ORIGINAL

No. S058537

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

v.

SCOTT FORREST COLLINS,

Defendant and Appellant

Los Angeles County
Superior Court No. LA 009810

APPELLANT'S SUPPLEMENTAL OPENING BRIEF

Appeal from the Judgment of the Superior Court of the State of California for the County of Los Angeles

HONORABLE LEON KAPLAN, JUDGE
HONORABLE HOWARD SCHWAB, JUDGE

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DEATH PENALTY

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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. SCOTT FORREST COLLINS, Defendant and Appellant.	)	No. S058537 (Los Angeles Sup. Ct. No. LA009810)

APPELLANT'S SUPPLEMENTAL OPENING BRIEF

This supplemental brief presents two additional arguments in appellant's automatic appeal. In order to avoid confusion, these arguments are numbered sequentially to the arguments in the opening brief. Consequently, the additional arguments are numbered 24 and 25.

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APPELLANT'S OBJECTIONS TO THE PROSECUTOR'S LEADING QUESTIONS TO SERGIO ZAMORA SHOULD HAVE BEEN SUSTAINED

The court repeatedly permitted the prosecutor to examine Sergio Zamora using improper leading questions on important evidentiary points. As a result, the jury heard details of purported admissions by appellant which otherwise would not have been in evidence, and Zamora appeared more credible than he would have been but for the improper questioning. Appellant's objections to these leading questions were erroneously denied on at least five occasions in violation of state statutory law as well as both the state and federal constitutions (Cal. Const., art. I, §§ 15, 16, 17; U.S. Const., 5th, 6th, 8th & 14th Amends.).

A. Procedural Background

Zamora was one of the five juvenile gang members from Bakersfield who testified against appellant. He was witness to many of the events of January 24, 1992, leading up to appellant's arrest – the partying, the drive-by shooting and the brief car chase that ended in a crash – and his testimony focused mostly on these events. In particular, Zamora claimed that during the car chase and after the crash appellant made admissions concerning the Los Angeles homicide which is the subject of this case. Zamora was detained and questioned by the police after the crash. In his first statement to the police, Zamora said the homicide was the work of a "homeboy," but he later told Detective Castillo of the Los Angeles Police Department that appellant admitted committing the crime. (28 RT 3320.) As the case moved closer to trial, Zamora enriched his story of appellant's admissions with new details which favored the prosecution. He offered one such new

detail to the police on the day of the preliminary hearing,[1] and yet another just before trial.[2]

Zamora's testimony regarding appellant's purported admissions was important because appellant would testify at trial and deny making any such admissions whatsoever. Appellant hypothesized that the police and prosecution could have given information to the juveniles about the circumstances of the Los Angeles homicide in order to inculpate appellant. (See e.g., 36 RT 4544.) The defense also developed evidence that the juveniles could have obtained general information about the homicide by overhearing police communication at the time of the car crash and arrest. (24 RT 2782-2785; 36 RT 4518) Accordingly, whether or not the jury believed Zamora's testimony regarding appellant's purported admissions was important in determining appellant's guilt or innocence.

At trial the prosecutor tried to elicit from Zamora a coherent version of the events supporting the state's case, while still presenting Zamora as a credible witness. But she soon ran into trouble during her direct examination. Zamora was erratic and not believable – he even acknowledged lying about preliminary hearing testimony which the prosecutor clearly expected him to reiterate. (28 RT 3319.) Over two objections by appellant, the prosecutor lapsed into using leading questions

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[1] In one of his statements to the police, Zamora had said appellant acknowledged shooting the victim. But at the preliminary hearing Zamora revealed for the first time that he remembered appellant had specified that the shot had been to the victim's head. (28 RT 3317, 1 CT Supplemental III 278.)

[2] Zamora told the prosecutor and Castillo that appellant had said that the victim was on his way to lunch when appellant put him in the car, took him to the bank and got $100-200. (28 RT 3322-3323.)

to shore up Zamora's credibility and to get before the jury "new" details of appellant's purported admission – details which Zamora supposedly remembered only days before his appearance at trial yet were not forthcoming from Zamora in his trial testimony until prodded by the prosecutor's leading questions. The relevant portion of the direct examination is set out in section B below, with the enumerations 1 and 2 referring to appellant's first two objections for improperly leading Zamora.

On cross-examination, Zamora's performance was even worse: he repeatedly claimed not to remember the events of the evening in question (see e.g., 28 RT 3325:25, 3330:5, 3333:26, 3334:4, 3334:6, 3336:25, 3337:20, 3337:23, 3338:9, 3338:15), responded with inappropriate sarcasm,[3] and apparently made derogatory remarks directed toward defense counsel under his breath (See AOB, Statement of Facts, p. 11). Faced with the grim prospect of having the jury disregard Zamora's testimony as unreliable if she could not rehabilitate her difficult witness, the prosecutor took matters further into her own hands on redirect – she essentially testified for Zamora by reading aloud and at length from Zamora's prior statement to Castillo, and from Zamora's preliminary hearing testimony, stopping only occasionally to ask the witness whether he recalled making the statements she was reading. Appellant objected three more times – including a final continuing objection – to the prosecutor leading the witness in this manner, but each objection was denied. The three relevant portions of the redirect examination are set out in section B below, with the enumerations 4, 5 and 6 referring to the three additional objections made by

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[3] When counsel asked Zamora what he was doing for a three hour period on the morning of January 24 he claimed he was "ironing [his] pants." (28 RT 3335.)

appellant.[4]

B. The Prosecutor's Improper Leading Questions

1 and 2. On direct examination, the prosecutor established that Zamora met with the prosecutor and Castillo shortly before testifying at trial. She used questions which were leading and assumed facts not in evidence to obtain the witness' testimony that appellant had revealed additional important details about the killing in his admission shortly after the crash:

"Q Do you remember telling us anything about what the defendant told you about the person in Los Angeles that he killed?

"A He just killed someone up in L.A.

"Q What else?

"MR. HILL: Assumes facts not in evidence, objection.

"THE COURT: Overruled.

"Q BY MS. D'AGOSTINO: Did you tell us that he told you the guy was going to get something to eat, was on his way to lunch?

"MR. HILL: Objection, leading.

"THE COURT: The witness may answer.

"Q BY MS. D'AGOSTINO: Do you remember telling us that?

"A Yes, Ma'am."

"Q Do you remember telling us that he then grabbed him

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[4] In his collateral attack on the convictions and judgment, *In re Scott Forrest Collins on Habeas Corpus*, No. S136461, ¶¶ 215-229, appellant has alleged that defense counsel was constitutionally ineffective in failing to object to similar improprieties in the prosecutor's examinations of the juvenile witnesses.

and put him in the car and took him to the bank and got 100 or 200 dollars?

"MR. HILL: Objection, leading.

"THE WITNESS: Yes, Ma'am.

"THE COURT: The answer may remain.

(28 RT 3322-3323.)

3. On redirect examination, Zamora did not provide all the details from appellant's purported admission which Zamora had previously described in a prior statement to Castillo. The prosecutor wanted the jury to hear those additional details. Nevertheless, she did not seek to have a transcript or recording of that statement introduced into evidence. Instead, to get these details in front of the jury, the prosecutor simply read aloud from that statement without first showing it to the witness, and asked Zamora to confirm the statement. She asked,

"Q And do you remember telling -- well, do you remember Detective Castillo finally at the end of that interview, starting at page 30, line 6, you were asked by the detective, 'Why did he kill the man?' Referring to Rascal.

"Do you remember that?

"A [By Zamora] Yes.

"Q Do you remember your answer, 'To get his money'?

"A Yes.

"Q And do you remember the detective then said to you, 'and?'

"And you said, 'And his wallet and his credit cards.'

"Is that true?

"A Yes."

(28 RT 3358-3359.)

The defense interposed an objection based on the prosecutor leading the witness, which the court overruled. (28 RT 3359.)

4. The prosecutor next elicited Zamora's statement that he had learned about appellant killing this man from appellant when they were in the car "driving through the Colonias" (28 RT 3359), which was where the drive-by shooting occurred. She sought to bolster Zamora's dubious credibility, while at the same time portraying appellant as a dangerous person, by reading part of the same purported statement to Castillo showing Zamora's fear of appellant:

"Q And do you remember the detective then said to you, 'Okay, why didn't you tell me this the first time?'

"And you said, 'The first time?'

"And the detective said, 'Yeah, the first time.'

"And do you remember you said, 'Because I didn't want -- I didn't want him to get mad because then he's going to read my files. Then I'm going to be the one that's going to get my ass kicked.'

"Do you remember that?

"A Yes."

(28 RT 3360.)

The court again overruled appellant's objection that this questioning was leading. (28 RT 3360.)

5. Next, the prosecutor returned to the subject of Zamora's preliminary hearing testimony and the purported statement by appellant which Zamora revealed for the first time at the preliminary hearing. On direct examination Zamora had surprised the prosecutor by testifying that he

had lied at the preliminary hearing when he had said appellant had stated he had shot the homicide victim in the head. (28 RT 3316-3317.) On redirect, she got Zamora to backtrack – he said he had heard appellant say he shot the man in the head. (28 RT 3361.) Zamora acknowledged that the first time he had mentioned this statement was when he came to Los Angeles for the preliminary hearing in this case. (28 RT 3361.) In this instance the prosecutor had Zamora review slightly more than one page of the relevant testimony – Reporter's Transcript page 300, line 4 through page 301, line 13 – but then, rather than asking him questions about his prior testimony, the prosecutor simply read that portion of the record aloud to the witness and to the jury while asking occasional questions:

> "Q. All right. Now, do you remember that the other lawyer [deputy public defender James Coady] asked you the following questions:
> "'From January until today, and that's the day you testified, did you tell anybody that Mr. Collins had said, 'I shot somebody in the head?'
>
> "MR. HILL: Objection.
>
> "THE WITNESS: No.
>
> "Q. By MS. D'AGOSTINO: Wait a minute.
>
> "THE COURT: Just a moment.
>
> "MR. HILL: I think I interr[up]ted a question. I'm sorry. Could the court note a continuing objection to these questions, please.
>
> "THE COURT: Noted.
>
> "MR. HILL: On the basis –
>
> "THE COURT: 791 and 770, I believe, are both applicable of the Evidence Code."

(28 RT 3362.)

The prosecutor then continued reading questions and answers from the preliminary hearing:

"Q [By Ms. D'Agostino] And you said, 'You mean he had said he shot someone in the head?'

"'Yes.'

"And you said, 'I told -- well, I told them today.'

"And the lawyer said to you, 'You told Detective Castillo that today, right?'

"And you said, 'Yes.'

"Do you remember that?

"A. Yes."

(28 RT 3362-3363.)

She continued:

"Q Then Mr. Coady, the lawyer, said, 'Before today had you ever told anybody that in your entire life?'

"And you said, 'No.'

"Do you remember that?

"A. Yes.

"Q. And then the lawyer said to you, 'So today was the very first time you said that?'

"And you answered, 'Yes.'

"Do you remember that?

"A Yes.

"Q Then he said, 'Did you forget it before or did you just remember it now?'

"And you asked him, 'Did I forget it before or do I remember right now?'

"And you said, 'I forgot before.'

"Do you remember that?

"A Yes.

"Q And then do you remember the lawyer saying to you, 'Did you see any pictures of the dead guy?

"And you said, 'Did I see any pictures of the guy?'

"And you said, 'What guy?'

"Do you remember that?

"A Yes.

"Q And then he said, 'The guy who got killed in this case.'

"And you said, 'No.'"

"And is that in fact true, Mr. Zamora? You haven't seen pictures of the dead man, have you?

"A No.

"Q And then the lawyer said to you, 'Did you know he was shot in the head?'

And you said, 'Do I know? Of course. I found out.'

And then he said, 'From whom?'

And you said, 'From Rascal.'

And he said, 'Who else did you find out from?

And you went, 'Huh?'

And he said, 'Who else did you find out from?

And you said, 'That's it.'

Do you remember those questions and answers?

"A Yes.

"Q And is that in fact what you remember happening?

"A Yes.

"Q When you came to court this week Tuesday, do you have that in mind?

"A Yes.

"Q And do you have in mind that you were in my office with Detective Castillo and the three of us were in my office in the morning?

Do you remember that?

"A Yes.

"Q Did you at that time say anything else to us that you had remembered or that you had not told us before?

"A (No response.)

"Q If you remember. If you don't remember, just say you don't remember.

"A I don't remember.

"Q Do you remember testifying at the preliminary hearing, however, that Rascal had told you that he had taken the guy to the bank and gotten money?

"A Yes.

"Q And did you testify to that at the preliminary hearing?

"A Yes.

"Ms. D'Agostino: Okay. Thank you. I have no further questions."

(28 RT 3363-3365.)

By reading the transcript rather than attempting to rely on her witness' recollection – whether independent or refreshed – the prosecutor was able to provide additional support for her theory that appellant both took the victim to the bank to get money and shot him in the head. By essentially testifying herself, she was able to guard against her unreliable witness again disavowing the truth of one of his prior statements or otherwise damaging her case.

C. The Prosecutor Engaged in a Pattern of Asking Improperly Leading Questions

Evidence Code section 767 provides that "[a] leading question may not be asked of a witness on direct or redirect examination" except under special circumstances where the interests of justice otherwise require.

A leading question is "a question that suggests to the witness the answer that the examining party desires." (Evid. Code, § 764.) Whether a question is leading or not depends on whether an ordinary person "would get the impression that the questioner desired one answer rather than another." (*People v. Williams* (1997) 16 Cal.4th 635, 672, quoting 1 McCormick on Evidence (4th ed. 1992) §6, pp. 17-18.) When the danger [of false suggestion] is present, leading questions should be prohibited; when it is absent, leading questions should be allowed." (1 Jefferson, Cal. Evidence Benchbook (2d ed. 1982) § 27.8, p. 762.) The rule is clearly violated by "a question that includes an assumption of the truth of a fact in controversy." (1 Witkin, Evidence (4th ed. 2000) Presentation at Trial, §165, p. 229.) The prosecutor's questions set out above and subject to appellant's objections were clearly leading: the answer the prosecutor expected was obvious from the question. This is particularly true in those instances in which the prosecutor read a transcript of a prior statement or testimony and then asked Zamora if he remembered making the statement – the prosecutor clearly expected Zamora to acknowledge that he had previously made the statements. Moreover, the questions by the prosecutor here also clearly included an assumption of the truth of a fact in controversy.

There is no special circumstance under Evidence Code section 767 which provides a valid exception here to the rule against leading questions. This Court has noted that a leading question may be permissible when it

serves "to stimulate or revive" a witness' recollection. (*People v. Williams*, *supra*, 16 Cal.4th at p. 672, citing 3 Witkin, Evidence (3rd ed. 1986) Presentation at Trial, § 1822, p. 1782.) That is not the case here. In none of these instances did the prosecutor attempt to exhaust Zamora's recollection before asking the leading question, including when she elected to read the prior statements in open court. Furthermore, while the prosecutor sometimes asked the witness whether he remembered making the prior statement or testifying to particular facts, she made little effort to have the witness affirm that the contents of the prior statement or testimony was actually true. In the portions of the record set out in section B. above, only in portions of No. 5 did the prosecutor ask the witness if the content of the prior statement she was reading was true or not. (See 28 RT 3363:9-11, 3363:24-26.)

Instead, the prosecutor asked leading questions and improperly read the prior statements and testimony to inform the jury of the factual contents of the question, particularly those reciting prior statements and testimony, rather than to refresh the witness' recollection. "Statements which have no independent basis of admissibility may not be introduced under the guise of refreshing a witness' memory." (*People v. Parks* (1971) 4 Cal.3d 955, 960-961; see *People v. Hamilton* (1963) 60 Cal.2d 105, 116 ["It is error to permit counsel, under the guise of refreshing the witness' memory, to get before the jury a former statement when the object is to discredit the verity of the testimony presently given."") If it is necessary to refresh the memory of a witness through the use of a prior recorded statement, that statement should not be read aloud before the jury. (*People v. Parks*, *supra*, 4 Cal.3d at p. 961.)

Federal law is consistent with California law on this point. It is error

where "under the pretext of refreshing witness' recollection the prior testimony was introduced as evidence." (*United States v. Socony-Vacuum Oil Co.* (1940) 310 U.S. 150, 234.) "[I]f a party can offer a previously given statement to substitute for a witness's testimony under the guise of 'refreshing recollection,' the whole adversary system of trial must be revised. *The evil of this practice hardly merits discussion. The evil is no less when an attorney can read the statement in the presence of the jury and thereby substitute his spoken work for the written document.*" (*Goings v. United States* (8th Cir. 1967) 377 F.2d 753, 760, emphasis in original.) While the older cases pre-date the liberalization of the use of prior consistent and inconsistent statements, the principle that the prosecutor may not circumvent the rules of evidence to put information before the jury through her own words remains vital today.

Neither the transcript of Zamora's preliminary hearing testimony nor the transcript of his interview with Castillo were introduced into evidence. The prosecutor's reading of the transcript and testimony was the first and last exposure of the jury to certain details in the contents of those two statements of Zamora. It is doubtful that the prosecutor could have elicited the same information from Zamora without leading him.

The record does not reflect the trial court's reason or reasons for overruling appellant's objection, although as to the fifth, continuing objection the court mentioned Evidence Code sections 770 and 791 regarding prior consistent and prior inconsistent statements. But whether the prior statement and testimony could have been properly offered and admitted as consistent or inconsistent statements is beside the point. The manner in which the prosecutor made her inquiries, i.e., simply reading the statements to introduce the content of those statements was improper, and

the court should have sustained appellant's objections.

Because the improper use of leading questions results in answers being suggested to the witness, the errors here are of constitutional dimension in that unreasonably suggestive procedures may result in violations of rights to due process and confrontation of witnesses. (See e.g., *Stovall v. Denno* (1967) 388 U.S. 293; *Neil v. Biggers* (1972) 409 U.S. 188; *People v. Shirley* (1982) 31 Cal.3d 18, 48, 52 and fns. 29 & 31.) A prosecutor's unprofessional behavior may infect the trial with such unfairness as to violate due process. (*Donnelly v. DeChristoforo* (1974) 416 U.S. 637; *People v. Hill* (1998) 17 Cal.4th 800, 845.)

D. The Error Was Prejudicial

Appellant's purported admissions were important to the prosecutor's guilt case. Of the four juveniles with appellant when the car crashed, Zamora gave the most damaging testimony regarding the admissions. Lorenzo Santana and Michael Hernandez claimed appellant said something about the car having a "murder rap" on it when the car crashed (28 RT 3394 [Santana]; 29 RT 3517 [Hernandez]), but neither recalled the kind of significant detail that Zamora claimed to remember.[5] David Camacho claimed appellant made a statement about "going to the county because he had the murder up in L.A." (26 RT 3056.) He also provided equivocal testimony about remembering appellant saying he used the gun from the drive-by in the Los Angeles homicide – he denied this at the preliminary hearing (26 RT 3089, 3218-3219; CT. Supp. III 225) and at trial (26 RT 3079) before finally agreeing that he was "pretty sure" that he had heard

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[5] Moreover, Santana contradicted himself on this point by testifying that appellant said nothing after the crash (28 RT 3449, 29 RT 3473) before reaffirming his original testimony (29 RT 3474).

appellant say this (26 RT 3088, 3089). Because these juvenile gang members were extremely unreliable witnesses, changed their statements and testimony repeatedly, and claimed faulty memory of the events (in several cases due to extraordinary consumption of alcohol that day and evening), reasonable jurors would regard their testimony with the gravest suspicion. (See generally, AOB, Statement of Facts, pp. 10-18.) By using improper leading questions, however, the prosecutor put before the jury information damaging to appellant and bolstered the credibility of an important but problematic prosecution witness. Whether assessed under the *Chapman*[6] beyond a reasonable doubt test or the *Watson*[7] reasonable probability test, the errors were prejudicial. Furthermore, the errors were prejudicial when considered in light of all the other errors in this case. Accordingly, the convictions and judgment of death must be reversed.

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[6] *Chapman v. California* (1967) 386 U.S. 18.

[7] *People v. Watson* (1956) 46 Cal.2d 818

25

THE PROSECUTOR COMMITTED *CALDWELL* ERROR BY TELLING THE PENALTY JURY THAT EXECUTION BY LETHAL INJECTION WOULD BE PAINLESS AND NON-INTRUSIVE

Besides the numerous acts of misconduct already alleged in appellant's opening brief, the prosecutor committed further misconduct during her penalty phase argument by encouraging the jury to consider the manner in which appellant might be executed, including her unsupported assertion that if appellant was executed by means of lethal injection his death would be "painless and non-intrusive." (51 RT 6288.) There was no evidence introduced at trial regarding the manner of executions generally, or lethal injection specifically. By arguing to the jury using inflammatory facts not in evidence, the prosecutor diminished the jury's sense of responsibility for imposing the death sentence in violation of the Eighth Amendment under *Caldwell v. Mississippi* (1985) 472 U.S. 320, and deprived appellant of due process and a fair and reliable penalty determination. (Cal. Const., art. I, §§ 7, 15, 16, 17; U.S. Const., 5th, 6th, 8th, 14th Amends.)

After appealing to the jury for vengeance (see Arguments 13 and 14) and informing the jurors that the victim's family wanted the jurors to impose the death penalty on appellant (Argument 2), the prosecutor told the jury the following:

> "Now, perhaps, and you may hear argument on this, the gas chamber does not lend itself to a truly dignified death. But I submit to you, it's far better th[a]n down in the dirt all alone with your brains oozing out, and what's more the defendant will have a chance to say goodbye and to make peace with his family and any friends and with his God if he has one. And if death is by lethal injection, we should all be

> able to end our lives in such a painless and non-intrusive manner."

(RT 6288.)

This Court has repeatedly ruled that evidence as to how the death penalty is carried out should not be admitted. (*People v. Thompson* (1988) 45 Cal.3d 86, 139; *People v. Harris* (1981) 28 Cal.3d 935, 962.) How an execution is conducted is irrelevant to aggravation, mitigation or sentence. (*People v. Grant* (1988) 45 Cal.3d 829, 860, discussing *People v. Harris*, *supra*, 28 Cal.3d at p. 962.) Accordingly, neither the prosecution nor the defense could have introduced evidence regarding the circumstances of a possible execution, including how painful or intrusive such an execution might be.

Despite the inadmissibility of such evidence, the prosecution made representations as to the benign nature of executions in California, including the bald assertion that execution by lethal injection would be painless and non-intrusive. As appellant noted frequently in his opening brief, it is misconduct for the prosecutor to refer to facts not in evidence in closing argument. (*People v. Hill* (1998) 17 Cal.4th 800, 827-828.) It is also misconduct for the prosecutor to imply the existence of evidence known to her but not to the jury. (*People v. Bolton* (1979) 23 Cal.3d 208, 212-213.) Referring to facts not in evidence during argument tends to make the prosecutor his own witness, offering unsworn testimony not subject to cross-examination in violation of the Sixth and Fourteenth Amendments. (*Ibid.*)

The prosecutor's argument also diminished the jurors' sense of responsibility for imposing the death penalty. A diminution of the jury's sense of responsibility undermines the Eighth Amendment's heightened

need for "the responsible and reliable exercise of sentencing discretion" in capital cases. (*Caldwell v. Mississippi*, *supra*, 472 U.S. at p. 329.)

The Eighth Circuit Court of Appeals case *Antwine v. Delo* (8th Cir. 1995) 54 F.3d 1357, is directly on point. In *Antwine* the prosecutor during closing argument at the penalty phase told the jury what purportedly would happen to the defendant in the gas chamber: "[H]e will be taken into a room. There will be witnesses that will come down. There will be a priest present. He will be asked if he has any last request. . . . He will be put in a chair. A pellet will be dropped into acid, and when he inhales that, he would be put to death instantaneously." (*Id.*, at p. 1361.)

The Court of Appeals found this argument improper, noting news accounts of the executions in California of Robert Alton Harris and David Mason:

> "The prosecutor's argument suggests that a condemned prisoner's death will be quick, painless, and humane: one quick breath, and the defendant will die at once. The reality, as we understand it, is or at least may be quite different. Eyewitness accounts of gas-chamber executions describe death throes lasting ten minutes or more; the inmate even remains conscious for the first few minutes after breathing the gas. Kevin Fagan, 'Mason Dies as He Said He Would,' *San Francisco Chronicle,* Aug. 25, 1993, at A1 (comparing the 14 minutes it took for David Mason to die to the 10 minutes it took for Robert Alton Harris, and noting that Mason was unconscious after the first three minutes); Kevin Leary, 'Eyewitness to Execution,' *Ottawa Citizen*, April 22, 1992, at A2 (noting that Harris appeared to lose consciousness one-and-one-half minutes after breathing the gas); John Hiscock, 'Killer Dies After Night of Reprieves,' *The Daily Telegraph,* April 22, 1992, at 1 (reporting that witnesses gave varying estimates of two to seven minutes for the time it took Robert

> Alton Harris to lose consciousness). Such a death is hardly 'instantaneous.'"

(*Id.*, at p. 1362.)

Subsequent litigation in California produced factual findings that corroborated the anecdotal reports cited in *Antwine*. In *Fierro v. Gomez* (9th Cir 1996) 77 F.3d 301, judgment vacated by *Gomez v. Fierro* (1996) 519 U.S. 918, the Ninth Circuit found execution by lethal gas unconstitutional based on factual finding from the district court, which it summarized as follows:

> "(1) 'inmates are likely to be conscious for anywhere from fifteen seconds to one minute from the time that the gas strikes their face,' (2) 'there is a substantial risk that consciousness may persist for up to several minutes,' (3) 'during this period of consciousness, the condemned inmate is likely to suffer intense physical pain,' and (4) the cause of death by cyanide gas, cellular suffocation, was a 'substantially similar experience to asphyxiation. . . . "

(*Fierro v. Gomez*, *supra*, 77 F.3d at p. 308.)

The point relevant to the present argument is not that the prosecutor in *Antwine* was factually wrong, but that he was essentially testifying in his argument to facts which could have been credibly contested if subjected to the adversary process. There has been an ongoing continuing controversy over whether lethal injection protocols may result in a prolonged and painful death rather than one which is "painless and non-intrusive."

Execution by lethal injection is generally accomplished by using a three-drug "cocktail": an ultra-short-term anesthesia such as sodium pentathol to induce unconsciousness, an paralytic agent such as pancuronium bromide to stop breathing, and potassium chloride to cause cardiac arrest. (See e.g., *California First Amendment Coalition v.*

Woodford (9th Cir. 2002) 299 F.3d 868, 871.) California's three drug sequence was recently described as five grams of sodium thiopental to induce unconsciousness; 50 or 100 milligrams of pancuronium bromide to induce paralysis; and 50 or 100 milliequivalents of potassium chloride to induce cardiac arrest. (*Morales v. Hickman* (N.D. Cal. 2006) __ F.Supp.2d__, 2006 WL 335427, 1.)

Attacks on lethal injection generally focus on the possibility that the anesthetic will be improperly or ineffectively administered, causing the inmate to be partially or completely conscious while he suffers asphyxiation and cardiac arrest while in a state of paralysis. (See generally *Chaney v. Heckler* (D.C. Cir. 1983) 718 F.2d 1174, 1191 [petitioners presented substantial evidence that errors in drug dosage can lead to paralysis but not immediate death, making the condemned the witness of his own asphyxiation], overruled by *Heckler v. Chaney* (1985) 470 U.S. 821; *LaGrand v. Lewis* (D.Ariz.1995) 883 F.Supp. 469; *Sims v. State* (Fla. 2000) 754 So.2d 657.) In *Beardslee v. Woodford* (9th Cir. 2005) 395 F.3d 1064, 1075, the Ninth Circuit noted that California's execution logs of four prisoners executed by lethal injection "contain indications that there may have been problems associated with the administration of the chemicals that may have resulted in the prisoners being conscious during portions of the executions." The district court in *Morales v. Hickman*, *supra*, __ F.Supp.2d __ , WL 335427, 6, with additional evidence from executions subsequent to *Beardslee*, found that inmates' breathing may not have stopped as expected in at least six of thirteen executions by lethal injection in California, raising "at least some doubt as to whether the protocol actually is functioning as intended. . . ." (*Ibid.*)

For purposes of this argument, appellant does not need to show that

lethal injection has been proven to cause pain and suffering. The question is – and was at the time of appellant's trial – an open one. Accordingly, the prosecutor did not have license to tell the jury that execution by lethal injection was painless and non-intrusive.[8]

Defense counsel did not object to the prosecutor's argument. No objection is required to preserve an issue for appeal when an admonition would not have cured the harm caused by the misconduct. (*People v. Price* (1991) 1 Cal.4th 324, 447.) In both *Antwine* and *Caldwell*, relief was granted despite the absence of an objection to the prosecutorial misconduct which resulted in a diminution of the jury's sense of responsibility for a death verdict. An admonition would not have cured the harm in this case. Furthermore, this was only one of numerous incidents of misconduct by the prosecutor. (See, e.g., AOB Arguments 2, 5, 6, 7, 8, 11, 12, 13, 14, 15, 16.) This Court has excused appellant from the requirement of objecting to each improper act where the misconduct was pervasive. (*People v. Hill*, *supra*, 17 Cal.4th at p. 821.) Finally, the Court may reach the merits of a claim where, as here, "plain error" has been committed at the penalty phase. (*People v. Wash* (1993) 6 Cal.4th 215, 276-277 (conc. & dis. opn. of Mosk, J.).)

To the extent an objection was necessary to preserve the issue for appeal, defense counsel provided constitutionally ineffective assistance of counsel under both the state and federal constitutions for failing to make

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[8] The prosecutor's remark regarding death by lethal gas was also improper, although arguably less inflammatory. Her suggestion that death by lethal gas is not undignified and would be better than the death suffered by the victim was not supported by the evidence, and appellant submits that it is simply untrue. (See *Fierro v. Gomez*, *supra*, 77 F.3d at pp. 306-309.)

such an objection. (*Strickland v. Washington* (1984) 466 U.S. 668; *People v. Pope* (1979) 23 Cal.3d 412.) There could be no tactical reason for counsel to allow the prosecutor to persuade the jury that appellant's execution by lethal injection would be painless and non-intrusive, particularly when there was no evidentiary support for that proposition and when the defense was legally precluded from offering evidence to the contrary. (*People v. Thompson*, *supra*, 45 Cal.3d at p. 139.)

The harm that was inflicted on appellant's penalty case was substantial. As the Eighth Circuit explained in *Antwine*:

> "So where is the harm in this vision of a quick and easy death? The danger is that the jurors, faced with a very difficult and uncomfortable choice, will minimize the burden of sentencing someone to death by comforting themselves with the thought that the death would at least be instantaneous, and therefore painless and easy. The prosecutor's argument diminished the jurors' sense of responsibility for imposing the death penalty.
>
> "This diminution of the jury's sense of responsibility undermines the Eighth Amendment's heightened need for 'the responsible and reliable exercise of sentencing discretion' in capital cases. The assurance of a quick and easy death -- like the assurance of appellate review that was denounced in *Caldwell* -- 'is no valid basis for a jury to return a sentence if otherwise it might not. It is simply a factor that in itself is wholly irrelevant to the determination of the appropriate sentence.'"

(*Antwine v. Delo*, *supra*, 54 F.3d at p. 1362, internal citations omitted.)

Just as the Eighth Circuit reversed Antwine's death penalty based on *Caldwell* error, so should this Court reverse appellant's death judgment. "A prosecutor's closing argument is an especially critical period of trial. Since it comes from an official representative of the People, it carries great weight and must therefore be reasonably objective. (*People v. Pitts* (1990) 223

Cal.App.3d 606, 694.) By diminishing the jury's sense of responsibility for the sentencing decision through her improper argument, the prosecutor denied appellant the right to a reliable penalty determination, requiring per se reversal of his death sentence under the Eighth Amendment. (See e.g., *Penry v. Lynaugh* (1989) 492 U.S. 302, 328; *Mills v. Maryland* (1988) 486 U.S. 367, 384; *Eddings v. Oklahoma* (1982) 455 U.S. 104, 113-117; *Lockett v. Ohio* (1978) 438 U.S. 586, 608-609.) Moreover, under any standard of review, the penalty judgment must be reversed. The case was a close one and the error cannot be considered harmless.[9] There is a reasonable possibility (*People v. Brown* (1988) 46 Cal.3d 432, 446-448), that absent the prosecutor's improper plea to the passions and prejudices of the jury in her final remarks to them, the penalty verdict would have been different. Stated otherwise, the prosecution cannot establish beyond a reasonable doubt that the error did not contribute to the verdict. (*Chapman v. California* (1967) 386 U.S. 18, 24; *People v. Ashmus* (1991) 54 Cal.3d 932, 984.) The death judgment must therefore be reversed.

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[9] The prejudice resulting from prosecutorial misconduct at the penalty phase is discussed repeatedly in the opening brief (see AOB, pp. 178-179, 184-185, 192, 205) and need not be repeated here.

CONCLUSION

For all of the reasons stated in appellant's Opening Brief, his Reply Brief, and this Supplemental Brief, appellant's convictions and death judgment must be reversed.

Respectfully submitted,

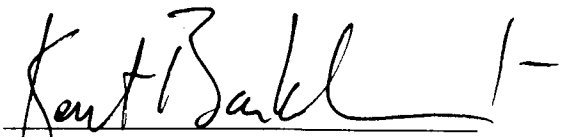
MICHAEL J. HERSEK
State Public Defender

KENT BARKHURST
Deputy State Public Defender

Attorneys for Appellant

Certificate of Counsel (Cal. Rules of Court, rule 36(b)(2))

I, Kent Barkhurst, am the Deputy State Public Defender assigned to represent appellant Scott Collins in this automatic appeal. I directed a member of our staff to conduct a word count of this brief using our office's computer software. On the basis of that computer-generated word count, I certify that this brief is 6,054 words in length.



KENT BARKHURST
Attorney for Appellant

DECLARATION OF SERVICE

Re: *People v. Collins* No.: S058537

I, Jeffrey McPherson, declare that I am over 18 years of age, and not a party to the within cause; that my business address is 221 Main Street, 10th Floor, San Francisco, California, 94105; that I served a true copy of the attached:

APPELLANT'S SUPPLEMENTAL OPENING BRIEF

on each of the following, by placing same in an envelope addressed respectively as follows:

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Mr. Scott F. Collins
(Appellant)

Each said envelope was then, on March 20, 2006, sealed and deposited in the United States mail at San Francisco, California, the county in which I am employed, with the postage thereon fully prepaid.

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

Executed on March 20, 2006, at San Francisco, California.

DECLARANT

ORIGINAL

DECLARATION OF SERVICE

Re: *People v. Collins* No.: S058537

I, Jeffrey McPherson, declare that I am over 18 years of age, and not a party to the within cause; that my business address is 221 Main Street, 10th Floor, San Francisco, California, 94105; that I served a true copy of the attached:

APPELLANT'S SUPPLEMENTAL OPENING BRIEF

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Said envelope was then, on March 20, 2006, sealed and deposited in the United States mail at San Francisco, California, the county in which I am employed, with the postage thereon fully prepaid.

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

Executed on March 20, 2006, at San Francisco, California.

DECLARANT