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In the Supreme Court of the State of California

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

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

REPLY BRIEF ON THE MERITS

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I. EVIDENCE REGARDING A DEFENDANT'S PLANS FOR RELEASE, AND HIS PAROLE STATUS UPON RELEASE ARE ADMISSIBLE IN SEXUALLY VIOLENT PREDATOR PROCEEDINGS

As to the first question presented for review, defendant claims that the Court of Appeal's decision did not address the issue, and therefore, this court need not reach it. He also claims that evidence of release plans is not relevant to SVP proceedings in any event. He is wrong on both counts.

A. The Only Reasonable Reading of the Court of Appeal's Opinion Is That it Limits the Scope of Relevant Evidence in All SVP Cases

Defendant claims that the People have "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.'" (ABOM 16.) However, it is axiomatic that if the prosecutor's statements about defendant's living situation and parole restrictions in closing argument were "improper references to the consequences of the jury's verdict," then the testimony that elicited those facts must also have been improper. If, as defendant suggests, the court's holding does not limit the admission of evidence regarding his living situation or parole statue upon release, then the prosecutor's reference to those properly-admitted facts cannot possibly constitute misconduct.

While not explicitly stated by the Court of Appeal, the opinion's misconduct holding necessarily presumes that evidence regarding defendant's parole status and his living situation upon release, is irrelevant,

and thus inadmissible, because it improperly references the consequences of the jury's verdict. Defendant's attempt to limit the far-reaching ramifications of the Court of Appeal's holding is fruitless.

B. Evidence Regarding Defendant's Release Plans and Parole Status Is Relevant to Assessing His Risk of Reoffense

As discussed in respondent's opening brief, evidence regarding defendant's post-release living situation and the lack of parole restrictions was relevant in assessing his likelihood of reoffense. Defendant incorrectly suggests that because *People v. Grassini* (2003) 113 Cal.App.4th 765 and *People v. Superior Court* (*Ghilotti*) (2002) 27 Cal.4th 888, did not explicitly discuss the admissibility of a defendant's living situation or parole status, they do not support respondent's argument. *Grassini* and *Ghilotti* are authority that an expert can and should consider all relevant factors that may increase or decrease a defendant's risk of reoffense while free in the community. The expert must consider not only a defendant's amenability to voluntary treatment, but other dynamic factors that may increase or decrease a defendant's risk of reoffense. Factors like stable family support and living situation, job opportunities, or access to a preferred class of victims may be relevant to an expert's conclusions as to whether a defendant poses a significant risk of reoffense generally, and whether that risk can be sufficiently lowered through a successful relapse prevention plan.

Here, defendant used the evidence regarding his living situation to support his contention that he had a stable relapse plan which would prevent him from reoffending. The prosecutor used the evidence to show that defendant's relapse prevention plan was not as stable as he would have the jury believe. After the prosecutor asked defendant if he knew his mother's address, and whether he knew if Maryland sex offender laws

would prevent him from living there (8 RT 882-785), defense counsel asked him about his mother's house, showed him the map of the surrounding area, and asked how defendant would deal with the presence of nearby parks and shopping malls (9 RT 1076-1077). Because the defense presented such evidence, the prosecutor was entitled to explore the defendant's credibility regarding his relapse prevention plan, as well as to demonstrate that no parole restrictions would require him to undertake any therapy or submit to any type of monitoring. This was especially relevant because, as the prosecution experts explained, defendant had a pattern of reoffending quickly when released from custody, despite the existence of parole restrictions. (See e.g., 6 RT 429; 7 RT 539-542.) The fact that defendant would not be on parole if released was relevant in determining whether defendant posed a substantial, that is, serious and well-founded, risk of reoffense if free in the community.

As defendant points out, the court in *Grassini* held that the jury "must be instructed that the prosecution has to prove that treatment in a secure facility is necessary to protect the public." (AOBM 18-19.) However, that holding does not lead inexorably to defendant's assertion that *Grassini* does not "require or allow the jury to consider where the defendant will be living if released." (AOBM 19.) Indeed, in order to support his defense and generate the sua sponte instructional duty of the trial court, the defendant in *Grassini* presented evidence regarding his release plans, which were considered by both the prosecution and defense experts. (113 Cal.App.4th at pp. 770-774.) Grassini's defense counsel argued to the jury:

> [T]hat appellant agreed to voluntary treatment in a nonsecure setting, including antiandrogen treatment, and that he had an effective relapse prevention plan. Counsel urged the jury to find that appellant therefore was unlikely to reoffend. Counsel argued, "He can do it on the outside under the supervision of a parole agent because of the gains he's made over the last 15 years. . . ." Responding to the prosecutor's argument, defense

> counsel pointed out that Dr. Vognsen had conceded that if appellant followed his parole conditions "he would not be able to reoffend. [¶] [Dr. Vognsen] had to admit . . . he said something like the parole conditions are strict enough to protect the community's safety. [Appellant] was required to be in treatment with electronic monitoring[,] parole agents telling him where to live, et cetera. [¶] And, ladies and gentlemen, if he just steps one toe off the line, the parole agent is not going to kick back and say, oh, I'll give you another chance. He's going to find himself right back behind bars." Counsel further argued that appellant had demonstrated, by suppressing his arousal during the PPG, that he was able to use the suppression technique and he would therefore succeed if he saw a young boy when he was "out in the community."

(*Id.* at p. 778.)

Grassini recognized the relevance of a defendant's release plans and parole status in assessing his risk of reoffense, so much so that it required a sua sponte instruction on the issue. To suggest, as did the Court of Appeal here, that a defendant is permitted to testify as to where he would be living and explain how he would manage to avoid high risk situations, but the prosecution is not permitted to cross-examine about those high-risk locations and his lack of any outside restrictions to control his behaviors is illogical. Indeed, it violates the People's due process right to a fair trial.

Finally, defendant cites *People v. Krah* (2003)114 Cal.App.4th 534 to support his contention that "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." (AOBM 20.) In *Krah*, the trial court excluded evidence of the terms and conditions of parole if the defendant were released. The Court of Appeal found no error, holding that "[s]uch 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 p. 546.) The

Krah court did not find the parole evidence relevant to the existence of a mental disorder (CALCRIM No. 3454 [element 2]), or to the defendant's amenability to voluntary treatment (CALCRIM No. 3454 [element 4]). But the court did not explicitly consider its relevance to element three: defendant is a danger to the health and safety of others because it is likely that he will engage in sexually violent predatory criminal behavior. (CALCRIM No. 3454 [element 3].) Thus, *Krah* is not controlling on the issue here—whether a defendant's parole restrictions, or lack thereof, are relevant to the experts' determination of his risk of reoffense.[1]

II. NONE OF THE CHALLENGED COMMENTS CONSTITUTED PREJUDICIAL MISCONDUCT

As discussed in respondent's opening brief, the Court of Appeal found ten instances of misconduct, only five of which were objected to, eight of which did not constitute misconduct, and none were prejudicial.[2] Defendant claims that this case presents an exception to the waiver doctrine, and that every instance of alleged misconduct must be considered in assessing prejudice. We disagree.

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[1] To the extent that *Krah* can be more broadly read to suggest that parole restrictions, or the lack thereof, are irrelevant to any SVP determination, we submit that *Krah* conflicts with *Grassini* and *Ghilotti*, and is, thus, wrongly decided.

[2] Defendant labels two of the instances of misconduct as "questionable conduct," suggesting that the Court of Appeal did not actually find those instances to be misconduct. (AOBM 46-47, 52-53.) However, the Court of Appeal specifically stated that the prosecutor's reference to defense counsel's veracity "was misconduct," (Slip Opn. at p. 18), and that the references to the defense expert were not, standing alone, prejudicial, but when considered with the other acts of misconduct "rendered the trial fundamentally unfair" (Slip Opn. at p. 17).

A. It Was Not Proper for the Court to Consider the Five Unobjected-To Comments in Assessing Whether Prejudicial Misconduct Occurred

Defendant concedes that five of the ten alleged instances of misconduct were unobjected to: (1) the remarks about defendant's release plans; (2) the remark about defendant's parole status; (3) the references to the defense expert; (4) the references to "grooming" the jury; and (5) the references to defense witnesses.[3]

Defendant claims, citing *People v. Hill* (1998) 17 Cal.4th 800 and *People v. Estrada* (1998) 63 Cal.App.4th 1090, that objections were unnecessary because the misconduct was "part of a pattern," and objections would have been futile. (ROBM 23.) *Hill* and *Estrada* are inapposite. In *Hill*, this court held that further objection would have been futile because of the "constant barrage of Prosecutor Morton's unethical conduct, including misstating the evidence, sarcastic and critical comments demeaning defense counsel, and propounding outright falsehoods . . . coupled with the trial court's failure to rein in her excesses . . . ." (17 Cal.4th at p. 821.) Likewise, in *Estrada*, the court noted that "we have never seen a display of misconduct rivaling that of [codefendant's counsel] in this case. Whatever his motivation, he did everything in his power, ethical and otherwise, to destroy appellant's credibility." (63 Cal.App.4th at p. 1106.)

The claimed instances of misconduct here, even if numerous, were not comparable to the egregious pattern of conduct noted in *Hill* and *Estrada*. As this court has noted, the facts in *Hill* were "unusual" (*People v. Riel*

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[3] Defendant correctly points out our mistaken reference to "defense counsel" instead of "defense witnesses" in our opening brief (see ROBM 11). However, we cross-referenced the correct subsection, which discussed the prosecutor's discussion of the defense witnesses as "two serial rapists and a child molester." Notably, defendant provides no response on the merits suggesting that such a reference was, in fact, misconduct.

(2000) 22 Cal.4th 1153, 1213), and this court has rarely, if ever, found the necessary "egregious conduct" that would merit application of the futility exception (*People v. McDermott* (2002) 28 Cal.4th 946, 1002). Moreover, "[t]o the extent defendant relies simply on the number of asserted instances of misconduct he has raised on appeal to demonstrate that any objections would have been futile and that therefore his failure to preserve his claims during the trial should be excused, such reliance is misplaced. The prevalence of asserted misconduct raised for the first time on appeal cannot establish that, had defense counsel made proper objections at trial, the trial court would have consistently overruled those objections, the prosecutor would have persisted in engaging in the asserted misconduct, or the jury would have been alienated by defendant's bringing the prosecutor's asserted improprieties to the court's attention." (*People v. Fuiava* (2012) 53 Cal.4th 622, 727.)

Moreover, of the five instances during closing argument that were not preserved, all five occurred *before* the other three instances of alleged misconduct during closing argument. The five unobjected-to instances of misconduct during closing argument occurred between Reporter's Transcript pages 1228 through 1240. The three overruled objections during closing argument occurred on Reporter's Transcript pages 1241, 1242, 1278, and 1282 through 1284. Thus, nothing about the court's actions during closing argument would have led defense counsel to believe that objecting to the first five alleged instances of misconduct during closing argument would have been futile; up to that point, no objections had been overruled.

Therefore, the only two alleged instances of misconduct which could establish the futility exception for the five unpreserved claims occurred during the questioning of Dr. Donaldson and Michael Ross. However, those objections had nothing to do with the prosecutor's actions during

closing argument. Indeed, the objections were not on the ground of prosecutorial misconduct—they were objections to relevancy and argumentativeness. To hold that the court's overruling of two unrelated objections during witness testimony proves that subsequent prosecutorial misconduct objections during closing argument would be futile makes the exception swallow the rule. Any defendant whose objection is overruled at any point during the trial could claim than any future objections, even on unrelated matters, would be futile. Indeed, perhaps recognizing this absurdity, the Court of Appeal did not conclude that objections would have been futile; it simply ignored the lack of objection altogether.

Defendant also points out that, at least as to the prosecutor's comments about his parole status, he argued in limine to exclude such evidence, and because that motion was denied, any objection to the later use of the parole evidence would have been futile. (AOBM 22.) However, he argued in limine only that the evidence was irrelevant, not that it constituted prosecutorial misconduct to discuss in during closing argument. An objection on one ground cannot excuse the failure to object on a separate ground. "It is, of course, 'the general rule that questions relating to the admissibility of evidence will not be reviewed on appeal in the absence of a specific and timely objection in the trial court on the ground sought to be urged on appeal.' [Citation]." (*People v. Benson* (1990)52 Cal.3d 754, 786, fn. 7.) In any event, defendant cannot have it both ways—he claimed in his first argument that the court's finding of prosecutorial misconduct had no broader impact on the admissibility of such evidence in SVP trials generally. (AOBM 17 ["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"].) If the opinion is limited to the actual statements made during closing argument, then an objection prior to trial regarding the admissibility of such evidence is irrelevant to

determining whether an objection would have been futile. If the opinion refers only to the "argument made by the prosecutor," then defendant should have objected to the "argument made by the prosecutor." His failure to do so waives his claim on appeal.

B. The Court Misapplied Well-Settled Misconduct Law

In our opening brief, respondent argued that the Court of Appeal incorrectly "conflated harmless error analysis with the defendant's burden to establish misconduct." (ROBM 12.) Defendant responds that "[d]espite the fact" the court misstated the applicable law, it nevertheless applied the law correctly in assessing each instance of misconduct. (AOBM 25.) We disagree. As explained in the opening brief, multiple instances of alleged misconduct, especially during closing argument, were susceptible of differing interpretations. (See, e.g., ROBM 24-32.) The Court of Appeal, in all instances, assumed the most damaging meaning from the prosecutor's questions and comments, and, thus misapplied the relevant legal principles in reaching its ultimate conclusion.

We respond only briefly to defendant's specific arguments about each alleged instance of misconduct.[4]

1. References to Family and Friends

Defendant contends that the prosecutor's discussion of how to explain its verdict to friends and family could only be interpreted as an improper appeal to consider public opinion. Defendant is correct that the prosecutor "specifically, repeatedly, and at length conducted a hypothetical conversation wherein a juror attempts to explain a verdict of not true to a

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[4] Defendant does not address the prosecutor's reference to defendant's witnesses as two serial rapists and a child molester. (See ROBM 25-26.) As discussed in our opening brief, the reference was based solely on the evidence, and even in finding alleged misconduct, the Court of Appeal failed to perform any actual legal analysis on that issue.

third person." (AOBM 30.) However, that "hypothetical conversation" specifically referenced the evidence presented at trial, along with the requisite legal elements. Nothing in the discussion referenced public opinion, reproval, or condemnation; had counsel substituted the word "yourself" or "another juror" for friends and family, the statements would have been proper.

Defendant attempts to create an inference of public reproval or condemnation, claiming that "the argument is delivered in a sarcastic, mocking tone, as if finding for the defendant would subject the juror to complete ridicule." (AOBM 30.) On the cold record, there is no way to conclude that the prosecutor's tone was sarcastic. The statements quoted by defendant could have been equally delivered in a matter of fact manner—as when a prosecutor explains how the evidence meets each legal element of a crime, and the defense evidence does not create any reasonable doubt.

2. References to Uncharged Crimes

As discussed in our opening brief, the prosecutor's reference to defendant being a prolific child molester combined with the statement that sex crimes go unreported may have had the effect of suggesting that defendant had committed other crimes that were not in evidence. (ROBM 29.) However, when the passing statement is read in the context of the entire argument, it is clear that the main import of the statement was not to persuade the jury to commit defendant because he committed other crimes, but to attack defendant's credibility regarding the existence of a mental disorder. The prosecutor, both before and after the challenged statement, listed the evidence which supported a finding on the mental disorder element. (See 10 RT 1239-1243.) Immediately prior to the challenged statement, the prosecutor discussed defendant's testimony that he was "helping" his victims "become monks," arguing that defendant was

unbelievable. (10 RT 1241.) In context, the challenged statement was more of the same—pointing out the implausibility of defendant's story. While mentioning that crimes go unreported may have suggested more than just the implausibility of his testimony, this court should not assume that the jury inferred the most damaging meaning from those remarks.

The remarks were a direct reference to an unobjected-to exchange that the prosecutor had with Dr. Donaldson:

> Q. You acknowledge that when a person such as Mr. Shazier will only admit to the precise number of victims for whom he has been caught that he almost certainly is lying, correct?
>
> A. I don't think there's any evidence for that. We know there are a lot of undetected offenses, but what we do know is that most undetected offenses are committed by a very small number of offenders, so you can't just assume that some average number of undetected offenses applies to everybody. That's the mistake.
>
> Q. So in fact Mr. Shazier may be the unluckiest sex offender in the world, correct?
>
> A. He could be. We could speculate all kinds of things.
>
> [¶] . . . [¶]
>
> Q. It makes sense even to you, Dr. Donaldson, that the type of offender who would have unreported victims would be someone who would be a master manipulator, correct?
>
> A. Correct.
>
> Q. Someone who was able to persuade victims not to report either out of misplaced loyalties to the offender or fear of the offender, correct?
>
> A. Correct.
>
> Q. And we do have evidence of that in this case?
>
> A. We do.

(9 RT 1017-1020.)

Thus, Dr. Donaldson's testimony provided the relevant connection between defendant's particular qualities and molestation patterns and the likelihood of additional victims. The prosecutor's attempt to discuss that connection did not rise to the level of prejudicial misconduct.

3. Questioning of Dr. Donaldson

Defendant contends, citing *People v. Buffington* (2007) 152 Cal.App.4th 446, that the questions to Dr. Donaldson about the facts of other SVP cases constituted misconduct because "they were not offered up to show a differing expert opinion," but "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." (AOBM 41-42.) As we argued in our opening brief, such a contention is belied by the fact that the prosecutor also asked one of the prosecution experts about the facts of the Ward case—the one case Dr. Donaldson remembered—and that the presentation of the facts of the additional cases were attempts to refresh Dr. Donaldson's recollection. Indeed, once Dr. Donaldson maintained that he could not remember the Badura, Flick, Rawls, and Hubbart cases, the prosecutor asked generally:

> Q. Dr. Donaldson, isn't it fair it wouldn't have mattered in any of these cases for your opinion, or in any SVP case, how absolutely repulsive the conduct is because that's just describing their criminality. It really just doesn't show that they have any sort of mental disorder. Isn't that—
>
> A. Well, it's true that criminal behavior does not identify a mental disorder.
>
> Q. All right. So the point is, it's not just a so-called yuck factor, Doctor. In fact, in every case where you've testified in court you have determined that the person did not qualify to be a sexually violent predator, correct?
>
> A. Correct.

(9 RT 994.)

The point of the questioning was not to relate the "egregious and incendiary facts . . . to inflame the passion and prejudice of the jury." (Slip Opn. At p. 14.) As this court has recently noted, "'the scope of cross-examination of an expert witness is especially broad . . . .' [Citations.] 'A party "may cross-examine an expert witness more extensively and searchingly than a lay witness, and the prosecution [is] entitled to attempt to discredit the expert's opinion. [Citation.] In cross-examining a psychiatric expert witness, the prosecutor's good faith questions are proper even when they are, of necessity, based on facts not in evidence. [Citation.]" [Citation.]' [Citation.]" (*People v. DeHoyos* (2013) 57 Cal.4th 79, 88-89.) In *DeHoyos*, "[t]he prosecutor's proposed questions concerning [the expert's] handling of the interview tapes in the prior case were relevant to establish a basis upon which the jury could find that [the expert's] failure to fully comply with the subpoena in this case was not the result of an innocuous misunderstanding or forgetfulness, but rather an expression of antipathy toward the prosecution." (*Id.* at p. 90.) Similarly, here, the questioning was relevant to establish Dr. Donaldson's bias against diagnosing paraphilias in forensic settings, and by extension, his antipathy toward the SVP law generally. (See 9 RT 925-934; 1016-1017.) Indeed, Dr. Donaldson explained on redirect, when discussing the challenged questioning, that "It's hard to get over your sense of repulsiveness in this to deal with what the real issues are, is this person really mentally ill. There are bad people around, and there are people that aren't bad and do dumb things. There are criminals, and there's criminal behavior, but some of it is pretty disgusting. That doesn't make them mentally ill. The fact that I am sickened by it doesn't mean the perpetrator is sick." (9 RT 1036.) The prosecutor's line of questioning was simply an attempt to demonstrate Dr. Donaldson's general belief that criminal behavior does not equal a mental

disorder, and his general bias against using paraphilia as a qualifying mental disorder under the SVPA.

Defendant claims that Dr. Donaldson did not remember the Ward case either, making the follow-up questions to Dr. Updegrove irrelevant in curing any *Buffington* error. (AOBM 41.) Dr. Donaldson initially did not recall the Ward case. After hearing the facts, location, and time frame, he said: "Yes, Riverside County. Okay. That was before the Crane case." (9 RT 989.)

Defendant also contends that "[e]ven 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." (AOBM 41.) In fact, the prosecutor attempted to elicit the testimony suggested by *Buffington*—"an expert witness who offered an opinion that under the bare bones facts described, regardless of anything else, it would not be reasonable to find the absence of mental disorder." (Buffington, supra, 152 Cal.App.4th at p. 455.) The fact that Dr. Updegrove, when asked for that testimony, clarified his answer was not within the prosecutor's control. The failure of the expert to testify as hoped cannot be the basis for finding prosecutorial misconduct.

4. Questioning of Michael Ross

Defendant contends that the prosecutor's questions to Michael Ross were improper and argumentative. He specifically argues that the questions, "You don't know what you are talking about?" and "Parents who have teenage children who end up being victimized by child molesters they really have themselves to blame?" were "sarcastic, rhetorical, and not designed to elicit testimony." (AOBM 45.)

First, the question, "you don't know what you are talking about," was not, in fact, rhetorical.[5] The prosecutor was specifically asking about how well Ross knew defendant. The question was a precise follow-up to the questions about how long he had known defendant at the state hospital and whether he knew of his prior sexual offenses. (8 RT 870-871.) Moreover, if there was any ambiguity, the prosecutor specifically explained, "[w]hen I asked you, "You don't know what you're talking about Mr. Ross," it's that one thing you don't know about is when Mr. Shazier was in prison, when he was at ASH, and when he was at Coalinga, correct?" (8 RT 873.) The prosecutor's question was not rhetorical and was designed to elicit a specific response.

Second, the question regarding parents being at fault for molestation was a direct follow-up to Ross's testimony that he would never allow his child to be in a position to be molested. It was not rhetorical; it was an attempt to garner an explanation for Ross' previous answer. To suggest that the prosecutor is not entitled to follow-up when a witness demonstrates a possible bias would artificially limit the prosecutor's ability to conduct a full examination. If Ross did not believe that parents were at fault for their children's victimization, he was free to clear up his position in response to the prosecutor's question. Indeed, the fact that he was able to clarify his answer after the objection was overruled is evidence that there was a "real answer" to the question. (AOBM 45.)

5. References to Defense Counsel

As discussed in our opening brief, the prosecutor, in discussing the SVP instruction, told the jury that defense counsel "left something off one of his charts. Frankly it was deceptive." (10 RT 1278.) He continued,

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[5] Moreover, on the cold record, there is no way of concluding that it was "sarcastic."

asking they jury, rhetorically, why defense counsel did not put part of the instruction on his chart, and suggested that counsel did not want the jury to consider that portion of the instruction. (10 RT 1278.) Defendant contends that the prosecutor attacked the integrity of defense counsel. (AOBM 47.) As we have discussed, the prosecutor's statements identified defense counsel's omission of a part of a jury instruction during closing argument; they did not slight defense counsel's personal integrity. (See *People v. Frye* (1998) 18 Cal.4th 894, 978, overruled on another ground in *People v. Doolin* (2009) 45 Cal.4th 390 ["Here, although the prosecutor called defense counsel 'irresponsible' for raising suspicions about Ron Wilson, the point of her criticism was counsel's lack of evidentiary support for such a claim. Because the focus of her comment was on the evidence adduced at trial, rather than on the integrity of defense counsel, it was proper"].)

6. References to Release Plans and Parole Status

As discussed above, the prosecution's eliciting of testimony regarding defendant's release plans and his lack of parole restrictions was relevant in assessing his likelihood of reoffense. Defendant has failed to explain how the reference to such properly-admitted evidence could establish misconduct. (*People v. Panah* (2005) 35 Cal.4th 395, 463 ["Defendant's further claim that the prosecutor's reference to the victim's age, weight, and height was intended to appeal to the jury's sympathies is also without merit. These were facts in evidence. The prosecutor cannot be faulted for misconduct because he referred to them"].)

Defendant argues that "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." (AOBM 50.) We

have been unable to locate such briefing, and defendant does not cite any part of his opening or reply briefs in which he specifically attacks the court's ruling on the in limine motion. His only reference to the parole evidence was in the context, as here, of making a prosecutorial misconduct claim. (See H035423 AOB 24-28; Reply Brief 2-4.)

7. References to "Grooming" by Defendant

The opening brief argued that the prosecutor's references to the jury being "groomed" by defendant were assertions that defendant "continued to be manipulative and was not truly amenable to voluntary treatment." (ROBM 25.) Defendant responds: "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." (AOBM 51.) However, a prosecutor is not "required to discuss his view of the case in clinical or detached detail." (*People v. Panah*, *supra*, 35 Cal.4th 395, 463.) Defendant has not demonstrated that using colorful or attention-grabbing flourishes constitutes misconduct.

8. References to Defense Expert

The opening brief asserts that the prosecutor's references to Dr. Donaldson as incredible, laughable, and as having a "streak" of testifying for the defense, were proper comments on Dr. Donaldson's credibility and were based on evidence presented at trial. Defendant argues that the prosecutor's comments were "much more colorful than just an indication that Dr. Donaldson had consistently testified for the defense, or, in general, lacked credibility." (AOBM 52.) Again, a prosecutor is not "required to discuss his view of the case in clinical or detached detail." (*People v. Panah*, *supra*, 35 Cal.4th 395, 463.)

Defendant also contends that the Court of Appeal did not find these statements to be misconduct, "only that it should be considered in assessing

prejudice given the multiple instances of misconduct herein." (AOBM 53.) As discussed above (see fn. 2), the court specifically found that the conduct was improper but it was not, standing alone, prejudicial. Indeed, defendant's assertion is illogical—if the statements were proper, i.e., not misconduct, then they had not prejudicial impact either.

III. ANY ERROR WAS HARMLESS

Defendant contends that each alleged instance of misconduct should be considered as establishing a "pervasive" pattern of misconduct throughout the trial. (AOBM 53.) As discussed, defendant waived his right to contest half of the alleged instances of misconduct, and thus, those cannot be considered in any prejudice assessment.

In any event, defendant argues that even considering only the preserved claims of misconduct, the cumulative error was prejudicial. Defendant claims that the state's case was weak, because defendant was presented to the jury as a man who had spent the last 15 years in treatment, had testified that he would continue voluntary treatment, had family support, had not reoffended while in custody, despite opportunities, and had been a model inmate and patient. (AOBM 55-56.) The jury heard additional evidence and how it impacted the opinions of the prosecution experts. The experts considered defendant's positive factors and determined that he nevertheless posed a substantial risk of reoffense.

Defendant also suggests that the prosecution experts had difficulty diagnosing defendant with an accepted mental disorder. (AOBM 56.) As discussed in respondent's opening brief (ROBM 32-33), both doctors were firm in their diagnoses of defendant. The facts defendant now relies on to suggest a weak diagnosis were fully explored on cross-examination and argued to the jury.

In sum, defendant sexually assaulted at least 12 victims over the course of seven years. Every time he was released from custody, he

immediately began grooming and molesting a new group of victims. Two independent experts from the SVP panel diagnosed defendant with Paraphilia NOS, which predisposed him to commit sexually violent offenses. His actuarial scores placed his risk of reoffense at 10 to 23 percent over five years.

Defendant's defense consisted of a defense expert who had been fired from the SVP panel in its infancy. That witness did not find defendant had any mental disorder, which contradicted the rest of defendant's defense, i.e, that he has been able to manage his mental disorder through treatment, and would continue to attend voluntary treatment if released. His other witnesses were three ex-Sexually Violent Predators and tangential hospital employees. They could only testify to defendant's behavior while in the confines of custody, and had no real relationship with defendant when he was out of custody and committing multiple sexual assaults. This was not a "close case," and any instances of misconduct, whether in isolation or combination were harmless.

CONCLUSION

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

Dated: August 1, 2013

Respectfully submitted,

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Attorney General of California
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LAURENCE K. SULLIVAN
Supervising Deputy Attorney General

BRIDGET BILLETER
Deputy Attorney General
Attorneys for Respondent

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CERTIFICATE OF COMPLIANCE

I certify that the attached REPLY BRIEF ON THE MERITS uses a 13 point Times New Roman font and contains 5,662 words.

Dated: August 1, 2013

KAMALA D. HARRIS
Attorney General of California

BRIDGET BILLETER
Deputy Attorney General
Attorneys for Respondent

DECLARATION OF SERVICE BY U.S. MAIL

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

I declare:

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

On August 1, 2013, I served the attached **REPLY BRIEF ON THE MERITS** by placing a true copy thereof enclosed in a sealed envelope in the internal mail collection system at the Office of the Attorney General at 455 Golden Gate Avenue, Suite 11000, San Francisco, CA 94102-7004, addressed as follows:

Jill A. Fordyce
Attorney at Law
P.O. Box 2058
Los Gatos, CA 95031
(2 copies)

Attn: Executive Director
Sixth District Appellate Program
100 North Winchester Blvd., Suite 310
Santa Clara, CA 95050

The Honorable Jeffrey F. Rosen
District Attorney
Santa Clara County District Attorney's Office
70 W. Hedding Street
San Jose, CA 95110

County of Santa Clara
Criminal Division - Hall of Justice
Superior Court of California
Attention: Criminal Clerk's Office
191 North First Street
San Jose, CA 95113-1090

Sixth Appellate District
Court of Appeal of the State of California
333 West Santa Clara Street, Suite 1060
San Jose, CA 95113

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on August 1, 2013, at San Francisco, California.

Tan Nguyen
Declarant

Tan Nguyen
Signature

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