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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.**	**S058537** **CAPITAL CASE**

Los Angeles County Superior Court No. LA009810
The Honorable Leon S. Kaplan, Judge

SUPPLEMENTAL RESPONDENT'S BRIEF

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DEATH PENALTY

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XXIV.

THE TRIAL COURT PROPERLY OVERRULED OBJECTIONS THAT THE PROSECUTOR ASKED LEADING QUESTIONS OF SERGIO ZAMORA

Appellant contends the trial court erred in permitting the prosecutor to examine Sergio Zamora using improper leading questions. (Supp. AOB 2-16.) He further argues that because the use of leading questions resulted in answers being suggested to the witness, the errors violated his rights to due process and to confront witnesses against him. (Supp. AOB 15.) To the extent the trial court allowed the use of leading questions, there was no abuse of discretion. Furthermore, there was no violation of appellant's right to due process or to confront witnesses.

A. Relevant Proceedings Below

Sergio Zamora was interviewed by Kern County Deputy Sheriff David Lostaunau shortly after his arrest on January 24, 1992. (24RT 2832.) Zamora was subsequently interviewed by Los Angeles Police Detective Jesse Castillo

on January 25, 1992 and again on January 30, 1992.[1/] (See 28RT 3280.) Before Zamora testified at trial, there was a lengthy discussion, initiated by the prosecutor, about avoiding prejudice to appellant based on Zamora's references to appellant's gang affiliations and recent incarceration during his two interviews with Detective Castillo. The prosecutor stated her willingness to avoid certain subject matters but also cautioned that the juvenile witnesses from Bakersfield were somewhat difficult to control due to their level of comprehension. (28RT 3280-3293.)

Defense counsel stated his intent to focus his cross-examination on Zamora's inability to recall the events of the night in question, based on Zamora's previous statements to the police that he had a limited recollection. Defense counsel further explained his intent to show that Zamora's testimony was based on information provided to him by others or as a result of Zamora's "fertile imagination." (28RT 3287.) It was ultimately agreed by the parties and the court that Zamora could be asked about his initial statements to the police that appellant said his "homeboys" stole the car and murdered the victim, although there would be no reference to any specific gang appellant was affiliated with. (28RT 3290-3294.)

Zamora testified on direct examination that when he was at the gathering at Dagoberto Amaya's house, he saw something being passed around in a handkerchief, which he later learned was a gun. (28RT 3305-3306.) That evening, Zamora got into a car with appellant and several other young men. (28RT 3309.) They drove into the Colonias neighborhood, and someone threw a brick at their car. They left and drove to a field, where appellant test-fired a

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1. The interviews conducted by Detective Castillo were tape-recorded, and transcripts were prepared. The tape recordings and transcripts were never introduced as exhibits at trial. Transcripts of these interviews were attached as exhibits to appellant's petition for writ of habeas corpus filed in this Court in case number S136461. (See Pet., Exhs. G, H.)

gun, first placing a nail in the bottom of the gun.[2/] They drove back to the Colonias. They saw someone in the street, and appellant shot the gun twice. They drove away, and shortly thereafter a police car was chasing them. (28RT 3310-3311.)

While the police car was chasing them, appellant threw the gun and some bullets out the window. Appellant then retrieved some credit cards and a black watch and threw them out the window as well. (28RT 3312.) The car crashed into a pole. (28RT 3311, 3314.) Appellant passed cigarettes out to everyone inside the car and said it was the last time they would see each other. Either during the pursuit or after the crash, appellant said that he had killed someone in the car. Appellant said that he had kidnapped a man, taken him to a bank to get money, and then shot him. Zamora stated that appellant had not told him what part of the victim's body had been shot. (28RT 3315.)

The prosecutor then asked Zamora whether he had testified at the preliminary hearing that appellant stated he had shot the victim in the head. Zamora responded, "I was lying. I can't remember." Zamora also claimed that he could not remember ever making such a statement to the detectives. (28RT 3317.) The following exchange ensued:

Q Okay. When you testified that he told you that he shot the person in the head, were you lying?

A Yes, I couldn't remember that. He just said he had shot someone up in L.A., he had killed someone.

Q When did he tell you he had shot someone in L.A.?

A In the car.

Q Was that right before you crashed or just when you crashed?

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2. Zamora described the gun as a .38-caliber revolver. The nail, which helped make the gun work, was placed in a small hole underneath the hole where the bullet came out. (28RT 3313.)

A Before we crashed.

Q Okay. Do you remember we were asking you the questions whether you told the police about the shooting in the head and you said no, you hadn't and then we asked you why you hadn't and you said you were afraid you would be involved in it?

A Yes.

Q Was that true or a lie there?

A That's true.

Q So you were afraid you would be involved in it? You said that; is that correct?

A Yes, ma'am.

Q Okay. In fact, Mr. Zamora, you never told anyone about [appellant] telling you he shot somebody in the head until the day you came to testify at the preliminary hearing, right?

A Yes, ma'am.

Q That's the first time you told Detective Castillo and me about that, right?

A Yes, ma'am.

Q Were you lying to us?

A I did not want to come up. He was going to be released and go do something to me. I was afraid of that happening.

Q You are telling us you did not say that before because you were afraid of him?

A Yes, ma'am.

Q Are you still afraid of him?

A No.

Q But you did tell us that day, correct?

A Yes, ma'am.

Q Were you lying to us?

A Yes. I didn't understand.

Q What don't you understand, Sergio?

A What you told me a little while ago like was I afraid of him, yes, I was afraid of him.

Q Afraid of whom?

A Rascal [appellant].

Q Why were you afraid of him?

A Because he would get released or something or try to put the rap on this and you know like blame it on us and like go out free.

Q Okay. Well, is that the reason when you first talked to the police officers you lied to them?

A Yes, ma'am.

(28RT 3318-3319.)

Zamora then testified that he originally lied to the police. He acknowledged telling them that a "homeboy" had committed the killing. Zamora explained that he lied because he was afraid of appellant and afraid because of his own involvement in the driveby shooting. (28RT 3320-3321.) The prosecutor then asked Zamora the following series of questions:

Q Now, do you remember anything else that Rascal [appellant] told you about the killing of this man?

A No.

Q Okay. Did you come here to court on Monday of this week? Were you downstairs in my office?

A Not Monday.

Q This week?

A Tuesday.

Q Tuesday. Do you remember coming down here Tuesday of this week?

A Yes, ma'am.

Q Do you remember being in my office with Detective Castillo?

A Yes, ma'am.

Q Do you remember saying you had forgotten to tell us something because you were scared and now you want to tell us something else?

[DEFENSE COUNSEL]: Objection, leading.

THE COURT: Overruled.

[ZAMORA]: Yes, ma'am.

Q [BY THE PROSECUTOR]: Do you remember what that was?

A I forgot.

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?

[DEFENSE COUNSEL]: Assumes facts not in evidence, objection.

THE COURT: Overruled.

Q [BY THE PROSECUTOR]: Did you tell us that he told you the guy was going to get something to eat, was on his way to lunch?

[DEFENSE COUNSEL]: Objection, leading.

THE COURT: The witness may answer.

Q [BY THE PROSECUTOR]: Do you remember telling us that?

A Yes, ma'am.

Q Do you remember telling us that he then grabbed him and put him in the car and took him to the bank and got 100 or 200 dollars?

[DEFENSE COUNSEL]: Objection, leading.

A Yes, ma'am.

THE COURT: The answer may remain.

(28RT 3321-3323.)

On cross-examination, defense counsel called into question Zamora's ability to recall the events of the night in question. Defense counsel asked Zamora whether anybody had been telling him what to say (28RT 3325), whether he had discussed his testimony with the prosecutor and the investigating officer (28RT 3326), whether he had been talking to the other witnesses from Bakersfield during the trial (28RT 3326-3327), how much alcohol he had consumed on the day in question (28RT 3331-3333, 3336-3337, 3345-3346), and whether a head injury he sustained in the car crash impaired his memory (28RT 3342-3343, 3349). Defense counsel asked Zamora whether it was true that at one point he told the police that appellant had not said anything about killing anyone. (28RT 3340.) Defense counsel also asked Zamora whether he was merely testifying based on what was written in the police reports, as opposed to his own recollection. (28RT 3347.)

On redirect, the prosecutor asked Zamora about some of the statements he had made to Detective Castillo. For example, the prosecutor asked Zamora the following series of questions:

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 [appellant]. [¶] Do you remember that?

A 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.

[DEFENSE COUNSEL]: Objection. Leading.

THE COURT: Overruled.

Q [PROSECUTOR]: And then the detective said to you, "And?" [¶] And you said, "The car."

A The car to get down there.

Q The detective said to you, "The car? Where did he kill this man?" [¶] And you said, "I don't know. I wasn't in the car when he killed him." [¶] Do you remember that?

A Yes.

Q And do you remember the detective then said to you, "I know dummy. I know that But where did he tell you he killed this man?" [¶] Do you remember that?

A Yes.

Q And then you said, "In the car when we were driving through the Colonias, when they shot at them Colonias boys." [¶] Do you remember that?

A Yes.

Q And do you remember the detective then said to you, "Okay. Why didn't you tell me this 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.

[DEFENSE COUNSEL]: Objection. Leading.

THE COURT: Overruled.

(28RT 3358-3360.)

The prosecutor later returned to the subject of whether appellant had told Zamora he had shot a man in the head. In light of Zamora's equivocal testimony on direct examination about whether he had indeed heard appellant make such a statement,[3/] the prosecutor reminded Zamora of his testimony on direct examination and the fact that he was under oath. (28RT 3360-3361.) She then asked the following series of questions:

Q Did you ever hear Rascal [appellant] say he shot the man in the head?

A Yes.

Q Where were you when he said that, if you know?

A I can't remember if I was in the car or down at Drifter's.

Q But you remember him saying that?

A Yes.

Q Is that something he said to you or something you heard him telling somebody else?

A Something he said to me.

Q And in fact, directing court and counsel to page 300 and 301 of the preliminary hearing transcript. [¶] Do you remember that the other lawyer at the preliminary hearing - - well, let me show you this testimony. See if you remember it first. [¶] May I approach, your honor?

THE COURT: Yes.

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3. See 28RT 3315 [Zamora denying that appellant had told him what part of the victim's body he had shot], 28RT 3317 [Zamora claiming he lied at the preliminary hearing when he testified that appellant said he shot the victim in the head; Zamora alternately claiming he did not remember whether he gave such testimony at the preliminary hearing or whether he had ever told the detectives that appellant made such a statement].

Q [PROSECUTOR]: I want you to start reading from line 4 on page 300 and go all the way to line 13 on page 301. Okay? Got that?

A (Witness complying.)

Q Have you had a chance to read that?

A Yes.

Q Do you remember a little bit better now about that?

A Yes.

Q All right. Now, do you remember that the other lawyer asked you the following questions: [¶] "From January until today, and that's the day you testified, did you tell anybody that [appellant] had said, 'I shot somebody in the head'?"

[DEFENSE COUNSEL]: Objection.

[ZAMORA]: No.

Q [PROSECUTOR]: Wait a minute.

THE COURT: Just a moment.

[DEFENSE COUNSEL]: I think I interrupted a question. I'm sorry. Could the court note a continuing objection to these questions please.

THE COURT: Noted.

[DEFENSE COUNSEL]: On the basis - -

THE COURT: 791 and 770, I believe, are both applicable of the Evidence Code.

(28RT 3361-3362.)

The prosecutor then read a number of additional questions and answers from Zamora's preliminary hearing testimony:

Q [PROSECUTOR]: 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.

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 he said, "Yes." [¶] 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 he said, "Yes." [¶] 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

[appellant]." [¶] 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 that 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 [appellant] 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.

(28RT 3363-3365.)

B. To The Extent The Trial Court Allowed The Prosecutor To Ask Zamora Leading Questions, There Was No Abuse Of Discretion

"A 'leading question' is one that suggests to the witness the answer that the examining party desires." (Evid. Code, § 764.) Leading questions are generally not permitted on direct examination. (Evid. Code, § 767(a)(1).) There are exceptions, however, such as: (1) where asking questions on preliminary matters (*Bruce v. Western Pipe & Steel Co.* (1917) 177 Cal. 25, 27; (2) where necessary to obtain relevant evidence from a child witness (Evid. Code, § 767(b)) or a hostile witness (*People v. Spain* (1984) 154 Cal.App.3d 845, 852-853); or (3) "under [other] special circumstances where the interests of justice otherwise require" (Evid. Code, § 767(a)), such as where there is little danger of improper suggestion.

The trial court has broad discretion in determining whether special circumstances justify leading questions. (*People v. Williams* (1997) 16 Cal.4th 635, 672.) A question calling for a "yes" or "no" answer is not necessarily leading; it is a leading question *only if*, under the circumstances, it is *obvious* that the examiner is suggesting that the witness answer the question one way. (*Ibid.*) Where a witness cannot remember a matter without some suggestion, leading questions may be permitted to the extent necessary to stimulate or revive his or her recollection. (*Id.* at pp. 672-673 [leading questions properly used to refresh prosecution witness' memory about statement by one of alleged murderers regarding intention to kill all occupants of house].)

Here, appellant first challenges questions the prosecutor asked on direct examination, including when she asked whether Zamora remembered telling her and Detective Castillo that appellant told him "the guy was going to get something to eat, was on his way to lunch?" and "Do you remember telling us that he then grabbed him and put him in the car and took him to the bank and got 100 or 200 dollars?" (Supp. AOB 5-6, citing 28RT 3322-3323.) The trial

court did not abuse its discretion in overruling defense counsel's objections, since the prosecutor was attempting to refresh Zamora's recollection. (See *People v. Williams*, *supra*, 16 Cal.4th at p. 672.)

Zamora claimed that he did not remember anything else appellant had told him about killing the victim. (28RT 3321.) The prosecutor then began asking Zamora about a meeting in her office earlier that week in an attempt to refresh his memory. Zamora acknowledged meeting with the prosecutor and Detective Castillo and recalled saying he had forgotten to tell them something before because he was scared, but that he wanted to tell them at that time. The prosecutor then asked Zamora what it was that he had told them. When Zamora replied, "I forgot," the prosecutor continued her attempt to refresh his recollection, by asking whether he told them anything about what appellant had told him about the person in Los Angeles that he killed. Zamora's response was, "He just killed someone up in L.A." (28RT 3322.) It was at that point that the prosecutor asked the two questions appellant now challenges. However, since the prosecutor was trying to refresh Zamora's recollection, the questions were proper.

Furthermore, because there was a reasonable basis for concluding that Zamora was being intentionally evasive in claiming he had no memory of what additional details appellant had told him about the murder, and no memory of telling the police that appellant told him he shot the victim in the head, the statements Zamora made to the prosecutor and Detective Castillo were admissible as prior inconsistent statements. (See Evid. Code, §§ 770, 1235; *People v. Ervin* (2000) 22 Cal.4th 48, 84-85 [where record supports trial court's implied finding that witness is being intentionally evasive in claiming lack of memory, proper to admit prior inconsistent statement]; see also 33RT 4059-4061 [trial court noting that there was a reasonable basis for concluding Zamora was dishonest in his claimed lack of memory].)

Appellant next complains about leading questions the prosecutor asked Zamora on redirect. (Supp. AOB 6-11.) Defense counsel challenged Zamora's credibility and suggested that his trial testimony contained recent fabrications. (See 28RT 3287, 3325-3327, 3331-3333, 3336-3337, 3340, 3342-3343, 3345-3347, 3349.) Accordingly, Zamora's statements to the police and his preliminary hearing testimony were admissible as prior consistent statements under Evidence Code sections 791 and 1236. (See *People v. Noguera* (1992) 4 Cal.4th 599, 629-630.) Furthermore, to the extent Zamora denied appellant telling him that he had shot the victim in the head (see 28RT 3315-3317), Zamora's prior testimony to the contrary at the preliminary hearing was admissible as a prior inconsistent statement under Evidence Code section 770. Appellant does not argue that the prior statements failed to meet the requirements of Evidence Code sections 770 or 791. Rather, his sole complaint goes to the manner in which evidence of the prior statements and preliminary hearing testimony were admitted, i.e., via leading questions. This contention should be rejected, as the trial court did not abuse its discretion in overruling defense counsel's objections.

To the extent the prosecutor asked leading questions, they went to preliminary matters, i.e., to lay a foundation for introducing prior consistent and prior inconsistent statements. While appellant notes that the neither the transcript of Zamora's preliminary hearing testimony nor the transcript of his tape-recorded police interviews were introduced into evidence (Supp. AOB 14), he fails to provide any authority for his implicit argument that this was the only way of introducing the evidence to the jury. To the contrary, there is no reason Zamora could not be asked about the prior statements and testimony as a means of introducing evidence of prior consistent and inconsistent statements. Moreover, since Zamora's statements to Detective Castillo were tape-recorded and Zamora's preliminary hearing testimony was transcribed by a certified court

reporter (see 1CT Supplemental III 1, 265-309), there was no serious dispute that Zamora had indeed made those statements.[4] Accordingly, the trial court did not abuse its discretion to the extent it allowed leading questions on such uncontroversial matters.

For the same reasons, appellant's suggestion that the prosecutor's questions infected the trial with unfairness (see Supp. AOB 15-16), lacks merit. The prosecutor did not seek to introduce otherwise inadmissible evidence by way of leading questions. Rather, any leading questions were either aimed at refreshing Zamora's recollection or were foundational in nature and were designed to introduce both prior consistent and prior inconsistent statements. Finally, appellant has not shown that the use of leading questions deprived him of his constitutional rights to due process and the confrontation of witnesses (see Supp. AOB 15), as Zamora was available to be cross-examined. (See *United States v. Owens* (1988) 484 U.S. 554, 559-560 [108 S.Ct. 838, 98 L.Ed.2d 951].)

Appellant cites *People v. Parks* (1971) 4 Cal.3d 955, 960-961, for the proposition that, "Statements which have no independent basis of admissibility may not be introduced under the guise of refreshing a witness' memory." (Supp. AOB 13.) While this assertion may be true, *Parks* is inapposite, since the prior statements and testimony in the instant case had an independent basis of admissibility under Evidence Code sections 770 and 791.

In any event, even if the trial court erred by allowing the prosecutor to ask leading questions of Zamora, there was no prejudice. There is no reason to believe that the prosecutor could not have elicited the same information by rephrasing her questions to eliminate leading questions. (See *People v. Hinton* (2006) 37 Cal.4th 839, 865, citing *People v. Hayes* (1971) 19 Cal.App.3d 459,

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4. There was no suggestion by defense counsel that Zamora's police interviews or his preliminary hearing testimony were inaccurately transcribed.

470 [no prejudice resulted from prosecutor's use of leading questions, where questions did not produce inadmissible evidence or prejudicial answers; rather evidence could have been properly elicited by questions not objectionable in form].) Here, the prosecutor could have shown Zamora the relevant portions of the transcripts of his police interviews and preliminary hearing testimony, asked him what they were, and then introduced them as prior consistent and/or inconsistent statements. It appears that the prosecutor declined doing so, at least in part, to avoid prejudice to appellant due to Zamora's references in his police interviews to a specific gang he believed appellant was involved in, as well as the fact that appellant had met his girlfriend while he was in prison. (See 28RT 3281, 3285, 3292.)

Furthermore, similar evidence was introduced through Detective Castillo. Detective Castillo testified that before Zamora testified at preliminary hearing, Zamora stated that appellant told him he had shot the victim in the head. Detective Castillo testified that he was surprised, since it was the first time Zamora had made such a statement. Zamora explained to Detective Castillo that he had not told him of the statement before because he was scared. Detective Castillo also testified that prior to Zamora's trial testimony, Zamora told Detective Castillo and the prosecutor about another statement made by appellant: that appellant had taken a man during lunch or while he was having sandwiches and robbed him, and that he used a gun and took $100 or $200. (33RT 4072.) Zamora told Detective Castillo that he had not mentioned this before because he did not think it was important, he thought the police already knew about it, and he was scared. (33RT 4073.)

Finally, Zamora provided highly incriminating testimony before any leading questions were asked. He described appellant test-firing a .38-caliber gun and later shooting the same gun in the Colonias neighborhood. Zamora also testified that during the ensuing police pursuit, appellant threw the gun,

bullets, credit cards, and a black watch out the window. (28RT 3310-3314.) When the car crashed, Zamora described how appellant told the people in the car it was the last time they would see each other. Zamora also testified that either during the pursuit or after the crash, appellant said that he had killed someone in the car, and that he had kidnapped the man, taken him to a bank to get money, and then shot him. (28RT 3314-3315.) In light of this testimony, obtained without any leading questions, any error was harmless, as it was not reasonably probable appellant would have obtained a more favorable verdict in the absence of the leading questions. (*People v. Williams*, *supra*, 16 Cal.4th at p. 673 [applying *Watson*[5] standard of harmless error review to claim that prosecutor improperly asked leading questions].) For the same reasons, even assuming the use of leading questions rose to the level of a constitutional violation, any error was harmless beyond a reasonable doubt. (See *Chapman v. California* (1967) 386 U.S. 18, 24 [87 S.Ct. 824, 17 L.Ed.2d 705].) Appellant's claim should be rejected.

XXV.

THE PROSECUTOR DID NOT DIMINISH THE JURY'S SENSE OF RESPONSIBILITY FOR IMPOSING THE DEATH PENALTY

In *Caldwell v. Mississippi* (1985) 472 U.S. 320, 328-329 [105 S.Ct. 2633, 86 L.Ed.2d 231], the United States Supreme Court held "that it is constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere." Appellant claims *Caldwell* error arose during the prosecutor's penalty phase argument, when she stated that death by lethal injection is "painless and non-

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5. *People v. Watson* (1956) 46 Cal.2d 818, 836.

intrusive." (Supp. AOB 17-24.) Respondent submits there was no *Caldwell* error, as the prosecutor's argument did not diminish the jury's sense of responsibility in determining the appropriate punishment.

A. Relevant Proceedings Below

During penalty phase closing argument, the prosecutor discussed the difficult decision facing the jury, the factors the jury was allowed to consider under the law, how the facts of the current case related to those factors, and the impact the victim's death had on his family members. (51RT 6216-6282.) In response to the common anti-death penalty argument that by imposing the death penalty, the jury would be no better than the defendant, the prosecutor argued that "nothing could be further from the truth." (51RT 6287.) The prosecutor explained:

> Even before this defendant ever faces the gas chamber or lethal injection, he had multiple rights which have been scrupulously attended by the court, his counsel, by me, by the police. His statements weren't taken until he was advised he had a right to remain silent and had a right to a have an attorney present. He had a right to a preliminary hearing and a determination as to whether there was sufficient evidence for him to stand trial on these charges. He had that preliminary hearing. He had a right to a jury trial. He had one. He had a right to be acquitted unless you found beyond a reasonable doubt and to a moral certainty that he committed the crimes with which he was charged, which you did. He had a right to a penalty phase under factor K to bring in every sympathetic thing he has ever done in his whole life and every good deed before you make your determination of the appropriate penalty. And if after all of this, ladies and gentlemen, you decide that the death penalty is appropriate and it will be just and it will be fair and it will be

what the community and the law shows you is right, and that process, ladies and gentlemen, does not in any way, shape or form resemble the killing of Fred Rose.

(51RT 6287.)

The prosecutor then argued that the victim had none of the rights bestowed upon appellant. (51RT 6288.) The prosecutor continued her argument as follows:

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 than down in the dirt all alone with your brains oozing out, and what's more [appellant] 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. Either way, [appellant] will never die the way Fred Rose did.

(51RT 6288.)

B. There Was No *Caldwell* Error

In *Caldwell*, the prosecutor advised the jury that their decision was "'not the final decision'" because it was automatically reviewable by the appellate court. (*Caldwell, supra*, 472 U.S. at p. 325.) The High Court determined: "In the capital sentencing context there are specific reasons to fear substantial unreliability as well as bias in favor of death sentences when there are state-induced suggestions that the sentencing jury may shift its sense of responsibility to the appellate court." (*Id.* at p. 330; see also *People v. Milner* (1988) 45 Cal.3d 227, 257 [reversible misconduct for prosecutor to repeatedly assure jurors that they did not have to "shoulder the burden of personal responsibility"

and could "hide behind the law" because it impermissibly suggested to jurors that they did not have ultimate responsibility for the sentence].)

In determining if a statement violated *Caldwell*, a reviewing court must view it in context and "'consider the instructions of the court and the arguments of both prosecutor and defense counsel.' [Citation.]" (*People v. Jackson* (1996) 13 Cal.4th 1164, 1238.) No error occurs if "there was no reasonable likelihood that the [statement] misled the jury to believe that the responsibility for determining the appropriateness of defendant's sentence lay elsewhere." (*Id.* at p. 1239; accord, *People v. Welch* (1999) 20 Cal.4th 701, 763 [no *Caldwell* error because "[n]o reasonable juror, after hearing . . . the prosecutor's argument, the defendant's argument, and the trial court's instructions, would have been mistaken as to the jury's role as the arbiter of defendant's fate"].)

In the present case, the prosecutor's argument did not mislead the jury as to its role as sentencer; she did not suggest that the jury was not the ultimate decision maker, or that the law, not the jury, dictated the punishment. Rather, the prosecutor's argument advised the jury that its role was to determine if aggravating circumstances outweighed the mitigating circumstances, and that its function was to determine if the death penalty was appropriate. (*People v. Hayes* (2000) 21 Cal.4th 1211, 1283; see *People v. Sanders* (1995) 11 Cal.4th 475, 553-554.)

The prosecutor informed the jurors that they would be asked to make "one of the most important decisions" of their lives. (51RT 6216-6217.) The prosecutor later repeated how difficult the jury's decision was. (51RT 6218.) The language used by the prosecutor throughout her argument made it very clear that the jury had the ultimate decision in imposing the death penalty. (See 51RT 6219 ["I cannot bring in every single bad thing this defendant has done throughout his life to convince *you* to give him the death penalty."]; 51RT 6236 [. . . ask *you* to bring in the death penalty for this defendant . . .]; 51RT 6270 ["I

am asking *you*, ladies and gentlemen, to give him the death penalty . . . . I'm asking *you* to impose the death penalty for his actions up to now because he deserves the death penalty."]; 51RT 6277 [". . . *you* can't consider the death penalty unless *you* find the factors in aggravation substantially outweigh those in mitigation . . . ."], emphasis added.) The prosecutor stressed that the imposition of the death penalty was an individual decision for each juror:

> Now, remember this is an individual decision each of you has to make and any of you can stop the imposition of the death penalty. It has to be a unanimous verdict.

(51RT 6289.) The prosecutor also made it clear that the jury had the power to spare appellant the death penalty by imposing a sentence of life without the possibility of parole:

> I say to you if you can find one, one redeeming thing about his life, the, spare him, but I submit to you there's nothing redeeming for you to find to spare him.

(51RT 6292.) The prosecutor concluded her opening penalty phase summation by asking the jury to "impose the death penalty because that's the punishment [appellant] deserves, nothing less." (51RT 6293.)

In other words, the prosecutor "never intimated that the jurors had only a minimal role in the sentencing process or could shift their sentencing responsibility elsewhere." (*People v. Arias* (1996) 13 Cal.4th 92, 181.) Therefore, the jurors were not misled into believing that the responsibility for determining the appropriate penalty "rested on someone or something besides themselves." (*People v. Fierro* (1991) 1 Cal.4th 173, 248.)

Appellant relies on the Eighth Circuit Court of Appeals case of *Antwine v. Delo* (8th Cir. 1995) 54 F.3d 1357. (Supp. AOB 19-24.) There, the prosecutor argued to the jury as follows:

> Let there be no question, we are asking you to put this defendant to death. . . . [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 Eighth Circuit observed that the prosecutor's argument, unsupported by evidence, suggested that a condemned prisoner's death would be "quick, painless, and humane: one quick breath, and the defendant will die at once." The court then noted, "The reality, as we understand it, is or at least may be quite different." (*Ibid.*) The court concluded that the harm in describing the prisoner's death as "quick and easy" was that it posed a danger 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.

(*Id.* at p. 1362.) The court further concluded that, "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." (*Id.* at p. 1362, citing *Caldwell v. Mississippi*, *supra*, 472 U.S. at p. 329.)

While *Antwine* is not binding upon this Court,[6] its reasoning is nevertheless unpersuasive. The concern at issue in *Caldwell* was whether the jury's sense of responsibility for imposing the death penalty was diminished as a result of being informed that the case would be automatically reviewed by an appellate court. (*Caldwell*, *supra*, 472 U.S. at pp. 330-335.) The same diminished sense of responsibility is simply not present just because the jury may believe that a condemned prisoner's death will be quick and painless. The jury would still understand and appreciate the awesome responsibility of being the sole decision-maker with respect to imposing the ultimate penalty of death. It is unfathomable that a jurist would vote to impose the death penalty on an undeserving prisoner based on a belief that the death would be quick and painless.

In any event, the facts of the instant case are distinguishable from those in *Antwine*. Here, unlike *Antwine*, the prosecutor never described in detail the manner in which the death penalty would actually be carried out. Rather, she made passing references to the two methods of execution in place in California at the time of appellant's trial, and acknowledged that an argument could be made that at least one of them did not lend itself to a dignified death. More importantly, however, the prosecutor's comments in the instant case appeared to have been made in an attempt to highlight the circumstances of the current crime. Viewed in context, the prosecutor was emphasizing the callous nature of appellant's actions and that just about any other method of death would be preferable to how appellant killed Fred Rose. There is no reasonable likelihood the jury was misled to believe that the responsibility for determining appellant's

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6. See *People v. Williams* (1997) 16 Cal.4th 153, 190 [decisions of lower federal courts interpreting federal law are not binding on California courts].)

sentence lay elsewhere. (See *People v. Jackson*, *supra*, 13 Cal.4th at p. 1239.) Accordingly, appellant's claim should be rejected.

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CONCLUSION

Accordingly, respondent respectfully requests that the judgment of conviction and sentence of death be affirmed.

Dated: June 21, 2006.

Respectfully submitted,

BILL LOCKYER
Attorney General of the State of California

Robert R. Anderson
Chief Assistant Attorney General

PAMELA C. HAMANAKA
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Attorneys for Respondent

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CERTIFICATE OF COMPLIANCE

I certify that the attached **SUPPLEMENTAL RESPONDENT'S BRIEF** uses a 13 point Times New Roman font and contains 6474 words.

Dated: June 21, 2006.

Respectfully submitted,

BILL LOCKYER
Attorney General of the State of California

THERESA A. PATTERSON
Deputy Attorney General

Attorneys for Respondent

DECLARATION OF SERVICE

Case Name: **People v. Scott Forrest Collins (CAPITAL CASE)**

No.: **S058537**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter; my business address is 300 South Spring Street, Suite 1702, Los Angeles, CA 90013. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service that same day in the ordinary course of business.

On June 22, 2006, I served the attached **SUPPLEMENTAL RESPONDENT'S BRIEF** by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the internal mail system of the Office of the Attorney General, addressed as follows:

Michael J. Hersek **(Two Copies)**
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221 Main Street, Tenth Floor
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Attn.: Michael Millman
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FOR DELIVERY TO:
HON. LEON S. KAPLAN, Judge

Lea Purwin D'Agostino **(One Copy)**
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L. A. County District Attorney's Office
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Van Nuys, CA 91401

DECLARATION OF SERVICE (cont'd.)

Case Name: **People v. Scott Forrest Collins (CAPITAL CASE)**

No.: **S058537**

On June 22, 2006, I caused the original and fourteen (14) copies of the **SUPPLEMENTAL RESPONDENT'S BRIEF** in this case to be delivered to the California Supreme Court at Ronald Reagan Bldg., 300 South Spring Street, Floor 2, Los Angeles, CA 90013, by **Personal Delivery**.

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on June 22, 2006, at Los Angeles, California.

C. Damiani
Declarant

Signature

TAP/cd
LA1997XS0005
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