick reoffense.

Q: A pattern of difficulty in controlling one's behavior.

A: Yes."

(10 RT 1184-85).

On recross-examination, the following exchange occurred:

"Q: Would you say that is not enough [sic] to say whether the person has a mental disorder or not just to have the bare-bone facts?

A: I would want to know more and would not automatically make a diagnosis on the fact pattern by itself; however, there would be likelihood of making a diagnosis." (10 RT 1187)."

That is the one instance of the prosecutor asking his own expert about one of the five cases (Ward). The prosecutor did not ask about the Badura, Flick, Rawls, or Hubbart cases, which makes it clear that they were not offered up to show a differing expert opinion. Respondent states that only the Ward case was mentioned because it was the only one Dr. Donaldson said he remembered. (OBM at 17). This is incorrect. Dr. Donaldson testified that he did not remember the Ward case, or any of the other cases the prosecutor asked about. ["Mr. Boyarsky: Do you remember an individual who was going through the process of determination whether or not he was an SVP by the name of Ronald Ward? ....The Witness: I recognize the name. I don't remember anything about the case."] (9 RT 991-94).

Even if it is accepted that the prosecutor did attempt to counter Dr. Donaldson's testimony with this one hypothetical to Dr. Updegrove, the testimony did not do so. Dr. Donaldson simply testified that, based on the "hypothetical" facts presented to him, it would be "unreasonable *not to consider the possibility* of the mental disorder." (10 RT 1185). This is not contrary to Dr. Donaldson's ultimate conclusion. It merely states that it would be unreasonable not to consider the possibility of a mental disorder, and it was never alleged that Dr. Donaldson failed to consider this possibility.

Petitioner also argues that the prosecutor properly relied on the rulings of the trial court, and therefore, under *People v. Visciotti* (1992) 2 Cal.4th 1 there cannot be "misconduct by hindsight." (*Id.* at 82) (OBM at 18). Defense counsel did not just object to the irrelevance of the evidence in this case. He specifically objected to the prosecutor's "inflammatory recital," in questioning Dr. Donaldson and was overruled.

The prosecutor continued to list all the horrible facts of Dr. Donaldson's other cases, elicited testimony that the expert didn't remember the specific facts in any of them, and then pointed out that the expert didn't find that any of them to have a mental disorder. After the prosecutor dramatically listed the details of these crimes, he never addressed the diagnosis or risk assessment with Dr. Donaldson or his own expert.

This is not a simple instance of relying on an erroneous evidentiary ruling. It wasn't offered to challenge Dr. Donaldson's conclusions. It was offered so that the facts of these cases could be paraded in front of the jury, in an effort to soil both defendant and Dr. Donaldson by association. When it was clear Dr. Donaldson did not remember any of the cases, the prosecutor continued asking about more of them. It should also be noted that the prosecutor made no attempt to refresh Dr. Donaldson's memory about his diagnosis in these previous cases, for example, by supplying a report or a case summary. He merely went through the facts of the crimes. The point was for the jury to hear the questions, as there was nothing to be

gleaned from answers when Dr. Donaldson did not remember the specific cases.

Defendant acknowledges that this Court rejected the contention that asking a defense expert about her handling of evidence in a previous case was improper in the recent case of *People v. DeHoyos* (July 8, 2013, S034800) 2013 WL 3369075 (Cal.), 13 Cal. Daily Op. Serv. 7144. Specifically, this Court held that the prosecutor's questioning properly went to bias because the evidence admitted demonstrated that the expert did not respond to his subpoena with all of the materials he requested. The questions about handling evidence in another case were relevant to establish a basis upon which the jury could find that the expert's failure to fully comply with the subpoena was not simply the result of misunderstanding or forgetfulness. (*DeHoyos, supra* at 31). There is no similar evidentiary basis in this case. The prosecutor did not ask about anything that would be relevant to assessing Dr. Donaldson's opinion, i.e., his diagnosis or risk assessment. He only listed the details of the horrible crimes, effectively arguing that commitment should be based on the crimes committed, as opposed to diagnosis, prognosis and treatment.

4. Argumentative Questioning of Michael Ross

Michael Ross, a psychiatric technician at Atascadero from 1999-2010 testified that he knew appellant for at least six years and never had any trouble with him. (8 RT 854, 870).

During cross-examination, the prosecutor asked Ross: "You don't know what you're talking about, do you?" (8 RT 870-71). The prosecutor also asked Ross whether he would let appellant take care of his "13- or 14-year old son." (8 RT 877). When Ross indicated that he wouldn't allow his son to hang around any unknown adults, the prosecutor offered: "So parents who have teenage children who end up being victimized by child molesters they really have themselves to blame by leaving their children out of their care at some period of time?" (8 RT 878) Defense counsel objected as beyond the scope, Evidence Code 352, and irrelevant, and the objections were overruled. (8 RT 878).

"The rule is well established that the prosecuting attorney may not interrogate witnesses solely 'for the purpose of getting before the jury the facts inferred therein, together with the insinuations and suggestions they inevitably contained rather than for he answers which might be given.'" (*People v. Wagner* (1975) 13 Cal.3d 612, 619.) The prosecutor's questions as to whether Ross knew what he was talking about, whether he'd let his children be around appellant, and finally, the inflammatory comment that "parents who have teenage children who end up being victimized by child molesters they really have themselves to blame" constituted misconduct because they were not proper questions designed to elicit actual evidence.

The court of appeal concluded that the prosecutor's questioning of Mr. Ross "was clearly argumentative, and was not intended to glean

relevant information" and that "these questions were 'speech[es] to the jury masquerading as...question[s]'...and were rhetorical attempts to degrade and disparage the witness." (Opn. at 16). The court also found that the questions were designed to argue that the defense was "blaming the victim," in child molestation cases. (Opn. at 16).

Petitioner maintains that "viewed in context, the question about whether Ross knew what he was talking about referred to the fact that Ross could not have known defendant as long as he claimed." (OBM at 21). Petitioner further maintains "[w]hether Ross blamed the parents of child molestation victims was plainly relevant to bias" and "reasonably went to Ross's minimization of defendant's crimes, and to his credibility." (OBM at 22).

First, there is no real answer to either of the questions posed. Both are sarcastic, rhetorical, and not designed to elicit testimony. Additionally, as the court of appeal noted in its Opinion, when the prosecutor asked the latter question, it "was not at all what Mr. Ross actually said." (Opn. at 15). Finally, the question is irrelevant. The issue is not whether or not you'd allow the defendant to babysit your children; the issue is whether he is clinically at risk to reoffend. Most parents do not allow strangers or mere acquaintances to babysit their children, even though they pose no clinical risk. The question was aimed at imposing a lower standard for committing defendant than the law requires. By posing this question, the prosecutor

asked the jury to make an emotional decision, not one based on the evidence with regard to risk.

"Questionable Conduct" With Objection

5. Impugning Character of Defense Attorney

During closing argument, the prosecutor argued that defense counsel "left something off of one of his charts. Frankly it was deceptive." (10 RT 1278). Defense counsel objected and moved to strike the comment and it was overruled. (10 RT 1278). The prosecutor continued by noting that only part of jury instruction 3454 was put on the chart and that defense counsel didn't put it up essentially because he didn't want them to see it. Defense counsel again objected and moved to strike and he was again overruled. (10 RT 1278-79).

"A prosecutor commits misconduct if he or she attacks the integrity of defense counsel, or casts aspersions on defense counsel." (*People v. Hill* (1998) 17 Cal.4th 800, 832.) "An attack on the defendant's attorney can be seriously prejudicial as an attack on the defendant himself, and, in view of the accepted doctrines of legal ethics and decorum, it is never excusable." (*Id.*). "If there is a reasonable likelihood that the jury would understand the prosecutor's statements as an assertion that defense counsel sought to deceive the jury, misconduct would be established." (See *People v. Cummings* (1993) 4 Cal.4th 1233, 1302 (emphasis added)).

In this case, the prosecutor actually used the word "deceptive" in his description of defense counsel during closing argument. The court of appeal did not find this to be prejudicial misconduct. Rather, it put the offensive remarks about defense counsel in the category of statements made that were "close to the line, and standing, alone, would not necessarily be prejudicial to defendant." (Opn. at 17.)

The statements made by the prosecutor in his closing argument were unambiguous. He told the jury that defense counsel was "deceptive" and that he intentionally misled them by leaving out a portion of an instruction. The statement cannot be construed as simply a reminder to the jury of its duty to apply the whole of the instruction as claimed by petitioner.

Prosecutorial Misconduct With Motion in Limine, But No Objection

6. Telling the Jury That Defendant Would be Living Near Schools and Parks and Would Not be on Parole

During his examination of defendant, the prosecutor showed him a map of his mother's home on Hilmar Drive, where he testified that he will be living if he is released. (9 RT 1099). He then pointed out two elementary schools, a park, a McDonald's, and a shopping center. (9 RT 1099-1100). He asked no questions about whether these surroundings affected the likelihood that he would reoffend.

During closing argument, the prosecutor argued: "And so there is really no stopping Mr. Shazier, not even when he was on parole. And now

of course, you know, he is not on parole. So when Mr. Shazier tells you that he is going to go live in Maryland with his mother, the only thing you have to go – the only thing that you have to believe that is what Mr. Shazier said." (10 RT 1229-30).

It is well-settled in both criminal and civil commitment cases that a jury should not consider what will happen as a result of its verdict. *(People v. Calderon* (2005) 124 Cal. App. 4th 80, *99,* citing *People v. Rains (1999)* 75 Cal. App. 4th 1165). In *People v. Rains,* the court of appeal held that it is error to admit evidence about the consequences of a true finding in an SVPA case because such evidence is irrelevant to the question of whether the defendant met the criteria of the SVPA. (5 Cal. App. 4th at 1170). Inviting a jury to consider speculative matters beyond the evidence and appealing to its fear at the guilt phase of a trial is prosecutorial misconduct. (*People v. Kirkes* (1952) 39 Cal.2d 719, 724; *People v. Pensinger* (1991) 52 Cal.3d 1210, 1250.) It also appealed to the jurors' passions, prejudices and fears by appealing to them to render a true finding in order to insure the safety of the community. (*In re Brian J.* (2007) 150 Cal. App. 4th 97).

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

"[t]here is no question the prosecutor's comments regarding the schools and lack of parole were designed to make the jury consider the consequences of its decision in this case. Such considerations are wholly improper and cast doubt on the jury's ability to properly consider the evidence in this case." (Opn. at 12).

Petitioner maintains that "the location of defendant's residence and its surrounding environs was relevant to prove that defendant posed a substantial danger of reoffense if not confined in a secure facility" and that "neither the examination nor the argument on these points was misconduct." (OBM at 13). As argued in section I(B) above, pursuant to *Grassini, Ghilotti*, and *Krah*, these were not the subject of proper inquiry and petitioner's argument represents a fundamental misunderstanding of the standards articulated in section 6600(a)(1).

Petitioner also argues that "even if the parole evidence was improperly admitted, there would not be a basis for a finding of misconduct" because it was properly admitted evidence by the trial court. Petitioner's reliance of *People v. Visciotti* is misplaced. This was not a circumstance of erroneously admitted evidence argued in good faith by the prosecutor. This specifically asked the jury to consider the consequences of their verdict and was especially irrelevant and inflammatory in this case because defendant did not even have an attraction to young children. Additionally, the prosecutor asked no questions about the effect of the

surroundings. The disputed issue at trial was whether or not defendant met the criteria to be declared an SVP. Where he lives if released was designed to frighten the jurors and should have no bearing on this determination.

As the Opinion of the court of appeal stated, former Chief Justice George's comments in his concurrence in *Hill*, is applicable in this case: "[T]he prosecutorial misconduct (together with the related erroneous rulings by the trial court) committed in this case in itself requires reversal of the judgment." (Opn. at 19, quoting *People v. Hill, supra*, at 853.) In the event this Court finds that the prosecutor was proper in arguing the lack of parole because of the evidentiary ruling, defendant requests that this case be remanded to the court of appeal for a ruling as to the propriety of that ruling. This issue was specifically briefed by defendant in his appeal (along with multiple other errors) that were not reached by the court of appeal.

Prosecutorial Misconduct With No Objection

7. References to "Grooming" by Defendant

The prosecutor echoed a theme throughout the trial when he told the jury that they "have been groomed" through the testimony of defendant. (10 RT 1231). During the trial, Dr. Murphy defined grooming as a "slow, steady manipulation to get a person in a compromising position or violate boundaries without awareness."

A prosecutor may not appeal to the passions or prejudice of the jury by asking it to view the crime through the victim's eyes. (*People v.*

Stansbury (1993) 4 Cal. 4th 1017, 1057). An argument by the prosecution that appeals to the passion or prejudice of the jury in this manner is improper. (*People v. Haskett* (1982) 30 Cal.3d 841, 866).

The court of appeal held that:

> "The prosecutor's argument that defendant was 'grooming' the jury, thus placing them in the same position as the defendant's victims was clearly improper. A prosecutor may not appeal to the passions or prejudices of the jury by asking it to view the crime through the victim's eyes. (citation omitted) Here, by arguing that defendant had 'groomed' them during trial, and that he had similarly 'groomed' his victims by a 'slow, steady manipulation to get [them] in a compromising position or violate boundaries without awareness,' the prosecutor was improperly appealing to the passions of the jury by implying they were also defendant's victims." (Opn. at 16.)

Petitioner maintains that the court of appeal "failed to assess whether there was a reasonable likelihood that the jury understood or applied the complained-of comments in an improper or erroneous manner" and that "when read in context, it is reasonable to infer that the prosecutor referred to evidence that defendant had groomed and manipulated his victims to argue that defendant continued to be manipulative and was not truly amenable to voluntary treatment." (OBM at 24-25). If that is the case, the prosecutor could have argued "defendant is not truly amenable to voluntary treatment" and articulated the reasons why based on the testimony of the two experts. Instead, after hearing detailed testimony from the expert witnesses as to how defendant groomed his victims, the prosecutor then

told the jury members that defendant had groomed them as well, which is a form of victimization.

"Questionable Conduct" With No Objection

8. References to Defense Expert

The prosecutor improperly impugned Dr. Donaldson during his closing argument, comparing him to Cal Ripken, for his "streak" of testifying for the defense. (10 RT 1234). The prosecutor also stated that Dr. Donaldson "was completely biased and not helpful..." and "incredible." (10 RT 1239, 1284). He talked about "a laughable assertion of Dr. Donaldson." (10 RT 1240).

The court of appeal concluded that the prosecutor's derogation of the defense expert was "close to the line, and standing alone, would not necessarily be prejudicial to defendant." (Opn. at 17). Petitioner states that the comments by the prosecutor were supported by the evidence because Dr. Donaldson "had testified 289 times for the defense," "had offered his services to the Department of Mental Health because he felt he was ahead of his time on the relevant science involved in SVP evaluations," and because "he could not diagnose a mental disorder without some evidence of internal distress." (OBM at 23-24).

The prosecutor's comments are much more colorful than just an indication that Dr. Donaldson had consistently testified for the defense, or in general, lacked credibility. He was called "incredible," his assertions

"laughable and he was sarcastically mocked for his "wisdom" and "brilliance." Nonetheless, the court of appeal did not hold that this constituted misconduct—only that it should be considered in assessing prejudice given the multiple instances of misconduct herein.

III. DEFENDANT WAS PREJUDICED BY MULTIPLE INSTANCES OF MISCONDUCT

Under both federal and state standards, the prosecutor's inflammatory and pervasive tactics resulted in a trial "infected...with unfairness as to make the resulting conviction a denial of due process" under the federal constitution. (*Donnelly v. DeChristoforo, supra.*)

The four instances of misconduct that were properly objected to are alone sufficient to warrant reversal. Adding in those instances of "questionable" conduct that were properly objected to, as well as conduct where there was a motion in limine, there are three additional instances of potential misconduct that should be considered as part of a pattern. The remaining instances of alleged misconduct confirm that it was pervasive throughout the trial.

As concluded by the court of appeal:

> "[t]his is not a case in which the prosecutor engaged in a few minor incidents of improper conduct. Rather, the prosecutor engaged in a pervasive pattern of inappropriate questions, comments and argument, throughout the entire trial, each one building on the next, to such a degree as to undermine the fairness of the proceedings. The misconduct culminated in the prosecutor flagrantly violating the law in closing argument, telling the jury to consider the reaction of

> their friends and family to their verdict implying they would be subject to ridicule and condemnation if they found in favor of defendant. The cumulative effect of all the prosecutor's misconduct requires reversal. (See *People v. Riggs* (2008) 44 Cal.4th 248, 298.)"

The court of appeal found that it was "reasonably probable that defendant would have obtained a more favorable result absent the repeated incidents of improper conduct." (Opn. at 19). The court concluded there was not overwhelming proof that defendant had a diagnosable mental disorder that would predispose him to sexual violence; that defendant spent the last 15 years while incarcerated seeking every voluntary treatment available; and that defendant had many opportunities to re-offend, but had not. (Opn. at 19-20).

In assessing prejudice, the Court must consider the cumulative effect of this misconduct. (*People v. Pitts* (1990) 223 Cal. App. 3d 606, 870). Much of the misconduct occurred during closing argument. The 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 people, it carries great weight and must therefore be reasonably objective. (*People v. Talle* (1952) 111 Cal. App.2d 650, 677). Simple admonishments that the statements of the attorneys were not evidence were insufficient to obviate any error by the prosecutor. The prosecutor is official representative of the people, and therefore, his

statements to the jury are given great weight. (*People v. Talle* (1952) 111 Cal. App.2d 650, 677).

In the closing argument, the prosecutor told jurors they were "groomed" by the defendant, just like the victims in the case; that his character witnesses were child molesters and serial rapists; and implied that he committed many more crimes than those with which he'd been charged. He told the jury that defense counsel was deceptive and Dr. Donaldson was "incredible." He reminded the jury that, if released, defendant would be living in the proximity of schools and malls and would not be on parole. Finally, he led the jury through the exercise of imagining how they'd explain their verdict to friends and neighbors in the event they came back with a verdict of not true, the implication being that they would be ridiculed for such a decision.

During the trial, the prosecutor presented the horrific facts of five other SVP cases, noting that the defense expert had found that, in each of those cases, as in this case, he did not find a mental disorder. He also improperly suggested that defense witness, Michael Ross, lay blame for child molestation at the feet of parents who failed to properly supervise their children.

Viewed in contrast with the relative weakness of the State's case, the impact on the jury cannot be denied. Defendant was presented as a man who has spent the last fifteen or so years tirelessly working on himself

while incarcerated, seeking every type of treatment offered to him. He indicated that he would continue voluntary treatment if released. His family testified that they'd support him. The people he was incarcerated with said he had many opportunities to reoffend while incarcerated—that there were extremely vulnerable teenage boys housed with him and that many other men committed sex crimes at the state hospital—but defendant did not. Three employees of the state hospital testified on his behalf, each of them stating that he followed the rules, was a leader, a good representative, and a friend to many who lived within the confines of the state hospital.

The prosecution experts had difficulty diagnosing defendant with an accepted mental disorder that predisposed him to sexual violence. Dr. Updegrove acknowledged that there are people who offend against teenage boys who don't have a mental disorder and that a mental disorder can turn on what society deems good, bad or forbidden. (10 RT 1151, 1153). He also conceded that his diagnosis was part of a template that is applicable to defendant only because his victims were minors, and therefore, legally not able to consent. (10 RT 1143). He conceded that there was no evidence that defendant is aroused by pain, use of force or any kind of sadism and that hebephilia and paraphilia n.o.s. nonconsent are controversial diagnoses. (10 RT 1139, 1149). Dr. Murphy acknowledged that hebephilia is not in the DSM and officially "doesn't exist" as a diagnosis. (6 RT 634). She agreed that there is nothing in defendant's behavior that indicates a specific arousal

to nonconsent, although his diagnosis is paraphilia n.o.s. nonconsenting persons or minors. (6 RT 641, 643).

This was the State's third attempt to commit defendant as an SVP. The first trial resulted in a hung jury, when the jurors were unable to agree whether or not defendant met the criteria to be declared an SVP. In the second trial, the State only secured a verdict by resorting to tactics that ultimately were held to be in violation of defendant's constitutional rights. In this, the third jury trial, the prosecution relied on a questionable diagnosis not found in the DSM and used a barrage of improper and unlawful tactics in order to secure an order of commitment.

CONCLUSION

The court of appeal properly concluded that the prosecutor's misconduct so infected the trial with unfairness as to make the resulting conviction a denial of due process. Defendant requests that this Court affirm the decision of the court of appeal. In the event that this Court does not affirm the decision of the court of appeal, defendant requests a remand to the court of appeal for decisions on the remaining issues raised by defendant in the appeal and not addressed in the Opinion.

DATED: July 16, 2013

Respectfully submitted,

Jill A. Fordyce
Attorney for Dariel Shazier

CERTIFICATE OF COUNSEL

I, Jill A. Fordyce, counsel for defendant Dariel Shazier, certify that the Answer Brief on the Merits contains 13,735 words.

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

Dated: July 16, 2013

Jill A. Fordyce

PEOPLE V. SHAZIER
CASE NO. S208398

I, Jill A. Fordyce, certify:

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

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