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 REPLY 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

MICHAEL J. HERSEK
State Public Defender

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DEATH PENALTY

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APPELLANT'S SUPPLEMENTAL REPLY BRIEF

In this brief, appellant replies to arguments made in the Supplemental Respondent's Brief (SRB) which responded to the two arguments made in Appellant's Supplemental Opening Brief (ASOB).

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THERE WAS NO VALID REASON FOR OVERRULING APPELLANT'S OBJECTIONS TO THE PROSECUTOR ASKING SERGIO ZAMORA LEADING QUESTIONS

In Appellant's Supplemental Opening Brief, appellant pointed out numerous occasions when the trial court denied objections to the use of leading questions by the prosecutor during the examination of her own witness, Sergio Zamora. (ASOB 2-16.) In the Supplemental Respondent's Brief, respondent does not claim the questions at issue are not leading. Rather, respondent attempts to justify the rulings as the proper exercise of the court's discretion to allow leading questions in "special circumstances" under Evidence Code section 767, subdivision (a). (SRB 13.) Appellant contends no such special circumstances existed to justify the court's rulings.

Respondent first claims that the prosecutor's leading questions to Zamora on direct examination (see ASOB 5-6), regarding what Zamora had told the prosecutor and Detective Castillo in an interview shortly before his testimony, properly refreshed the witness's recollection. (SRB 13-14.) Appellant disagrees. Rather, the prosecutor refreshed Zamora's recollection and then was not satisfied by the answer she received. After asking about the conversation and receiving Zamora's answer that he forgot what he said, the prosecutor asked, "Do you remember telling us anything about what the defendant told you about the person in Los Angeles that he killed?" This apparently refreshed Zamora's recollection and he answered, "He just killed someone up in L.A." (28 RT 3322.) That was not the answer the prosecutor sought, however, so she pressed for additional details, asking "What else?" Appellant objected that this assumed facts not in evidence – i.e., that there was in fact something else. The court overruled that objection. But instead of re-asking what else the witness remembered, as

the court had permitted, the prosecutor simply told the witness, by way of leading questions, what else she was seeking. These are the two questions to which appellant objected as leading. And those questions were not in response to Zamora indicating he could not remember – he had already said that he remembered appellant saying he had killed someone in Los Angeles.

Respondent alternatively claims the leading questions on direct examination were proper to elicit prior inconsistent statements. Even assuming the prior statements could be have been introduced as prior inconsistent statements, their admissibility did not give the prosecutor license to introduce them through the leading questions. Respondent's reliance on *People v. Ervin* (2000) 22 Cal.4th 48, 84-85 is misplaced. In that case the prosecutor properly introduced the transcript of a preliminary hearing to establish the inconsistency. (*Ibid.*)

Next, respondent contends that the trial court properly overruled appellant's objections to the prosecutor's leading questions on redirect examination (see ASOB 6-11). Respondent's main justification for the rulings is that the prosecutor was seeking to introduce Zamora's prior consistent and inconsistent statements. (SRB 15-16.) Evidence Code section 767 does not specifically authorize the use of leading questions for this purpose, and respondent does not explain how the prosecutor's questions here fall under the "special circumstances" exception of section 767. The fact that a particular piece of evidence is admissible does not mean a party can use leading questions to admit it. If there were legitimate means to introduce some or all or the evidence in question as respondent claims, respondent should explain why the prosecutor should have been permitted to use illegitimate means that prejudiced appellant.

Respondent also claims that any leading questions went only to

preliminary matters. (SRB 15.) This is not true. As shown in the opening brief, the prosecutor asked leading questions that contained information she wanted before the jury. Respondent also argues that leading questions were proper because there was a reasonable basis for concluding Zamora was being intentionally evasive. (SRB 14.) Even assuming that it's true that Zamora was being evasive, appellant's objections were not interposed at times when any such evasiveness was in evidence.

Respondent also suggests that the use of leading questions was harmless because the same evidence would have come in regardless of any impropriety. (SRB 16-17.) This ignores appellant's contention (see e.g., ASOB 3-4) that the prosecutor used leading questions in part keep Zamora from damaging the prosecution case. Zamora had, for example, already volunteered that he lied during his preliminary hearing testimony. (28 RT 3319.) The prosecutor used leading questions to minimize the chance that Zamora would disavow other parts of his statements or testimony or inflict further damage to his own credibility – not only his truthfulness but his ability to recall events as well. This is not a justifiable use of leading questions.

The prejudice resulting from the court's erroneous rulings is addressed in appellant's supplemental opening brief and need to be reiterated here. For all the foregoing reasons, and those in the supplemental brief, the convictions and judgment of death must be reversed.

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THE PROSECUTOR'S ARGUMENT TO THE JURY THAT LETHAL INJECTION IS A PAINLESS WAS MISCONDUCT AND CONSTITUTED CALDWELL ERROR

Appellant showed in his supplemental opening brief how the prosecutor committed misconduct by encouraging the jury to consider the manner in which appellant would be executed if he received the death penalty, and how she relied on evidence outside the record in doing so. The prosecutor told the jury that if appellant were to be executed by lethal injection "we should all be able to end our lives in such a painless and non-intrusive manner." (51RT 6288.) There was no evidence introduced at trial regarding the manner of execution in California and this Court has held that such evidence should not be admitted. (See ASOB 17-24; *People v. Thompson* (1988) 45 Cal.3d 86, 139.)

Respondent makes no attempt to contend that the prosecutor's argument was proper, and thereby tacitly concedes appellant's claim of misconduct. Instead, respondent asserts that what the prosecutor said did not amount to error under *Caldwell v. Mississippi* (1985) 472 U.S. 320 as argued by appellant. (SRB 20.) In *Caldwell*, the prosecutor told jurors that if they imposed the death sentence their decision would be automatically reviewed by an appellate court. (*Caldwell v. Mississippi*, *supra*, 472 U.S. at pp. 325-326.) The plurality held that it was constitutionally impermissible to rest a death sentence on a determination made by a sentencer that who had been led to believe that the responsibility for determining the appropriateness of the defendant's death sentence lay elsewhere. (*Id.* at pp. 328-329.) Justice O'Connor, whose concurrence supplied the fifth vote, stated that "the prosecutor's remarks were impermissible because they were inaccurate and misleading in a manner that diminished the jury's sense of

responsibility." (*Id.*, at. p. 342.)

In *Antwine v. Delo* (8th Cir. 1995) 54 F.3d 1357 the Eighth Circuit correctly applied *Caldwell* to a capital case in which the prosecutor attempted to comfort the jurors with the misleading and unsupported argument that upon execution defendant's death would be instantaneous. The Court of Appeals held that the prosecutor's "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.'" (*Antwine v. Delo*, *supra*, 54 F.3d at p. 1362.) Respondent disagrees with the *Antwine* court's application of *Caldwell* and contends that appellant's jury would still understand and appreciate the awesome responsibility of making the life or death decision despite the prosecutor's argument. (SRB 24.) Respondent ignores the fact that people are deeply affected by the manner of human death, particularly pain and suffering in death. Jurors charged with the responsibility of choosing to impose a life or death sentence would be likely to feel the gravity of that responsibility wax or wane depending on how much suffering they perceived their verdict might inflict. *Antwine* was a proper application of *Caldwell.*

Although decisions of the federal Courts of Appeals are not binding authority on this Court, they are entitled to great weight. (*People v. Burton* (1989) 48 Cal.3d 843, 854, fn. 2; *People v. Bradley* (1969) 1 Cal.3d 80, 85.) The analysis in *Antwine* was correct and should be followed by this Court.

Respondent attempts to distinguish *Antwine* as involving a more detailed description by the prosecutor of the manner of execution. But the description is *Antwine* was hardly detailed, and what detail existed was not the source of the error – the error was that the prosecutor told the jury the unproven fact that defendant's death would be instantaneous. (See *Antwine*

v. Delo, *supra*, 54 F.3d at p. 1361-1362.) In fact, the prosecutor's statement in the present case is more damaging in that it expressly stated what was only implicit in *Antwine* – that the execution would be painless and non-intrusive. Furthermore, the prosecutor in the present case also told the jury how appellant would have the opportunity "to say goodbye and to make peace with his family and any friends and with his God if he has one." (51 RT 6288.) The *Caldwell* analysis in *Antwine* is therefore applicable to this case.

Furthermore, even if there was no *Caldwell* error, the prosecutor's argument was still misconduct which requires reversal as a violation of appellant's state and federal due process rights. There is a reasonable possibility that but for the error the jury's verdict would have been more favorable to appellant. (*People v. Brown* (1988) 46 Cal.3d 432, 446-448 [state law error].) The prosecution cannot show beyond a reasonable doubt that the error did not affect the verdict. (*Chapman v. California* (1967) 386 U.S. 18, 24 [federal constitutional error].) Even if the error was not of constitutional dimensions, the prosecutor's argument rendered the penalty phase fundamentally unfair. (*Donnelly v. DeChristoforo* (1974) 416 U.S. 637, 642-643.)

Finally, respondent attempts to justify the prosecutor's misconduct by characterizing her argument simply as "an attempt to highlight the circumstances of the current crime." (SRB 24.) In light of the prosecutor's misconduct throughout this case (see AOB Arguments 2, 4, 5, 6, 7, 11, 12, 13, 14, 15) appellant questions this characterization. But even assuming a gloss of innocent intentions does not change the fact that the prosecutor's argument relied on evidence outside the record – evidence which would have been inadmissible even if properly offered – which had an

unconstitutionally prejudicial impact on the jury. The death judgment must be reversed.

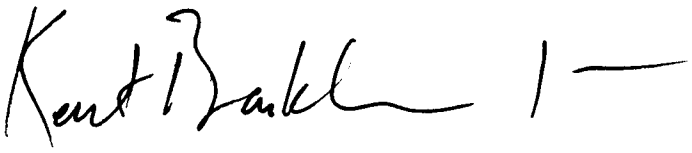
CONCLUSION

For all the reasons stated above and in his opening brief, reply brief and supplemental opening brief, the judgment of conviction and sentence of death in this case should be reversed.

Dated: August 24, 2006

Respectfully Submitted,

MICHAEL J. HERSEK
State Public Defender



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(CAL. RULES OF COURT, RULE 36(B)(2))

I, Kent Barkhurst, am the Supervising Deputy State Public Defender assigned to represent appellant Scott Forrest 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 1, 798 words in length.

Dated: August 24, 2006

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 REPLY BRIEF

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Each said envelope was then, on August 24, 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 August 24, 2006, at San Francisco, California.

DECLARANT