IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

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

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

DEFENDANT'S REPLY BRIEF ON THE MERITS

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I. *People v. Katzenberger* (2009) 178 Cal.App.4th 1260, Holds that Argument on Reasonable Doubt Using an Analogy That Invites the Jury to Jump to a Conclusion Misstates the Law.

In the opening brief, defendant showed that under *People v. Katzenberger* (2009) 178 Cal.App.4th 1260 (*Katzenberger*), *People v. Otero* (2012) 210 Cal.App.4th 865 (*Otero*), and other cases, the prosecutor's California map diagram and accompanying argument on reasonable doubt invited the jury to jump to a conclusion of guilt and demeaned and misstated

the beyond a reasonable doubt standard of proof, constituting prosecutorial misconduct. (OBOM 26-42)

Respondent distinguishes *Katzenberger* on grounds the "fundamental flaw" with the argument in that case involved adding pieces to an unfinished jigsaw puzzle, with the prosecutor inviting the jurors to ***guess*** at identifying a familiar object (the Statue of Liberty), and stating, "We know what this picture is ..." when only six of eight puzzle pieces were in place. (RBOM 13, and see *Katzenberger, supra,* 178 Cal.App.4th 1260, 1264.) In contrast, respondent argues, the California map diagram used here was not a puzzle and did not ask the jury to guess at all because it was identified as California by the prosecutor. (RBOM 10, 13-15)

This distinction does not save the argument presented here. First, the California map was presented as a puzzle for the jury to solve. The prosecutor presented a hypothetical trial in which "the issue is, what state is this?" (3RT 615) That the prosecutor provided the answer ["...is there a reasonable doubt that this is California?" (3RT 615)] is not substantially different from the prosecutor's statement in *Katzenberger*: "We know what this picture is even before all the pieces come up." (*Ibid.*)

Second, encouraging the jury to guess at an incomplete image (a partially completed Statue of Liberty jigsaw puzzle) was not the only flaw in

the prosecutor's argument as found by the *Katzenberger* court. Rather, *Katzenberger* cautioned against arguments that invite the jury to "guess or jump to a conclusion, a process completely at odds with the jury's serious task of assessing whether the prosecution has submitted proof beyond a reasonable doubt." (*Id.* at 1267, emphasis added.)

The map of California is an immediately recognizable icon that every juror would know depicts the state of California. (*People v. Otero, supra,* 210 Cal.App.4th 865, 872.) In respondent's words, "the task the prosecutor was referencing, identifying a familiar object [the outline of California] was akin to the everyday decision criticized in [*People v.*] *Nguyen* [(1995) 40 Cal.App.4th 28]." (RBOM 13) When the prosecutor asked the jurors, "... is there a reasonable doubt that this is California?" despite incomplete and inaccurate information on the diagram (3RT 615), she relieved them of any need to determine the solution to the "What state is this?" puzzle, instead inviting them to jump to a quick conclusion. (See, RBOM 14 ["prosecutor conceded that the image was of California"].) The prosecutor's presentation implied the jury could determine guilt based on just one piece of compelling evidence [the iconic shape of California] without the necessary analysis and weighing of conflicting evidence [improperly named and located cities within the diagram], including evidence that supported a conclusion defendant did not

commit the charged offenses. The argument's invitation to reach an immediate conclusion was at direct odds with the jurors' solemn duties during deliberations to review all of the evidence with an open mind, to refrain from premature decision making, and to form an independent judgment only after considering all of the evidence and discussing it with the other jurors. (*People v. Engelman* (2002) 28 Cal.4th 436, 449.) The argument presented in this case, which encouraged the jury to jump to a conclusion of guilt based on a flawed iconic image, falls within *Katzenberger*'s analysis.

II. *People v. Otero* (2012) 210 Cal.App.4th 865 was Correctly Decided.

Respondent criticizes *People v. Otero, supra,* 210 Cal.App.4th 865 (*Otero*) on two grounds: First, respondent argues *Otero*'s reliance on *Katzenberger* was misplaced because the prosecutor's argument in *Katzenberger* was couched in terms of a puzzle, inviting the jury to guess at the conclusion prior to placement of all the pieces, whereas the California map used by the prosecutor in *Otero* (as here) was "explicitly labeled as California" so that the jury did not need to guess at what the image was depicting, but instead had to listen to the prosecutor's argument "to discern the point being made." (RBOM 17-18) However, as shown above, *Katzenberger* was not grounded solely on asking the jury to guess at what an incomplete puzzle depicted, but also condemned use of a readily identifiable image as an analogy

to represent the "beyond a reasonable doubt" standard. (*Katzenberger, supra,* 178 Cal.App.4th 1260, 1266.) In both *Katzenberger* and *Otero*, the visual aid and accompanying argument invited the jury to jump to an immediate conclusion on guilt without consideration of additional conflicting evidence. The California map diagram used in *Otero* and in this case, explicitly labeled as California by the prosecutor here ["...is there any reasonable doubt that this is California?" (3RT 615)], no more required the jury "to listen to the prosecutor's argument in order to discern the point being made" (RBOM 17-18) than did the Statue of Liberty jigsaw puzzle used in *Katzenberger.* Both visual aids involve immediately recognizable iconic images with accompanying arguments that imply the jury can decide guilt beyond a reasonable doubt by jumping to a conclusion based on immediate or near immediate recognition of the image, with less than a full analysis and consideration of all evidence presented by both sides, including the evidence supporting a not guilty verdict.

Respondent also attacks *Otero*'s "strained application" of *Katzenberger*'s quantification analysis. (RBOM 18) *Katzenberger* held that the prosecutor's Statue of Liberty jigsaw puzzle contained an improper "quantitative component" in that the prosecutor told the jury "this picture is beyond a reasonable doubt" when the sixth of eight puzzle pieces was put in

place. (*Katzenberger, supra,* 178 Cal.App.4th 1260, 1268.) Respondent recognizes *Katzenberger's* quantitative analysis stemmed from the argument being framed in terms of an incomplete puzzle and telling the jurors they could determine what it depicted when it was only 75% complete. (RBOM 14) But, argues respondent, quantitative analysis fails as to the California map diagram used in *Otero* and the present case, because the visual aid was not an incomplete puzzle that quantified the burden of proof. (RBOM 14, 16-18)

The quantification analysis in *Otero, supra,* 210 Cal.App.4th 865 (*Otero*) does not render the decision "wrongly decided" as respondent asserts. (RBOM 16-18) First, *Otero* noted that a "quantitative aspect" was not required to render the prosecutor's argument using the California map a misstatement of the burden of proof and thus misconduct. (*Id.* at 871.) The *Otero* court then pointed out that the California map diagram had eight components, most notably the outline of California. Based on the prosecutor's argument that she was "looking for a state that 'looks like this,'" while pointing to the outline of California, the jurors reasonably could believe they needed only that one piece of information – the readily recognized outline of California – to determine what state the prosecutor was looking for. (*Id.* at 872-873.) *Otero* noted only in passing that one of eight components constitutes "12.5 percent of the information supplied" by the diagram, and the court's decision did not rest on

this observation. (*Id.* at 873.) While it may be unreasonable, as respondent argues, to believe that the jurors in *Otero* or here would have counted up eight components of the California map diagram and calculated that one component (the map outline) constituted 12.5 percent of the total components and was enough to support a finding of guilt (RBOM 18), the *Otero* court did not find the jury would have to make that kind of calculation. Similarly, defendant in this case has never argued the error lies with the jury counting up the elements of the California map diagram, and then calculating that the predominate outline element constituted 12.5 percent or some other percent of the total and that such percentage was enough to find guilt beyond a reasonable doubt. (See, RBOM 18.) The prosecutor in this case did not argue percentages at trial and no error for such an argument has been made in the briefs. Rather, the quantitative aspect the prosecutor added to the argument in the present case was that the jury's decision had to be "in the middle" between the reasonable and the unreasonable (3RT 615), which misstates the law as further discussed below.

The *Otero* court's point was that the map puzzle is a bad analogy to reasonable doubt because it includes one predominating element that all jurors will immediately recognize (the outline of California), and infers that jurors can ignore other elements, even those which are "demonstrably false," such as

the improperly named and located cities on the map. (*Ibid.*) Respondent argues the inaccurate information was included to approximate the state of the evidence at trial, because a criminal trial always contains the very real possibility that a witness may convey inaccurate information, and that the inaccurate and missing information "actually made the image a better analogy than one in which all information points to a single conclusion." (RBOM 18) However, because the California map diagram and the prosecutor's argument encouraged the jurors to reach an immediate conclusion in response to the question, "What state is this?," it is reasonably likely the jurors understood the diagram and argument as suggesting that once they recognized the predominant element (the shape of California), they could reach a conclusion of guilt beyond a reasonable doubt and need not further consider other evidence, including that which supported a finding of not guilty, so long as the prosecution had presented a "reasonable account" and the jury's decision was "based on reason." (3RT 615) That is not the proper way for the jury to approach its decision-making process. *Otero* correctly held that the California map diagram and accompanying argument misstated the law and demeaned and trivialized the decision-making process the jury was required to engage in.

III. The Analogies Used in *People v. Anderson* (1990) 52 Cal.3d 453, *People v. Nguyen* (1995) 40 Cal.App.4th 28, and *People v. Jasmin* (2008) 167 Cal.App.4th 98, Do Not Support Respondent's Position.

In *People v. Anderson* (1990) 52 Cal.3d 453 (cited at RBOM 13), a death penalty case, the prosecutor used a baseball analogy that the "tie goes to the runner" in describing the state's burden of proof. As here, defense counsel did not object to the remark. On appeal, the defendant complained that the jury may have interpreted that remark as meaning that the defendant would prevail only if the evidence were closely balanced, but would lose, despite a reasonable doubt, if the prosecution's case slightly outweighed the defense. This Court considered the context in which the remark was made and found no misconduct because the prosecutor was making the legally accurate observation that "conflicting testimony and inferences must be resolved in defendant's favor. In any event, defense counsel amply clarified the matter during his own closing argument, and thereafter the court correctly instructed on the subjects of reasonable doubt and burden of proof." (*Id.* at p. 472.) Here, however, the prosecutor was actually misstating the law concerning reasonable doubt, and leading the jury to believe that it could decide the case based on a single predominating piece of evidence, while ignoring conflicting evidence.

As respondent points out (RBOM 12), *People v. Nguyen* (1995) 40 Cal.App.4th 28, 36, held that the prosecutor's argument likening the jury's

decision making process to the "almost reflexive" decision whether to change lanes, misstated the law. This is so because the standard used to make such everyday decisions is more like a preponderance of evidence standard, which is far less than the abiding conviction necessary to a decision of guilt beyond a reasonable doubt in a criminal case. (*Ibid.*) Here, respondent concedes that the task the *Katzenberger* prosecutor asked the jury to undertake – "identifying a familiar object" – "was akin to the everyday decisions criticized in *Nguyen.*" (RBOM 13) By the same token, the question the prosecutor asked here, "What state is this?," asked the jury to identify a familiar object, akin to the everyday decisions criticized in *Nguyen.*

People v. Jasmin (2008) 167 Cal.App.4th 98 (cited at RBOM 12-13) also provides no support for respondent's position. There, the prosecutor argued the jury had to approach their decision as they would a "critical, life-changing decision, which required a careful and reasonable review of all available facts." (*Id.* at 116.) This did not reduce reasonable doubt to a mere reasonable decision, as in cases likening the jury's decision making process to a decision whether to change lanes while driving or whether to get married. (*Id.* at 115.) Here, however, the prosecutor did not tell the jurors that identifying "what State is this?" was like a critical, life-changing decision, but instead implied the jury could answer the question easily, because the answer

was obvious. The prosecutor's presentation in this case told the jury their task was as easy as identifying the iconic shape of California, a misstatement of the law and of their duties in determining the question of guilt beyond a reasonable doubt.

IV. The Washington and Kansas Cases Support Defendant's Claims of Error.

Respondent asserts *State v. Jackson* (2013) 305 P.3d 685, does not support defendant's position. (RBOM 15-16) In that case, the prosecutor talked about a famous painting of George Washington that was only missing some paint from the very bottom of the picture but was still entirely recognizable "beyond a reasonable doubt." In holding the comments did not constitute error, the Kansas Court of Appeal pointed out that the prosecutor stressed that a blank canvas is like the presumption of innocence, that during the course of the trial, the evidence starts to form a picture, and that the jury's job at the end of the trial was to decide if the prosecutor had put on enough paint so that the jury could decide what the picture showed "beyond a reasonable doubt." (*Id.* at 691.) The comments stressed that the defendant was presumed innocent and that it was the state's burden to put enough paint on the canvas to prove their case beyond a reasonable doubt. (*Id.* at 693.)

In *State v. Fuller* (2012) 169 Wash.App. 797, 243 P.3d 126, where the prosecutor used a jigsaw puzzle showing the City of Tacoma to illustrate

reasonable doubt and the trial process, the prosecutor repeatedly stressed to the jury that with just a few pieces of the puzzle, although it might look like Tacoma, the jury could not know until it had enough evidence to see that it was Tacoma beyond a reasonable doubt; for that, the jury had to have enough pieces of evidence to identify the puzzle *with certainty* and to have an abiding belief in the truth of the charge. (243 P.3d at 140-141.) Moreover, the Washington court in *Fuller* pointed out that the prosecutor did not purport to quantify the degree of certainty required. (*Id.* at 142.) Here, in contrast, the prosecutor told the jury their decision had to be based on a "reasonable account" and be "somewhere in the middle" between impossible and reasonable. And she did not stress that the jury could not reach a decision beyond a reasonable doubt with only a few pieces of evidence; instead, she implied the jury could ignore conflicting evidence because it was so apparent what state the map depicted, i.e., it was obvious the defendant was guilty. (3RT 615)

Respondent argues *Jackson* supports the prosecutor's presentation here because the "blank canvas of innocence" was the beginning of trial, the prosecutor's case applied the paint, an identifiable picture had been painted by the end of trial, and the prosecutor "told the jury that the image represented the product of several witnesses' testimony and that, through that testimony,

sufficient evidence had been presented to make a decision." (RBOM 16) But that is not what the prosecutor said in this case. She did not stress the presumption of innocence or say that the trial process involved starting with a blank piece of paper and that the evidence supplied the outline of California and the information shown inside that outline. The prosecutor's presentation in this case simply does not compare to that in *Jackson*, where the prosecutor's fundamental points were that the trial started with the presumption of innocence and that the state's burden of proof required it to present enough evidence so that the jury could determine the question of guilt beyond a reasonable doubt.

Respondent distinguishes *State v. Crawford* (2011) 46 Kan.App.2d 401, 262 P.3d 1070, from the present case on grounds the prosecutor in this case was making a permissible point with the California map diagram. In *Crawford*, the prosecutor analogized reasonable doubt to a jigsaw puzzle showing portions of a lighthouse and ocean, and asked whether, even with some pieces missing, "Are you ... able to say that looks like a lighthouse and ocean?" (262 P.3d 1070, 1079.) Relying on *Katzenberger*, the Kansas Court of Appeal in *Crawford* held it was improper to argue the jury could find the defendant guilty if, from the evidence, it "looked like" he committed the charged crimes. (*Id.* at 1080.) Respondent argues this case is different

because the prosecutor was not arguing for a decision based on a lower level of certainty than beyond a reasonable doubt, but was making the point that "incomplete and inaccurate information did not render a decision impossible." (RBOM 19) But what the prosecutor did here was not just tell the jury they could decide the case despite conflicts in the evidence. She presented an iconic image that the jury could readily identify, with accompanying argument that implied the jury could decide the case based on one single determinative piece of evidence (the outline of California) – i.e., because it "looked like" California. *Crawford* teaches that implying the jury can determine guilt if it "looks like" the defendant was guilty misstates the prosecution's burden of proof. The prosecution's presentation here likewise implied that the jury could decide guilt beyond a reasonable doubt if it "looked like" defendant was guilty. The presentation demeaned, trivialized, and misstated the burden of proof

V. The Prosecutor's Argument That the Jury's Decision Had to Be "In the Middle" Between the Reasonable and Unreasonable Added an Improper Quantitative Element to the Reasonable Doubt Argument Which Further Demeaned the Standard and Constitutes a Misstatement of the Law and Thus, Prosecutorial Misconduct.

Respondent makes three points about the improper quantification aspect of the prosecutor's argument: (1) the map diagram itself did not quantify the burden of proof; (2) the prosecutor was not referencing the image when she made the "in the middle" comment; and (3) the prosecutor was not saying the

jury's decision had to be "in the middle of guilt and innocence," but, as held by the Court of Appeal, she was explaining that "reasonable doubt involves reflecting on the spectrum of possibilities that are supported by the evidence – from those that are impossible, to those that are unreasonable, and then to those that are reasonable and possible." (RBOM 21, quoting from Slip. Opn. at 8.)

First, it is not determinative that the map diagram itself did not quantify reasonable doubt at 50% or "in the middle," in the manner of the numerical graph showing a scale from one to ten with reasonable doubt at 7.5 as in *McCullough v. Nevada* (1983) 99 Nev. 72, 657 P.2d 1157, 1157-1158. (See, OBOM 47.) Second, the prosecutor's statement that the jury's decision had to be "in the middle" between the reasonable and unreasonable followed immediately after the prosecutor's inquiry whether, despite the incomplete and inaccurate city descriptions on the map diagram, "is there was any reasonable doubt that this is California?" (3RT 615) The prosecutor then told the jury that in the world of possibilities, between the impossible and the reasonable, its decision had to be "in the middle." (3RT 615) This was an improper "watering down" of the jury's constitutionally prescribed duty not to find guilt unless they "feel an abiding conviction of the truth of the charge." (Pen. Code, §1096; *People v. Garcia* (1975) 54 Cal.App.3d 61, 69.)

Third, while the Court of Appeal herein characterized the prosecutor's argument as a "roundabout" explanation that "reasonable doubt involves reflecting on the spectrum of possibilities that are supported by the evidence – from those that are impossible, to those that are unreasonable, and then to those that are reasonable and possible" (Slip Opn., p. 8), what the Court of Appeal said about the argument is not what the prosecutor told the jury. The prosecutor never told the jury to reflect on "the spectrum of possibilities that are supported by the evidence." Those are the appellate court's words. (Compare Slip Opn., p. 8 to 3RT 615 ["There is the impossible, which you must reject, the impossible [sic] but unreasonable, which you must also reject, and the reasonable possibilities, and your decision has to be in the middle."].)

Telling the jury its decision had to be "in the middle" between what it determined to be reasonable and unreasonable misstated the jury's duty to find guilt beyond a reasonable doubt. The misstatement of the law constitutes misconduct.

VI. This Court Should Revisit its Decision in *People v. Romero* (2008) 44 Cal.4th 386, to the Extent it Approves a Prosecutor's Closing Argument That the Reasonable Doubt Standard Asks Jurors to "Decide What Is Reasonable to Believe Versus Unreasonable to Believe" and to "Accept the Reasonable and Reject the Unreasonable."

In the opening brief on the merits, defendant argued the prosecutor misstated its burden to prove guilt beyond a reasonable doubt when it told the jury that, "with reasonable doubt, you need to accept the reasonable and reject the unreasonable" (3RT 614), and that:

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

(3RT 615; OBOM 48-54)

Respondent argues the argument was approved in *People v. Romero* (2008) 44 Cal.4th 386 (*Romero*). (RBOM 22-23) To the extent *Romero* decides the issue presented here, it should be reexamined.

Romero was a death penalty case in which the defendant contended, first, that the standard jury instructions on circumstantial evidence lessened the prosecution's burden of proof, and second, that the prosecutor's argument misused the language of the instructions to lessen the prosecution's beyond a reasonable doubt burden of proof. (*Id.* at 415-416.) The prosecutor in *Romero*

stated in closing argument that the reasonable doubt standard asks jurors to "decide what is reasonable to believe versus unreasonable to believe" and to "accept the reasonable and reject the unreasonable." (*Id.* at 416.) This Court held: "Nothing in the prosecutor's explanation lessened the prosecution's burden of proof. The prosecution must prove the case beyond a reasonable doubt, not beyond an unreasonable doubt." (*Ibid.*)

This conclusion in *Romero* does not dispose of the complained of arguments in the present case. Here, unlike in *Romero*, the prosecutor not only told the jury to accept the reasonable and reject the unreasonable, she also stated that the jury's decision "has to be in the middle. It has to be based on reason. It has to be a reasonable account." (3RT 614-615) Deciding what is a reasonable account versus an unreasonable account may be the test for determining the sufficiency of circumstantial evidence (*id.* at 415), but it does not equate to the decision necessary to render a guilty verdict, that is, that the jury has no reasonable doubt as to the truth of all elements of the criminal charges. (*People v. Riel* (2000) 22 Cal.4th 1153, 1182; *In re Peterson* (2007) 156 Cal.App.4th 676, 692.) Nor does a decision "based on reason" that is a "reasonable account" meet the high standard of proof beyond a reasonable doubt, which leaves the jurors "in that condition that they cannot say they feel an abiding conviction of the truth of the charge." (Pen. Code, § 1096.)

The Kansas Supreme Court addressed a similar argument in *State v. Sappington* (2007) 285 Kan. 176, 169 P.3d 1107, discussed in defendant's opening brief on the merits (OBOM 49-50), but not addressed in respondent's brief. *Sappington* held that the prosecutor's question, "Is it reasonable?" misstated the state's burden of proof, because to find a defendant guilty, the jury must find that it has "no reasonable doubt" as to the truth of each claim. Yet, asking whether the jury's decision is "reasonable" suggests that the jury may convict if it believes it merely "reasonable" that he committed the crime. (*Sappington, supra,* 169 P.3d 1107, 1115.) The Kansas high court concluded the argument diluted the state's burden "because a jury could convict due to its reasonable belief that a defendant committed a crime while still having a reasonable doubt as to guilt. Accordingly, the comment is outside the wide latitude afforded a prosecutor." (*Ibid.*)

Based on this reasoning, defendant requests this Court revisit its decision in *Romero* and hold that the arguments of the prosecutor herein, that reasonable doubt required the jury to render a decision "based on reason" that was a "reasonable account" in the middle between the reasonable and the impossible, misstated the burden of proof.

VII. There Could Be No Sound Professional Tactical Reason Why Defense Counsel Did Not Object to the Prosecutor's Rebuttal Argument on the Reasonable Doubt Burden of Proof.

In his opening brief on the merits, defendant argued there could be no sound tactical reason why defense counsel did not object to the prosecutor's misstatements of the state's burden of proof in rebuttal argument. (OBOM 59-61) Respondent argues defense counsel may have determined not to object because he "concluded that the prosecutor's abstract discussion of reasonable doubt was tangential to the issue before the jury." (RBOM 25) According to respondent, the reasonable doubt burden of proof was tangential because defense counsel "spent closing argument discussing specific evidentiary issues that he asserted were fatal to the prosecution's case," and he may have wanted the prosecutor to remain focused on reasonable doubt because "the longer she spent discussing the concept of reasonable doubt, the less time she was rebutting the defense's specific allegations." (RBOM 25-2)

The record does not support respondent's argument. From the start, defense counsel's closing argument focused on the prosecution's failure to meet its burden to prove its case beyond a reasonable doubt. That the prosecution had not proved all elements of its case beyond a reasonable doubt was not a "tangential" issue, but the central theme of defendant's closing argument. (3RT 599-602, 606, 609, 614)

People v. Kaurish (1990) 52 Cal.3d 648, cited by respondent for the proposition that defense counsel could have reasonably concluded the prosecutor's misconduct in closing argument involved only tangential matters (RBOM 25), is inapposite. Kaurish was charged with murder; during trial the prosecution elicited testimony about his past misconduct, including drug dealing, to discredit a defense witness. During closing argument, the prosecutor commented on defendant's drug dealing and also made reference to defendant's possession of the victim's apartment keys, a fact not in evidence. Defense counsel did not object; on appeal defendant asserted ineffective assistance of counsel. (*Id.* at 677.) This Court held the comments about defendant's past misconduct did not exceed the wide latitude given prosecutors to discuss and draw inferences from the evidence, and that defense counsel could have reasonably concluded such evidence was tangential to the case and that objections would only accentuate defendant's negative qualities. (*Id.* at 677-678.) Defendant's possession of the victim's apartment keys was also tangential to the case, because the prosecution's theory was not that the murderer gained access by using the keys, but that the victim released the deadbolt lock to allow entry by someone she knew. (*Id.* at 678.)

This case is far different. As respondent concedes, "the jury was presented with diametrically opposed versions of events and had to weigh

witness credibility in order to make a decision." (RBOM 27) Thus, whether the prosecution proved its case on all elements of the charged offenses beyond a reasonable doubt was central to both the prosecution and the defense, and that is why defense counsel's closing argument focused on the prosecution's failure to prove the case beyond a reasonable doubt. Here, an objection to the prosecutor's improper PowerPoint presentation and argument on reasonable doubt would not have served to highlight matter unfavorable to the defendant. (*People v. Stewart* (2004) 33 Cal.4th 425, 509) Rather, an objection would have given the court the opportunity to advise the jury that the California map diagram and accompanying argument did not properly illustrate either the state's burden to prove the defendant's guilt beyond a reasonable doubt, or the jury's duties in examining and discussing all of the evidence – including that which pointed to a not guilty verdict – in order to reach a verdict; and that the jury's task was not to decide what was reasonable and "in the middle" of the "world of possibilities." (3RT 614-615, 621)

The prosecutor's argument was not an "abstract" discussion of reasonable doubt tangential to the case. (See, RBOM 25) Rather, the PowerPoint presentation and accompanying argument gave the jury a very concrete, but improper, reference point for deciding that the prosecution had

established its case on all elements on a lesser standard of proof than the constitutionally required standard of proof beyond a reasonable doubt.

Nor is it reasonably likely that defense counsel failed to object to the improper argument because he perceived it to imply a "higher burden of proof not met by the evidence presented." (RBOM 26) Likening the jury's decision-making process to recognizing the iconic image of the map of California, where there was no reasonable doubt what state was depicted despite "relatively insignificant" errors within the diagram (respondent's characterization, RBOM 26), and telling the jury it had to decide what is a "reasonable account" and that its "decision has to be in the middle" (3RT 615), could not reasonably be perceived by experienced felony defense trial counsel as implying a "higher burden of proof" as respondent argues. Even tactical decisions still require the basis for the tactical choice be within reasonable competence (*People v. Frierson* (1979) 25 Cal.3d 142, 163; *People v. Bess* (1984) 153 Cal.App.3d 1053, 1061), and it is established that counsel cannot withhold an objection merely from concern of highlighting improper arguments (*People v. Boyette* (2002) 29 Cal.4th 381, 432). The record does not support respondent's theories that defense counsel deliberately withheld objection to the improper argument as a reasonable tactical choice.

VIII. The Prejudice from the Prosecutor's Arguments Was Not Dispelled by the Strength of the Prosecution's Case or the Trial Court's Instructions on the Burden of Proof.

Respondent concedes "the percipient witnesses disagreed on whether a crime had even been committed," that the jury was "presented with diametrically opposed versions of events and had to weigh witness credibility in order to make a decision," and that "the state of the evidence was not such that it overwhelmingly pointed to a specific conclusion." (RBOM 26-27) As explained in defendant's opening brief, given the conflicting evidence and defendant's steadfast denial of any wrongdoing, a perfectly reasonable juror, applying the principles espoused by the prosecutor in closing argument, could have found defendant guilty because the prosecution's case presented "a reasonable account" somewhere "in the middle" between the impossible and the reasonable. This case thus presents a reasonable chance, more than an abstract possibility, that the jury returned its verdict based on a misapprehension of the law which would have been corrected had defense counsel objected and the trial court corrected the error with an admonition and further instruction on the correct burden of proof. (*People v. Hill* (1998) 17 Cal.4th 800, 820-821, overruled on another ground in *Price v. Superior Court* (2001) 25 Cal.4th 1046, 1069, fn. 13.)

The presumption that a prosecutor's misstatements of law in closing argument are generally dispelled by the trial court's correct instructions (*People v. Osband* (1996) 13 Cal.4th 622, 717) should not be applied here. The court delivered its instructions in the afternoon on April 12, 2010, and it is apparent from the record that it did so quickly, because it prefaced the instructions by saying, "... you will have all of these [instructions] in deliberations with you. So if I go a bit fast, don't worry." (1CT 100; 3RT 554-558) The prosecution did not present its initial closing argument until the following morning, and the improper PowerPoint presentation and argument concerning reasonable doubt were delivered in rebuttal argument, giving the defense no opportunity to respond (and defense counsel did not object). (1CT 103; 3RT 582-598, 614-621) The trial court gave no further iteration or explanation of the beyond a reasonable doubt standard of proof after the arguments were concluded. (3RT 622-629) The prosecutor's misstatements of the reasonable doubt standard of proof thus were the last word on the subject.

Jury instructions given by the court do not always correct a prosecutor's misstatements of the law. (*People v. Hill, supra,* 17 Cal.4th 800, 845.) Even if the jurors did not consciously apply a standard of proof less than the beyond a reasonable doubt standard, there is a reasonable possibility they substituted

the erroneous decision making process urged by the prosecutor, and decided guilt because the prosecutor's case was a "reasonable account" and "in the middle" between the impossible and the reasonable. Therefore, the prosecution cannot show beyond a reasonable doubt that the prosecutor's misstatements of the law and defense counsel's failure to object to them and obtain an admonition, did not contribute to the verdict, and reversal is therefore required. (*Chapman v. California* (1967) 386 U.S. 18, 24 [87 S.Ct. 824, 17 L.Ed.2d 705].)

CONCLUSION

For the reasons stated herein and in the opening brief on the merits, this court is requested to find that the prosecutor committed misconduct during closing argument by misstating the state's burden of proof.

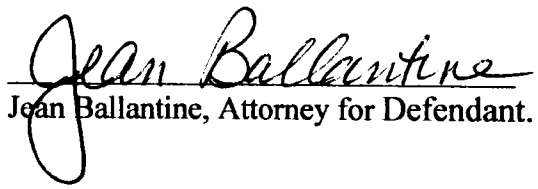
Dated: December 12, 2013

By: 

Jean Ballantine, SBN 93675
Attorney for Defendant-Appellant
Jonis Centeno
By appointment of the Supreme Court
Under the Appellate Defenders, Inc.
Independent Case System.

CERTIFICATE OF WORD COUNT

I certify that the word count for Defendant's Reply Brief on the Merits herein is 5,789 words, as counted by the WordPerfect computer program which was used to produce this brief.



Jean Ballantine, Attorney for Defendant.

PROOF OF SERVICE

I, Jean Ballantine, declare and say that:

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

On December 12, 2013, I served the foregoing document described as DEFENDANT'S REPLY BRIEF ON THE MERITS, on the interested parties in this action by placing a true copy thereof enclosed in a sealed envelope, postage prepaid, first class mail, with the U.S. Postal Service, addressed as follows:

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per rule 8.360(d)(2), appellant has requested in writing that no copy be sent.

And by electronic service to:
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I declare, under penalty of perjury, that the foregoing is true and correct.

Executed December 12, 2013 at Los Angeles, California.

Jean Ballantine