IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT, DIVISION EIGHT

PEOPLE OF THE STATE OF CALIFORNIA,	)	
	)	
Plaintiff and Respondent,	)	2 Crim. B197574
	)	
vs.	)	
	)	Los Angeles County
MICHAEL FRANK GOODWIN,	)	Superior Court
	)	No. GA052683
Defendant and Appellant.	)	
_____	)	

APPEAL FROM THE JUDGMENT OF THE
SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

HONORABLE TERI SCHWARTZ, JUDGE

APPELLANT'S OPENING BRIEF

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by appointment of the Court of
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STATEMENT OF APPEALABILITY

This appeal is from a final judgment following a jury trial and is authorized by Penal Code § 1237.

STATEMENT OF THE CASE

On October 28, 2004, the Los Angeles County District Attorney[1] charged appellant Michael Frank Goodwin with two counts of murder (Pen. Code §187, subd. (a)), with special circumstance allegations he intentionally killed the victims by means of lying in wait (§190.2(a)(15)) and committed multiple murder (§190.2(a)(3)). (3CT 851-853.)

The murders occurred in 1988. Jury trial commenced on October 17, 2006. (7CT 1795-1796; 6RT 301.)

On January 4, 2007, a jury convicted Goodwin of two counts of first degree murder and found both special circumstances to be true. (7CT 2022-2024; 23RT 10202-10203.)

On March 1, 2007, the court denied Goodwin's motion for new trial (8CT 2032-2086, 2109-2157; 24RT 10521-10557) and sentenced him to two consecutive life sentences without possibility of parole (8CT 2182-2186; 24RT 10576-10579).

Notice of appeal was timely filed. (8CT 2187.)

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[1]Hereinafter "LADA."

INTRODUCTION

Mickey Thompson was a race-car driver and an American icon. Mike Goodwin was a brash concert and sports promoter who made enemies.

On March 16, 1988, an unknown gunman shot Mickey Thompson and his wife Trudy to death in the driveway of their Bradbury Estates home. From the beginning, investigators suspected Goodwin contracted the killings due to the famously soured business relationship between Goodwin and Thompson and the bitter litigation that followed, but little evidence connected Goodwin to the murders.

Thompson's sister, Collene Campbell, was certain Goodwin was the killer.[2] Campbell was the executor of Thompson's

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[2] In 1992 there were at least two or three investigators working on Campbell's behalf, all of whom took statements from witnesses, including Stewart Linkletter, Scott Smith and Lance Johnson and others. (1CT 76-77; 5RT Y-8 – Y-9.) At the preliminary hearing, some witnesses testified they approached Campbell before they contacted the police, or claimed not to remember whether they had contacted Campbell first. (1CT 35-38, 40 [Keay]; 1CT 259-260 [Williams]; 2CT 364-365; 5RT Y-11.) In a telephone conversation taped by Campbell, witness Keay told Campbell he would wear a wire and attempt to entrap Goodwin into saying something incriminating, but Keay claimed he could not recall the conversation. (1CT 40-41, 45-47.) Witness Stewart Linkletter's wife did some unpaid investigative work for one of Campbell's investigators "as part of being a upstanding citizen to take care of this situation." (1CT 74-80.)

Prior to Goodwin's trial, 48 Hours, America's Most Wanted, Hard Copy and Unsolved Mysteries had already interviewed many of the witnesses who testified at trial and had aired multiple segments on the Thompson murders, starting in 1988. (1CT 73; 2CT 379, 384-385; RT

estate. Her attorney in the Thompson probate was Tony Rackauckas. (13RT 4826.)

Los Angeles was the obvious venue for trial; however, in 1998 the LADA declined to prosecute Goodwin for the murders because the evidence LASD Detective Mark Lillienfeld presented was insufficient.

In January of 1999, Campbell's now personal friend Tony Rackauckas took office as the Orange County District Attorney.[3] (Orange County Preliminary Hearing RT[4] 27.)

In 2001, Goodwin was arrested and charged in Orange County with two counts of murder for financial gain and conspiracy to commit murder.

On April 23, 2004, the Court of Appeal, Fourth District, granted Goodwin's writ petition, finding there was no evidence any preliminary or overt acts in furtherance of any conspiracy had occurred

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Y-11; 5RT Z-12; 6RT 2845-2846; 7RT 3030-3031; 13RT 4941, 4953; 7RT 3030; 20 RT 7582.) The television shows hired actors, did their own recreations of the crimes, and announced Campbell's $1 million reward. (1CT 74, 2CT 379; 6RT 2845-2846; 7RT 3030-3032, 3159.) Trial witnesses had appeared on some of those programs. (6RT 4; 11RT 4334.)

[3] Hereinafter referred to as "OCDA." See, generally, http://orangecountyda.com/home/index.asp?page=384

[4] Hereinafter referred to as "OCPHRT." Appellant asks this Court to take judicial notice of the transcript of the Orange County preliminary hearing in People v. Michael Frank Goodwin, case number 01CF329, provided herewith.

in Orange County.[5]

In the Fall of 2004, the LADA charged Goodwin with the murders but not conspiracy, and – following a preliminary hearing – on October 13, 2004, Goodwin was held to answer.

At trial the prosecutor failed to prove any connection association or agreement between Goodwin and the killers. Goodwin was convicted on the testimony of witnesses that Goodwin hated Thompson and wanted him dead. The jurors were able to reach guilty verdicts by following a defective conspiracy instruction permitting them to draw the inference – given the evidence of Goodwin's bad character, and Goodwin's overtly stated hatred of Thompson – Goodwin *could have* hired someone to kill Thompson. (8CT 2079, 2082.)

During trial, the court excluded evidence – ironically mostly from prosecution sources – others were responsible for the murders, and the investigators purposely did not investigate or follow up on that evidence, especially related to Joey Hunter, who had confessed to his participation. The Court allowed inflammatory evidence of Goodwin's bad character and equally inappropriate evidence of Thompson's good character and fear of Goodwin. The court also gave inappropriate and altered jury instructions, effectively negating Goodwin's ability to launch a defense.

Prior to and during trial, prosecutors Alan Jackson and

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[5] Appellant requests this Court take judicial notice of the docket in Court of Appeal, Fourth District No. G031285, and the unpublished decision in that case.

Patrick Dixon possessed and utilized numerous attorney-client privileged documents illegally seized by Lillienfeld and Orange County investigators. During trial the prosecutors exploited the evidentiary and instructional errors by engaging in multiple forms of prejudicial misconduct by, among other things, constantly leading their own witnesses to say what they wanted them to say, misstating the burden of proof, and advising jurors to consider why Goodwin did not testify at trial to establish an alibi.

As a result, Goodwin was deprived of due process and a fair trial.

STATEMENT OF FACTS

PROSECUTION CASE

THE SOURED RELATIONSHIP BETWEEN MICKEY THOMPSON AND MIKE GOODWIN

In 1984, Thompson ran a successful motor sport promotion company that sponsored indoor stadium races primarily with off-road, four-wheeled vehicles. (6RT 2795; 7RT 3128-3129, 3139-3140, 3144.) At the same time, Goodwin had a similar successful business promoting indoor motorcycle dirt track racing in stadiums. (6RT 2794; 7RT 3023-3024, 3120, 3126, 3144.) In 1984, Thompson and Goodwin decided to merge businesses. (6RT 2796-2798; 7RT 3168-3173, 3180; People's Exhibit 10.) That same year, after a series of failed races and a complete deterioration of their social and business relationship, Thompson sued Goodwin. (7RT 3127-3131, 3166-3167, 3176; 11RT 4299-4301.)

In May of 1986, Thompson prevailed, obtaining a $514,000 judgment, which eventually grew to nearly $800,000 with interest and

attorney fees. (7RT 3187-3191; People's Exhibits 12 and 13.) Goodwin and his company declared bankruptcy not long after the judgment was final. (7RT 3196-3199; 8RT 3473-3487, 3493-3494; People's Exhibits 14 and 15.) Goodwin appealed the judgment, but on January 29, 1988, the California Supreme Court denied review, ending the litigation. (8RT 3375-3379, 3381; People's Exhibits 16-18.) Thompson's lawyers and the bankruptcy trustee testified to the unusual contentiousness and bitterness of the litigation. (8RT 3495; 10RT 4043.)

THE MURDERS

On March 16, 1988, the Thompsons were shot to death in the driveway of their suburban home on Woodlyn Lane in Bradbury, a gated community. (7RT 3021; 12RT 4607.) The Thompsons' neighbor, Allison Triarsi – 14 years old at the time of the shootings and 33 at the time of trial – was the sole eyewitness the prosecutor presented to testify to the murders. (12RT 4622, 4627-4629, 4657.)

Allison testified she was in the shower at 6:00 o'clock that morning when she heard screams and multiple gunshots coming from the Thompson property across the street. (12RT 4622, 4627-4629, 4657.) Her mother pulled her out of the shower and put her down on the floor by the dining room, from which vantage point she observed Mickey Thompson at the top of his driveway next to a man who was pointing a gun at him, an armed man approaching Trudy Thompson – who was on her knees at the bottom of the driveway, and the Thompsons' van parked with its doors open. (12RT 4628-4631, 4634-4640, 4649.) Allison heard Mickey Thompson repeatedly say, "Please don't kill my wife." (12RT 4635-4637, 4639, 4642.) The man standing over Trudy Thompson

then shot Trudy in the head. (12RT 4649-4651.) The other gunman shot Mickey Thompson several times. (12RT 4651-4652.)

Allison further testified she ran outside and approached Trudy, who lay on the ground with a gunshot wound to her head. (12RT 4652-4653.) Allison claimed she hid behind a wall after she heard more gunshots until the police arrived, but no police witness testified to seeing her there. (12RT 4654.) She testified to hearing the "click click click" of ten-speed bicycles when she was in the area where Trudy was shot, but did not see the gunmen escaping. (12RT 4661-4663.) At trial, Allison never mentioned the shooters' race.[6]

According to investigators, nothing at the crime scene indicated robbery was a motive, or that anyone had attempted to break into the Thompsons' cars or house. (15RT 5445-5449.) More than $4,000 in cash and $10,000 in jewelry were found on or near the Thompsons' bodies, with no evidence anyone had tried to remove valuables. (15RT 5208-5209; 5438-5445; 5449-5450.)

Investigators found live .9 millimeter rounds and spent casings near the bodies and in nearby vegetation where footprints were discovered. (15RT 5181-5188, 5412-5416, 5419-5422.) Investigators

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[6] At the Los Angeles preliminary hearing, the prosecutor asked Allison if she could describe the man who shot Mickey Thompson. (2CT 538.) She answered, "It was a man in dark clothing with a gun," but she could not recall the man's age, his race or his face. (2CT 537-538.) Allison gave the same answer when asked about the man who shot Trudy Thompson. (2CT 539-540.) Two other eyewitnesses who did not testify at trial told the police the person at the foot of the driveway was a white man. (6RT 34, 52, 53; 22RT 8245-8246.)

recovered eight fired bullets – six at the scene and two from the victims. (16RT 6047-6048.)

Ballistics expert Manuel Munoz analyzed the fired cartridge cases, fired bullets and live rounds, but had no gun to compare to them. (16RT 6029-6030, 6053-6054.) All of the fired cartridges were .9 millimeter. (16RT 6035-6036.)

Munoz determined two firearms were used during the murders. (16RT 6036; 6056-6057.) Of the eight fired bullets, four came from one gun, four from the other. (16RT 6053-6054, 6061-6062.) The same gun fired both bullets recovered from Trudy Thompson's head, the bullet in the van and the bullet found under Mickey Thompson's head – indicating the same weapon was used to shoot both victims. (16RT 6063, 6089, 6093-6094.)

Dwight Van Horn performed a ballistics analysis before Munoz did his. (16RT 6066.) Munoz reviewed Dwight Van Horn's notes and original report dated May 23, 1988, before performing his own analysis. (16RT 6066-6067.) Munoz's analysis differed from Van Horn's, in that Munoz identified the bullets as having come from two different weapons. (16RT 6066-6067, 6089-6090.)

Munoz was familiar with the three-digit model firearms Smith & Wesson produced during the 1980's, all of which had five right lands and grooves, such as the firearms Goodwin owned. (16RT 6080-6081; 20RT 7601, 7615.) The two firearms used in the Thompson murders had six right lands and grooves; therefore, Goodwin's firearms could not possibly have been the weapons used to kill the Thompsons. (16RT 6065, 6081.)

Investigators found a battery-operated stun gun at the crime scene, but there was no indication it was used during the murders, and no fingerprints were found on it.[7] (15RT 5255-5256, 5416-5417; 17RT 6316-6317, 6320-6321.)

Kathy Weese, Goodwin's disgruntled former employee, testified that in 1986 – while house-sitting for the Goodwins at their Laguna Beach residence – she had noticed a similar stun gun in a box in a storage area. (11RT 4319-4322, 4324, 4354-4355.) Weese could not explain how she knew the stun gun was relevant to this case, but she knew it was a "big part" of it. (11RT 4356-4357.)

Goodwin had accused Weese of embezzling $30,000 from him, but she was acquitted. (11RT 4324-4325.) The defense impeached Weese with her extensive criminal history – particularly thefts – her use of aliases, and the fact she had lied to Goodwin to get her job because she was an escapee from a Colorado prison. (11RT 4325-4328, 4340-4351, 4354, 4360-4362.) Lillienfeld promised he would "take care of" Weese if she testified against Goodwin. (11RT 4332, 4342.) Weese told Lillienfeld, "If I can help you get this guy, I will do anything." (11RT 4359.) Weese referred to Goodwin as a "son of a bitch." (11RT 4340, 4344.)

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[7] The prosecutor did not elicit testimony the stun gun had been altered with tape, or a hair stuck to that tape sat in the evidence locker for eighteen years untested for DNA until the defense insisted on testing it. (17RT 6328-6329; 6339; 19RT 7014-7015, 7021-7023.)

THE PURPORTED ESCAPE ROUTE

Four witnesses described seeing two black men on 10-speed or racing bicycles in the vicinity of the Thompson house the morning of the murders. (13RT 4853, 4855-4857, 4899; 19RT 7041-7045.) Also around 6:00 a.m., Wilma Johnson was driving on North Royal Oaks when two men in their late teens or early twenties pushing new ten-speed bicycles ran in front of her van, from north to west, and went through a break in the fence and onto a jogging and bicycle path on the other side. (13RT 4933-4936, 4938, 4944-4946, 4952-4953, 4955, 4957; People's Exhibits 43 and 47.) When the men jumped out near Woodlyn and ran into the street, Johnson nearly hit them and had to brake suddenly. (13RT 4937, 4947.) Johnson was able to see one of the men clearly. (13RT 4952-4953, 4397-4398.) He was a "tallish" black man wearing a hooded sweatshirt; the other was shorter and stockier. (13RT 4938, 4955.) It was unusual to see black men in that neighborhood at that time. (13RT 4953.)

Later that day Wilma Johnson was in the area again and encountered a roadblock related to the Thompson murders, at which time the police questioned her. (13RT 4939-3941, 4956.) Soon after that, a sketch artist made a composite drawing with Johnson's assistance. (13RT 4940-4941, 4954.) Between 1995 and 1997, Johnson provided information to America's Most Wanted for another composite drawing. (13RT 4941, 4953; People's Exhibit 51.) Of the two sketches, the one done by America's Most Wanted was more accurate. (13RT 4942-4943, 4954.) Nobody ever showed Wilma Johnson photographs of black men or asked if she could identify anyone. (13RT 4955-4956.) She would

have looked at a photograph had someone asked. (13RT 4956.)

THREAT AND MOTIVE EVIDENCE

Goodwin was eliminated by investigators as a shooter in the Thompson murders because he was not black. However, more than half of the prosecution witnesses testified to Goodwin's hatred of Thompson and threats Goodwin had purportedly uttered against him and others. Other witnesses testified to a financial motive for murder. According to the prosecutor's theory, Goodwin wanted revenge because Thompson had destroyed him financially. All but one of the witnesses who testified to hearing Goodwin make threats did not come forward until Campbell offered her $1 million reward.[8]

The prosecution witnesses who testified to threats and financial motive were numerous:

(1) Stewart Linkletter, Goodwin's employee, said he heard Goodwin say, "We're going to screw Mickey out of everything" and engage in a 45-minute diatribe about ripping off Thompson (7RT 3027-3028), finishing the conversation with, "Stew, if you ever say a word about this conversation to anybody, I will fucking kill you." (7RT 3028-3029.)

(2) David Jacobs, general manager of the Rose Bowl, which hosted motocross events, was successful in moving the event contract from Goodwin's company to Thompson's company in 1987

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[8] Campbell had access to a fund that was willing to offer a $1 million dollar reward, and during the 1990's she appeared on various national crime shows to announce that reward. (5RT Y-11.)

and 1988. Goodwin was in the hallway after Thompson's application was approved in early 1988 and seemed very angry and upset at losing the contract to Thompson. (7RT 3131-3132, 1336.)

(3) Dolores Cordell, a partner with the law firm Clark & Trevithick, very aggressively attempted to collect from Goodwin's corporate as well as personal assets the judgment Thompson won against Goodwin (8RT 3456-3460), but her efforts were ultimately thwarted by Goodwin's corporate and personal bankruptcies.

(4) John Williams, a former marshal, claimed he executed a levy on Goodwin's Mercedes in January 1988 – although documentation showed the levy was in 1986. (10RT 3994-3998, 4012-4013.) Williams claimed Goodwin said, "Mickey Thompson is fucking dead. He doesn't know who he is fucking with." Williams claimed Diane Goodwin joined in, both of them saying "fuck" a lot. (10RT 4003, 4027-4028.) Goodwin told Williams there was "no way in hell" Williams was going to take the car. (10RT 3999-4002.) Williams claimed as he completed the levy, the Goodwins made numerous profanity-laced threats against Mickey Thompson while making trips back and forth from the Mercedes to the house with their property. (10RT 4004.) The tirade went on for about 15 minutes, and Goodwin's comments stood out to Williams as extraordinary in their degree of viciousness and anger. (10RT 4005-4006.)

(5) Jeffrey Coyne, head of the bankruptcy department at the LA office of Graham & James (10RT 4039), was the bankruptcy trustee in charge of the assets of Goodwin's company, E.S.I. (10RT 4040, 4043, 4045-4046, 11RT 4213-4214, 4234-4235), of which Mickey

Thompson was the most vocal, active and interested creditor. (10RT 4056-4057, 11RT 4216-4217, 4256.) The company was a "gutted facade," the operating part of which had been sold to a company named Supercross S.X.I., which Goodwin's wife and Chuck Clayton owned. (10RT 4046, 4055-4056.) Coyne had difficulty determining what E.S.I. had owned and where it had gone. (10RT 4047, 4053; 11RT 4223, 4255.) Coyne was concerned that when he contacted S.X.I., Goodwin always responded. (10RT 4056.) Coyne believed much of what he saw in E.S.I. and the transfers to S.X.I. were done for the purpose of moving the business without paying creditors. (10RT 4056-4058; 11 RT 4214-4215.)

In 1986, before Coyne became trustee, the main agreement allowing E.S.I to run motocross events, was sold, with bankruptcy court permission, to S.X.I. (10RT 4057-4058, 11RT 4229.) At the time Coyne became trustee, the buyers were in default and the documents securing the sale had never been prepared. (10RT 4059.) Coyne believed the activity was fraudulent and that Mickey Thompson was adversely affected. (10RT 1060.) At Coyne's insistence Diane Goodwin and Clayton eventually paid $385,000 of the $500,000 Insport agreement sale price. (10RT 4060-4061, 11RT 4224, 4227.) Thompson's attorney told Coyne that Thompson would be interested in buying the Insport agreement should it be repossessed. (10RT 4063, 11RT 4226-4227, 4256.)

About three weeks before the Thompson murders, Coyne and other members of his firm had a face-to-face meeting with Goodwin at Graham & James' offices. (10RT 4066-4067, 4069; 11RT 4215-4216.) After the meeting Goodwin approached to within eight

inches of Coyne's face and said, "You better lighten up or things will get bad." (10RT 4067.) Goodwin was "just barely restrained" and in a "black rage," trembling and speaking in a staccato fashion. (10RT 4069-4070.) Coyne backed up, and Goodwin said, "If you fuck up my life, I'll fuck up yours." (10RT 4068.) Coyne could not produce any records indicating when this confrontation took place. (11RT 4250-4251.)

This bankruptcy was the most acrimonious, angry, intense, resentful and rageful Coyne had ever seen. (10RT 4070.)

(6) Scott Hernandez worked for Goodwin's company, Supercross, Inc., as a general clerk from the spring of 1985 until late 1987, when he came to work one day to find the office was closed. (11RT 4261-4264.) Toward the end of Hernandez's career with Goodwin, there was increasing tension around the office over Thompson, and at the end the tension was constant. (11RT 4267-4268.) Goodwin almost daily brought up Thompson's name, expressing his anger and frustration over his dealings with him. (11RT 4268-4369.) Goodwin was loud and intimidating in general. (11RT 4282.)

Around October or November of 1987, within weeks of the office being closed down, Hernandez heard Goodwin talking on the speaker phone with his attorneys in the Thompson case, and then he heard a ruckus, like books flying and hitting the wall, and Goodwin going into a rage. (11RT 4269-4271, 4278, 4283, 4291.) Hernandez was impeached with his 2002 statement to investigators this incident took place in February or March of 1987. (11RT 4278-4279.) Hernandez testified he heard Goodwin yell, "I'll kill that motherfucker. I'll kill that

motherfucker" – referring to Thompson – and was impeached with his prior testimony that he simply assumed the tirade was about Thompson. (11RT 4271, 4276-4277.)

(7) Cheryl Sarantis worked less than one year during 1986 and 1987 in marketing, advertising and promotions for Supercross, Goodwin's company. (11RT 4296-4297, 4301.) Goodwin yelled a lot, which made the job very tense. (11RT 4298, 4306.) Sarantis heard Goodwin rant and rave about Thompson every day. (11RT 4298-4299.) Once while outside of the conference room Sarantis heard a crash, like a lamp being thrown against a wall. (11RT 4300-4301, 4306.) Sarantis testified she heard Goodwin say he wanted to destroy Thompson, but after being confronted with her statement to Lillienfeld, she admitted the word "destroy" was her word, not Goodwin's. (11RT 4302-4306, 4309.)

(8) Barron Wehinger encountered Goodwin at a social gathering in 1984, when Wehinger was 16 years old. (8RT 3430, 3434.) He claimed he overheard Goodwin and his stepfather talking about money and Goodwin's court battle with Thompson. Goodwin was saying, "I'll kill him" – referring to Thompson – if Goodwin lost his power to run the superbowl of motocross and his million-dollar-a-year income. (8RT 3432-3434.) Goodwin said, "I can get it done for 50 grand." Wehinger's father said, "I can get it done for 20 grand." Goodwin said, "I don't want to get you involved, Tom." (8RT 3435.) Wehinger did not mention anything about the $50,000 at the preliminary hearing, or when he talked to the police, or when he talked to Jackson. (8RT 3440-3441.) Wehinger previously testified Goodwin

was at his house on the day Mickey Thompson was murdered, not days afterward (8RT 3443-3444), and that the conversation he overheard between Goodwin and his stepfather was in December of 1987, not 1984. (8RT 3451.)

(9) Bill Wilson – a stadium manager who did business with both Mickey Thompson and Goodwin – and Nina, his wife, hosted a dinner party on February 1, 1988, attended by Mike and Diane Goodwin. (6RT 2788, 2792-2796, 2799-2801, 2813-2814, 2822, 2834.) During the evening, Goodwin said Thompson was "killing" him, "destroying" him and "taking everything I've got." (6RT 2802.) Goodwin said, "I'm going to take him out." Wilson told him that was a bad idea. (6RT 2802-2803, 2825.) Goodwin responded that he was too smart to get caught. (6RT 2804-2805.) Goodwin then said that he was just kidding and "could never do anything like that." (6RT 2805, 2826-2827.) Wilson did not take any action because he did not believe Goodwin was serious about the threat.

On cross-examination, Wilson explained that in racing "I'm going to take him out" means running someone off the track. (6RT 2814.)

(10) Karen Dragutin met Goodwin and his wife on only one occasion on a date Dragutin could not recall. (6RT 2836-2837, 2847.) Goodwin became arrogant and "mad" during a discussion about lawsuits. (6RT 2837-2838.) Goodwin asserted, "The only way to get out of the mess was to take care of Mickey Thompson." (6RT 2838.) Goodwin did not say how he was going to do this. (6RT 2838.) Goodwin said that the only way he was going to get out of it was if

Thompson died. (6RT 2840.) Goodwin did not say how it would come about, but he said it could happen, though he did not claim he was doing anything to make it happen. (6RT 2840.)

Goodwin also talked about getting a boat and going away to Bermuda. (6RT 2840.) Goodwin was drinking at the time he made these comments. (6RT 2848.)

(11) Kathy Weese, Goodwin's employee at his motocross promotion business in 1986, testified she overheard Goodwin complaining about Thompson on an almost daily basis. (11RT 4311-4312, 4314, 4318-4319.) She claimed during one telephone conversation she heard Goodwin say to Thompson, "I'm going to take you out. I'm going to take you out." (11RT 4316.) Weese claimed she heard Goodwin tell Thompson that "[f]or $500 and a motorcycle, I'll have you killed." (11RT 4316-4317, 4352.) Weese never came forward with any information she had about this case. (11RT 4330-4331.) She appeared on the program "48 Hours," but claimed she could not remember a reward being offered. (11RT 4334-4335.)

(12) Nancy Lucia (formerly Wilkinson) was Trudy Thompson's friend. (12RT 4611-4613.) In September or October of 1987, Wilkinson was visiting at the Thompsons' home when Mickey ran upstairs and yelled, "Close the window. Close the drapes. Goodwin could have a sniper out there right now." (12RT 4614-4617.)

(13) Dale Newman testified he was out on a boat in Mexico with Mike and Diane Goodwin in 1987, when he overheard them commiserating over their circumstances. (10RT 3976-3978.) What impressed Newman was Goodwin's threatening tone of voice while

attempting to reassure his wife that nothing bad would happen because he was going to "take care of the party involved." (10RT 3978-3979.)

(14) Greg Smith was executive director of Anaheim's convention sports and entertainment department. (9RT 3763.) Goodwin was the first person to propose staging stadium motor sports events and successfully produced the motocross event in the Anaheim stadium for years. (9RT 3767-3770.) Goodwin complained loudly and aggressively when Smith and his colleagues first put on another motor sports event by a different promoter because Goodwin believed they were diluting the market, but both events were sellouts. (9RT 3771-3773, 3776, 10RT 3969.) Based on the success of those two January events, in 1986 Smith decided to put on a third January event, for which Thompson submitted a proposal. (9RT 3773-3776.) Thompson was an easy person to work with and successfully promoted that event. (9RT 3776-3777, 10RT 3972.)

After 1987, Smith no longer did business with Goodwin. (9RT 3777-3781; 10RT 3924-3927, 3930, 3971-3972.) Instead, starting with the 1988 season, Smith hired Thompson and another company to produce all of Anaheim's motor sports events, with Thompson producing the event Goodwin had previously produced and a fourth event added for January of 1988. (9RT 3781-3782; 10RT 3931; People's Exhibit 23.) Goodwin – who had submitted a proposal for those events – was advised of the change by letter dated June 19, 1987. (10RT 3927-3929, 3941-3942; People's Exhibit 22.) Goodwin was very upset at the news. (9RT 3782; 10RT 3924, 3931-3932.)

On August 27, 1987, the executives at Anaheim Stadium

held a press conference to announce the change in the relationships with Anaheim's promoters and the award of the supercross event to Thompson. (10RT 3933-3935; People's Exhibit 21.) The LA Times and the Orange County Register ran articles the same day. (10RT 3937-3938, People's Exhibits 27-28.) The January 1988 events were very successful. (10RT 3935-3937, 3970; People's Exhibits 26-27.)

Smith was summoned to appear in Goodwin's bankruptcy proceedings in 1987. (10RT 3940-3941.) Prior to the hearing, Goodwin sat down behind Smith in the courtroom and said to the back of Smith's head, "You don't know what you're doing to me. You'll be sorry for this. I'll be back." (10RT 3942-3943, 10RT 3969-3970.) Smith took the statement as threatening. (10RT 3943.) In several conversations Smith had with Goodwin leading up to this incident, Goodwin was confrontational and upset, but this was the first time Smith felt threatened. (10RT 3944.)

(15) Greg Keay, Goodwin's cousin, two or three months prior to the Thompson murders, heard Goodwin say Thompson was out to get all of Goodwin's money, and before that would happen, Goodwin would "have him wasted." (7RT 3147-3149.)

Keay admitted he saw TV shows about this case years before this trial, but claimed not to know whether those shows offered a financial reward for information until defense counsel mentioned it at the preliminary hearing. (7RT 3158-3159.) After making that admission, Keay changed his story, testifying he might have heard about the reward on TV prior to the preliminary hearing, but he claimed ignorance of the dollar amount. (7RT 3159.) Keay admitted to

having a conversation with Campbell at one point, but still claimed he did not know the family had offered a reward. (7RT 3158.) Keay could not recall whether he called the police or Campbell first. (7RT 3160.)

Keay did not like what Goodwin did, and he considers Goodwin a braggart and a loudmouth, but he denied being envious of Goodwin's success. (7RT 3160.) In an audiotaped interview with Campbell, Keay said he did not mind going outside the law to try to help her convict Goodwin, and he told her: "He doesn't play by the rules, so I don't have to play by the rules." (7RT 3160-3161.)

(16) Joel Weissler, Thompson's nephew, testified he overheard a telephone conversation in the Thompsons' home office about three months before the Thompsons were killed. (19RT 6949, 6958.) Weissler claimed he heard Goodwin say, "You will never see a cent of it. I'm going to hurt you and your family." (19RT 6959.) Weissler also heard a second conversation in the Thompsons' residence about two months before the murders. (19RT 6959-6960.) Thompson was on a speaker phone, and Goodwin made similar threats. (19RT 6960-6961.)

Around the time of the Thompsons' funeral, Weissler told a detective he had heard Goodwin make threats, but the detective did not ask for details. (19RT 6970.) Upon having his recollection refreshed, Weissler admitted he went to a police station in August of 1991 with his uncle, gave the police his business card and asked them to call him. (19RT 6970-6972.) Weissler failed to tell investigators at that time about the telephone conversations he testified to at trial. (19RT 6973.)

(17) Penn Weldon, a former L.A. deputy sheriff, was hired by Goodwin as his private investigator in early 1988. (7RT 3101-3102.) When they met, Goodwin said Thompson had ruined his life, defrauded him on deals, taken everything that he had, and Goodwin was going to get even with him. (7RT 3102-3103.) Goodwin wanted Weldon to investigate Thompson's attorney, find out what cars he had, and bug the cars and Thompson's attorney's house. (7RT 3104.) Weldon told Goodwin he could not do those things because they were illegal. (7RT 3104.) Goodwin was upset and angry. (7RT 3106.)

CHARACTER AND FLIGHT EVIDENCE

Karen Kingdon testified the Goodwins fraudulently commingled and liquidated assets and moved money offshore.[9] (18RT 6763-6764, 6773-6774.)

In mid-May of 1988, the Goodwins made two purchases of gold coins for a total of $350,000. (17RT 6417-6420, 6423-6431; People's Exhibits 79-82.)

On June 28, 1988, Michael Goodwin had work done on a 57-foot boat. (7RT 3040-3042.) In early August Goodwin asked that the work be expedited because hurricane season was approaching. (7RT 3059-3060, 3064, 3071.)

LATER DEVELOPMENTS

Years after the murders, purportedly "new" developments in the case occurred.

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[9] The details of Kingdon's testimony are set out more fully in Argument V., *infra*.

Goodwin's 1999 Inquiry About Gun Registration

In February 1999, Goodwin asked gun store owner Randy Garell about gun registration records, and again in 2000, Goodwin asked him specifically about stun gun registration laws. (17RT 6358, 6361-6365.) During the 1999 conversation, Goodwin said he was trying to investigate the case because he had been named as a suspect, and Goodwin may have said the detective made false statements about weapons Goodwin may have owned.[10] (17RT 6371.) Stun guns do not have serial numbers. (17RT 6373.) Many retailers carry stun guns, and they are freely available for purchase at gas stations. (17RT 6374.)

Ron and Tonyia Stevens' 2001 Identification of Goodwin

At the time of the Thompson murders, Ron and Tonyia Stevens lived in Bradbury, near the Thompsons, on the main route into the Bradbury area. (11RT 4371-4372, 12RT 4562-4563, 4596.) Even with binoculars, a person sitting in front of the Stevenses' house could not possibly see the Thompson residence. (12RT 4538-4539, 4606.)

Tonyia testified that two or three days before the Thompson murders she had picked her daughter up at school during

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In fact, despite information indicating a three-digit model Smith & Wesson firearm could *not* have been used in the Thompson murders, Lillienfeld falsely swore in multiple affidavits and during multiple court proceedings that a gun legally registered to Goodwin could have been the murder weapon. (Exhibit B, pp. 8-9, to the 1538.5 motion filed under seal; 20RT 7587-7588.) Based in significant part on these misrepresentations, Goodwin was arrested for the murders and held to answer on charges in Orange County. (20RT 7588.)

the afternoon. (12RT 4564.) When reminded the Thompsons were killed on a Wednesday, Tonyia was certain the incident occurred on the Monday before the murders. (12RT 4595-4596.) She noticed an "old clunker" station wagon with Arizona license plates and two men in it parked across the street from her house, the driver holding binoculars, which he lowered when she drove by. (12RT 4564-4567, 4610.) Tonyia testified she saw the driver's face full-on, and was concentrating on him because he had the binoculars, which seemed unusual to her. (12RT 4566.)

Ron recalled the incident as occurring a week or so – possibly four or five days – before the murders. (11RT 4378-4379.) As he drove up to his house in the middle of the day, he saw a car he had never seen before or since, parked the wrong way on the street along his corral, and two men inside with binoculars. (11RT 4378-4384; 4392, 4397, 12RT 4543; People's Exhibit 32.) Both Ron and Tonyia thought the men were looking at a nearby grammar school and they were concerned that someone might be about to kidnap a child. (11RT 4379, 4383, 12RT 4565, 4609-4610.) When Ron pulled into his driveway, Tonyia told him the car had been there for five to fifteen minutes. Ron asked Tonyia to call the police and then walked through his corral so as to avoid being seen by the men inside. (11RT 4384-4386; 12RT 4513.)

Instead of calling the police, Tonyia followed Ron over to the car, where she saw the driver's face when he looked in her direction. (11RT 4393-4394; 12RT 4567-4571.) Tonyia was also able to see the passenger's face, but not well, before the car sped away seconds later. (12RT 4569-4571.)

Ron testified the car was a dirty, early model, blue-green 1970 Chevy station wagon with oxidized paint. (11RT 4386-4387; 12RT 4539.)

As Ron approached the car from behind, he saw two men sitting inside. (11RT 4387.) On direct, Ron testified that he came within eight feet of the rear of the car. (11RT 4387.) The man in the driver's seat, who was closest to him and facing toward the school, was holding the binoculars up to his eyes. (11RT 4388-4389.) On cross, Ron was impeached with his statements to Lillienfeld that he only got to within 15 or 20 feet of the back of the car, meaning directly behind the taillights, and that he was not sure which man had the binoculars. (12RT 4513-4514, 4519-4520.) At some point the man lowered the binoculars. (11RT 4389.) The driver was a big man with reddish hair, wearing a watch cap that sat back on his head. (11RT 4389-4390; 12RT 4533-4534, 4557-4558.) As Ron continued to approach the men, he had an unclear view of the driver's left profile, then the driver turned, looked at him, started the car and drove off. (11RT 4390-4391; 12RT 4542-4543, 4554-4555.)

Both Ron and Tonyia identified Goodwin in court as the driver. (11RT 4395, 4405, 12RT 4503-4504, 4512, 4570.) Ron's account at trial of his ability to see the men in the car conflicted with what he told Lillienfeld during their 2001 interview and during the 2001 identification procedures.[11] (11RT 4391; 12RT 4513-4514; 4542, Defense

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[11] See detailed discussion of the identification procedures and these discrepancies in Argument II, *infra*.

Exhibits Z and Z-1.)

Ron took down the license plate number on a business card. (12RT 4554.) About seven years before this trial Ron found the card and discarded it because the police still had not contacted him. (12RT 4554-4555.) Ron testified that in 2001 he told Lillienfeld about having written down the license plate number, but had not given the number to any of the law enforcement officers he had called in 1988. (12RT 4559-4560.)

According to Tonyia, about two weeks after the murders she stopped at a roadblock and told a uniformed police officer about the car. (12RT 4606.) The officer asked if she had already told the police about it, and Tonyia said she had, after which the officer waved her through. (12RT 4606.)

Both Ron and Tonyia testified at trial that three or four times, not long after the murders, they attempted to report the men in the station wagon. (12RT 4541.) Ron called the Duarte Sheriff's Department and told an officer he thought he had some information on the Thompson murders. The officer said a detective would call, but that did not happen. A couple of weeks later Ron called the Temple City sheriff's station and left another message, to which he received no response. (12RT 4508-4510.) Ron called one or two other times after that, with the same result. (12RT 4509.) No police officer ever contacted Ron about the car incident until 2001 – 13 years after the murders. (12 RT 4509-4510, 4540-4541, 4553-4554.)

Tonyia testified she was "pretty sure" she attempted to contact the authorities about what she had seen in addition to the one

time she called Temple station days before the murders, but no one called back. (12RT 4572.)

In March of 2001, after several shows – including an episode of America's Most Wanted – had aired on television featuring the Thompson murders and Campbell's million-dollar reward, Lillienfeld – who at the time was the lead detective on the Thompson case – contacted the Stevenses and arranged for Ron to view a photographic lineup. (12RT 4572; 20RT 7633.) When Ron could not narrow his selection beyond three of the six photos, Lillienfeld later showed both Ron and Tonyia a live lineup, at which both selected Goodwin. (3CT 634-635, 661, 666-668; 12RT 4518, 4546, 4584-4585.)

There were inconsistencies between Tonyia's testimony and her first interview with Lillienfeld, and between her testimony and Ron's. (12RT 4585.) According to Lillienfeld's 2001 report, Tonyia said she did not know whether the station wagon was occupied. (12RT 4585-4587.) At trial Tonyia was certain she saw two men in it. (12RT 4586.) Unlike Ron, Tonyia did not tell Lillienfeld the car was parked the wrong way on the street – as far as she could recall, it was parked legally. (12RT 4591, 4609.) The car was a light color – either light green or light yellow. (12RT 4591.) Tonyia could not recall telling Lillienfeld the car was either blue or yellow – she just knew she told him it was light. (12RT 4591-4593.)

Immediately before Tonyia testified, Lillienfeld showed her the 2001 report. (12RT 4592-4593.) Tonyia did not know whether her statement was the reason Lillienfeld did not ask her to view the photographic lineup. (12RT 4594.) Tonyia did not know if she ever

told anyone in law enforcement prior to her testimony at trial that Goodwin looked like someone she had known at school. (12RT 4594-4595.)

Ron could not identify the passenger in the car, and was unable even to describe his race. (11RT 4404-4405.)

Kathy Weese's Observations

Sometime after the interview with Stevens, Kathy Weese came forward with another detail purportedly of no importance until the Stevens' statements were "discovered." Weese said she had seen an older-model station wagon with out-of-state license plates parked in the employees' lot of the Goodwin business in Orange County on one occasion. (11RT 4323.)

DEFENSE CASE

Possible Robbery Motive

On April 14, 1988, Eric Miller told Detective LaPorte Thompson said he had taken possession of a valuable item of a specific dollar amount. (21RT 7836-7840; 22RT 8233-8234.) LaPorte would have given the report about this interview to Griggs and Olberholtzer. (21RT 7840-7841, 22RT 8237.) LaPorte did not recall following up on any of his interviews, nor did he look into Thompson's financial records to see if he could match up the dollar amount of this valuable item with a deposit or debit. (21RT 7842; 22RT 8238-8239.)

Sandra Johnson reported seeing from her windows two black men dressed in dark sweatsuits, with drawstring bags on their backs, riding racing bikes down Woodlyn Lane. (19RT 7040-7045; 20RT 7623-7624.)

According to gold dealer Robert Wiborg, gold is often delivered in sealed canvas bags. (17RT 6436.) The bags are generally white and made of cloth, look like a regular bank bag and usually have a metal seal on top. (17RT 6436.) The size of the bag depends on how much material is inside. (17RT 6436.) Such bags are delivered to individuals as well as businesses. (17RT 6436.)

The Stevenses' Identification

Eyewitness identification expert Kathy Pezdek testified to the unreliability of eyewitness identifications. (22RT 8104-8198.) Pezdek described the factors that influence the accuracy of eyewitness identifications and opined a 13-year delay between the event and the identification procedures alone renders the identifications unreliable.[12] (22RT 8116-8122, 8162, 8181)

LACK OF INVESTIGATION

Detective Griggs

Detective Griggs was the lead investigator until he retired from the Los Angeles County Sheriff's Department[13] in January of 1992. (20RT 7530, 7551.)

Griggs obtained Goodwin's telephone records and created a database out of them, but did not seek information on Thompson's telephones. (20RT 7547.) Griggs did not investigate Goodwin's or

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[12] The facts pertaining to the identification procedures that correspond to the expert's testimony on unfair and unreliable identification procedures are set out in Argument II, *infra*.

[13] Hereinafter "LASD."

Thompson's finances, nor did Griggs investigate the finances of any Thompson family member or employee. (20RT 7549-7550.)

Griggs never caused a case to be filed against Goodwin or arrested Goodwin. (20RT 7551, 7556-7557.) There was never a time Griggs sought to arrest Goodwin or could not find him. (20RT 7557, 7567-7568.) Griggs never went to Florida with the intention of bringing Goodwin back to California. (20RT 7557.)

Detective Lillienfeld

When Detective Lillienfeld was assigned the Thompson case in 1995, Goodwin was the only suspect on whom investigators had conducted surveillance. (20RT 7569, 7636.)

When Lillienfeld first spoke with Allison Triarsi in 1997, she said the shooter could have been a white man. (20RT 7570-7571.) Allison told Lillienfeld it was possible Trudy was shot while Allison was running down her driveway. (20RT 7572.) Allison said she had spoken to her neighbors and a school psychologist about the shootings. (20RT 7572.) Allison also told Lillienfeld she believed her recollection was influenced by her mother. (20RT 7571.) Allison's mother did not specifically recall Trudy Thompson being shot. (20RT 7571-7572.)

Lillienfeld interviewed Baron Wehinger in 2003 and again in 2004 with Alan Jackson. (20RT 7572-7574.) Wehinger told Lillienfeld he heard Goodwin talking in late 1987, not in 1984. (20RT 7574.) Wehinger never told him there was a bidding war for getting a hit man; in fact, he never mentioned a hit man. (20RT 7575.)

Lillienfeld claimed in 2001 Kathy Weese told him Goodwin said, "For $500 and a motorcycle, I could have him taken out." (20RT

7575-7576.) When reminded that the statement had been taped, Lillienfeld admitted he was wrong; he would have put such a comment in a police report, and there was no such statement in his report. (20RT 7575-7576, 7627.)

Lillienfeld never reviewed a database of Goodwin's telephone numbers, never attempted to get Thompson's telephone records and did not notice whether any detective had obtained Thompson's records. (20RT 7576-7577.) He never reviewed the file on the lawsuit between Thompson and Goodwin. (20RT 7578.) Lillienfeld did not see any documentation indicating a writ had been issued for Goodwin's Mercedes in January or February of 1988, and did not confront Williams with the paperwork or even the idea that Goodwin was in bankruptcy at the time Williams claimed the tow occurred. (20RT 7578, 7580-7581.)

Lillienfeld was involved in the production of the America's Most Wanted show that first aired in 1997. (20RT 7583.) He first interviewed Lance Johnson on June 6, 1997, which may have been the day Lillienfeld went to the Thompson home with the film crew. (20RT 7627-7628.) Lillienfeld knew the Unsolved Mysteries show that first aired in 1988 had aired several times since then. (20RT 7582.)

Lillienfeld had the original investigating officers' contemporaneous notes from the morning of March 16, 1988, indicating someone might have been doing construction work at the Thompson home at the time of the murders, but he did not attempt to locate the workers. (20RT 7628-7629.) Lillienfeld never tried to obtain any financial or telephone records for Thompson's household employees.

(20RT 7631.)

Lillienfeld interviewed Greg Keay in 1997, who did not tell him about the statement Keay later attributed to Goodwin that Thompson was after Goodwin's money and "before that happens I'll have him wasted." (20RT 7631-7632.) All Keay reported at the time was, "That partner of mine is rubbing me the wrong way, he won't be rubbing me much longer." (20RT 7631.)

Lillienfeld obtained a warrant to seize computers belonging to Goodwin. (20RT 7632.) He asked for help from the Secret Service, the DEA, the FBI and Customs. (20RT 7632.) He obtained permission from the court to place a wiretap on Goodwin's phones, and he put Goodwin under surveillance. (20RT 7632-7633.)

Lillienfeld contacted the Stevenses in 2001. (20RT 7636.) Prior to interviewing them, Lillienfeld reviewed all of the reports. (20RT 7635.) He noted in his report that Tonyia was unable to recall whether or not the station wagon she saw in front of her property was occupied. (20RT 7633-7634.) Had she said she remembered seeing someone, Lillienfeld would have put that statement in his notes. (20RT 7633-7634.) Tonyia never told Lillienfeld an individual she saw in the car reminded her of a childhood friend. (20RT 7635.) Tonyia's entire interview took up less than a paragraph or two of his report. (20RT 7635.)

Lillienfeld denied finding in the original investigators' notebooks any mention of a suspect vehicle with Arizona plates until defense counsel refreshed his recollection. (20RT 7636, 7638.) The note had nothing to do with Goodwin, but was connected to another

suspect. (20RT 7641.) Lillienfeld made no attempt to determine whether Arizona plates mentioned in the files came back to station wagons, even though he had access to a searchable database identifying license plates and vehicles' registered owners going back years. (20RT 7641-7642.) Even after the Stevenses told Lillienfeld the station wagon they saw had an Arizona plate, he still made no attempt to run the Arizona plate. (20RT 7639.)

When Lillienfeld asked Claudette Freidinger to assist in making a composite of the men she saw on bikes, she told him her son did not start work until 7:00, so she doubted the man she saw was involved, based on the timing. (20RT 7642-7643.) Lillienfeld never attempted to determine how long it would take to get from the Thompsons' home to Freidinger's location. (20RT 7644.)

Lillienfeld admitted he knew of black men who were suspected shooters; however, he never showed photographs of those men to Claudette Freidinger, Wilma Johnson, Lance Johnson, or any other witness. (20RT 7644-7645.) Lillienfeld displayed only Goodwin's photograph to witnesses. (20RT 7644.)

Lillienfeld claimed he reviewed lab reports, but he did not recall seeing the March 16, 1988, report indicating a criminalist had removed a hair from the stun gun. (20RT 7645.) Lillienfeld did not know about the hair until defense counsel told him about it. (20RT 7645-7646.) Lillienfeld never requested testing of the hair, but he knew defense counsel requested it. (20RT 7646.)

Lillienfeld was aware that in 1988 a criminalist had collected fingernail clippings and scrapings from the Thompsons, but

he never submitted those items for testing. (20RT 7646.) He was aware they were eventually tested at defense request. (20RT 7646.) Lillienfeld knew those items sat in the evidence locker from 1988 until trial. (20RT 7646-7647.)

Lillienfeld was unaware of any warrant being issued for Goodwin's arrest prior to 2001, and he always knew where Goodwin was. (20RT 7582.)

The Surrender of Goodwin's Mercedes Was Uneventful

In January of 1988, Goodwin surrendered his Mercedes to the bankruptcy trustee via Jackie Southern and her husband. (21RT 7822-7826.) Southern recalled waiting while her husband approached the front gate, where someone met him. (21RT 7826.) There was no confrontation; the person handed the keys to her husband, who gave them to her. (21RT 7823-7826.) Southern stored the Mercedes until it was auctioned off. (17RT 7828.)

ARGUMENT

I. THE TRIAL COURT PREJUDICIALLY ERRED IN DENYING GOODWIN'S MOTIONS TO DISMISS AND TO RECUSE THE LADA

A. Overview

Goodwin brought several motions in an attempt to cure the massive invasion of attorney-client privilege that occurred when Lillienfeld led Orange County investigators in the search of Goodwin's residence and seized hundreds of privileged documents, which the OCDA and LADA retained and reviewed. (Augmented Settled Record[14], pp. 5-7.)

Goodwin first sought to dismiss the case, then suggested recusal of the entire LADA's office as a remedy, then sought removal of prosecutors Dixon and Jackson, who had reviewed the privileged documents. The court denied all of those motions, ruling there was insufficient justification to exercise the court's inherent authority to order Jackson and Dixon off the case. (4RT O-9; 4RT V-15 – V-28.) In doing so, the court found:

- The documents seized and reviewed by the prosecution team were privileged (4RT O-9);

- This case did not involve an actual conflict of interest, but a taint – and that taint was that Jackson and Dixon had access to Goodwin's attorney-client privileged material all along (ART 12-18-2007, E-8); and

- The court had inherent authority to remove Jackson and Dixon

[14]Hereinafter referred to as "ASR".

from the case. (4RT O-6.)

The court erred in failing to provide an adequate remedy for the invasion of Goodwin's attorney-client privilege, and Goodwin's convictions must be reversed.

B. Facts Relevant to All Motions

All of the motions arose from the December 13, 2001, search of Goodwin's home by members of the LASD and OCSD. (See Exhibit B to 1538.5 motion filed under seal on April 7, 2005.) Deputies seized thousands of documents filling approximately 120 storage boxes. (4CT 880.)

Few, if any, of the seized documents were listed in the search warrant or requested in the affidavit. Most related solely to Goodwin's past and ongoing legal matters, including the Thompson murder investigation. (4CT 881.) Because of wiretaps on Goodwin's telephones, at the time of the seizure the police and the OCDA knew Goodwin was preparing a defense to the expected Thompson murder charges, Goodwin worked from his home, and he had hired an attorney – Jeff Benice – to defend him. (4CT 881.) Goodwin and Benice were in constant communication. (4CT 881-882.)

In March of 2001, Lillienfeld served Goodwin with a subpoena to appear before the Orange County grand jury. Goodwin directed Lillienfeld to a bedroom he used exclusively for an office for his legal matters, informing Lillienfeld he had prepared many of the documents in the room to defend against anticipated murder charges. (Exhibit A, p. 42.) This was the same room where deputies seized most

of the privileged documents during the December 2001 search. (4CT 882.)

During late March and April 2001, Lillienfeld procured the services of "Butch" Jones, a twice-convicted sex offender who worked as an office assistant or runner for Goodwin, and later for Benice. (4CT 882-883.) Lillienfeld persuaded Jones to provide the police with daily updates on activities relating to Goodwin's defense. (4CT 883.) This included reporting on issues Jones had learned of during attorney-client conferences. (4CT 883.) Through Jones the authorities learned about Goodwin's potential sources of financial support, his belief in a conspiracy against him by various Orange County officials, and his efforts to investigate the possible connections between the Thompson murders and the murder of Thompson's nephew, Scott Campbell. (4CT 883.)

Furthermore, Jones gave Lillienfeld advance notice of Goodwin's and his counsel's pre-arrest tactics and strategies, including a two-day advance notice of a planned press conference in front of the Orange County Courthouse on March 28, 2001, proclaiming Goodwin's innocence and knowledge of the pending grand jury investigation. (4CT 883.) Lillienfeld was also well aware at the time he seized Goodwin's documents that Benice had been defending Goodwin since March of 2001. (4CT 883.) Benice appeared with Goodwin when Goodwin was summoned before the Orange County grand jury (4CT 883), represented Goodwin at a live lineup and spoke on Goodwin's behalf at a press conference afterward. (4CT 884.)

Prior to the December 2001 search, Goodwin had placed

a sign on his home office door asserting his claim of privilege over the items in that room and directing the police to Benice, his counsel of record. (4CT 884.) The sign also clearly indicated the location of meticulously labeled binders containing documents related to the Thompson murders. (4CT 884.) Within two weeks after Lillienfeld seized Goodwin's documents, Benice demanded in a letter to the lead Orange County prosecutor, David Brent, that Brent appoint a special master to protect any privilege. (4CT 884.) Brent summarily rejected that demand. (4CT 884.) The OCDA retained Goodwin's privileged documents for several months, then returned the originals to Goodwin, forwarding copies to the LADA's office after the Court of Appeal ruled Orange County had no jurisdiction over the case. (4CT 884.)

The prosecutors obtained numerous clearly privileged documents by way of the search, among them:

> 1. Handwritten memoranda from Goodwin to attorney Ronald Columbe discussing issues relating to the Goodwins' bankruptcy.
>
> 2. A four-page typewritten letter from Goodwin to attorney Allan Stokke dated December 17, 1998, detailing facts and possible avenues of defense to the murder charges. The letter refers to certain potential exculpatory evidence that is no longer available.
>
> 3. A 24-page "to do" list and memorandum of the state of the defense dated October 24, 2001, including defense theories and investigations. The document is clearly marked at the top "FAX TO JEFF BENICE."[15]

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15 A copy of this document was attached to the motion to dismiss as

4. Two memoranda from Goodwin to Benice concerning the effect of his association with Butch Jones on his probation status.

(4CT 885-886.)

In all, deputies removed approximately 120 boxes from Goodwin's home. (4CT 886; Exhibit "I" [Return to Search Warrant].) Of those, 116 boxes were returned, many in such a state of disarray their value to the defense was greatly reduced. (4CT 886.)

C. Goodwin Continually Asserted the Privilege and Due Process Violations

1. Motion to Dismiss filed December 9, 2004 and Denied March 17, 2005

On December 9, 2004, Goodwin moved to dismiss the case against him for intentional violations of privilege and due process. (4CT 880-903 [exhibits A through I filed under seal].) The sealed exhibits included a sampling of 35 documents representing the most egregious violations. (2RTD-14.) The prosecutor did not dispute the obviousness to any police officer this was attorney-client privileged material.[16] (2RTD-14.)

Exhibit "G." The defense copy contains arrows and notations, (put in later by the client), and a post-it note from Lillienfeld, showing he read the document and acknowledged its origin.

16

Defense counsel later clarified she meant these were the most obvious documents in terms of attorney-client privilege, but the least egregious in terms of content. (2RT D-40.)

Goodwin argued investigators could have sought appointment of a special master under § 1524 to accompany the officers serving the warrant, and then followed the procedures set out in § 915 and submitted the seized documents for *in-camera* review so as to avoid violating privilege. Goodwin asked the court to dismiss the case with prejudice. (4CT 893-902.)

At the December 9 hearing, Dixon asserted the LADA was not responsible for Lillienfeld's violation of Goodwin's rights; rather, the responsibility lay with the Orange County Sheriff and LASD. (2RT A-2.)

On March 7, 2005, the LADA filed its opposition to the motion to dismiss, arguing the government was not required to seek appointment of a special master because the area searched was not a lawyer's office, Butch Jones did not work for Goodwin's lawyer and was not a part of the defense team, and there was no prejudice to Goodwin. (4CT 913-937.)

Goodwin's reply to the LADA's opposition emphasized Lillienfeld's sworn statements in the search warrant he was aware Butch Jones was involved in attorney-client privileged communications, the written notice Benice had sent to investigators that Goodwin's home office contained numerous attorney-client privileged documents, and the prosecutor's failure to address the *Barber* case.[17] (4CT 950-954.)

On March 17, 2005, the court heard and denied the motion.

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[17] *Barber v. Municipal Court* (1979) 24 Cal.3d 742, 750.

(2RT D-8 – D-44.) During the hearing defense counsel suggested for the first time recusal of the LADA could be an alternative to dismissal. (2RT D-10 – 11.) Jackson did not dispute the materials were seized, but denied they were privileged. (2RT D-11 – 12.) Jackson again conceded the seized communications were obviously communications between a client and an attorney about the Thompson murders. (2RT D-11.) The court ruled the sheriffs had seized attorney-client protected material. (2RT D-11.)

The court announced the next step was to determine whether the claim of privilege had been raised, and if so, whether the authorities in Orange County should have done something to preserve the privilege. (2RT D-12.)

Defense counsel reiterated there was a sign on the door to Goodwin's home office alerting law enforcement to the privilege. (2RT D-14.) Defense counsel asserted she could produce at least another 50 examples of privileged communications on attorney letterhead, and several more boxes containing lists of witnesses and other matter created in anticipation Goodwin would be charged with the Thompson murders. (2RT D-15.)

Defense counsel clarified her contention not only were the sheriffs and the OCDA obligated to preserve privilege, but the LADA was obligated not to review the privileged documents, and to turn them over to a judge. (2RT D-15 – 16.) Defense counsel also clarified the claim as to Butch Jones - that Jones, as a private citizen, was asked to spy on the attorney-client privileged relationship between Goodwin and Benice. (2RT D-17 – 18.)

The court defined the issue arising out of the letter Benice sent to Orange County as whether the OCDA had a duty to notify the court of the privilege issue. (2RT D-18 – 19.)

Jackson argued Goodwin waived the privilege by publishing much of the seized material in books or documents. (2RT D-19 – 20.) Jackson claimed the prosecutor was not required to take steps to protect the privilege, but Benice had been obligated to make his objections known to the Orange County court. (2RT D-20 – 22.) Jackson also argued Goodwin had waived the privilege by failing to assert it when the Fourth District Court of Appeal found Orange County did not have jurisdiction over the case and suggested the LADA prosecute Goodwin, and waived it again by failing to mention the privilege during the Los Angeles preliminary hearing. According to Jackson, objecting six months after the Los Angeles preliminary hearing ended was too late. (2RT D-22 – 23.)

Defense counsel responded Benice had raised the issue repeatedly in Orange County, and Goodwin had appealed the Orange County case on purely jurisdictional grounds, leaving no opportunity to address the privilege violations at that time. (2RT D-26.) Defense counsel also pointed out the LADA had reviewed the privileged documents prior to charging Goodwin – before Goodwin's attorneys could ask the LADA not to look at them. (2RT D-27 – 28.)

Defense counsel also noted there were 40,000 pages of documents, and it took a long time for the Los Angeles Public Defender to review those pages and discover the privileged documents. (2RT D-28.) Jackson conceded some of the privileged documents were turned

over to the defense as discovery. (2RT D-29.)

While Jackson claimed he did not care about the attorney-client privileged material and did not recall seeing any of it, defense counsel pointed out the charges against Goodwin had changed significantly between the Orange County proceedings – where the OCDA charged him with conspiracy and murder for financial gain – and the Los Angeles proceedings – where the LADA charged him only with murder. The letters between Goodwin and his lawyer exposed a fatal fallacy in the OCDA's theory Goodwin stood to gain financially from Thompson's death. (D-29 – 31.)

Goodwin proposed the court remove the LADA from his case, review the material, redact every attorney-client privileged document and give the case to another prosecutorial agency. (2RT D-31.)

Dixon protested he did not have all of the disputed material when he reviewed the case for filing. (2RT D-32.) Dixon claimed the LADA decided not to file the financial gain special circumstance in Los Angeles, not because of any document Benice or Goodwin had generated, but because Goodwin owed Thompson's estate the judgment before and after the murders. (2RT D-32.) Dixon believed the conspiracy count had been filed in Orange County to bolster the OCDA's weak claim of jurisdiction in Orange County. (2RT D-32.)

Based on the prosecutors' representations they were not using information from privileged documents to prosecute Goodwin, that all of the privileged items had been returned to Goodwin, and that

the evidence to be presented at trial came from independent sources, the court denied the motion to dismiss and declined to recuse the LADA. (2RT D-33, 35-38.) The court, however, invited the defense to make a new motion submitting the privileged materials under seal, and suggested the court appoint a special master to review the material and advise the court what could be characterized as attorney-client privileged documents so the court could determine which evidence was independently obtained. (2RT D-38 – 40, 42.)

2. Motion to Recuse LADA, Motion to Dismiss, and 1538.5 Motion for Return of Property – Filed April 7, 2005

On April 7, 2005, Goodwin filed three motions under seal: a motion to recuse the LADA (4CT 959; ACT January 4, 2008, 7 [sealed]); a motion to dismiss the case based on the violation of attorney-client privilege and the illegal seizure of Goodwin's personal papers (4CT 958; [sealed]); and a 1538.5 motion for return of Goodwin's property. (Sealed document filed April 7, 2005; see ASR 29.)

On April 26, 2005, the LADA filed an amendment to his original opposition to the original motion to dismiss, and on May 26, 2005, the Attorney General filed its opposition, arguing recusal is permitted only in a narrow category of cases, and that Goodwin was required to show a conflict of interest so serious as to render it unlikely he would receive a fair trial. (4CT 989-992.) The Attorney General also argued recusal must be denied if an "ethical wall" can be erected, and Goodwin showed no disabling conflict such that recusal of the entire staff of the district attorney's office was necessary to remedy the alleged

conflict. (4CT 993-1000.)

(a) The April 27, 2005 Hearing

On April 27, 2005, the court partially addressed the three motions, after announcing the court had not appointed a special master to review the material filed under seal because the material was not as voluminous as the court had expected. (2RT E-1 – E-55.)

The court declined to hear the recusal motion because the Attorney General had not been served, but suggested litigating the 1538.5 motion as a potential remedy for some of the misconduct described in the motion to recuse. (2RT E-8 – 9.)

The defense called Lillienfeld to testify. (2RT E-9 --37.) In 2001, Lillienfeld was investigating Goodwin for the Thompson murders and intercepting his telephone calls using a wiretap. (2RT E-10 – 11.) During that time Lillienfeld encountered Butch Jones, who was receiving telephone calls from Goodwin. (2RT E-11 – E-12.) Lillienfeld ran Jones' rap sheet and discovered Jones had failed to register as a sex offender. (2RT E-11.) Lillienfeld went to Jones' apartment, asking Jones to provide any information he might have about Goodwin's involvement in the Thompson murders. (2RT E-12.) Lillienfeld discussed Jones' conviction with him and told him how to register as a sex offender, but did not arrest Jones for failing to register. (2RT E-13 – 14, 17.)

On a daily basis for several weeks, Jones gave Lillienfeld information about Goodwin's movements and communications. (2RT E-12, E-15.) Lillienfeld knew Benice was Goodwin's attorney. (2RT E-14.) Jones would tell Lillienfeld at times that Goodwin was meeting

with Benice. (2RT E-18.) Jones told Lillienfeld he was at Benice's office with Goodwin, but Lillienfeld never admonished Jones to be careful about reporting anything Goodwin and Benice discussed. (2RT E-20 – 21.) Lillienfeld denied knowing Jones was privy to information Goodwin had discussed with Benice, even though Jones told Lillienfeld Goodwin's attorney was trying to set up a press conference. (2RT E-12 –13, 18.) Prior to the press conference, Lillienfeld learned the defense intended to address certain defense strategies, but denied hearing this from Jones. (2RT E-18 – 19.)

On March 27, 2001, Jones told Lillienfeld Goodwin and his attorneys were meeting to figure out a defense strategy in case Goodwin was indicted or arrested. (2RT E-19 – 20.) Lillienfeld claimed he did not ask Jones what those strategies were. (2RT E-20.)

Lillienfeld would sometimes ask Jones to say certain things to Goodwin in order to stimulate conversation on the wire intercept. (2RT E-16.)

In 2001 Lillienfeld asked Jones if he was employed by Benice, and Jones said he was not. (2RT E- 16 – 17.) Lillienfeld claimed that in 2001 he tried to substantiate that claim on his own by obtaining copies of checks written and signed by Goodwin made out to Jones for Jones' services. (2RT E-17.) Lillienfeld did not attempt to get such records from Benice. (2RT E-17.)

Lillienfeld claimed at the time Jones was giving him information, Lillienfeld asked if Jones was attending meetings between Goodwin and Benice, and Jones said he was not. It was only after Goodwin filed the pending motion Jones told Lillienfeld he had been

present at a meeting between Goodwin and Benice. (2RT E-14 – 16.)

(b) The June 2, 2005 Hearing

A representative for the Attorney General's office appeared at the June 2, 2005 hearing. (RT 6-2-2005, 1.)

Defense counsel stated the motion to recuse was based not only on the prosecutor having seen privileged documents, but the illegal seizure of the documents. (RT 6-2-2005, 2.) Counsel noted the search warrant only authorized seizing documents pertaining to ownership Goodwin's home and travel, yet the searchers took 118 boxes of documents. (RT 6-2-2005, 3.) The "murder book" was delivered to defense counsel in boxes, and counsel placed the papers in 61 binders. (RT 6-2-2005, 3.) Goodwin contended 50 of those binders contained material neither the prosecutor nor his agents should have seen, and five of those contained attorney-client privileged materials. (RT 6-2-2005, 3.) The inventory attached to the return clearly listed material that was privileged. (RT 6-2-2005, 4.)

Counsel argued there was no justification for the seizure of items such as the screenplay. Even though some documents were in "plain view," they were not contraband such that they could be seized without a warrant. (RT 6-2-2005, 7.) Instead of seizing 118 boxes of documents, the searchers should have taken only the approximately 50 documents covered by the warrant. (RT 6-2-2005, 7.) Defense counsel reiterated Goodwin should not be forced to accept the word of a prosecutor who could not possibly ignore what he had seen in those papers. (RT 6-2-2005, 5.)

Defense counsel provided the court with an eight-page

database listing approximately 130 letters counsel had located in a cursory review of the discovery. (RT 6-2-2005, 6.) Counsel pointed out Bartinetti, Cordell and Kingdon testified to many of the issues Goodwin and Benice had discussed in their letters and other materials. (RT 6-2-2005, 6-7.) Defense counsel described in the sealed material the specific violations of privilege that denied Goodwin a fair trial. (RT 6-2-2005, 7-8.) Those incidents related to the bankruptcy, the settlement, and Goodwin's conduct both before and after the murders. (RT 6-2-2005, 8-9.)

Defense counsel also argued the prosecutor's knowledge of the attorney-client privileged material precluded Goodwin from testifying in his defense. (RT 6-2-2005, 9-10.)

Defense counsel pointed out the LADA might be seen as blameless because the OCDA had an opportunity to correct the error, and instead turned over the privileged material to the LADA; however, the LADA had reviewed the material before defense counsel had an opportunity to stop it. (RT 6-2-2005, 10-11.)

Defense counsel again asked the court to take all of the material away from the prosecutor and give it to a special master who could remove all privileged documents, and then recuse the LADA and give the case to an untainted prosecutorial agency. (RT 6-2-2005, 11-12.)

Defense counsel countered the Attorney General's argument there was no conflict of interest, emphasizing the due process violation. (RT 6-2-2005, 12.) Defense counsel expressed a willingness to consider the Attorney General's proposal Jackson be removed from

the case, provided Dixon went as well. (RT 6-2-2005, 12.) However, defense counsel asserted it was necessary to recuse the entire LADA's office because of the volume of material Lillienfeld had seized and the LADA reviewed. (RT 6-2-2005, 12-13.)

The court interjected her perception of the situation, stating this was not truly a recusal motion, but a motion to address a situation where the LADA's office possessed information it should not have. (RT 6-2-2005, 13-14.) The court again found much of that material was privileged. (RT 6-2-2005, 15.)

Counsel for the Attorney General asked the court to deny the recusal motion because §1424 is not a remedy for prosecutorial misconduct. (RT 6-2-2005, 25-26.)

The court denied the recusal motion without prejudice, finding 1) there was no "conflict" within the meaning of § 1424, and 2) the prosecutor had agreed not to use the privileged material at trial. (RT 6-2-2005, 26-29.)

Defense counsel reiterated that no matter how the problem or the remedy were characterized, Goodwin could not get a fair trial in Los Angeles if Jackson and Dixon were the prosecutors, and their promise not to use the attorney-client privileged material against Goodwin meant nothing since they had already used it. (RT 6-2-2005, 36-37.)

The court found "that may be a disadvantage to the defense, but it doesn't, in my mind, rise to the level of depriving the defendant of a fair trial." (RT 6-2-2005, 38.) However, the court at that point decided to appoint a special master to review and isolate the

privileged documents. (RT 6-2-2005, 38-39, 43, 48.) The court also found Goodwin had made a sufficient showing on the 1538.5 motion to shift the burden to the prosecution. (RT 6-2-2005, 42.)

(c) The August 17, 2005 Hearing

On August 17, 2005, the court issued an order appointing George Bird as special master, directing him to go through all of the prosecution's discovery and determine what material was privileged, and what items had been seized that were not specified in the warrant. (3RT I-2 – 5.)

(d) The November 16, 2005 Hearing

The court consulted with the special master *in camera* and asked him to remove the documents that were clearly privileged. (3RT K-13.) The court proposed the special master place the privileged material in a separate file, noting what pages were removed so the prosecutor could see where materials had been removed. (3RT K-31-32.) The parties agreed. (3RT K-32.)

Next the court asked the special master to identify and remove the documents that appeared to be outside the scope of the warrant, so the court could refer to them later in the suppression motion. (3RT K-32-33.) Jackson asked if the papers considered to be outside the warrant would be returned to him, and defense counsel objected. (3RT K-33 - 37.)

(e) The February 6, 2006, Hearing

At the February 6, 2006, hearing, the court addressed the renewed motions to dismiss and recuse based on the violation of attorney-client privilege, to which the attorney general had filed a

response. (4CT 1049-1052, 1055-1091; sealed motions; 4RT N-1 – 39.)

The Attorney General's papers asserted the only appropriate remedy for the District Attorney's possession of privileged materials would be suppression of the seized material and its fruits. (4CT 1043.)

The Attorney General's opposition referenced Jackson's declaration he was the only prosecutor who had reviewed the documents, he had not disclosed any privileged information to anyone and would not do so in the future, all of the decisions to investigate and prosecute this case were made in the usual and customary manner, and no decision had been influenced in any way by the LADA's possession of any privileged document. (4CT 1043.)

The court addressed the recusal motion, noting the problem with the Attorney General not having been able to review the disputed documents. (4RT N-2 – 3, N-17.) The Attorney General argued the motion was procedurally defective under § 1424 for that reason. (4RT N-2 – 3.)

Defense counsel interjected she had offered to deliver a copy of the substantive motion if the Attorney General's office would dedicate a "dirty team" and a "clean team" to reading the motion, but the Attorney General refused. (4RT N-4.) Goodwin's motion listed the letters counsel believed were privileged, the content of those letters and the nature of the prejudice, so that giving that material to the Attorney General would taint the agency if the motion to recuse were granted. (4RT N-4.)

The court found Jackson had viewed the attorney-client

privileged material. (4RT N-5 – 6; see Jackson declarations; 4CT 927, 1003-1004.) The court reminded all parties of her order barring the prosecutor from using any of that material at trial and Jackson's representation he would not use it. (4RT N-6.)

The court asserted it had inherent authority to remove a prosecutor. (4RT N-7 – 8, N-11, N-23.) The court suggested the LADA put another deputy on the case and "build a wall" as a method for guaranteeing the court's order was enforced. (4RT N-8, N-11 – 12.) The court stated §1424 authorized recusing the entire LADA's office. (4RT N-8.)

Goodwin did not accept Jackson's representations he would not use the privileged material, nor could Goodwin accept Dixon's representations he did not know the content without cross-examining him. (4RT N-8 – 9.) Defense counsel pointed out Jackson had briefed Dixon before the preliminary hearing, and Dixon knew the prosecution theories. (4RT N-9.)

The Attorney General reasserted the court's authority to dictate who prosecutes a case is limited by §1424, which requires a conflict of interest to disqualify a particular district attorney or district attorney's office. (4RT N-10.) The court suggested Jackson voluntarily step down as prosecutor, but Jackson insisted there was no legal basis for removing him. (4RT N-12 – 16.)

Following an *in-camera* hearing with the special master, during which the court and the special master agreed the material was privileged (4RT N-28 – 30), the court again denied the motion to dismiss for egregious governmental misconduct, declined to recuse the

entire LADA's office, but left open the issue of recusing Jackson and Dixon. The court requested briefing on the court's inherent authority to remove a prosecutor from a case under Code of Civil Procedure § 128. (4RT N-31 – 39.)

(f) The February 15, 2006, Hearing

At the hearing Jackson stated the law was clear the court could recuse him under §1424 if it found an inherent and grave conflict. (ART 12-18-2007, E-2 – 3.) Jackson disagreed the court had any power under §128 to grant a recusal or disqualify a particular attorney or prosecutor. (ART 12-18-2007, E-3.) Jackson concluded §1424 governed, and there was no conflict sufficient to justify recusal. (ART 12-18-2007, E-4.)

Jackson refused to recuse himself, complaining it was unfair because he had already devoted two years to Goodwin's prosecution. (ART 12-18-2007, E-4 – 6.) Jackson asserted he "needed time" to look at "the actual documents" deemed privileged so he could "absorb" and "analyze" them. (ART 12-18-2007, E-6 – 7.)

The court ruled she had the inherent authority to remove prosecutors from particular cases. (ART 12-18-2007, E-8 – 9.) The court distinguished this case as not involving an actual conflict, but a taint – which was that Jackson had access to privileged material all along. (ART 12-18-2007, E-8.)

The remaining issue was whether Goodwin had waived attorney-client privilege by disclosing the material to others outside the defense camp. (ART 12-18-2007, E-8 - 9.) The court ruled if the material was subject to the attorney-client privilege, and the material

had not been disclosed to third parties, Jackson had already been privy to it, so in all fairness Jackson should be able to respond to Goodwin's motion before the court disqualified him. (ART 12-18-2007, E-9.) Ultimately defense counsel agreed to the court giving the unredacted report of the special master to Jackson. (ART 12-18-2007, E-18.) The court handed over to Jackson the original box of documents that had been labeled SM-1 to review "for waiver of the privilege only." (ART 12-18-2007, E-19 – 21.)

(g) The March 6, 2006, Hearing

Prior to the March 6, 2006, hearing, Jackson filed his opposition to Goodwin's renewed motion to recuse (4CT 1110-1144; ASR 81-116) and Goodwin filed a reply. (4CT 1145 [filed under seal].) Jackson's opposition presented a detailed analysis of the privileged documents in the box labeled Exhibit SM-1 and argued Goodwin had the burden of "point[ing] to any prejudice that results from a claimed violation of the attorney-client privilege." (ASR 83.) The prosecutor asserted the motion to recuse did not, as defense counsel had argued, involve "hundreds" of documents, but "turns on only 27 pages of claimed privileged materials." (ASR 86.) In a section titled "The Math," the prosecutor argued:

> 475 pages were included in the Special Master's packets in total. Of those, 216 pages were duplicates, leaving 259 original pages. Of those, 42 pages are, on their face, not privileged, leaving 217 original, privileged pages. Of those, 164 pages are not prejudicial, in that they pertain to either the defendant's federal fraud litigation or another subject not related to the Thompson murders, thus leaving 53 original, privileged, relevant pages. Of those, the Court

> has previously ruled on 26 pages, finding them not prejudicial, leaving 27 pages at issue. As the table in "Attachment A" illustrates, the defendant can claim no prejudice as to DDA Jackson's review of those 27 pages, as the subject matter in those documents has been published by the defendant in an alternative forum—effectively, a waiver.

(ASR 86.)

The court found no substantial showing of prejudice and denied the motion to recuse Jackson and Dixon. (4RT O-5.)

3. Motion to Exclude Witnesses' Testimony at Trial, Or, in The Alternative, to Recuse the District Attorney – Filed May 10, 2006

(a) Facts Pertaining to The Motion

On May 10, 2006, Goodwin filed a motion to exclude witnesses' testimony at trial, or, in the alternative, to recuse the district attorney. (5CT 1405-1406.) Defense counsel argued the LADA's office was estopped from calling Bartinetti, Cordell, Coyne, Kingdon and others to testify at trial based on Jackson's assertions the privileged documents Jackson and Dixon reviewed were irrelevant because they pertained to "federal fraud litigation."

Citing *In Re Sakarias* (2005) 35 Cal.4th 140, the defense argued that by calling the financial witnesses, the prosecutors would be changing theories of the case based upon the content of Goodwin's privileged documents. (5CT 1407.) Goodwin argued the estoppel principles of *Sakarias* and its progeny should apply. (5CT 1407.)

Defense counsel pointed out that in Jackson's March 6, 2006, opposition, Jackson argued why he should not be removed from

the case even though he had reviewed hundreds of pages of privileged material. (5CT 1408; ASR 81-116.) Jackson listed between 150 and 200 pages he asked the court to disregard, deeming them "irrelevant" because they contained information about Goodwin's prior federal criminal case and not Goodwin's prosecution for the Thompson murders. (5CT 1408-1409; ASR 88-116.)

In 1993 Goodwin was charged in federal court with bankruptcy and loan fraud. (5CT 1409.) Those charges stemmed from an allegation of bankruptcy fraud made by the Campbell family, their lawyers and the OCDA. (5CT 1409.) In fact, the charges were initiated by the law firm representing Thompson's estate and were investigated by an accountant employed by the OCDA. (5CT 1410.)

Cordell and Kingdon were part of the driving force behind Goodwin's prosecution for crimes related to his bankruptcy. (5CT 1410.) These witnesses would be the prosecutor's main witnesses as to the purported motive for the Thompson murders. (5CT 1410.)

Goodwin was convicted of making false statements to a financial institution (18 U.S.C. §1014), but not the charges of bankruptcy fraud against him under 18 U.S.C. § 152. (5CT 1412.)

Jackson, in urging the court to hold Goodwin to answer for the murder charges, argued Goodwin "was brought to his knees financially from a corporate level and from a personal level. He had to declare corporate bankruptcy, his business was taken away; his livelihood was taken away." (5CT 1411-1412.)

Defense counsel pointed out the letters between Goodwin and his lawyers regarding the federal criminal case and his bankruptcy

were highly relevant to the murder charges; in fact, they were the basis for the claimed motive to kill the Thompsons, and to argue otherwise was not only unjust but unethical. (5CT 1412.)

Jackson had argued to the court in oral and written motions that Goodwin's motive for murder was that he had lost a civil lawsuit and was thrust into bankruptcy as a result of his financial dealings with Thompson. (5CT 1417.) The facts that formed the basis for Goodwin's federal criminal trial were facts about the civil suit, the bankruptcy and Goodwin's efforts to avoid paying on the judgment obtained by Thompson and others. (5CT 1417.) The letters between Goodwin and his attorneys directly bore on these facts, Goodwin asserted his privilege in those letters, and Jackson admitted to reading them. (5CT 1417.) His argument that they were irrelevant was belied by his witness list for the trial. (5CT 1417.)

Jackson filed his opposition on June 15, 2006, attaching an attorney-client privileged letter to it and citing *United States v. Morrison* (1981) 449 U.S. 361, for the proposition no remedy was necessary because Goodwin had suffered no prejudice.[18] (6CT 1607 [motion filed under seal].)

Defense counsel promptly filed a reply asking the court to seal the exhibit attached to Jackson's opposition. (6CT 1610-1618.)

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In *Morrison* the issue was whether the Sixth Amendment was violated by police agents' action of meeting with defendant without her counsel's knowledge or permission and seeking her corroboration in a related investigation – not whether privileged communications had been invaded.

Defense counsel argued Goodwin had suffered extreme and irreparable prejudice from the violation of the privilege, in that the blueprint of his defense to the financial allegations was exposed, along with his thought processes and conduct relating to his handling of the civil judgment and the bankruptcy. (6CT 1615.) Defense counsel pointed out that Goodwin faced a prosecutor armed with information received outside the bounds of the rules governing fair trials, and Goodwin's due process rights under both the Federal and State constitutions would be severely impaired at trial. (6CT 1615.)

Defense counsel also pointed out that when the court made the prior rulings on dismissal and recusal, the court did so after being misled by the district attorney in his moving papers into believing a substantial portion of the attorney-client privileged documents would not be at issue in the trial, but Jackson's witness list indicated otherwise. (6CT 1616-1617.)

(b) Hearing and Ruling on the Motion

On June 20, 2006, the court heard and denied the motion. (4RT V-15 – 28.)

The court stated she assumed Jackson and Dixon had taken seriously her order not to use any attorney-client privileged material. (4RT V-20.) The court also stated she assumed Jackson and Dixon were calling witnesses they had planned on calling all along, and they had not obtained any new information from their review of the privileged material. (4RT V-20.)

D. The Trial Court Erred by Failing to Dismiss the Case Against Goodwin or to Recuse the Prosecutors

1. The Standard of Review for Denial of a Motion To Dismiss a Case for Denial of Due Process Due to Outrageous Government Misconduct

According to the most current California case on point, a trial court's finding that a prosecutor's misconduct was outrageous governmental conduct is primarily a legal question subject to independent review. (*People v. Uribe* (2011) 199 Cal.App.4th 836, 857-858.)[19] A trial court's consideration and weighing of the evidence and assessing the credibility of the witnesses to determine factually whether, and to what extent, governmental misconduct occurred, in determining whether the government engaged in outrageous conduct in violation of the defendant's due process rights, is a factual determination subject to a deferential standard of review. (*Ibid*.)

2. The LADA Was Not Absolved of Responsibility for Violating Goodwin's Attorney-Client Privilege Just Because the Misconduct Originated in Orange County

The court expressed the belief Jackson and Dixon were absolved of wrongdoing because the initial violation of Goodwin's

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Uribe conflicts with the doctrine of *Rochin v. California* (1952) 342 U.S. 165, and other California cases. (See, *Morrow v. Superior Court* (1994) 30 Cal.App.4th 1252, 1259-1261; *Boulas v. Superior Court* (1986) 188 Cal.App.3d 422, 429, 434; *People v. Moore* (1976) 57 Cal. App. 3d 437, 442; see also, *People v. Tribble* (1987) 191 Cal.App.3d 1108, 1116.) The California Supreme Court has not yet ruled on these conflicts.

privilege occurred in Orange County, and the OCDA turned the privileged documents over to the LADA without advising the LADA there were attorney-client privileged documents in the seized material. (See 2RT D-28 – 29; 4RT O-12.) The court was mistaken.

The LADA is accountable for the outrageous misconduct of the investigators and the prosecutors, both in Orange County and in Los Angeles. Although the documents were seized in Orange County, the detective who headed the search team was Lillienfeld – a member of the LASD. Because the LADA initially refused to prosecute Goodwin for lack of substantial evidence of his involvement in the Thompson murders, Lillienfeld had been working for years with the OCDA and Orange County Sheriffs to find incriminating evidence against Goodwin where there was none. Lillienfeld could not have missed the sign on Goodwin's home office door asserting attorney-client privilege and directing police to his attorney, yet he led the charge that resulted in the wholesale seizure of Goodwin's attorney-client privileged documents. The LADA, therefore, is responsible for Lillienfeld's actions because Lillienfeld was a part of the prosecution team.

(a) <u>The Attorney-Client Privilege is Sacrosanct And a Prosecutor Must Protect It</u>

The California Supreme Court has recognized a prosecutor is not only the defendant's adversary, but is also the guardian of the defendant's constitutional rights. (*People v. Trevino* (1985) 39 Cal.3d 667, 681; *People v Sherrick* (1993) 19 Cal.App.4th 657, 660.) The prosecutor's role is a unique one within the criminal justice system. Though the

district attorney must diligently discharge the duty of prosecuting individuals accused of criminal conduct, the prosecutor may not seek victory at the expense of the defendant's constitutional rights. (*People v. Superior Court (Greer*) (1977) 19 Cal.3d 255, 266; *People v. Fuller* (1982) 136 Cal.App.3d 403, 424.) Thus, the prosecutor is obligated to respect the defendant's right to a fair and impartial trial in compliance with due process of law. (*Berger v. United States* (1985) 295 U.S. 78, 88 [79 L.Ed. 1314, 1321, 55 S.Ct. 629]; *People v. Lyons* (1956) 47 Cal.2d 311, 318, 319; *Fuller, supra*, 136 Cal.App.3d 403, 424, fn. 26.)

The prosecutor's dual role as the defendant's adversary and as a guardian of the defendant's constitutional rights extends to protecting a defendant's Sixth Amendment right to counsel and the attorney-client privilege. The attorney-client privilege is the oldest confidential communications privilege known to the common law. "Its purpose is to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice. The privilege recognizes that sound legal advice or advocacy serves public ends and that such advice or advocacy depends upon the lawyer's being fully informed by the client." (*Upjohn Co. v. United States* (1981) 449 U.S. 383, 389, 101 S.Ct. 677, 682, 66 L.Ed.2d 584.) The privilege "rests on the need for the advocate and counselor to know all that relates to the client's reasons for seeking representation if the professional mission is to be carried out." (*Trammel v. United States* (1980) 445 U.S. 40, 51, 100 S.Ct. 906, 913, 63 L.Ed.2d 186.) The privilege's purpose is to encourage clients to make a full disclosure to

their attorneys. (*Fisher v. United States* (1976) 425 U.S. 391, 403, 96 S.Ct. 1569, 1577, 48 L.Ed.2d 39.)

Documents within the scope of the attorney-client privilege are "zealously protected." (8 C. Wright & A. Miller, Federal Practice and Procedure § 2017 (1970); see *Chore-Time Equipment, Inc. v. Big Dutchman, Inc.* (W.D.Mich.1966) 255 F.Supp. 1020, 1021 ["[I]t generally is acknowledged that the attorney-client privilege is so sacred and so compellingly important that the courts must, within their limits, guard it jealously."]; *In re Grand Jury Subpoena Duces Tecum* (S.D.N.Y.1975) 391 F.Supp. 1029, 1034 [where one part of a memorandum is privileged and doubts exist as to other parts, doubt resolved in favor of application of the privilege].)

The privilege extends to verbal statements, documents, and tangible objects conveyed by both individual and corporate clients to an attorney in confidence for the purpose of any legal advice. (8 J. Wigmore, Evidence § 2292 (J. McNaughton rev. ed. 1961); see also *United States v. Liebman* (3d Cir.1984) 742 F.2d 807.) Although the privilege belongs to the client and only he may waive it, an attorney may assert the privilege on his client's behalf. (McCormick on Evidence § 92 (E. Cleary 3d ed.1984).) Moreover, the canons of ethics make the attorney's common law obligation to maintain the secrecy of his communications with his client a professional mandate. (See Model Rules of Professional Conduct Rule 1.6 (1983); Model Code of Professional Responsibility DR 4-101 (1980).)

(b) <u>The Prosecution Team's Duty to Protect the Attorney-Client Privilege is Analogous to the Prosecution Team's Duty to Disclose Exculpatory Evidence</u>

The extent of the prosecutors' obligation to protect a defendant's attorney-client privilege is analogous to a prosecutor's duties under *Brady v. Maryland* (1963) 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (*Brady*). Responsibility for *Brady* compliance lies exclusively with the prosecution, including the "duty to learn of any favorable evidence known to the others acting on the government's behalf in the case." (*Kyles v. Whitley* (1995) 514 U.S. 419, 437, 115 S.Ct. 1555, 1567, 131 L.Ed.2d 490 (*Kyles*).) Whatever the reason for failing to discharge that obligation, the prosecution remains accountable for the consequences. (*Id*. at pp. 437-438.)

Pursuant to *Brady, supra*, 373 U.S. 83, the prosecution must disclose material exculpatory evidence whether the defendant makes a specific request (*id.* at p. 87 [83 S.Ct. at pp. 1196-1197]), a general request, or none at all (*United States v. Agurs* (1976) 427 U.S. 97, 107 [96 S.Ct. 2392, 2399, 49 L.Ed.2d 342] (*Agurs*)). Likewise, it would seem obvious where a prosecutor comes across a cache of correspondence between a criminal defendant and his attorneys, an ethical prosecutor would immediately do something to assure the material was placed back in the hands of the defendant's counsel or in the hands of the court so as not to violate the privilege. It would also seem obvious a prosecutor is obligated to protect the attorney-client privilege even where the defendant is unaware privileged documents have been

seized. The court acknowledged this would be the right thing to so. (2RT D-28 ["I can clearly say based on what you have presented that Mr. Brent should have gotten guidance from the court. And I think most prosecutors faced with that situation perhaps would have."].)[20]

The scope of the *Brady* disclosure obligation extends beyond the contents of the prosecutor's case file and encompasses the duty to ascertain as well as divulge "any favorable evidence known to the others acting on the government's behalf ...." (*Kyles, supra*, 514 U.S. at p. 437, 115 S.Ct. at p. 1567.) Courts have thus consistently "decline[d] 'to draw a distinction between different agencies under the same government, focusing instead upon the "prosecution team" which includes both investigative and prosecutorial personnel.' "

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In fact, in the civil context an opposing counsel's obligation to protect privileged documents when they are inadvertently disclosed has been clear since 1999. In *State Compensation Insurance Fund v. WPS, Inc.* (1999) 70 Cal.App.4th 644, the primary question was what a lawyer was to do when he or she received through the inadvertence of opposing counsel documents plainly subject to the attorney-client privilege. The Court of Appeal held: "When a lawyer who receives materials that obviously appear to be subject to an attorney-client privilege or otherwise clearly appear to be confidential and privileged and where it is reasonably apparent that the materials were provided or made available through inadvertence, the lawyer receiving such materials should refrain from examining the materials any more than is essential to ascertain if the materials are privileged, and shall immediately notify the sender that he or she possesses material that appears to be privileged. . . . We do, however, hold that whenever a lawyer ascertains that he or she may have privileged attorney-client material that was inadvertently provided by another, that lawyer must notify the party entitled to the privilege of that fact." (*Id.* at pp. 656-657.)

(*United States v. Auten* (5th Cir. 1980) 632 F.2d 478, 481.) "A contrary holding would enable the prosecutor 'to avoid disclosure of evidence by the simple expedient of leaving relevant evidence to repose in the hands of another agency while utilizing his access to it in preparing his case for trial,' [citation]." (*Martinez v. Wainwright* (5th Cir. 1980) 621 F.2d 184, at p. 188; *United States ex rel. Smith v. Fairman* (7th Cir. 1985) 769 F.2d 386, 391-392.) Thus, "whether the nondisclosure was a result of negligence or design, it is the responsibility of the prosecutor. The prosecutor's office is an entity and as such it is the spokesman for the Government." (*Giglio v. United States* (1972) 405 U.S. 150, 154, 92 S.Ct. 763, 766, 31 L.Ed.2d 104; *Kyles, supra*, 514 U.S. at p. 439, 115 S.Ct. at p. 1568.) The same concerns apply to attorney-client privileged documents, and they apply to this case in particular.

Both the prosecutor and the court here drew a distinction between the agencies of the OCDA and the Orange County Sheriff – entirely overlooking the fact of Lillienfeld's primary involvement in the violation – and the court expressed reluctance to "sanction" the LADA for acts committed in Orange County by government agents other than Jackson and Dixon. (See 2RT D-28 – 29; 4RT O-12.) The truth is that the work of both Sheriffs' offices and prosecutors' offices was commingled, and the Los Angeles case was built upon the efforts of the Orange County agencies in a way that cannot be untangled.

"As a concomitant of the prosecutor's duty under *Brady*, any favorable evidence known to the others acting on the government's behalf is imputed to the prosecution." (*In re Brown* (1998) 17 Cal.4th 873, at p. 879.) "The individual prosecutor is presumed to have

knowledge of all information gathered in connection with the government's investigation." (*U.S. v. Payne* (2d Cir. 1995) 63 F.3d 1200, 1208 (*Payne*); see *Smith v. Secretary Dept. of Corrections* (10th Cir. 1995) 50 F.3d 801, at pp. 824-825, and cases cited therein.) In *Kyles*, the Supreme Court reiterated this principle: "whether the prosecutor succeeds or fails in meeting this obligation [to learn of favorable evidence] (whether, that is, a failure to disclose is in good faith or bad faith, [citation]), the prosecution's responsibility for failing to disclose known, favorable evidence rising to a material level of importance is inescapable." (*Kyles, supra*, 514 U.S. at pp. 437-438, 115 S.Ct. at pp. 1567-1568; see also *Giglio v. United States, supra*, 405 U.S. at p. 154, 92 S.Ct. at p. 766.)

There is no reason why the same principle of accountability for the entire prosecution team should not apply to the prosecutor's duty to preserve a suspect's attorney-client privilege when conducting searches or otherwise. Jackson and Dixon must be presumed to have knowledge of – and responsibility for -- all information gathered in connection with the government's investigation, no matter whether the agents were from Los Angeles or Orange County. Any other interpretation invites the kind of mischief condemned by *Brady* and its progeny.

3. Goodwin Did Not Waive Attorney-Client Privilege

Jackson repeatedly argued Goodwin had waived his privilege in the seized documents, either by not timely raising an objection, or by "publishing" privileged information to third parties in documents that appeared to be screenplays. (2RT A-2; D-19 – 23; 4RT

O-9.) Jackson also stated he was not asserting Goodwin had published his privileged letters in an alternative forum, but he meant investigators had 17 years of access to unprivileged material containing virtually the same information the prosecutors saw in the privileged material. (4RT O-10.) Ultimately it was not clear what Jackson meant by "waiver." At one point Jackson stated what he meant was not that the documents he had reviewed were not privileged; rather, he meant Goodwin had not been prejudiced as a result of Jackson having seen them. (4RT O-9.) The court made no ruling on Jackson's waiver claim.

"While it is perhaps somewhat of a hyperbole to refer to the attorney-client privilege as 'sacred,' it is clearly one which our judicial system has carefully safeguarded with only a few specific exceptions." (*Mitchell v. Superior Court* (1984) 37 Cal.3d 591, 600, footnote omitted.) The attorney-client privilege has been statutorily defined by the Legislature. " '[C]onfidential communication between client and lawyer' means information transmitted between a client and his or her lawyer in the course of that relationship and in confidence by a means which, so far as the client is aware, discloses the information to no third persons other than those who are present to further the interest of the client in the consultation or those to whom disclosure is reasonably necessary for the transmission of the information or the accomplishment of the purpose for which the lawyer is consulted, and includes a legal opinion formed and the advice given by the lawyer in the course of that relationship." (Evid. Code § 952.) A reviewing court is bound by the statutory limits of this privilege because "the privileges contained in the Evidence Code are exclusive and the courts are not

free to create new privileges as a matter of judicial policy." (*Valley Bank of Nevada v. Superior Court* (1975) 15 Cal.3d 652, 656, 125; *Roberts v. City of Palmdale* (1993) 5 Cal.4th 363, 373.)

"Whenever a privilege is claimed on the ground that the matter sought to be disclosed is a communication made in confidence in the course of the lawyer-client ... relationship, the communication is presumed to have been made in confidence and the opponent of the claim of privilege has the burden of proof to establish that the communication was not confidential." (Evid. Code §917, subd. (a).) "The effect of a presumption affecting the burden of proof is to impose upon the party against whom it operates the burden of proof as to the nonexistence of the presumed fact." (Evid. Code §606.) The attorney-client privilege "is waived with respect to a communication protected by the privilege if any holder of the privilege, without coercion, has disclosed a significant part of the communication or has consented to disclosure made by anyone. Consent to disclosure is manifested by any statement or other conduct of the holder of the privilege indicating consent to the disclosure, including failure to claim the privilege in any proceeding in which the holder has the legal standing and opportunity to claim the privilege." (Evid. Code §912, subd. (a); *People v. Wilson* (2005) 36 Cal.4th 309, 336.) "Subject to Section 912 and except as otherwise provided in this article, the client, whether or not a party, has a privilege to refuse to disclose, and to prevent another from disclosing, a confidential communication between client and lawyer if the privilege is claimed by: [¶] (a) The holder of the privilege." (Evid. Code §954.) "Section 912, subdivision (a), *supra*,

contemplates a waiver only when the holder of the privilege ... reveals a significant part of the communication, consents to disclosure, or fails to object when he has the opportunity. The disclosure of the communication by [the attorney], unless done with the consent of the [client], will not, therefore, constitute a waiver of the privilege under section 912." (*Roberts v. Superior Court* (1973) 9 Cal.3d 330, 341 [psychotherapist-patient privilege].)

Despite Jackson's vague assertions Goodwin had waived the privilege, he produced no evidence Goodwin had consented to any of his attorneys waiving the privilege, or authorized any of his lawyers to waive his privilege. Jackson did not prove Goodwin failed to claim the privilege when he had an opportunity to do so. Jackson offered no proof Goodwin had waived the privilege in an "alternative forum" or by "publishing" attorney-client privileged communications anywhere. Jackson offered no proof as to the authorship the documents, "Bury Him" and "Deadliest race," or where Jackson had obtained them. Jackson ultimately conceded that the documents were privileged and there had been no "waiver." (4RT O-9 – 10.)

Goodwin did what he could to protect his attorney-client privileged materials. Anticipating he would be arrested for the Thompson murders, Goodwin placed a sign on his home office door notifying anyone who entered it contained attorney-client privileged information. (Sealed Exhibit C to Motion to Dismiss; 2RT D-14.) The boxes inside the office were clearly marked as attorney-client material. (Sealed Exhibit C to Motion to Dismiss.) Goodwin, through Jeff Benice, made a timely assertion of privilege to the documents seized from

Goodwin's home office by letter to David Brent of the OCDA's office on December 26, 2001. (Sealed Exhibit D to Motion to Dismiss; 2RT D-18 – D-19, D-24.) The OCDA chose to ignore Goodwin's claim of privilege, and to violate it again by forwarding the privileged documents to the LADA, purportedly without advising the LADA of their character. (2RT D-28.) On July 22, 2002, Benice filed a document, "Michael Goodwin's Notice of Motion and Motion to Return and/or Suppress Attorney/Client Privileged Documents Illegally Seized." (2RT D-26.) The motion was never ruled upon because it was placed on hold pending resolution of the jurisdictional issue in the Court of Appeal. (2RT D-26.) Once the case was brought by the LADA and Elena Saris reviewed the discovery and realized the 40,000 pages of materials she had received contained hundreds of pages of attorney-client privileged communications, she promptly raised appropriate objections to the prosecutor retaining those materials and moved to recuse the LADA.

This case is distinguishable from, for example, *People v. Gillard* (1997) 57 Cal.App.4th 136. In *Gillard*, the seized documents were "held under seal to allow the defendant to file a motion to suppress or to seek return of the materials...." (*Gillard*, *supra,* at p. 164.) When "[n]o motion or objection was filed[,] ... the file was released to the prosecution." (*Ibid*.) Here, defense counsel preserved Goodwin's privilege by interposing timely privilege objections, requesting appointment of a special master, and doing her best to protect the documents from further review by anyone associated with the LADA.

Therefore, the prosecutor failed to prove that Goodwin

waived his privilege as to the information in his attorney-client privileged documents.

4. Dismissal Is Required

There are no California cases addressing a violation of attorney-client privilege of the magnitude that occurred here. The most similar case appellant can find is *State v. Lenarz* (2011) 301 Conn. 417, 22 A.3d 536. In *Lenarz*, the defendant was charged in two separate towns – Granby and Simsbury – with certain crimes. The cases were consolidated. The Simsbury police obtained a search warrant for Lenarz's residence. During a November 17, 2004, search, the police seized a computer, which they sent to the Connecticut Forensic Science Laboratory (state laboratory) to be forensically searched. The next day, at Lenarz's arraignment, defense counsel advised the trial court that certain materials in the computer were subject to the attorney-client privilege and asked the court to fashion orders to protect Lenarz's rights. The court ordered that "any communications from [defense counsel] to [the defendant] or from [the defendant] to [defense counsel] remain unpublished [and] unread." The court entered a similar order with respect to communications to and from the defendant's private investigator.

During its examination of the defendant's computer, the state laboratory discovered voluminous written materials containing detailed discussions of Lenarz's trial strategy. The state laboratory read and copied much of this material and transmitted it to the Simsbury police along with its report. In turn, the police department forwarded the materials and the report to the prosecutor. At a meeting between

the prosecutor and defense counsel in September 2005, the prosecutor provided defense counsel with a copy of the materials he had received from the Simsbury police. Defense counsel immediately requested a meeting with the judge in chambers, during which he advised that the prosecutor had read privileged materials. The court ordered the police and the prosecutor to turn over any "questionable material" to the court, to be sealed. Although it was unclear how long the prosecutor had possessed the privileged communications before the September 2005 meeting, defense counsel made the undisputed claim at a suppression hearing that the prosecutor kept the material for six weeks.

Lenarz filed a motion to dismiss based on the state's intentional invasion of his attorney-client privilege. Lenarz argued the intrusion prejudiced him because the privileged communications contained detailed trial strategy. The prosecutor admitted reading the materials and did not dispute their content, but claimed that, because he had not conducted any further investigation based on the materials, Lenarz had suffered no prejudice. The prosecutor claimed the violation was unintentional, and he had obtained the privileged materials in good faith. The prosecutor argued the appropriate remedy was to suppress the privileged communications.

The trial court concluded because the communications were not letters or e-mails between Lenarz and his attorney, the state laboratory and the prosecutor had not intentionally violated the order prohibiting the state from publishing or reading any privileged communications. Nevertheless, the trial court ruled the materials were privileged because Lenarz swore he had delivered the materials to his

attorney. The trial court ordered a hearing to determine whether Lenarz had been prejudiced by the state's unintentional invasion of the attorney-client privilege and to find a remedy.

Following an evidentiary hearing, the trial court denied Lenarz's motion to dismiss, concluding that because the Simsbury police department had not shared the privileged information with the Granby police department, Lenarz had suffered no prejudice in the Granby cases. To ensure a fair trial, however, the trial court severed the Simsbury case from the Granby cases. Lenarz insisted dismissal was the only appropriate remedy and asked that all of the cases be tried together. The trial court granted that request.

Lenarz argued on appeal the trial court's finding the state unintentionally invaded the attorney-client privilege was error, and that the intentional invasion constituted a *per se* violation of the right to counsel for which dismissal is the sole appropriate remedy. Lenarz claimed irreparable prejudice because the material contained trial strategy. The state countered that, because the trial court properly found the invasion of the privileged documents was unintentional, and there was no prejudice, the trial court properly denied the motion to dismiss. The state further contended even if Lenarz was prejudiced, the appropriate remedy was to order a prosecutor who had not read the privileged documents to try the case, and Lenarz had waived that remedy.

The Supreme Court of Connecticut held "prejudice may be presumed when the prosecutor has invaded the attorney-client privilege by reading privileged materials containing trial strategy,

regardless of whether the invasion of the attorney-client privilege was intentional." (*Id*. at p. 425.) The court further concluded the prosecutor could rebut that presumption by clear and convincing evidence. (*Ibid*.) Finally, the Court concluded "when a prosecutor has intruded into privileged communications containing a defendant's trial strategy and the state has failed to rebut the presumption of prejudice, the court, *sua sponte*, must immediately provide appropriate relief to prevent prejudice to the defendant." (*Id*. at pp. 425-426.)

The *Lenarz* Court also held that, because, "after reviewing the privileged materials, the prosecutor tried the case to conclusion, the taint caused by the state's intrusion into the privileged communications would be irremediable on retrial and the charge of which the defendant was convicted must be dismissed." (*Id*. at p. 426.)

Like California, "Connecticut has a long-standing, strong public policy of protecting attorney-client communications.... This privilege was designed, in large part, to encourage full disclosure by a client to his or her attorney so as to facilitate effective legal representation." (*Id*. at p. 426 [citations omitted]. The *Lenarz* Court noted "several courts have held that the government's intrusion into privileged attorney-client communications constitutes an interference with the defendant's right to assistance of counsel in violation of the Sixth Amendment only when the intrusion has prejudiced the defendant," citing, among other authorities, *United States v. Costanzo* (3d Cir.1984) 740 F.2d 251, 257, cert. denied, 472 U.S. 1017, 105 S.Ct. 3477, 87 L.Ed.2d 613 (1985); *United States v. Steele* (6th Cir. 1984) 727 F.2d 580, 585–586, cert. denied sub nom. *Scarborough v. United States*

(1984) 467 U.S. 1209, 104 S.Ct. 2396, 81 L.Ed.2d 353; *Briggs v. Goodwin* (D.C. Cir. 1983) 698 F.2d 486, 495), vacated on other grounds, 712 F.2d 1444; see also *Weatherford v. Bursey* (1977) 429 U.S. 545, 558, 97 S.Ct. 837, 51 L.Ed.2d 30.) .

Here, the trial court attempted to remedy the LADA's overwhelming violation of Goodwin's right to counsel by ordering Jackson and Dixon not to use the privileged information at trial. (2RT D-33, 35-38; 4RT N-6; RT 6-2-2005, 26-29.) As defense counsel pointed out, this order was impossible to enforce, and it was unrealistic to believe Jackson and Dixon had not used – and would not use – the privileged information to their advantage. (4RT N-8 – N-9; 5CT 1410; RT 6-2-2005, 5, 36-37.) Although Jackson scoffed at the idea he had used the attorney-client privileged materials pertaining to the federal criminal proceedings against Goodwin in formulating the prosecution's case for motive (D-29 – 31), Jackson and Dixon did exactly that.

Jackson asked the court to disregard between 150 and 200 pages of documents deemed privileged by the special master, claiming they were "irrelevant" to the violation because they addressed Goodwin's prior federal criminal case, not Goodwin's prosecution for the murders. (5CT 1408-1409; ASR 88-116.) However, the prior federal criminal case had to do with alleged bankruptcy fraud, and several witnesses the prosecutors called at trial – including Bartinetti, Cordell, Coyne and Kingdon – testified Goodwin was engaged in fraudulent transactions to avoid paying Thompson his judgment. (See 8RT 3459-3460, 3472 [Cordell]; 10RT 4047; 4054-4058 [Coyne opined that the activity between Goodwin, his wife, E.S.I, S.X.I., Clayton and the

Insport agreement was fraudulent]; 11RT 4214-4215, 4223, 4244-4245, 4254-4255 [Coyne]; 7RT 3183-3184, 3193-3195 [Bartinetti]; Argument V, *infra*.[Kingdon].) Therefore, Goodwin's privileged communications regarding the federal criminal proceedings were relevant. In fact, they went to the heart of the prosecutor's theory of the case, which was based on motive, "fraud," and Goodwin's bad character.

E. The Prosecutor's Seizure, Retention and Review of the Privileged Material Requires Reversal, Whether or Not Goodwin Can Demonstrate Prejudice

In *People v. Poe* (1983) 145 Cal.App.3d 574, the issue was whether the prosecutor read the defendant's legal mail. The prosecutor swore: "... I will solemnly aver and affirm under oath at the present time that I have no knowledge of any content of any legal mail that has gone between the defendant and his Counsel, and if any information ever comes to my possession, I will certainly make it available or let the Court know the instant that that happens." (*People v. Poe, supra* at 578.) Poe argued it was impossible for him to show prejudice for the violation "because this whole matter of mail was uniquely in the control of the authorities down there, and we would just have no way of showing who might have handled or might have read the mail." (*People v. Poe, supra* at 578.) The defendant argued the prosecutor could not prove the letter in question had not been read. In commenting on this argument, the *Poe* Court noted the defendant – unlike Goodwin – never made an offer of proof as to the contents of the letter. (*People v. Poe, supra*, at 578.) Because of this failure, the Court declined to find prejudice. (*Id*., at p. 579.)

In *Boulas, supra*, 188 Cal.App.3d 422, the Court of Appeal, Second District noted, "It is not always easy to compute the effect of governmental tampering with the attorney-client relationship. 'The right to have the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial.'" (*Glasser v. United States* (1942) 315 U.S. 60, 76 [86 L.Ed. 680, 702, 62 S.Ct. 457]; see also *Barber v. Municipal Court, supra.*, 24 Cal.3d at p. 757; *People v. Moore, supra.*, 57 Cal.App.3d at p. 442.)" (*Id.* at p. 431.) Here, Jackson denied using the privileged materials and denied they were "relevant" – but that determination was not his to make.

In no case, published or unpublished, has there been such a large number of attorney-client privileged documents seized, retained and reviewed by prosecutors as in Goodwin's case. The dismissive attitude Lillienfeld, Deputy OCDA Brent, and Deputy LADAs Jackson and Dixon have displayed toward Goodwin's constitutional rights is outrageous and must not go unchecked. "Dismissal is, on occasion, used by courts to discourage flagrant and shocking misconduct by overzealous governmental officials in subsequent cases." (*Barber v. Municipal Court, supra*, 24 Cal.3d at pp. 759-760; *People v. Moore, supra*, 57 Cal.App.3d at p. 442.) This Court should employ dismissal to vindicate Goodwin's rights and discourage future misconduct of this type.

A number of courts have held that where, as here, the privileged communications contain details of the defendant's trial strategy, the defendant is not required to prove he was prejudiced by

the governmental intrusion, but prejudice may be presumed. In *Briggs v. Goodwin, supra*, for example, the court acknowledged the very problem Goodwin faced:

> The prosecution makes a host of discretionary and judgmental decisions in preparing its case. It would be virtually impossible for an appellant or court to sort out how any particular piece of information in the possession of the prosecution was consciously or subconsciously factored into each of those decisions. Mere possession by the prosecution of otherwise confidential knowledge about the defense's strategy or position is sufficient in itself to establish detriment to the criminal defendant. Such information is inherently detrimental ... unfairly advantage[s] the prosecution, and threaten[s] to subvert the adversary system of criminal justice. Further, once the investigatory arm of the government has obtained information, that information may reasonably be assumed to have been passed on to other governmental organs responsible for prosecution. Such a presumption merely reflects the normal high level of formal and informal cooperation which exists between the two arms of the executive." [Internal quotation marks omitted.]

(*Briggs, supra*, 698 F.2d 486, at pp. 494–495.) Similarly, in *United States v. Levy* (3d Cir.1978) 577 F.2d 200, the court held that, when the defendant's trial strategy has been disclosed to the government, "there are overwhelming considerations militating against a standard which tests the Sixth Amendment violation by weighing how prejudicial to the defense the disclosure is." (*Id*. at p. 208.) In support of this conclusion, the court reasoned "it is highly unlikely that a court can ... arrive at a certain conclusion as to how the government's knowledge of any part of the defense strategy might benefit the government in its

further investigation of the case, in the subtle process of pretrial discussion with potential witnesses, in the selection of jurors, or in the dynamics of trial itself." (*Id*. at p. 208.)

So it was here; there was and is no way to disentangle what Jackson and Dixon knew or how they formed their approach to this case after reading and analyzing Goodwin's attorney-client privileged materials from what they knew or did independently. Jackson and Dixon should not be given any benefit of any presumption or any doubt, given their misconduct in deliberately retaining and reviewing the privileged documents once they recognized what they were. As explained in section I.C.2., above, Jackson and Dixon were under just as much a duty to protect the privilege as the OCDA, and both sets of prosecutors shamelessly ignored that duty.

Finally, a number of courts have held a defendant is not required to prove he was prejudiced by the government's intrusion into attorney-client communications when the intrusion was deliberate and was unjustified by any legitimate governmental interest in effective law enforcement. (See *Shillinger v. Haworth* (10th Cir.1995) 70 F.3d 1132, 1141–1142; *Morrow v. Superior Court*, *supra,* 30 Cal.App.4th 1252, 1258.) The *Shillinger* Court reasoned "no other standard can adequately deter this sort of misconduct." (*Shillinger v. Haworth, supra,* at p. 1142.)

Lillienfeld led the raid on Goodwin's residence, entering Goodwin's home office where a sign on the door advised attorney-client privileged material was stored, seizing clearly-marked boxes of privileged material – none of which was subject to the warrant – and taking everything to the OCDA for review. These actions constitute a

deliberate violation of Goodwin's Sixth Amendment attorney-client privilege that should not have been rewarded by the trial court. As a result, this Court must reverse Goodwin's convictions.

F. The Trial Court Erred by Failing to Recuse the LADA or Remove the Individual Prosecutors, Jackson and Dixon, From Goodwin's Prosecution

1. Standard of Review for Denial of a Motion to Recuse

The standard of review for assessing a trial court's denial of a motion to recuse a prosecutor is abuse of discretion. (*Haraguchi v. Superior Court* (2008) 43 Cal.4th 706, 711–713; *Hollywood v. Superior Court* (2008) 43 Cal.4th 721, 727–729.) That standard does not insulate trial courts' recusal orders from meaningful appellate review. (*People v. Superior Court* (2008) 43 Cal.4th 737, 742.) Where the trial court's decision rests on an error of law, the trial court abuses its discretion. (*Ibid*.)

2. Recusal Was Required Under Penal Code § 1424

Penal Code § 1424 provides the procedural framework for bringing a motion to disqualify a district attorney, and provides "[t]he motion may not be granted unless the evidence shows that a conflict of interest exists that would render it unlikely that the defendant would receive a fair trial." (§ 1424, subd. (a)(1).)

In *People v. Eubanks* (1996) 14 Cal.4th 580, the Supreme Court described a two-part analysis: "(i) is there a conflict of interest?; and (ii) is the conflict so severe as to disqualify the district attorney from acting? Thus, while a 'conflict' exists whenever there is a

'reasonable possibility that the DA's office may not exercise its discretionary function in an evenhanded manner,' the conflict is disabling only if it is 'so grave as to render it unlikely that defendant will receive fair treatment.' (*Id.* at p. 594.)

In *Eubanks* the defendants focused on the likelihood of pretrial prejudice, and the "reasonable possibility the district attorney, ... would be unwilling to drop the charges or bargain for a lesser plea." (*Id.* at p. 593.) "The prosecutorial discretion goes beyond the decision of what charges to file and the trial itself; it extends to all portions of the proceedings." (*People v. Milsap* (1999) 70 Cal.App.4th 196, 200.)

If an accused is to derive the full benefits of his right to counsel, he must have the assurance of confidentiality and privacy of communication with his attorney. (*Barber v. Municipal Court, supra,* 24 Cal.3d 742, 751.) Here, the prosecution team intentionally and illegally invaded the defense team by 1) intercepting privileged conversations by wiretap and 2) seizing all of Goodwin's privileged materials from Goodwin's home office, after which both the OCDA and LADA reviewed those protected communications and used them to form their theories of the case.

Although Jackson admitted he had seen the documents and knew they were privileged, he did not relinquish them for nearly a year and a half – from late April of 2004 until August of 2005 – when he was compelled to turn them over to the special master. (4CT 1053-1054; 3RT I-1 – I-2.) Even if Jackson believed he was blameless because the documents came to him as a result of the OCDA's misconduct or inadvertence, once Jackson knew those documents were

in his possession he should have refrained from examining the materials any more than was essential to ascertain if they were privileged, and should immediately have notified defense counsel he possessed material that appeared to be privileged. (*State Compensation Insurance Fund v. WPS, Inc., supra,* 70 Cal.App.4th 644, 656-657.)

Once Jackson violated Goodwin's right to counsel and his attorney-client privilege by reviewing Goodwin's documents, there was no going back and separating out what Jackson had gathered from unprotected sources or the "public domain," and what he had gleaned from the protected documents. The federal courts recognize one function of the attorney-client privilege is to preserve the secrecy of confidential communications. Federal Rules of Evidence, Rule 1101, subdivision (c) supports the view that confidentiality once destroyed cannot be restored, and a privilege is effective only if it bars all disclosures at all times. (*U.S. v. Mackey* (E.D. N.Y. 1975) 405 F. Supp. 854, 864–65, 2 Fed. R. Evid. Serv. 1060.)

A second objective of Rules 1101(c) and (d) may be to supplement the traditional function of the privileges themselves in encouraging the formation of protected confidential relationships and free and frank discussion within those relationships. (See, e.g., Wigmore, Evidence §§ 2285, 2286, 2290, 2291, 2332, 2333 (McNaughton rev. 1961); McCormick, Evidence §§ 72 to 74, 78, 87, 98 (Cleary ed. 1972).) A Fifth Amendment due process violation may occur when government interference in an attorney-client relationship results in ineffective assistance of counsel or when the government's actions amount to outrageous misconduct. (*U.S. v. Marshank* (N.D. Cal. 1991)

777 F. Supp. 1507, 1518-1519.)

Suppressing the documents might have been an appropriate remedy had the court been able to identify and isolate any evidence obtained in violation of Goodwin's due process rights. The prosecutor then would have been denied "the fruits of [his] transgression" and Goodwin's right to a fair trial might have been preserved. However, part of the fruit for the LADA consisted of charging Goodwin on revised theories. As such, it is simply impossible to excise the taint of the government's transgressions from Goodwin's prosecution. The taint infected all phases of the investigation and prosecution. (See *United States v. Marshank*, *supra*, 777 F.2d at 1523–1524, 1530; see Arguments XVI and XVII., *infra.)*

3. The Court Had Inherent Power to Remove Jackson and Dixon and Should Have Exercised It

Code of Civil Procedure §128 authorized the court to remove Jackson and Dixon. Section 128(a)(4) provides "every court shall have the power to do all of the following: . . . (4) to compel obedience to its judgments, orders and process...(5) to control in furtherance of justice, the conduct of its ministerial officers, and of all other persons in any manner connected with a judicial proceeding before it..."

The Court of Appeal has made clear that §128 is the original source of a court's power to disqualify. (*Greer, supra*, 19 Cal. 3d 255, 261). The trial court's concerns here about separation of powers were unfounded. "Indeed, a categorical denial of the trial court's authority to ever disqualify a district attorney, far from protecting a

constitutional power of the executive, would excise a significant aspect of the judge's traditional power to enforce the law." (*Id*. at p.263). *Greer* was decided prior to the enactment of California Penal Code §1424. Recusal cases have subsequently disapproved of *Greer* to the extent the "appearance of impropriety" provides a basis for recusal; however, the inherent power of the court to disqualify a prosecutor or prosecutorial agency remains intact.

4. The Los Angeles and Orange County Sheriffs and The OCDA and LADA are Equally Responsible For the Wrongdoing

The court expressed her belief the OCDA's office was responsible for the "egregious misconduct" in this case, pointing out that even after receiving a letter from Goodwin's attorney objecting to the seizure of clearly privileged documents, the OCDA did nothing to correct it. The court found the OCDA should at least have notified the court of the problem. (4RT N-21 – 22.) The court failed to explain how the LADA's retention and review of the same material was any less egregious misconduct.

The LADA was just as culpable as the OCDA and the sheriffs for violating Goodwin's attorney-client privilege and his Sixth Amendment right to counsel. (See Argument I.C.2., *supra*.)

5. A Defendant Has A Fundamental Right To Due Process Throughout All Stages Of The Proceedings

The trial court's failure to recuse the district attorney's office infringed upon Goodwin's right to a fair and impartial trial,

which "is a fundamental aspect of the right of accused persons not to be deprived of liberty without due process of law." (*Greer, supra*, 19 Cal.3d 255, 266, citing U.S. Const., 5th & 14th Amends.; Cal. Const., art. I, § 7, subd. (a).) As such, proceeding to trial over defense objection with a prosecutor whose decisions were not "born of objective and impartial consideration" of Goodwin's case was constitutional error. (*Greer, supra*, 19 Cal.3d at p. 267.)

A "partisan" prosecutor raises due process concerns and implicates a defendant's right to a fair trial, including fairness during all relevant proceedings. (See, *Marshall v. Jerrico, Inc.* (1980) 446 U.S. 238, 249-50, 100 S.Ct. 1610, 64 L.Ed.2d 182.) The injection of "personal interest, financial or otherwise, into the enforcement process may bring irrelevant or impermissible factors into the prosecutorial decision and in some contexts raise serious constitutional questions." (*Ibid.*, citing *Bordenkircher v. Hayes* (1978) 434 U.S. 357, 365, 98 S.Ct. 663, 54 L.Ed.2d 604; see also *Ganger v. Peyton* (4th Cir. 1967) 379 F.2d 709.)

In *People v. Conner* (1983) 34 Cal.3d 141, the California Supreme Court discussed the constitutional duty of the prosecuting agency: "The DA's office is obligated not only to prosecute with vigor, but also to seek justice. This theme was stressed almost half a century ago by the United States Supreme Court in *Berger v. United States, supra,* 295 U.S. 78, 88, 79 L.Ed. 1314, 1321, 55 S.Ct. 629, '[The prosecutor] is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall

be done.' " (*People* v. *Conner, supra*, 34 Cal.3d 141, at p. 148.)

Other jurisdictions have recognized due process concerns may require recusal. In Texas, for example, trial courts have no authority to recuse a prosecutor, but defendants are not left without recourse in the appellate courts if the "prosecution's failure to recuse itself violated [the defendant's] due process rights." (*State ex. rel. Eidson v. Ehwards* (Tex.Crim.App. 1990) 793 S.W.2d 1, 6; see also *State v. Britton* (1974) 157 W.Va. 711, 203 S.E.2d 462.)

In *Ganger v. Peyton, supra,* 379 F.2d 709, the Fourth Circuit Federal Court of Appeals reversed a Virginia State conviction after finding the prosecutor's conflict of interest violated fundamental fairness. (*Id.* at pp. 714-715.)

In *State v. Jones* (1924) 306 Mo. 437 [268 S.W. 83], the Missouri Supreme Court found a prosecution brought by an interested party "is not due process of law, but a prostitution of the criminal process of the state, and a reproach to the administration of justice." (*Id.* at p. 446; see also *Young v. Slate* (Fla. 1965) 177 So.2d 345; *State v. Cox* (1964) 246 La. 748 [167 So.2d 352]; *State of N.J. v. Imperiale* (D.N.J. 1991) 773 F.Supp. 747, 751-756; *People v. Zimmer* (1980) 51 N.Y.2d 390 [434 N.Y.S.2d 206, 414 N.E.2d 705, 708]; *Cantrell v. Com.* (1985) 229 Va. 387 [329 S.E.2d 22, 25-27].)

The California Supreme Court has, in recent cases, declined to discuss the constitutional implications of an erroneous denial of a recusal motion. (See *People v. Griffin* (2004) 33 Cal.4th 536, 570, fn. 4; *People v. Snow* (2003) 30 Cal.4th 43, 86; *Hambarian v. Superior Court* (2002) 27 Cal.4th 826, 833, fn. 4.) In *People v. Eubanks, supra,* the

California Supreme Court noted *Ganger v. Payton, supra*, and other cases finding a violation of due process following conviction by a conflicted prosecutor, but found it unnecessary to reach the constitutional question because it upheld the trial court's grant of a recusal motion on statutory grounds. (*People v. Eubanks, supra*, 14 Cal.4h at p. 596, fn 8.)

In *Greer*, however, the California Supreme Court addressed "the due process implications of prosecutorial bias [which] form a background for our consideration of the scope of the trial judge's power to recuse." (*Greer, supra*, 19 Cal.3d at p. 268.) The *Greer* Court recognized a trial court's power to disqualify a district attorney's office to avoid "inevitable reversals on appeal." (*Id.* at p. 264.)

The Fourteenth Amendment, §1, to the United States Constitution, in pertinent part, provides no state shall "...deprive any person of life, liberty, or property, without due process of law..." The California Constitution, article I, § 7, in pertinent part provides "(a) a person may not be deprived of life, liberty, or property without due process of law." The California Constitution, article I, § 1, in pertinent part, provides: "All people are by nature free and independent and have inalienable rights. Among these are ... privacy. (*White v. Davis* (1975) 13 Cal.3d 757, 773-776.)

The right to counsel is guaranteed to a defendant in a criminal case by both the Sixth Amendment to the United States Constitution and Article I, § 15 of the California Constitution. This right is a "fundamental constitutional right, which has been carefully guarded by the courts of this state...Meaningfully applied, the right to counsel includes the opportunity to receive 'effective aid [of counsel]

in the preparation and trial of the case.' [Citations omitted.]" (*Barber v. Municipal Court, supra,* 24 Cal.3d 742 at 750.)

The attorney-client privilege is not only based in constitutional law, it is codified in numerous legislative enactments as well. Business and Professions Code § 6068, subdivision (e) states: "It is the duty of an attorney: ". . . .(e) To maintain inviolate the confidence, and at every peril to himself to preserve the secrets, of his client." Evidence Code § 954 grants a client "a privilege to refuse to disclose, and to prevent another from disclosing, a confidential communication between client and lawyer . . . ." Penal Code section 636 makes it a felony for anyone to eavesdrop or record "a conversation" between "a person who is in the physical custody of a law enforcement officer . . . and such person's attorney."

6. Investigators Invaded Goodwin's Right to Counsel When Lillienfeld Used Wiretaps and Butch Jones to Spy on Goodwin's Communications With Benice

The right to counsel, which embodies the right to private consultation, is violated when a state agent is present at confidential attorney-client conferences. (*Barber vs. Municipal Court, supra*, 24 Cal.3d 742, 752.) The *Barber* Court further stated:

> It is irrelevant to the reasons underlying the guarantee of privacy of communication between client and attorney that the state is intruding for one purpose rather than for another. [The] purpose and necessities of the relation between a client and his attorney require, in many cases, on the part of the client, the fullest and freest disclosure to the attorney of the client's objects, motives, and actions.' The chilling effect on full and free disclosure by

> a client would be the same, whatever the state's asserted purpose for intruding. The intruding state agent by his presence will be privy to confidential communications. Aware of this possibility, a client will be constrained in discussing his case freely with his attorney.

(*Id*. at 753.)

The prosecutor did not dispute the privilege applied between Goodwin and Jeffrey Benice, his counsel of record. Joining them at various conferences was Butch Jones. Attorney-client communications that are made with a third party present are covered under the privilege when the other parties are acting in furtherance of the attorney client relationship. Courts have held that this includes spouses, parents, and business associates, among others. (*Id*. at 753.) Evidence Code § 952 provides that a confidential communication between client and lawyer includes information disclosed by a client to his attorney in the presence of third persons "who are present to further the interest of the client in the consultation or . . . to whom disclosure is reasonably necessary for the transmission of the information or the accomplishment of the purpose for which the lawyer is consulted."

"Although the attorney-client privilege is not constitutionally based, it is the oldest recognized confidential communications privilege... It is grounded on public policy considerations and 'is in furtherance of the proper and orderly functioning of our judicial system, which necessarily depends on the confidential relationship between the attorney and the client.' The purpose of such evidentiary privilege is to safeguard the confidential relationship between a client and counsel so as to promote full and

open disclosure of facts and tactics surrounding the case for which the relationship exists. In enacting such privilege, the Legislature recognized that the benefits derived therefrom justify the risk that unjust decisions may sometimes result from the suppression of relevant evidence.'" (*People (Lockyer) v. Superior Court (Pfingst*) (2000) 83 Cal. App.4th 387, 397).

A prosecutor's deliberate attempt to obtain confidential information from the defense is an invasion of the "defense camp." (*Morrow v. Superior Court, supra,* 30 Cal.App.4th 1252, 1259–1261 [*Morrow*] [prosecutor sent investigator to eavesdrop on defendant's conversation with his counsel]; *People v. Leon* (2001) 91 Cal.App.4th 812, 818.) Such prosecutorial misconduct compromises the defendant's right to a fair trial and may justify dismissal of the case. (*Morrow, supra*, at p. 1263.) In *Morrow*, the prosecutor used her investigator to eavesdrop on a courtroom conversation between the defendant and his attorney. The prosecutor and investigator both exercised their privilege against self-incrimination when called as witnesses at the hearing on the defendant's motion to dismiss on the ground of prosecutorial misconduct. The trial court denied the motion, concluding the defendant had failed to show prejudice. The Court of Appeal, Second District, noting "eavesdropping on an attorney-client conversation is inappropriate anywhere and cannot be tolerated," held:

> Where, as here, the prosecutor orchestrates an eavesdropping upon a privileged attorney-client communication in the courtroom and acquires confidential information, the court's conscience is shocked and dismissal is the appropriate remedy. Even when the issue is narrowed

> to a Sixth Amendment violation, dismissal is still appropriate because here there is a "substantial threat of demonstrable prejudice" as a matter of law. (*United States v. Morrison, supra*, 449 U.S. at p. 365 [66 L.Ed.2d at p. 589].)

(*Id*. at p. 1261.)

Here, as in *Morrow*, Lillienfeld attempted to obtain – and did obtain – privileged information from the defense, using someone from the defense camp as a spy for several weeks. Lillenfield knew Jones was providing him information he had gleaned from his presence at attorney-client conferences and from his work at Benice's office. (4CT 892.) It was obvious attorney-client communications were being repeated, no matter that Lillienfeld believed he could obtain the same information elsewhere.

This egregious violation of Goodwin's privileged communications with his counsel requires reversal of Goodwin's conviction and dismissal of all charges. (*Morrow v. Superior Court, supra,* 30 Cal.App.4th 1252, 1259–1261.)

Officer Lillienfeld knew Butch Jones was providing him information Jones had gleaned from his presence at attorney-client conferences. It was not up to Lillienfeld to determine in what capacity Jones was functioning. It was obvious attorney-client communications were being repeated. For Lillienfeld to continue to consult with Jones and to ask him to continue to report on these conferences is the worst violation of attorney client relationship imaginable. It is akin to placing a "bug" or wiretap in the attorney's office.

Because Lillienfeld violated Goodwin's right to counsel,

Goodwin's convictions must be reversed. (*Barber vs. Municipal Court*, *supra*, 24 Cal.3d 742, 752.)

7. Because the Error is Structural, Reversal is Required

The trial court's error in denying Goodwin's recusal motion was structural and requires reversal *per se.*

In *Young v. U.S. ex rel. Vuitton et Fils S.A.* (1987) 481 U.S. 787, 789-790, the District Court appointed the attorneys for the respondent ("*Vuitton*") to prosecute a criminal contempt action brought against the petitioners. A plurality of the United States Supreme Court held that the appointment of counsel for Vuitton to conduct the contempt prosecution in these cases was reversible *per se.* (*Id.* at pp. 809-810.) In so holding, the *Vuitton* plurality emphasized three critical factors.

First, the plurality noted the appointment of an interested prosecutor raises doubts about the integrity of the proceedings. (*Young v. U.S. ex rel. Vuitton et Fils S.A.*, *supra*, 481 U.S. at pp. 810-811.) Among other things, the involvement of an interested prosecutor is inconsistent with the "fundamental premise . . . that the state wield its formidable criminal enforcement powers in a rigorously disinterested fashion, for liberty itself may be at stake in such matters." (*Id.* at p. 810.)

Second, the appointment of an interested prosecutor creates an appearance of impropriety that diminishes faith in the fairness of the criminal justice system in general. (*Young v. U.S. ex rel. Vuitton et Fils S.A.*, *supra*, 481 U.S. at p. 811.) Elaborating on the harm

caused by the appearance of impropriety, the plurality commented "[s]ociety's interest in disinterested prosecution . . . would not be adequately protected by harmless-error analysis, for such analysis would not be sensitive to the fundamental nature of the error committed." (*Id*. at p. 812.)

Third, the plurality recognized that the appointment of an interested prosecutor is an error whose effects are pervasive, for it "calls into question, and therefore requires scrutiny of, the conduct of an entire prosecution, rather than simply a discrete prosecutorial decision." (*Young v. U.S. ex rel. Vuitton et Fils S.A., supra*, 481 U.S. at p. 812.) Moreover, determining the effect of such an appointment would be extremely difficult because "[a] prosecution contains a myriad of occasions for the exercise of discretion, each of which goes to shape the record in a case, but few of which are part of the record." (*Id*. at pp. 812-813.)

Each of these concerns is present here, requiring automatic reversal of the entire judgment. The record makes clear that Jackson and Dixon did not treat Goodwin "in a rigorously disinterested fashion." (*Young v. U.S. ex rel. Vuitton et Fils S.A., supra*, 481 U.S. at p. 810.) As argued above, Lillienfeld spied on the defense, utilizing a wiretap and the services of Butch Jones. Lillienfeld also seized all of Goodwin's privileged documents and gave them to the OCDA, who retained those documents and reviewed them over the protests of Goodwin's attorney, Jeff Benice. When the Court of Appeal found Orange County had no jurisdiction over the case, the OCDA packed up Goodwin's privileged documents and sent them to the LADA.

The conduct of the OCDA and the LADA can only undermine public confidence in the fairness of the system, particularly in light of evidence Deputy OCDA Brent refused to return Goodwin's documents to Benice when Benice demanded them, and then Jackson and Dixon violated their ethical duties by failing to notify the court or defense counsel that the prosecutors possessed clearly privileged material. (See discussion in section I.C.4., *supra*.) Such open disregard for the constitutional rights of a criminal defendant cannot be tolerated.

Finally, the effect of the trial court's failure to recuse the LADA is not susceptible to harmless-error analysis. A court cannot determine from the record the extent to which Jackson's and Dixon's conflict of interest affected their decisions, particularly those decisions which were confidential or not memorialized, perhaps even hidden from Goodwin and the court. Similarly, the record cannot fully disclose the extent to which Jackson's and Dixon's decisions were affected – whether consciously or subconsciously – by the privileged information they reviewed. Under these circumstances, the trial court's failure to recuse Jackson and Dixon, or the entire LADA's office for that matter, constituted structural error, and the entire judgment must be reversed. (*Young v. U.S. ex rel. Vuitton et Fits S.A.*, *supra*, 481 U.S. at pp. 809-810; see also *Arizona v. Fulminante* (1991) 499 U.S. 279, 309-310.)

Appellant is aware the California Supreme Court has stated it does not find the *Vuitton* plurality's arguments for structural error compelling as applied to California procedures. (*People v. Vasquez* (2010) 39 Cal.4th 47, 69.) While that may be true in most California cases involving conflicted prosecutors, the California Supreme Court's

distinctions of *Vuitton* do not hold true here. First, although "the basic guardians of the defendant's rights at trial are his attorneys and the court, not the prosecutor" (*ibid*.), neither the trial court nor defense counsel could have adequately protected Goodwin's interests where investigators and prosecutors violated wholesale his Fifth and Sixth Amendment rights to counsel and his privileged communications beginning years before trial even commenced.

Moreover, this Court should not turn a blind eye to the corrosive effect such arbitrary and capricious behavior by both the OCDA and the LADA must have on the public confidence in the fairness of the judicial system. (Cf. *People v. Vasquez, supra*, 39 Cal.4th 47, 69.)

Finally, for the reasons set forth above, Goodwin is unable to show the full extent of actual prejudice, as the misconduct was disclosed belatedly, and neither Jackson nor Dixon was cross-examined under oath as to what documents they reviewed, when they reviewed the documents, and how the documents affected their decisions at various stages of the proceedings.

However, at a minimum Goodwin has shown at least one critical instance of actual prejudice: Jackson and Dixon called multiple witnesses to testify they suspected Goodwin had committed fraud in connection with the bankruptcy proceedings in order to avoid paying Thompson's judgment against him. (See detailed discussion in section I.C.4., *supra*; Cf. *People v. Vasquez, supra*, 39 Cal.4th 47, 69-70 [concluding that Vasquez had failed to show prejudice].) While at trial Jackson and Dixon denied formulating their theories based upon the improperly

seized privileged material, Lillienfeld admitted at the Orange County preliminary hearing he had read "tens of thousands that turned into hundreds of thousands of documents," including documents about plans Goodwin had filed in the bankruptcy proceedings to pay his creditors, including Thompson. (OCPHRT 226.) Lillienfeld later admitted, in justifying his failure to investigate the claimed financial motive for the Thompson murders:

> In going through the hundreds of thousands of documents created during the course of this case, *many of them created by Mr. Goodwin*, there are dozens if not hundreds of names of attorneys, accountants, trustees, judges, lawyers, and other people involved in his personal and financial [sic] bankruptcy, the pension plan, and the investments, and it would be a virtual impossibility to go out, scatterbrained, and interview all of these people to see if perhaps they did or did not have information regarding the murder investigation.

(OCPHRT 229 [emphasis added].)

Immediately after remarking, "I'm the murder police, I'm not the bankruptcy police," Lillienfeld at first denied – then admitted, when confronted with the content of his affidavits – the motive he assigned to Goodwin for the murders was that Goodwin had filed a fraudulent bankruptcy proceeding to avoid paying Thompson. (OCPHRT 230-231.) That was the theory presented at trial, based at least in part on the prosecutors' review of Goodwin's privileged documents. Therefore, the court's failure to recuse the LADA was prejudicial.

For these reasons, the entire judgment must be reversed

even if this Court were to apply harmless error analysis. (*Chapman v. California* (1967) 386 U.S. 18, 24; see also *People v. Vasquez, supra*, 39 Cal.4th 47, 66-71 [holding that a violation of Penal Code section 1424 which does not violate due process principles must be evaluated for harmless error under the standard of *People v. Watson* (1956) 46 Cal.2d 818].)

II. THE EVIDENCE IS INSUFFICIENT TO SUSTAIN GOODWIN'S CONVICTIONS FOR THE THOMPSON MURDERS

A. Overview

The Thompson murders occurred in 1988. A decade later, the LADA rejected the case against Goodwin for lack of evidence. In 2001, the new OCDA, a personal friend of Thompson's sister, arrested Goodwin and attempted to prosecute him in Orange County based on preparatory conspiratorial acts allegedly occurring there. The Court of Appeal rejected the OCDA's venue argument. In 2004, 16 years after the fact, the LADA filed charges against Goodwin, relying on a conspiracy theory (although not alleging conspiracy) to connect Goodwin to the murders, since no evidence placed him at the murder scene or indicated that he knew or had any communication with – let alone hired – the killers.

The evidence offered to connect Goodwin to the murders consisted of (1) 15 witnesses who said they either heard Goodwin make threats against Micky Thompson or Thompson express fear of Goodwin; (2) four attorney or accountant witnesses who testified to a financial motive for the murders; (3) the presence of a stun gun at the murder scene, coupled with evidence that someone had once seen one at Goodwin's home; and (4) testimony from neighbors who identified Goodwin at trial as one of two men parked on a street near the Thompson residence with binoculars about a week before the

murders.[21]

B. Standard of Review

A conviction can be reversed on the grounds of insufficiency of the evidence only when "it ... (is) made clearly to appear that upon no hypothesis whatever is there sufficient substantial evidence to support the conclusion reached in the court below." (*People v. Resendez* (1968) 260 Cal.App.2d 1, 7, citing *People v. Newland* (1940) 15 Cal.2d 678, 681.) "Evidence, to be 'substantial' must be 'of ponderable legal significance... reasonable in nature, credible, and of solid value.' " (*People v. Johnson* (1980) 26 Cal.3d 557, 576.)

The appellate court must view the evidence in the light most favorable to the prosecution and presume in support of the judgment the existence of every fact the trier of fact could reasonably deduce from the evidence. (*People v. Mosher* (1969) 1 Cal.3d 379, 395.)

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[21] The testimony of the neighbors is bathed in reliability problems. For example, Tonyia had told investigator Lillienfeld in 2001 that she could not recall if the car she saw in front of her property was even occupied (12RT 4585-4587); yet by the time of the trial, she was certain she had seen Goodwin in the car. (12RT 4586.) Similarly, Ron's initial description of the man in the car indicated that he was a white man with long blond hair sticking out from a watch cap. (3CT 623-624, 628.) At trial Ron insisted the man had red hair and a pock-marked face. (11RT 4399-4400; 12RT 4504-4506, 4512-4513, 4545-4546.)

During the time between the first descriptions of what Ron and Tonyia saw and the trial, there was a barrage of publicity on TV and in the press, all of which displayed images of Goodwin. There was also an offer of a $1 million reward. Most important, however, were the flawed lineups witnessed by the couple, who, in addition, saw Goodwin sitting as the defendant at the preliminary hearing.

"The test on appeal becomes whether substantial evidence supports the conclusion of the trier of fact, not whether the evidence proves guilt beyond a reasonable doubt." (*Ibid*.) The court does not, however, limit its review to only the evidence favorable to the respondent; the issue is resolved as to the whole record, and not isolated bits of evidence selected by the respondent. (*People v. Johnson, supra*, 26 Cal.3d at 577.) Due process mandates that the standard for evaluating the sufficiency of evidence in a criminal case is whether any rational trier of fact could find guilt beyond a reasonable doubt. (*Jackson v. Virginia* (1979) 443 U.S. 307, 317-318; 99 S.Ct. 2781, 2788-2789.)

The evidence must be substantial enough to support the finding of each essential element of the crime. (*People v. Barnes* (1986) 42 Cal.3d 284, 303.) Substantial evidence is that which is reasonable, credible and of solid value. (*Ibid*.) Reversal is not warranted if the findings are reasonable and supported by the evidence, even if a contrary finding might also be reasonable. (*People v. Redmond* (1969) 71 Cal.2d 745, 755.) "Whether the evidence presented at trial is direct or circumstantial, under *Jackson* and *Johnson* the relevant inquiry on appeal remains whether any reasonable trier of fact could have found the defendant guilty beyond a reasonable doubt." (*People v. Towler* (1982) 31 Cal. 3d 105, 1257.)

Because the "eyewitness" testimony of the Stevenses is a single slice of the circumstantial evidence pie that convinced the jury to convict, and the only one that potentially implicates Goodwin being in the vicinity within a few days of the murders, their "eyewitness" identification must be held to the standards of reliability mandated by

federal law. Specifically, to sustain a conviction, consideration must be given to – among other things – (1) the opportunity the eyewitness had to observe the individual, (2) the lapse of time between the event and the first identification procedure; and (3) whether the initial description compares favorably with the person accused. (*United States v. Smith* (9th Cir. 1977) 563 F.2d 1361, 1363.)

C. The Evidence Presented by the Prosecutor Was Insufficient To Support Goodwin's Convictions for the Thompson Murders, as There Was No Corpus Delecti To Prove a Conspiracy

The LADA relied on a conspiracy theory to connect Goodwin to the murders, as Goodwin was not present during the killings and no physical evidence connected him to the crimes. Thus, the case for murder against Goodwin stands or falls on the sufficiency of the evidence of a conspiracy between Goodwin and the two unknown men who shot and killed the Thompsons.

Section 28, subdivision (d), of the California Constitution provides, *inter alia*: "Except as provided by statute hereafter enacted by a two thirds vote of the membership in each house of the Legislature, relevant evidence shall not be excluded in any criminal proceeding...." That section did not abrogate the corpus delicti rule[22] insofar as it provides that every conviction must be supported by some proof of the

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CALJIC No. 2.72 defines the corpus delicti rule as follows: "No person may be convicted of a criminal offense unless there is some proof of each element of the crime independent of any [confession] [or] [admission] made by [him] [her] outside of this trial."

corpus delicti aside from or in addition to the defendant's extrajudicial statements, and that the jury must be so instructed. (*People v. Alvarez* (2002) 27 Cal.4th 1161, 1165.) The necessary elements to prove a criminal conspiracy are: (1) an agreement between two or more persons; (2) a specific intent to agree or conspire to commit a public offense; (3) a further specific intent actually to commit the offense; and (4) an overt act committed by one or more of the parties for the purpose of accomplishing the object of the agreement or conspiracy. (*People v. Backus* (1979) 23 Cal.3d 360, 390; *People v. Herrera* (1999) 70 Cal.App.4th 1456, 1464; *People v. Liu* (1996) 46 Cal.App.4th 1119, 1128; 1 Witkin & Epstein, Cal.Criminal Law (3d ed. 2000) Elements, §§ 68, 76-78, pp. 277-280, 288-293.)

In proving the agreement it is not necessary to show that the parties met and actually agreed to undertake an unlawful act or that they previously arranged a detailed plan. Generally a conspiracy can only be established by circumstantial evidence because the essence of a conspiracy – the unlawful design – can usually be proved only by the establishment of independent facts, bearing more or less closely upon the common design. [Citation.] Thus, a conspiracy may be proved by indirect evidence and inferences justified by the circumstances. [Citations.]'" (*People v. Hardeman* (1966) 244 Cal.App.2d 1, at p. 41, citing *People v. Kefry* (1958) 166 Cal.App.2d 179, 185-186; see also *People v. Phillips* (1960) 186 Cal.App.2d 231, 243-244 and *People v. Miller* (1960) 185 Cal.App.2d 59.)

More important, "'A legal inference cannot flow from the nonexistence of a fact; it can be drawn only from a fact actually

established. [Citation.] It is axiomatic that "an inference may not be based on suspicion alone, or on imagination, speculation, supposition, surmise, conjecture or guesswork." ' " ' " (*People v. Stein* (1979) 94 Cal.App.3d 235, at p. 239.)

The problem here is exemplified by the court's remark at the end of the preliminary hearing: "And of all the evidence that was presented in this case, there is simply no one else that the court can say committed this crime or had a reason to commit this crime." (3CT 846.) The court's erroneous thinking was echoed by the jury foreman after reaching guilty verdicts: "Once we determined that it was not a robbery, or random act of violence, we had no evidence to consider regarding anyone other than Michael Goodwin who would have wanted to harm the Thompsons. I asked, "If not Goodwin then who else could have done this?" (8CT 2080.) "If not Goodwin, then who else" is not a permissible inference because it is an inference flowing from a nonexistent fact. Goodwin's conviction must be reversed.

"Conspiracies cannot be established by suspicions. There must be some evidence. Mere association does not make a conspiracy. There must be evidence of some participation or interest in the commission of the offense." (*People v. Long* (1907) 7 Cal.App. 27, 33, 93, as followed in *Davis v. Superior Court* (1999) 175 Cal.App.2d 8, 23; see *People v. Herrera* (2006) 136 Cal.App.4th 1191, 1204-1205.) Where there is some evidence of participation or interest in the commission of the offense, it, *when taken with evidence of association*, may support an inference of a conspiracy to commit the offense. (See *People v. Miller, supra*, 185 Cal.App.2d 59, 72-74; *People v. Kefry, supra*, 166 Cal.App.2d

179, 186.)

1. There Was No Evidence of Association Between Goodwin and the Killers, or Anyone Associated With the Killers

The prosecutor was arguably able to show an interest or motive to kill Thompson. The prosecutor, however, was unable to provide the requisite evidence of *association* between Goodwin and the shooters, or between Goodwin and anyone who might have hired the shooters on Goodwin's behalf, or evidence Goodwin had entered into an agreement to commit murder.[23]

Cases discussing sufficiency of evidence to prove association and agreement indicate a prosecutor must produce at least

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[23] Responding to Goodwin's contentions in his motion for new trial on this point, prosecutor Jackson wrote: "[T]he defense argues that the evidence is insufficient to support a conviction for murder, because there is no direct testimony describing the agreement between defendant Goodwin and the two hit men he hired, and 'the evidence was uncontested that Goodwin did not personally kill the [sic] anyone.'" (8CT 2122.) Jackson further asserted: "Obviously, if murderers who hired hit men could only be convicted with direct evidence of the agreement, then many of those murderers would go free. This would occur even if, as here, there was overwhelming circumstantial evidence of the agreement and conspiracy." (8CT 2122.) Then, instead of pointing out the facts constituting "overwhelming circumstantial evidence" that would support a finding of association and agreement, Jackson offered a sarcastic footnote: "Presumably, this evidence would take the form either of the confession of one of the murderers, or a secret recording of their criminal conspiracy made by a hypothetical third-party to the crime." (8CT 2122.) Neither party cited or discussed cases addressing the quantum of evidence necessary to support such findings.

some circumstantial evidence of association. For example, in *People v. Miller*, *supra*, an arson case, the Court of Appeal held the trial court had properly found a *prima facie* showing of conspiracy where the defendant contended the evidence showed only an association between himself and a woman whose business property had been destroyed by an arson fire, not a conspiracy. The Court of Appeal cited evidence the defendant and his co-conspirator had maintained a confidential business relationship over two years which gave the defendant the opportunity to know all of the business affairs of the co-conspirator. The court also cited evidence the defendant was the co-conspirator's financial advisor; was consulted about new business ventures; knew that $100,000 had been embezzled from her, and that her indebtedness approximated $1,000,000; loaned her money; cashed her checks; paid overdue bills; contemplated buying an interest in the business; was considered for the position of general manager; and was the recipient of her concern and activity in obtaining legal counsel to represent him in the arson trial. This evidence of association was deemed sufficient to support the association element of a conspiracy. (*Id*. at pp. 72-73.)

More specifically, a survey of cases involving contract "hits" reveals most such cases involve the testimony of a co-conspirator; someone who was solicited to commit the murder; a friend, neighbor or relative who was privy to a conversation about the scheme; or a police agent who was part of a sting operation. For example, in *Commissioner v. Mayhue* (Penn. 1994) 536 Pa. 271, 639 A.2d 421, Mayhue and his wife were involved in protracted, bitter divorce proceedings, in which Mayhue had lost his horse farm to his wife and

was living in a condominium. The wife disappeared, and Kisow – an associate of Mayhue – found her body in the trunk of her boyfriend's car abandoned in the driveway of Kisow's home. The evidence showed – among other things – Mayhue had repeatedly attempted to solicit someone to kill his wife. Mayhue had repeatedly asked Kisow to "chop up a car with a body in it," and a couple of months before the murder had called Kisow and told him not to be surprised if he found a car in his driveway. Mayhue's friend Hardin had offered an alibi for Mayhue, but his statements to police were inconsistent with Mayhue's and disclosed knowledge of details of the crime that had not been released to the public. Evidence was also offered to show Hardin attempted to dispose of physical evidence of the murder.

In *State v. Marshall* (NJ 1992) 130 N.J. 109, 613 A.2d 1059, Marshall, an insurance agent, began an extramarital affair with a married woman. Within months, Marshall mentioned to his girlfriend the idea of killing his wife. A few months later, Marshall met Robert Cumber and questioned him about hiring an "investigator." Marshall later telephoned Cumber, who referred him to McKinnon, a former sheriff's officer. Telephone records traced Marshall to McKinnon, who turned state's evidence. McKinnon implicated Marshall, identified another man as the triggerman, and testified to being paid to kill Marshall's wife, the details of the planning, and how the murder was eventually carried out.

In *State v. Yarbrough* (Ohio 2002) 95 Ohio St.3d 227, 767 N.E.2d 216, the defendant claimed there was insufficient evidence to prove murder for hire. The appellate court held the testimony of

witness Jelks that he not only heard the conversation in which Calvin Davis hired the defendant to kill Arnett, but he actually saw one of the co-conspirators pay his portion in cash, was sufficient to prove the defendant killed Arnett, that he did so to prevent Arnett's testimony against Calvin Davis's drug ring, and that he did so for hire. (See also *Sutton* v. *State* (Ind. 1986) 495 N.E.2d 253 [Substantial evidence supported finding defendant agreed with undercover police officer, posing as a "hit man," to murder defendant's daughter-in-law and, thus, sustained defendant's conviction for conspiracy to commit murder].)

In *State v. Davis* (Ohio 1991) 62 Ohio St.3d 326, 581 N.E.2d 1362, evidence of defendant Davis' prior association with his alleged employer – a man both involved in buying and selling cars and manufacturing and selling drugs – and Davis' occupation as hit man, multiple purposes motivating the defendant to travel to the city where the murder occurred – including furtherance of the narcotics enterprise of Davis' alleged employer and Davis – that Davis needed money, and that absence of incriminating evidence at the scene could have been related to Davis' experience as hit man was sufficient to sustain his conviction.[24] (See also *State v. Clausell* (N.J. 1991) 121 N.J. 298, 580 A.2d 221 [Defendant and another man hired to kill Atwood by Roland Bartlett, the Atwoods' neighbor and the alleged leader of a Philadelphia drug-distribution ring known as the "Mini Mob." Bartlett had

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[24] See detailed discussion of the court's error in excluding third-party culpability or biased investigation evidence, in Argument IX, *infra*.

quarreled with the victim over Bartlett's dog; evidence presented of conversations about paying a certain amount of money to kill someone; the day after the shooting. Wright told Grant that he "took care of business" and was going to be paid.].)[25] The above cases demonstrate the typical quantum of evidence required to prove a conspiracy to murder in a contract killing case.

There was no evidence whatsoever of any association between Goodwin and the unknown men who shot and killed the Thompsons. There were no telephone records, no evidence of any payments to the killers, no witnesses to Goodwin soliciting the murders, no evidence of meetings or discussions, and nothing to connect Goodwin to the murder scene. The prosecutor failed to prove his case against Goodwin.[26]

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In Goodwin's case, the prosecution did not follow leads indicating members of the Vagos gang had motive to kill the Thompsons, in that Thompson's nephew had killed one of their gang, Thompson had testified at the trials of the men who were convicted of the murders, and he was scheduled to testify at the retrial of one of them. (See Argument IX, *infra*.) Jackson mocked Goodwin's theory the investigators deliberately or negligently ignored those leads, arguing Thompson's testimony in Cowell's murder trial was "irrelevant," bore little "weight," and would not give motive to someone like Cowell or his associates to kill Thompson. (6RT 23-24.) However, as the *Clausel* case – where the dispute was over the victim's dog – demonstrates, it does not take much to motivate a gang member to kill someone. (See Argument IX, *infra*.)

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When arguing to exclude evidence Lillienfeld ignored other, more likely suspects, and asserting evidence of Goodwin's motive and threats was sufficient to support his case, the prosecutor remarked: "He

2. There Was No Evidence of Agreement Between Goodwin and The Killers or Anyone Associated With the Killers

Unquestionably, the most important aspect of the crime of conspiracy is the agreement. (*People v. Austin* (1994) 23 Cal.App.4th 1596, 1606.) Although proof of an express or formal agreement is unnecessary, the prosecution must still prove, whether by direct or circumstantial evidence, the existence of an agreement to commit the underlying crimes beyond a reasonable doubt. (*Id*. at pp. 1606-1607.) Mere suspicion on the part of the trier of fact that there is a conspiracy is not sufficient to establish that one exists. (See *Davis v. Superior Court* (1959) 175 Cal.App.2d 8, 23 [evidence only giving rise to suspicion of conspiracy to obstruct justice and remove product of prison labor from

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[Goodwin] made the promises that he would go through with that motive. Now I would ask counsel to show us anywhere in the record where Dean Kennedy, John Young, Kit Paepule, Larry Cowell, Larry Shaleen, Joey Hunter, any of the players that [defense counsel is] talking about said anything coming close to the following, 'I'm going to kill that son of a bitch. I'm going to kill that mother fucker. I'm going to take care of him if I lose the civil suit. I'm going to take Mickey out. I'm too smart to get caught. I'll have him wasted. Mickey doesn't know who he's fucking with. He's fucking dead.' Larry Cowell? Kit Paepule? Dean Kennedy? Anything? I mean if this is the best effort that the defendant can come up with in creating or crafting a story that's convenient to him, he's missed the mark." (6RT 19-20.) This argument was disingenuous at best – as in *State v. Davis, supra*, the absence of incriminating threats from these individuals would have been related to their experience as professional criminals and hit men. Professional hit men would not express anger or draw attention to themselves by making threats, but would coolly and without fanfare do the job. (*State v. Davis, supra*, 62 Ohio St.3d 326, 338.)

prison did not support indictment]; *People v. Busby* (1940) 40 Cal.App.2d 193; 199 [circumstantial evidence consisting of isolated facts established only suspicion of conspiracy to commit child stealing and abduction].) There was no evidence of agreement here.

The prosecutor here attempted to show "agreement" via the Stevenses' testimony they had seen Goodwin sitting in a station wagon parked in front of their home a few days before the murders, looking through binoculars in the direction of a school. The key to the prosecutor's theory was the temporal association of Goodwin's alleged presence in the rough vicinity of the Thompson home before the murders. This highly speculative "fact" is not sufficient, even if the Stevenses' stale and tainted eyewitness identifications could be viewed as credible evidence.[27]

Mere presence of both parties at or near the scene of a crime is insufficient evidence of knowing participation in a conspiracy. (*United States v. Sarro* (11th Cir. 1984) 742 F.2d 1286, 1298.) Here, the prosecutor did not claim Goodwin was present at the scene of the crime; rather, the prosecutor offered only the dubious testimony of Ron and Tonyia Stevens they had seen Goodwin sitting in a station wagon parked in front of their house with binoculars somewhere between ten to three days before the murders.

As indicated by *People v. Austin, supra,* 23 Cal.App.4th 1596, all inferences must be reasonable: "Whether a particular inference can be drawn from the evidence is a question of law. (*People*

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[27]See Argument II.D, *infra*.

v. Morris (1988) 46 Cal.3d 1, 20-21.) A reasonable inference 'may not be based on suspicion alone, or on imagination, speculation, supposition, surmise, conjecture, or guess work.' (*Id*. at p. 21.) It must logically flow from other facts established in the action. (Evid. Code § 600, subd. (b).)" (*People v. Austin*, *supra*, 23 Cal.App.4th at p. 1604.) No reasonable inference of association or agreement flows from the Stevenses' testimony. Even if one assumes the Stevenses actually saw Goodwin in the car, Goodwin's purported presence in the neighborhood days or a week prior to the murders is simply too tenuous and speculative to make the inferential leap from that testimony to a finding of association and agreement to commit the Thompson murders.

3. Evidence of Hostility Between Goodwin and Thompson is Not Enough to Prove Conspiracy

There was a fight going on between Goodwin and Thompson. But there were also simultaneous and ongoing hostilities between the Thompson/Campbell clan and the thugs – Larry Cowell and Donny DiMasio and their associates – who had killed Thompson's nephew and Campbell's son, Scott Campbell, in 1982. (6CT 1491.) In 1976, Scott Campbell killed someone who had ties to the same local gang of which one of Scott's killers, Donny DiMasio, was a member. (6RT 9-10; see discussion in Argument IX, *infra*.) Cowell was convicted of Scott Campbell's murder, but his conviction was overturned on appeal. Thompson was scheduled to testify at Cowell's retrial, but was murdered before he could testify. There was evidence, not presented at Goodwin's trial, to support a case that Cowell and possibly others –

not Goodwin – had hired the people who killed the Thompsons.[28]

It appears, therefore, that other people with motive and interest to kill Thompson were on parallel tracks and interacting with the Thompson/Campbell clan at the same time Goodwin was involved in his legal disputes with Thompson.

But here – unlike that of the underworld camp associated with Scott Campbell[29] – none of Goodwin's actions supplies any inference of an agreement between the unknown killers and Goodwin to commit the murders. There is no substantial evidence from which the jury could reasonably infer a joint agreement, plot or conspiracy by Goodwin and the unknown killers to murder the Thompsons.

4. United States v. Todd (8th Cir. 1981) 657 F.2d 212: Evidence of Association and Defendant's Admissions To Participating in a Robbery Were Insufficient to Sustain His Convictions for Conspiracy to Rob or Conspiracy to Murder

In *United States v. Todd* (8th Cir. 1981) 657 F.2d 212, where Todd was charged with conspiring to both rob and murder, he had admitted agreeing with three other men to lure the victim out of a bar in order to rob him; his statements included details about his assisting the men in hiding the victim's body after he was killed in the robbery. The government admitted that Todd's statements made no reference to a plan or agreement to murder the victim. The government's contention was that because the victim and the alleged conspirators were members

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[28]See Argument IX, *infra.*

[29]See Argument IX, *infra.*

of the same basic training company and because Todd stated that they intended to rob, it is reasonable to assume that they planned also to murder him so that he would not identify them after the robbery. The 8th Circuit, adhering to the same standards that govern in California, reversed the conviction:

> *We are unaware of any case in which a court or jury was allowed to convict on the basis of inference alone*.
>
> The government has not presented an admission by the defendant of a conspiracy to murder; nor has it offered any evidence of an agreement between Todd and another person to murder Williams. Although the government is allowed to prove an agreement by circumstantial evidence, *United States v. Taylor* [8th Cir. 1979] 599 F.2d at 838, here there is only speculation and inference. This court has said that the "(e)vidence must do more than merely raise suspicion of possibility of guilt. Surmise cannot be permitted in a criminal case." *United States v. Jones*, 545 F.2d 1112, 1115 (8th Cir. 1976), cert. denied, 429 U.S. 1075, 97 S.Ct. 814, 50 L.Ed.2d 793 (1977). We are not convinced that the evidence here was sufficient to prove beyond a reasonable doubt that Todd was involved in a conspiracy to murder Williams.

(*Id*. at p. 217 [Emphasis added].)

Here, the prosecutor presented many witnesses who testified Goodwin hated Thompson, uttered threats against Thompson, and had a motive to kill Thompson. Therefore, the prosecution showed Goodwin may have had an interest in seeing Thompson dead, which rendered Goodwin suspect. The prosecution failed, however, to show Goodwin participated in committing the murders, and failed to provide any evidence whatsoever of agreement between Goodwin and

the unidentified men who shot the Thompsons.

As to evidence of association, the prosecution case relied entirely upon suspicion. Suspicion alone is insufficient to establish a connection between alleged co-conspirators. (*People v. Hardeman, supra*, 244 Cal.App.2d 1, 41; *People v. Herrera, supra*, 136 Cal.App.4th 1191, 1205.) Indeed, had Goodwin been charged with the crime of conspiracy, that charge would have failed the *corpus delecti* test, as the conspiracy theory was based entirely on Goodwin's extrajudicial statements, and not on any independent evidence of any conspiracy. (*People v. Herrera*, *supra*, 136 Cal.App.4th 1191, 1205.)

On closing, the prosecutor improperly argued a "totality of the circumstances" burden of proof of a conspiracy as the standard for proving Goodwin murdered the Thompsons. (23RT 8759 ["Everybody agrees that these people (the men observed at the scene) were obviously working together. There was an agreement there. And if the totality of the circumstances suggest that Michael Goodwin is responsible for the killings of Mickey and Trudy Thompson, then Michael Goodwin is a conspirator along with the two actual killers"].) "Totality of the circumstances" is not the burden of proof for establishing a defendant's participation in a conspiracy. The burden is proof "beyond a reasonable doubt." (*In re Winship* (1970) 397 U.S. 358, 361-362; see *United States v. Alvarez* (9th Cir. 2004) 358 F.3d 1194, 1201; *United States v. Penagos* (9th Cir. 1987) 823 F.2d 346, 348.) The prosecutor's argument should be taken as Jackson's admission he failed to prove beyond a reasonable doubt Goodwin was involved in any conspiracy to murder the Thompsons.

D. The Eyewitness Identification Testimony of Ron and Tonyia Stevens Is Insufficient To Support Goodwin's Convictions for the Thompson Murders

Pared to its essence, the question presented to the jury was whether Goodwin engaged in a conspiracy with unknown shooters to kill the Thompsons by way of a contract hit. The only evidence introduced by the prosecution in an attempt to link Goodwin to the killers temporally or physically was the eyewitness identification testimony of Ron and Tonyia Stevens they had seen Goodwin sitting in a station wagon some distance from the Thompson home days before the murders, looking through binoculars in the direction of a school. (See 23RT 8754-8755 ["The evidence suggests he planned it. He planned it. He was there three days before the murders."]; 23RT 8777 ["Now to say that this was anything other than a perfectly planned, perfectly orchestrated, perfectly choreographed execution does violence to logic, folks. Of course, this was perfectly planned. And why is that important? Because of where the Stevenses saw the defendant."] 23RT 9016-9017, 9020.)[30]

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The jury did not, in fact, believe there was any evidence of such a connection: "The evidence was clear that Goodwin did not personally kill the Thompsons. There was no evidence offered that showed a direct connection between the people who in fact killed Mickey and Trudy Thompson and Michael Goodwin. The judge's instructions regarding conspiracy allowed the jurors to skip this step and find Michael Goodwin guilty." (8CT 2078 [Declaration of jury foreman Mark Matthews].)

1. The Stevenses' Testimony

(a) Ron Stevens' Testimony at the Los Angeles County Preliminary Hearing

At the Los Angeles preliminary hearing, Ron Stevens testified that probably less than a week, and no more than a week-and-a-half, before the murders, and at about 11 a.m., he saw a station wagon with two men sitting in it parked in front of his house, and the driver had binoculars. (3CT 598-599, 601, 603.) Ron could not recall or denied describing the driver during a tape-recorded interview with Lillienfeld as "stocky and he had on a cap, but he had blond hair." (3CT 623-624, 628.) Ron admitted telling Lillienfeld the driver's hair was, "Not real long, but normal, longer than yours. You could see the hair sticking out." (3CT 624.) Ron could not recall telling Lillienfeld in the first interview both people in the car were white males. (3CT 629.)

Ron recalled the following exchange with Lillienfeld during his first interview:

> LILLIENFELD: Do you remember what race he was?
>
> RS: Well, you asked me before if he was black and I said no. I don't think he was black I'm almost positive he wasn't black.
>
> LILLIENFELD: Was not black?
>
> RS: Right, he may have been, but it was a long time ago.
>
> LILLIENFELD: Oh yeah.

RS: That's why when it said "killed by two black people," I thought this wasn't right.

(3CT 629.) Ron could not recall thinking his perception might have been inaccurate because he later learned that in fact a black man may have been involved. (3CT 630.)

Ron denied telling Lillienfeld he had not observed the station wagon himself, but after he pulled into his driveway, his wife informed him there was a strange car outside, at the base of the driveway. (3CT 630, 632.) Ron denied telling his wife to call the police that day, denied calling the police himself, and denied telling Lillienfeld Tonyia had, in fact, called the police and waited for them to respond, but they never showed up. (3CT 630-631.)

Nor did Ron recall telling investigators he never got within more than ten or fifteen feet of this car; Ron recalled a distance of eight feet. (3CT 632-633.) In his taped interview Ron said, "I didn't see him face-on very good. I saw him from the side with a hat on." (6CT 633.) At the preliminary hearing Ron added he did not see the driver very well "until he turned and looked at me, yes." (6CT 633.) Ron denied telling Lillienfeld he might have seen Goodwin on TV, although he admitted he might have seen a show about Scott Campbell's murder. (6CT 633-634.) Ron claimed not to know Scott's murder was mentioned on America's Most Wanted. (6CT 634.)

Ron denied having difficulty distinguishing between numbers 1, 3 and 5 in the photographic lineup, claiming he "took [his] time looking at the pictures." (6CT 634.) He did not remember telling Lillienfeld each of those three had a particular characteristic he

remembered of the individual in the station wagon. (6CT 634.)

Ron could not recall telling Lillienfeld, "I think I saw something on that this guy here," indicating number 3, and telling Lillienfeld, "Yeah. It was the type of complexion and that color hair." (3CT 635.) Ron also could not recall Lillienfeld saying, "Oh, yeah, really?" and Ron's answer, "But they all look similar." (3CT 635.) Ron could not remember Lillienfeld saying, "Yeah, that's the way the slimy defense lawyers do is set sextuplets and also show sometimes twins and triplets." (3CT 635.) Ron could not recall saying, "I didn't see him face-on real good. I saw him from the side and with a hat on. It was this color of hair here, but it was this type of nose and that type of complexion. I couldn't be positive." (3CT 635.) Lillienfeld responded, "The type of nose you're talking about is number five. . .but the complexion is number three, right?" (3CT 635.)

(b) Ron Stevens' Trial Testimony

At trial Ron claimed he saw two men sitting inside, one in the driver's seat and one in the front passenger seat. (11RT 4387.) On direct, Ron testified he came within eight feet of the driver, who was closest to him and facing toward the school, holding the binoculars up to his eyes. (11RT 4387-4389.) Ron was impeached with his interview statements he only approached to within 15 or 20 feet of the back of the car, and he was not sure which man had the binoculars. (12RT 4513-4515, 4519-4520.)

According to Ron, the man lowered the binoculars. (11RT 4389.) The driver was a big man with light reddish or reddish hair, wearing a watch cap that sat back on his head. (11RT 4389-4390; 12RT

4533-4534, 4557-4558.) As Ron continued to approach the men he had an unclear view of the driver's left profile, then the driver turned, looked at him, started the car and drove off. (11RT 4390-4391; 12RT 4542-4543, 4554-4555.)

Ron insisted he viewed the driver face-on for a minute, even though that would have been impossible given the angle at which he approached the car, and even though at the photographic lineup he told Lillienfeld he was only able to view the man from the side. (11RT 4391; 12RT 4513-4514; 4542, Defense Exhibits Z and Z-1.) On cross, Ron admitted the "minute" he referred to was the time it took to approach the car over a distance of about 120 feet. (12RT 4542.)

Ron testified he looked at the man because he wanted to see who it was, the man did not belong there, and he was concerned that the man might intend to kidnap someone from the school. (11RT 4391.) Ron noted the man's face and attempted to remember what he looked like. (11RT 4391-4392.)

On direct, Ron testified he did not get a good look at the passenger or know his race, as he was concentrating on the driver. (11RT 4395.) He was impeached with his February 26, 2001, statement to Lillienfeld that both men were white males (11RT 4520, 12RT 4559), and his subsequent taped statement and unequivocal preliminary hearing testimony the man in the passenger seat was black. (11RT 4520-4522, 12RT 4559.) Neither Ron nor the men in the car spoke. (11RT 4392.)

(c) Tonyia Stevens' Testimony at the Los Angeles County Preliminary Hearing

At the preliminary hearing, Tonyia Stevens testified it "seemed like" a few days – meaning two or three days – before the murder she had picked her daughter up from school just before noon or 3:00. (3CT 654-655.) As they were driving home she saw a light-colored, old clunker station wagon with Arizona license plates parked facing east on the south side of Gardi. (3CT 655-657.) The car was not facing the wrong way on the street. (3CT 657-658.) Two men were seated in it and, Tonyia remembered "the men putting the binoculars down." (3CT 655-656.) Tonyia viewed the men in the car for five seconds as she drove by. (3CT 663.) Driving by, Tonyia looked directly into the windshield of the station wagon, viewing the driver face-on. (3CT 663.) Tonyia and her daughter went inside the house debating calling the police when Ron arrived. (3CT 655.)

Tonyia told Ron she was going to call the police, and he said he was "going to go out and see." Tonyia followed Ron out and was five feet behind him when he reached the end of the corral. (3CT 658-659.) The driver, with the binoculars, was closest to her. (3CT 659-660.) Tonyia recalled seeing the driver's face full-on, getting a good look at him for about six seconds, but she could not recall whether he was wearing anything on his head. (3CT 660-663.)

Tonyia identified Goodwin in court as the man in the driver's seat; she was certain it was him. (3CT 656, 661, 664.) According to Tonyia, the driver's hair was curlier at the time she saw him in the car than Goodwin's hair was at the preliminary hearing. (3CT 661.) Tonyia had told Lillienfeld the driver's hair was "brownish-blond, not blond, but brown, and that he had a ruddy face,

"kind of like he had had acne." (3CT 662.) The driver's hair was different from the way Goodwin's hair looked in court, but Goodwin's complexion was consistent with the way the driver's complexion looked in 1988. (3CT 662-663.)

Tonyia had seen Goodwin on television before she identified him from the live lineup. (3CT 661.) She explained Lillienfeld told Ron not to watch television because a show about the Thompson murders was going to air. (3CT 664.) Tonyia testified:

> But they didn't tell me because I had forgotten that I remembered what he looked like and so it came on. I told my husband to go out and they were talking about it and there were five, maybe six men walking and I looked and I thought, I yelled to my husband, I said, "oh my gosh, you're going to identify him because I remember him now, so for sure you will.

(3CT 664.) Ron left the room before the show came on. (3CT 665.) Tonyia recognized one of the men on the screen, even though nobody stated his name. (3CT 666.)

Tonyia called out to Ron upon seeing the men on TV because she "had forgotten and then . . . [she] . . . remembered why [she] remembered his face." (3CT 666.) Tonyia said she was relating the story about seeing Goodwin on TV to Lillienfeld, and then she "opened [her] big mouth and said [she] remembered." (3CT 666.) Lillienfeld then asked her to view the live lineup. (3CT 666-668.)

(d) <u>Tonyia Stevens' Testimony at Trial</u>

By the time of trial, Tonyia was certain the incident occurred on the Monday before the Wednesday murders. (12RT

4595-4596.) Tonyia claimed she saw the driver's face full-on as she drove by, and was concentrating on him because he had the binoculars, which seemed unusual. (12RT 4566.)

Tonyia testified she followed Ron to within ten to fifteen feet of the car. (11RT 4393-4394; 12RT 4567-4569, 4571.) The driver looked in her direction, at which point she was able to see his face. (12RT 4569-4570.) Tonyia's testimony was inconsistent with Ron's testimony about when the man moved the binoculars away from his face. According to Tonyia, the driver put the binoculars down when she first drove past, and she did not recall if he ever raised them again. (12RT 4571.) Tonyia also claimed she saw the passenger's face, but not well, before the car sped away seconds later. (12RT 4569-4571.)

2. Lillienfeld Exposed the Stevenses to Suggestive Identification Procedures

The murders occurred on March 16, 1988. (14RT 5123.) In March of 2001 – 13 years later and after several shows, including an episode of America's Most Wanted, had aired on television featuring the Thompson murders and Campbell's million-dollar reward – Lillienfeld contacted the Stevenses for the first time. (12RT 4572; 20RT 7633.)

Prior to any identification procedure, Ron described the man in the car to Lillienfeld as a big man in his forties with reddish-colored hair and a ruddy complexion – meaning he had pock-marked skin. (11RT 4399-4400; 12RT 4504-4506, 4512-4513, 4545-4546.) On cross, Ron admitted he might have used the word "stocky" to describe the man. (12RT 4545-4547.) Tonyia described the

man as "40-ish," having a ruddy complexion, "kind of brownish blond hair," and not a small person. (12RT 4597-4598, 4601.)

(a) Lillienfeld First Showed a Photographic Lineup to Ron Stevens in March of 2001 – 13 Years After the Murders

In March, 2001 – again, 13 years after the incident – Lillienfeld showed Ron Stevens a series of six photographs. (11RT 4398-4399; 12RT 4502, 4581; People's Exhibit 35.) Lillienfeld did not construct the photographic lineup; he gave a crime lab photographer the photograph of Goodwin and told him to assemble five look-alikes. (20RT 7642.) Lillienfeld did not invite Tonyia to view the photographs. (12RT 4593-4594, 4596.) Before showing the photographs to Ron, Lillienfeld told Ron about Goodwin's impending prosecution in Orange County. (12RT 4561.) The only person in the photographic six-pack with a pock-marked face was Goodwin, in position 3. (12RT 4513; People's Exhibit 35.)

Ron testified he spent a lot of time looking at each person, trying to make sure the person he had seen was in the photographs. (12RT 4547.) On direct, Ron claimed he selected Goodwin's picture as the driver of the station wagon. (11RT 4397-4400; 12RT 4502-4503; 12RT 4507, 4548-4549; People's Exhibit 35.) On cross, Ron admitted he was unable to narrow his selection down to Goodwin's photograph; rather, he narrowed it down to three out of the six. (12RT 4514-4517; 7CT 1859-1861; Defense Exhibits Z and Z-1, AA and AA-1.) In the recorded interview, Ron commented: "This type of nose," "that type of hair" and "this type of complexion," as he pointed to three different individuals.

(12RT 4515; Defense Exhibits Z and Z-1.) Ron admitted the question Lillienfeld asked was, "Yeah, but the guy you saw in the wagon that day most resembles who in this photo array now?" (12RT 4517; 7CT 1862.) Ron also admitted Goodwin was the only man in the photographic lineup with a ruddy, pockmarked complexion. (12RT 4512-4513, 4519.) Because Ron could not narrow his selection down beyond three people, Lillienfeld offered to present him with a live lineup. (12RT 4518.)

On the same day he viewed the photographic lineup, Ron told Tonyia he was able to pick someone out. (12RT 4599-4600.)

(b) Five Months Later, Lillienfeld Showed Both Ron and Tonyia Stevens a Live Lineup In Which Goodwin Was the Only Individual Repeated From the Photographic Lineup

Five months later, on August 13, 2001, Ron and Tonyia drove to the jail together so Ron could view the live lineup. (11RT 4400-4404, 12RT 4577, 4581, 4598-4600; People's Exhibit 33.) At that point Tonyia was not supposed to be involved in the procedure at all. (12RT 4599.) According to Tonyia, she and Ron entered the room together where Ron was to view the lineup and talked to Lillienfeld. (12RT 4581.) Someone told them about Campbell's reward, but at trial Tonyia denied knowing the amount. (12RT 4599.)

Tonyia told Lillienfeld, in Ron's presence – referring to Ron – "Oh, he's not going to have any trouble identifying him because I could identify him." (12RT 4581, 4600.) Lillienfeld then asked Tonyia if she would also view the lineup. (12RT 4582.)

Ron and Tonyia viewed the lineup separately. (12RT 4582.) Tonyia picked Goodwin, in position 5. (12RT 4584-4585; Defense Exhibit DD.) When Tonyia viewed the lineup she expected the man she had seen on the news to be among the six people, and she was looking for that face. (12RT 4601-4602.) The man in position 1 was fifty to sixty years old. (12RT 4605.) No. 2 was in his thirties. (12RT 4604.) No. 3 appeared to be between fifty and sixty years old and Hispanic. (12RT 4605.) No. 4 was in his forties. (12RT 4604.) No. 5 appeared to be between fifty and sixty years old. (12RT 4605.) No. 6 appeared to be in his late thirties. (12RT 4604.)

Ron understood prior to viewing the lineup that one of the individuals who was in the photographic lineup was going to be there in person for him to identify. (12RT 4519, 4561.) After viewing the lineup, Ron and Tonyia identified Goodwin as the driver with the binoculars they had seen in the station wagon. (11RT 4400-4404; 12RT 4517-4518; 4558-4559, 4572-4577; People's Exhibits 33-34, 36.) Goodwin was the only man appearing in both the photo spread and the live lineup. (12 RT 4519.) Ron was looking for a man in his fifties, so it was easy to eliminate anyone who was much younger than that. (12RT 4546.) There were at least two people who were over 40 or 50 years old in the lineup. (12RT 4546.) Only Goodwin had pock-marked skin. (See Defense Exhibit DD.)

On cross, Ron admitted he and his wife might have discussed what they were going to do on their way to the live lineup, even though Lillienfeld had asked them not to. (12RT 4518.)

Ron was aware of news conferences on TV about this case

at the time, and of proceedings in Orange County generating publicity. (12RT 4518.) He read about the Thompson case in the newspapers, although he denied seeing it featured on America's Most Wanted or other shows. (12RT 4523-4524, 4553.) When confronted with his prior statements, Ron admitted that he might have seen a show about the case and recalled an incident before he viewed the lineup where he was in the house with Tonyia and she called out to him Goodwin was on the news. (12RT 4530-4532, 4543-4544.) After Ron saw the photographic lineup and before he viewed the live lineup, the police told him not to watch any shows about the murders. (12RT 4544.)

Tonyia admitted to seeing Goodwin's face on television before she viewed the live lineup. (12RT 4574, 4596.) She said the police told Ron not to watch any newscasts about the trial or the murder before viewing the live lineup. (12RT 4574.) There was a teaser on the news that a story on the Thompson murders was coming up. (12RT 4574-4575, 4596.) Tonyia told Ron to leave the room, but she stayed to watch the news alone, during which she claimed neither Goodwin's name, nor any other identifying information, was mentioned. (12RT 4575-4576, 4596-4597.) She saw footage of four to six men walking out of a building that might have been a courtroom, which "brought it all back." (12RT 4575, 4596-4597.) Tonyia recognized Goodwin in the newscast. (12RT 4576-4577.) She told Ron, "You're going to remember him. I have no problem remembering him." (12RT 4575.) On direct, Tonyia testified when she looked at the driver, he reminded her of a boy she had gone to school with, and Goodwin looks like that person; on cross, Tonyia admitted it was when she saw

Goodwin on the news she remembered he reminded her of somebody from school. (12RT 4577, 4597.) The prosecutor led Tonyia to state Goodwin has a face that sticks in her mind. (12RT 4577.) After Tonyia saw the television show and recognized Goodwin, Lillienfeld asked her to participate in the live line-up. (12RT 4577.)

3. The Stevenses' Identification of Goodwin in 2001 As One of the Men They Saw in Front of Their House in 1988 Is Not Substantial, Credible Evidence Goodwin Engaged in a Conspiracy to Murder the Thompsons

"The identification of strangers is proverbially untrustworthy [and] [t]he hazards of such testimony are established by a formidable number of instances in the records of English and American trials." (*United States v. Wade* (1967) 388 U.S. 218, 228, 87 S.Ct. 1926, 1933, 18 L.Ed.2d 1149.) Eyewitness identifications are, "at best, highly dubious, given the extensive empirical evidence that eyewitness identifications are not reliable." (*United States v. Smith*, *supra,* 563 F.2d 1361, at p. 1365.) "Centuries of experience in the administration of criminal justice have shown that convictions based solely on testimony that identifies a defendant previously unknown to the witness is highly suspect [and] the least reliable, especially where unsupported by corroborating evidence." (*Jackson v. Fogg* (2d Cir.1978) 589 F.2d 108, at p. 112.) In *Wade*, the United States Supreme Court recognized "the vagaries of eyewitness identification are well-known; the annals of criminal law are rife with instances of mistaken identification." (*United States v. Wade*, *supra*, 388 U.S. 218, 228, 87 S.Ct. 1926, 1933, 18 L.Ed.2d 1149.) The court noted "the high incidence of miscarriage of justice"

caused by such mistaken identifications, and warned that "the dangers for the suspect are particularly grave when the witness' opportunity for observation was insubstantial, and thus his susceptibility to suggestion the greatest." (*Id.* at pp. 228, 229, 87 S.Ct. at p. 1933.)

In *Fogg, supra*, 589 F.2d 108, the Court upheld an order vacating a robbery-murder conviction on habeas corpus because pre-lineup procedures were unduly suggestive and because the four eyewitnesses had only a brief opportunity to observe the gunman under stressful conditions and showed varying degrees of certainty in their identifications of the defendant. There was no other evidence connecting the defendant with the crime. (*Id.* at p. 112.)

Some of the reasons for the unreliability of eyewitness identifications were discussed in *United States v. Russell* (6th Cir.1976) 532 F.2d 1063, 1066: "There is a great potential for misidentification when a witness identifies a stranger based solely upon a single brief observation.... [T]his danger is inherent in every identification of this kind, ..." As the Circuit Court noted, "This problem is important because of all the evidence that may be presented to a jury, a witness' in-court statement that 'he is the one' is probably the most dramatic and persuasive." (*Id.* at p. 1067.)

In *United States v. Brown* (D.C.Cir.1972) 461 F.2d 134, Judge Bazelon pointed out "[o]ne critical problem [of eyewitness identifications] concerns their reliability, yet courts regularly protest their lack of interest in the reliability of identifications, as opposed to the suggestivity that may have prompted them, arguing that reliability is simply a question of fact for the jury. [Citation.] There already

exists, however, great doubt – if not firm evidence – about the adequacy and accuracy of the process. Unquestionably, identifications are often unreliable – perhaps consistently less reliable than lie detector tests, which we have in the past excluded for unreliability." (*Id*. at p. 145, fn. 1.)

Since the 1970's, empirical studies of the psychological factors affecting eyewitness identification have supported the conclusion they are often unreliable. (See Eyewitness Testimony: Psychological Perspectives (Wells & Loftus edits. 1984); Evaluating Witness Evidence: Recent Psychological Research and New Perspectives (Lloyd-Bostock & Clifford edits. 1983); Sobel, Eyewitness Identification: Legal and Practical Problems (2d ed. 1983); Loftus, Eyewitness Testimony (1979); Yarmey, The Psychology of Eyewitness Testimony (1979); see also Johnson, Cross-Racial Identification Errors in Criminal Cases (1984) 69 Cornell L.Rev. 934; Note, Did Your Eyes Deceive You? Expert Psychological Testimony on the Unreliability of Eyewitness Identification (1977) 29 Stanford L.Rev. 969.)

The United States Supreme Court's seminal case on suggestive eyewitness identification procedures, *Manson v. Braithwaite* (1977) 432 U.S. 98, has not been revisited by the Court in the intervening thirty-plus years.[31] (See Gary L. Wells & Deah S.

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[31] Recently the United States Supreme Court discussed *Manson v. Braithwaite* in *Perry v. New Hampshire* (2012) __U.S. ___, 132 S.Ct. 716. The focus of *Perry*, however, was not whether eyewitness identifications are inherently unreliable, but whether the Due Process Clause requires a trial judge to conduct a preliminary assessment of the

Quinlivan, Suggestive Eyewitness Identification Procedures and The Supreme Court's Reliability Test In Light of Eyewitness Science: 30 Years Later, 2009, 33 Law & Human Behavior, 1.) In the meantime, scientific studies of eyewitnesses have progressed, and exonerations based on DNA evidence not available to the *Manson* court in 1977 show mistaken identification is the primary cause of convictions of the innocent. Ironically, recent studies have found that suggestive identification procedures inflate the eyewitnesses' reliability standing on three of the five reliability criteria articulated in *Manson* – view, attention, and certainty – that were used to decide whether the suggestive procedures were a problem. (Wells 2009, *supra*, at pp. 9-13.)

As to the numbers of the wrongly convicted, "[t]he known DNA exoneration cases can only be a fraction of the innocent people who have been convicted based on mistaken eyewitness identification evidence," because in some cases the biological evidence for DNA testing has deteriorated, has been lost, or has been destroyed. (Wells 2009, at p. 2.) Another problem is that virtually all DNA exoneration cases involve sexual assaults, because those are the cases for which definitive biological evidence contained in semen is available to establish the mistaken identification. Such biological evidence is almost never available for murder cases, such as this one, that have relied on eyewitness identification evidence. (*Ibid*.) Goodwin, therefore, falls into the class of defendants who cannot benefit from

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reliability of an eyewitness identification made under suggestive circumstances not arranged by the police. The answer was no. Justice Sotomayor dissented.

DNA evidence to exonerate him in the event of a mistaken identification, as his case turns on whether he was somehow connected to Thompson's killers and agreed with them to commit the murders, not on physical evidence linking him to the crime scene, and there was no physical evidence to link him to the station wagon the Stevenses claim they saw.[32]

The California Commission on the Fair Administration of Justice has recognized the urgent need for safeguards and improvements in the administration of criminal justice in California. (California Commission on the Fair Administration of Justice, Report and Recommendations Regarding Eye Witness Identification Procedures (April 13, 2006), p. 1.) The Commission concluded "the risk of wrongful conviction in eyewitness identification cases exists in California, as elsewhere in the country, and that reforms to reduce the risk of misidentification should be immediately implemented in California. (*Id*. at p. 3.) The Commission's findings make a compelling argument Goodwin's murder convictions are unreliable, especially in

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Due to the passage of time and the carelessness of the investigators and of Ron Stevens, a crucial piece of evidence related to the Stevenses' identification of Goodwin disappeared before trial – the business card upon which Ron Stevens wrote the Arizona license plate number of the station wagon he saw. (12RT 4559-4560; 4571.) See Argument III, *infra*.

The Superior Court recently appointed counsel to assist Goodwin in obtaining DNA analysis of the hair found on the stun-gun recovered at the scene of the murders. Goodwin has already been excluded as the donor of that hair.

light of the lack of any DNA or other corroborating evidence.[33] (*Ibid*.)

It appears only Lillienfeld was present when he showed Ron Stevens the photo lineup. However, there is an audiotape of the discussion between Lillienfeld and Ron that contradicts Ron's claim he unequivocally picked Goodwin. The recording reveals Ron's comments as he pointed to photographs of three different men. (12RT 4515; Defense Exhibits Z and Z-1.) The record also indicates Lillienfeld did not admonish Ron the suspect may or may not be in the lineup – but instead improperly asked him, "Yeah, but the guy you saw in the wagon that day most resembles who in this photo array now?" (7CT 1862; 12RT 4517.)

Lillienfeld followed only one of the Commission's protocols during the live lineup – a still photograph was taken of it.

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The Commission recommended a number of reforms including: (1) double-blind identification procedures, where the person displaying the photo lineup or operating a live lineup does know who the suspect is; (2) sequential display of photos and lineup participants (when double-blind procedures are used); (3) instructions to the witness that the suspect may or may not be in the photos or lineup, and that failure to make an identification will not end the investigation; (4) identification procedures should be videotaped where possible, or at least audiotaped, and a still photo of a live lineup should be taken if video is not available; (5) witnesses should be asked to make a statement regarding the certainty of their identification, and should not be given feedback as to the accuracy of their identification until the statement of certainty has been made and recorded; and (6) identification procedures should be conducted, whenever practicable, with only one witness at a time, or at least the witnesses should be separated so they will not be aware of the responses of any other witnesses. (*Id*. at pp. 5-6.)

(11RT 4401, 12RT 4603; Defense Exhibit DD.) Ron and Tonyia drove to the police station together prior to viewing the live lineup. (12RT 4598.) It appears both witnesses had opportunities to converse and compare their perceptions, and both admitted they expected to see Goodwin in the live lineup – Ron because he had previously seen a photograph of Goodwin's pock-marked face in the photographic lineup, and Tonyia because she had seen Goodwin on television. The identification procedures, therefore, were both suggestive and unreliable.

(a) Ron Had Little Opportunity to Observe the People in the Car

Ron's opportunity to observe the men in the car was extremely limited, as, according to his testimony, he was 8 to 15 feet behind the car the entire time. (12RT 4513-4514.) Moreover, as argued above, the initial photographic lineup in which Ron identified Goodwin was unduly suggestive, rendering the subsequent in-person identification unreliable.

The opportunity to observe was fleeting. Although it was daylight, Ron – according to his earliest statement to Lillienfeld – only observed the man in the car at a distance within 15 or 20 feet. (12RT 4519-4520.) It would have been more difficult for Ron to see someone sitting inside a vehicle than to see someone standing in front of him – especially because Ron approached the car from behind and at an angle, which would have limited his view of the car's occupants. (11RT 4390-4391, 12RT 4513-4514.) Although Ron testified he was able to see the man's face full-on, he was impeached with his prior statement he only saw the man in profile, unclearly. (12RT 4514.) His opportunity

to observe was very brief because the man immediately started the car and drove away. (11RT 4390-4391; 12RT 4542-4543.)

Ron testified he observed the man face-to-face for a minute, but he also testified the "minute" he referred to was the time it took him to walk over to the station wagon – a distance of about 120 feet. (12RT 4542.) If Ron did see the man at a distance of from 8 to 20 feet, he might have had a very brief opportunity to observe facial features, but Ron contradicted himself as to whether he ever saw the man's face other than in profile.

(b) Tonyia's Account Contradicted Her Original Statement to Investigators, and She Also Had Little Opportunity to Observe

Lillienfeld's 2001 report indicated Tonyia could not recall whether the station wagon was occupied. (12RT 4593.) Tonyia testified at trial she was about to make the turn into her driveway when she noticed the station wagon with two men in it parked across the street from her house, the driver holding binoculars, which he lowered as she drove by. (12RT 4564-4567, 4571, 4610.) Tonyia claimed she saw the driver's face full-on as she was driving. (12RT 4566.) Tonyia testified she followed Ron down to the car, about two to five feet behind him, all the way through the corral, to within fifteen or sixteen feet of the car. (11RT 4393-4394; 12RT 4567-4569, 4571.) Tonyia testified she could see inside the car, and the driver (who had put the binoculars down earlier when she'd first driven past) looked in her direction, at which point she was able to see his face full-on. (12RT 4569-4571.) At the time Tonyia

also claimed she was able to see the passenger's face, but not well, before the car sped away seconds later. (12RT 4569-4571.)

(c) <u>The Lapse of Time Between The Event and The First Confrontation Was Too Great For The Identification of Goodwin to Be Reliable, Especially Given the Intervening Influences Affecting the Stevenses' Memories</u>

The station wagon incident occurred in early March of 1988. The first identification procedure – a photographic lineup – occurred in March of 2001, thirteen years later. (11RT 4398-4399; 12RT 4502, 4581; People's Exhibit 35.)

The greatest memory loss following an event occurs soon after the event. (Wells 2009, *supra,* p. 13.)

> " ... The shape of the forgetting curve is a negatively decelerating function of time. This means that each time frame (whether measured in minutes, hours, or days) produces a greater loss in memory than the same time frame that follows it. Hence, more memory is lost in the first hour than in the second hour, more in the first day than the second day, more in the first week than in the second week, and so on. This forgetting function is one of the oldest phenomena in scientific psychology, dating back more than 100 years (e.g., Ebbinghaus 1885)." [Citation omitted.] "In general, eyewitness identification experiments show that the elapsed time between witnessing an event and later identification accuracy is negatively correlated with accurate identifications and positively correlated with mistaken identifications (see Cutler and Penrod 1995; Shapiro and Penrod 1986)."

(*Id.* at p. 14.) The gap of thirteen years between the event and the identification procedures destroyed any possible true memory of the

men in the station wagon in the minds of Ron and Tonyia Stevens. This is especially true given that, over the intervening years, several events occurred that likely influenced the Stevenses' memories.

Recent studies have established that post-event influence is more significant than mere passage of time in its effect on memory.

> "Post-event influence" refers to the fact that eyewitnesses' recollections of an event can be affected by "information" acquired well after the witnessing event has occurred. . . (Loftus and Greene 1980). People will even extract information from questions in ways that change their later testimony. For instance, after viewing a car-pedestrian accident, people who were asked 'Did another car pass the red Datsun while it was stopped at the stop sign?' were later much more likely to report that they saw a stop sign than were those not asked that question, even though it was a yield sign (Loftus et al. 1978). The point of post-event influence as it relates to the time interval between the witnessed event and the identification is that greater amounts of time permit greater opportunity for post-event influences to affect memory: Detectives can inadvertently insert information into their questions, witnesses can have their memory contaminated by other witnesses, witnesses can glean "facts" from newspaper stories about the crime, and so on. Hence, it is not just forgetting that is a problem with the passage of time, it is also the fact that time passage permits events that can create changes in how the witness remembers the original event. Later, witnesses cannot effectively parse what they actually saw from what they might have acquired later.

(Wells 2009, *supra,* at p. 14.)

Wells notes that "there is an interaction between the passage of time and susceptibility to post-event influences. The longer the time between the witnessed event and the introduction of

misleading post-event information, the greater the effect of the misleading information on witness's subsequent reports (Loftus et al. 1978)." (*Ibid*.)

The record indicates some of the interactions Ron and Tonyia Stevens had with each other, the police, the media or other individuals who might have suggested "facts" to them about the physical description of the man they claimed to have seen in the station wagon.

First, before Lillienfeld ever contacted the Stevenses, several crime shows had aired on national television featuring re-enactments of the Thompson murders, some of them mentioning the million-dollar reward. (12RT 4572; 20RT 7633.) The Stevenses were cagey about what they saw, but it is clear that both of them had viewed images of Goodwin on television, and possibly in newspaper articles before they participated in the identification procedures. (3CT 661-666; 12RT 4518, 4523-4524, 4530-4532, 4543-4544, 4553, 4574-4577, 4596-4597.)

Second, Ron and Tonyia had discussed the incident with each other prior to the identification procedures, and Tonyia had acted as somewhat of a cheerleader to bolster Ron's confidence he would select the "right" person from the lineups. (12RT 4518, 4575)

Third, Lillienfeld, knowing who the suspect was, suggestively asked Ron during the photographic lineup, "Yeah, but the guy you saw in the wagon that day most resembles who in this photo array now?" (7CT 1862; 12RT 4517.)

Lillienfeld then somehow conveyed to Ron the expectation

Goodwin would appear in the live lineup. Then Lillienfeld presented both Stevenses with a live lineup in which Goodwin was the only person who appeared in both lineups, the only person with a pock-marked face in both lineups, and one of only two men in the right age group in the live lineup. The lineup proceedings could not have been any more suggestive.

The record establishes there was a thirteen-year period in which the Stevenses' memories would have faded significantly, with or without the post-event influences, rendering the identification of Goodwin as the man in the station wagon unreliable. Of particular importance here is the suggestiveness of both the photographic and live lineups, which included only one individual exhibiting the single unusual characteristic Ron had described – pock-marked skin – and that individual was Goodwin. (See People's Exhibit 35 [photographic lineup].)

4. In Addition to The Smith Factors, The Identification Procedures Further Reduced the Reliability And Credibility of the Stevenses' Identification of Goodwin as the Man They Saw

As noted above, the identification procedures did not include precautions against possible influences on the Stevenses' identification of Goodwin as the man they saw.

The first identification procedure, the photographic lineup, was presented by Lillienfeld, the detective investigating the case; he was fully aware of which photo was the suspect. The record reveals what Lillienfeld said to Ron as Ron looked at the photo spread: "Yeah,

but the guy you saw in the wagon that day most resembles who in this photo array now?" (12RT 4517; 7CT 1862.) Lillienfeld offered to show Ron a live lineup, and Ron came away from the discussion with Lillienfeld at the photographic lineup with the understanding that the live lineup would include Goodwin.

The live lineup apparently was not documented by a videotape or audiotape, but the experience was influenced by discussions Ron had with Tonyia before the procedure. Tonyia was certain she knew who the man in the car was well before she viewed the live lineup, and she communicated to Ron her confidence he would recognize the same man at the live lineup. Both Ron and Tonyia admitted they might have seen Goodwin's image on television prior to viewing the live lineup.

Experiments demonstrate confirmatory suggestive remarks following a mistaken identification lead witnesses to inflate their estimates of how much attention they paid to the culprit during the witnessed event. This "post-identification feedback effect" means witness' reports of their attention are not only malleable, but are affected by suggestive procedures. (Wells 2009, at p. 11.) Witnesses also inflate the attention paid when police use a suggestive photo array. Suggestive procedures enhance the eyewitnesses' standing on a *Manson* reliability factor. (Wells 2009, at p. 11.)

E. Conclusion

Goodwin's convictions rest entirely upon evidence raising only a suspicion Goodwin somehow arranged the Thompson murders. The LADA presented evidence of motive and threats Goodwin

purportedly made against Thompson, but no evidence connecting Goodwin to the killers or to any scheme to murder the Thompsons. As the jury foreman put it:

> Personally, I was initially reluctant to vote for conviction because I had heard no credible evidence connecting Michael Goodwin to the actual killers, even though most of the other evidence pointed towards guilt. The conspiracy instruction allowed us to convict Goodwin based on all of the other incriminating evidence because we could infer from that evidence that Goodwin wanted Thompson dead and *could have* hired the killers to commit the crime *even though no evidence of a connection between the conspirators was presented*. We asked "Was it reasonable to believe that Goodwin *could have been* responsible?" Once we answered that in the affirmative, we felt we reconciled that lack of connection to the killers by applying the instruction on conspiracy, which allowed us to infer that connection.

(8CT 2079 [emphasis added].) Furthermore, the trial court's error in refusing to permit Goodwin to present evidence of third party culpability and a biased investigation deprived Goodwin of important testimony that would have tended to undermine the prosecutor's already flimsy case against him. Given that there is insufficient evidence to support the verdicts, Goodwin's convictions must be reversed.

III. THE UNJUSTIFIED AND PREJUDICIAL DELAY OF SIXTEEN YEARS IN PROSECUTING GOODWIN FOR THE THOMPSON MURDERS VIOLATED HIS STATE AND FEDERAL CONSTITUTIONAL DUE PROCESS RIGHTS

A. Overview

According to the prosecutor, the Thompson murders were a contract hit Goodwin engineered. Whether the jury could reasonably accept that hypothesis depended on two crucial evidentiary premises.

The first was that Goodwin had some connection with the purported killers — in other words, was it reasonable to conclude, without knowing the identities of the killers, and without showing a connection between them and Goodwin – that Goodwin arranged for the murders?

The second was whether the evidence supported the contract hit theory – did the shooters perform a contract hit,[34] or were the killers at the Thompson residence to commit a theft, to which the shootings were incidental? Only by establishing beyond a reasonable doubt an affirmative answer to the first question, and convincing the jurors this was not a robbery gone bad, could prosecutors avoid an acquittal.

The LADA's sixteen-year delay in charging Goodwin accomplished that objective. By late 2004 witnesses had died,

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[34] The defense was deprived of the opportunity to show that if there was a contract killing, it was arranged by people who had no connection to Goodwin, but plenty of connections to Thompson and his family. (See Argument IX, *infra*.)

memories had faded, and witnesses had been tainted by their interviews with Lillienfeld, Colleen Campbell and her private investigators, and television shows "reconstructing" the crimes – not to mention heavily influenced by Campbell's offer of a $1 million reward for information leading to Goodwin's conviction. Also gone by the time of trial were the documents that would have explained why Griggs abruptly ended his career as a homicide detective in 1992 and the investigation shifted away from Joey Hunter and his associates and exclusively toward Goodwin.[35] The evidence the LADA offered at Goodwin's 2006 trial was essentially identical to what the LADA could have mustered for trial soon after the killings in 1988. In the meantime, the defense evidence faded away almost completely.

Three years before the Thompson murders, in *People v. Hartman* (1985) 170 Cal.App.3d 572, this Court warned Los Angeles County law enforcement and prosecution authorities against unreasonable delay in filing charges years after all the evidence had been discovered:

> The primary function of the office of prosecutor is to diligently and vigilantly pursue those who are believed to have violated the criminal codes of the state.
>
> In that regard, the guiding light of due process illuminates the field of combat and defines the depth of the duty to be obeyed.
>
> While hard blows may be struck against an opponent, the strike may not be withheld without warrant

[35]See Argument IX, *infra*.

until such time as occasions an adversarial disability.

(*Id*. at p. 583.)

The prosecutor ignored his duty of vigilance here, and the result was to deny Goodwin a fair trial. As in *Hartman*, the sixteen-year pre-charging delay in prosecuting Goodwin for the Thompson murders implicates the core "touchstone of due process," and compels reversal.

B. Background

1. Goodwin's Motion to Dismiss

Goodwin vigorously challenged the pre-charging delay on state and federal due process grounds. On January 10, 2006, he filed a motion to dismiss because of the sixteen-year delay. (4CT 1042-1048.) At Goodwin's request, the trial court deferred hearing and ruling upon this motion until the trial was completed.[36] (4CT 1047-1048; 8CT 2087; 9RT 3623.) On February 14, 2007, Goodwin filed supplemental points and authorities detailing the evidence lost. (8CT 2087-2181.)

2. The People's Opposition

The prosecutor argued Goodwin failed to prove "actual" or "substantial" prejudice. (8CT 2158-2165; 2168-2172.) Without explaining how or why the prosecutor believed he lacked the ability to prove his case earlier, the opposition simply asserted ". . . several

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This Court should note Goodwin was substantially handicapped in preparing and arguing the speedy trial issues because the trial court refused to order daily transcripts (6RT 66-67), and the defense was unable to review the trial record in this extraordinarily complex case.

separate investigators headed the investigation and each made significant strides toward solving the case" and "new evidence was becoming available more than a decade after the murders, when Gail Hunter told police that the defendant confessed to her, and in 2001 when the Stevenses positively identified the defendant near the crime conducting surveillance days before the executions." (8CT 2172-2173.)

The prosecutor asserted these two "new" sources of information demonstrated "the continuing investigation of this evidence certainly illustrates the ongoing nature of the investigation." (8CT 2172.) In other words, the prosecutor offered only two pieces of purportedly "newly discovered" evidence obtained since 1988: 1) Gail Moreau-Hunter's claim Goodwin had confessed the murders to her – testimony available to investigators since 1990 or 1991, had they bothered to look for it – which the prosecution declined to introduce at trial because of Moreau-Hunter's severe mental illness and utter lack of credibility; and 2) Ronald and Tonyia Stevens' claim – reported in 1988 *prior to* and immediately after the killings, and followed up by investigators for the first time in 2001 – they saw Goodwin a week or so before the murders sitting in a station wagon and looking through binoculars in the direction of the local school. (8CT 2173; 11RT 4379-4390; see OCPHRT 151.)

Goodwin filed a reply to the prosecutor's opposition. (8CT 2177-2181.)

3. The Hearing on the Motion to Dismiss

The court heard argument on March 1, 2007. (24RT 10502-10520.)

The court rejected the prosecutor's argument Goodwin was required to show intentional delay in order to take advantage of the situation or as a tactical ploy. (24RT 10514.) The court summarized the required analysis as: 1) a showing by the defense of actual prejudice occasioned by the delay; and, that being shown, 2) the court must determine whether there was a legitimate reason for the delay. (24RT 10515.) The court ruled as follows:

> . . .Ms. Saris, you did an excellent job in presenting to the jury that heard this case the problems inherent in a lot of the testimony presented by the People.
>
> And those problems were in large part due to a lack of recollection; a lack of physical evidence . . .. So the bottom line I think it's fair to say the delay did not just prejudice – potentially prejudice the defense. The delay prejudiced I think both sides in this case. And that's unfortunate. But I'm not going to assume that every witness that wasn't called would have testified favorably . . . . for Mr. Goodwin. However, even assuming that is the case, even assuming that I agree with the defense that all of the information that was not presented because of the delay would have been favorable to Mr. Goodwin, if I make that assumption, I then get to that second question: was there a legitimate reason for the delay? Whereby the answer is yes.
>
> So no matter how I look at it, given the legal standard that I believe applies on this case, I have made inquiry into whether or not there was prejudice. I agree there was prejudice, but there was a legitimate reason for the delay.
>
> I do note that I'm well aware of the opinion that was issued in this case by the Court of Appeal on a 995, I believe it was, from the Orange County ruling denying the

995 for lack of venue. And I do note that in that opinion the appellate court did point out this new evidence that was presented or was discovered. And I also note that the appellate court practically begged Los Angeles to take another look at this case. I recall when I first read that opinion, although it wasn't a published opinion because shortly thereafter I think the case was presented to this court for warrant.

So to say that there was delay without any legitimate reason, I think is unfair. I think there was a legitimate reason. I think there was ongoing investigation. I know that Detective Lillienfeld took over the case and pursued the case. And I can't fault anyone for the fact that it took so long to actually get enough evidence to file the case. And at the behest of the Court of Appeal that's what the L.A. County District Attorney did.

So given all of that, I do not believe that there has been anything that rises to the level of due process violation here. I agree there is no statute of limitations and therefore there is no technical statutory violation of Mr. Goodwin's right to a speedy trial, that's why the analysis is one of due process, but from what I can glean from the cases that have been cited, the due process violation has not been established. There was no due process violation in the delay. And the motion to dismiss for due process violation is denied.

(24RT 10518-10520.)

C. Principles Governing Pre-charging Delay

California cases have long recognized – independent of the Fifth and Sixth Amendment considerations governing a defendant's rights to a speedy trial and due process of law as protection against unreasonable delay in prosecution – §15 of article I of California's

Constitution provides similar protection "at least as favorable . . . as the law under the United States Constitution" (*People v. Nelson* (2008) 43 Cal.4th 1242, 1251), and "due process is the appropriate test to be applied to a delay occurring after a crime is committed but before a formal complaint is filed or the defendant is arrested." (*People v. Cowan* (2010) 50 Cal.4th 401, 430; *Scherling v. Superior Court* (1978) 22 Cal.3d 493, 505.)

The California constitutional analysis is essentially the same as the analysis for post-charging delay: prejudice to the defendant is weighed against justification for the delay. (*People v. Martinez* (2000) 22 Cal.4th 750, 767, *People v. Dunn-Gonzalez* (1996) 47 Cal.App.4th 899, 909.) The only difference is that in the post-charging situation, prejudice can be presumed from a lengthy delay, whereas in a pre-charging case, the defendant has the burden to show prejudice. (*Dunn-Gonzalez, supra*, at p. 911.) That burden is "minimal." (*Id.* at p. 915.)

The Due Process analysis involves three steps: "First, the defendant must show he has been prejudiced by the delay. Second, the burden then shifts to the prosecution to justify the delay. Third, the court balances the harm against the justification." (*People v. Abraham* (1986) 185 Cal.App.3d at p. 1226 [internal quotation marks omitted].) Both prejudice and justification — the first two steps in the analysis — are left to the trial court's discretion. (*Ibid.*)

Once the court reaches the third step — balancing — it considers such factors as "(1) time involved; (2) who caused the delay; (3) the purposeful aspect of the delay; (4) prejudice to the defendant;

and (5) waiver by the defendant." (*People v. Archerd* (1970) 3 Cal.3d 615, 640; *Dunn-Gonzalez*, *supra*, 47 Cal.App.4th at p. 911.) *Archerd* has been abrogated to the extent that it required purposeful delay; negligent delay is sufficient. (*People v. Cowan*, *supra*, 50 Cal.4th 401, 431; *People v. Nelson*, *supra*, 43 Cal.4th 1242, 1255.) However, whether the delay was purposeful or negligent is relevant to the balancing process; "purposeful delay to gain advantage is totally unjustified, and a relatively weak showing of prejudice would suffice to tip the scales towards finding a due process violation." (*People v. Cowan, supra*, 50 Cal.4th 401, at p. 431.) "If the delay was merely negligent, a greater showing of prejudice would be required to establish a due process violation." [Citation omitted.] The justification for the delay is strong when there is "investigative delay, nothing else." (*Ibid*.)

"In balancing prejudice and justification, it is important to remember that prosecutors are under no obligation to file charges as soon as probable cause exists but before they are satisfied that guilt can be proved beyond a reasonable doubt or before the resources are reasonably available to mount an effective prosecution. Any other rule 'would subordinate the goal of orderly expedition to that of mere speed.'" (*People v. Dunn-Gonzalez, supra*, 47 Cal.App.4th at p. 915.)

"The balancing task is a delicate one, 'a minimal showing of prejudice may require dismissal if the proffered justification for delay is insubstantial. [Likewise], the more reasonable the delay, the more prejudice the defense would have to show to require dismissal.' (*People v. Dunn-Gonzalez*, *supra*, 47 Cal.App.4th at p. 915.)" (*Id*. at p. 777.)

As explained in part D, *infra*, once having found prejudice, the court erred in finding justification for the delay, and skipped the third step – balancing prejudice against the prosecutor's justification - altogether.

D. Because the Prejudice to Goodwin Was Real and Substantial, and the Delay Was Unjustified, Goodwin's State and Federal Due Process Rights Were Violated

1. Standard of Review

Although the trial court ruled Goodwin established prejudice in Los Angeles County's sixteen-year delay before charging him with murder, the court found adequate justification by the prosecutor and denied Goodwin's motion to dismiss without employing the required balancing.

Ordinarily an appellate court reviews for abuse of discretion a trial court's ruling on a motion to dismiss for prejudicial pre-arrest delay and defers to any underlying factual findings if substantial evidence supports them. (*People v. Cowan, supra*, 50 Cal.4th 401, 431; cf. *People v. Hill* (1984) 37 Cal.3d 491, 499.) Here, however, a *de novo* standard of review must be employed because California's Constitutional due process protection against pre-accusation delay presents a mixed question of fact and law, with comparable interests in "law declaration" to guide law enforcement, unify precedent and stabilize the law. (*People v. Cromer* (2001) 24 Cal.4th 889, 901 [*Cromer*].) This Court must bear in mind the proper standard of review is influenced in part by the importance of the legal rights or interests at stake. (See, e.g., *Cromer, supra*, 24 Cal.4th 889, 899.)

Here, the trial court found prejudice at the first step and justification at the second; however, the court did not reach the third step – weighing justification against the prejudice to Goodwin. Moreover, in making its ruling the court did not question the credibility of Jackson's assertions of reasonable delay, or resolve any disputed factual questions. As a result, the trial court misapplied the balancing test controlling the due process question. "Even a minimal showing of prejudice may require dismissal if the proffered justification for delay is insubstantial." (*People v. Dunn-Gonzalez, supra*, 47 Cal.App.4th 899, 915; accord, *People v. Nelson, supra*, 43 Cal.4th 1242, 1251; *People v. Boysen* (2007) 165 Cal.App.4th 761, 777.) Thus, if Goodwin showed even minimal prejudice, the trial judge's error in not undertaking the required weighing requires reversal. (See *Penney v. Superior Court* (1972) 28 Cal.App.3d 941, 950.)

2. The Prosecutor's Justification For the Delay was Insubstantial; There Was No Justification

The court should have examined factors such as the time involved; who caused the delay; prejudice to Goodwin; and waiver, if applicable. (*People v. Archerd, supra,* 3 Cal.3d 615, 640; *Dunn-Gonzalez, supra*, 47 Cal.App.4th 899, 911.) Prejudice from pre-accusation delay "may be shown by loss of material witnesses due to lapse of time [citation] or loss of evidence because of fading memory attributable to the delay." (*People v. Catlin* (2001) 26 Cal.4th 81, at p. 107, internal quotation marks omitted; accord, *People v. Nelson, supra*, 43 Cal.4th 1242, 1250.) This balancing, done correctly, would have tipped the

scales in Goodwin's favor, as the facts prove false the court's assertion "the defendant was arrested. . . .a couple of months after all of this new information was presented." (24RT 10517.)

Sixteen years passed between the date of the murders and Goodwin's arrest. The LADA and OCDA had openly named Goodwin as a suspect since 1988.

(a) <u>The Investigation Was at Best Negligent, Not Continuous</u>

The prosecutor claimed the two "new" sources of information – the Stevenses and Gail Moreau-Hunter – demonstrated a "continuous" and "ongoing" investigation. (8CT 2172.) The record proves this claim false.

The discovery and testimony at trial indicate investigators did nothing during the periods 1990 through 1992, 1992 through 1995, and 1996 through 1997. (24RT 10507-10508.) Detective Griggs did not focus on the leads he should have followed, apparently because he was impaired or was pressured not to follow them.[37] (6CT 1473-1474, 1592.) In 1988, four investigators – LaPorte, Verdugo, Jansen and Uloth – were taken off of the case due to "manpower requirements." (5CT 1244.) In January of 1992, Griggs retired on stress disability. (20RT 7508, 7551.) Following more delay, Lillienfeld was assigned to the case in January of 1993 or 1995, depending on whether one believes his testimony at the preliminary hearing or at trial. (OCPHRT 68, 20RT 7570.) Lillienfeld also testified he "assumed control" of the Thompson investigation in

[37]See Arguments XVI and XVII, *infra*.

May of 1997. (OCPHRT 68.) The prosecutors knew of all the evidence offered to justify the delay years before they filed charges.

(b) The Stevenses' Information Was Not "New;" Investigators Were on Notice in 1988, and The Loss Of the License Plate Information Prejudiced Goodwin

The prosecutor's claim Goodwin had arranged a contract killing rested largely upon the testimony of Ron and Tonyia Stevens, who swore they saw Goodwin sitting in front of their home in an old station wagon with Arizona license plates days before the murders. (23 RT 8754-8755 [". . . [T]he evidence suggests he planned it. He planned it. He was there three days before the murders."]; 23RT 8777 ["Of course, this was perfectly planned. And why is that important? Because of where the Stevenses saw the defendant."]; see 23RT 8755.)

The prosecutors' delay, negligence and malfeasance deprived Goodwin of key evidence identifying the owner of that station wagon – the Arizona license plate number from the car Ron Stevens had preserved on a business card days before the murders. (11RT 4397; 12RT 4554.) Ron kept the card to give to the police and still had it when he moved six or seven years before Goodwin's trial, but he threw the card away because the police had not contacted him, despite the Stevenses' numerous attempts to report the incident. (3CT 648-649; 12RT 4554-4555.) On both occasions when detectives interviewed Ron in 2001, he told them he had the license plate number of the station wagon. (RT 4559-4560.)

The lost license plate information likely would have

exonerated Goodwin, or at the very least would have confirmed he had no connection with the station wagon the Stevenses described. That loss also demonstrates Lillienfeld's reckless disregard for the facts. LASD investigator files indicated in 1988, when the LASD was investigating Joey Hunter, someone observed – within seven miles of the Thompson house – an old car with an Arizona license plate parked in the driveway of a drug dealer associated with Hunter. (20RT 7595, 7635-7642.)

While it is true Lillienfeld would have been the only detective aware of the Arizona license plate Ron had noted and its possible connection to Hunter after the Stevenses announced themselves directly to the Thompson investigation team in 2001, the prosecution had constructive knowledge of that information in 1988.[38]

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Starting in 1988 – roughly a week before the murders – the Stevenses attempted several times to tell law enforcement about the men in the station wagon. (12RT 4568 [Ron calls the police immediately after seeing the station wagon]; 4606 [Tonyia stops at a roadblock two weeks after the murders and tells an officer about the station wagon].) In 1988, Ron called the Duarte Sheriff's Department and told an officer he thought he had some information on the Thompson murders. The officer said a detective would call, but no one did. A couple of weeks later, Ron called the Temple City sheriff's station and left another message, but received no response. (12RT 4508-4510.) Ron called one or two other times after that, with the same result. (12RT 4509.) No investigator ever contacted Ron about the car incident until 2001 – 13 years after the murders. (12RT 4509-4510, 4540-4541, 4553-4554.) The information Ron and Tonyia Stevens provided to the Temple City Sheriff's Station, the officers at the roadblock and the Duarte Sheriff's Station in 1988 is imputed to the prosecution. (*Kyles v. Whitley*, *supra*, 514 U.S. 419, 438; *Odle v. Calderon* (N.D. Cal. 1999) 65 F.Supp.2d 1065,

(20RT 7595, 7636.) Yet Lillienfeld made no attempt to determine the make, model or type of the vehicle associated with Hunter before placing Goodwin's photograph in the six-pack, nor did he ask Ron to give him the license plate number he had noted. (20RT 7595-7596, 7635-7642, 7667-7668, 7673.) Lillienfeld's grossly negligent investigation ultimately prejudiced Goodwin, not only because it strongly appears the investigators ignored other, more viable, suspects[39] – but because it closed off an avenue of defense. (*Penney v. Superior Court, supra*, 28 Cal.App.3d 941, 950.)

The trial court, therefore, failed to examine sufficiently one of the two justifications for delay offered by Jackson – the investigators' "discovery" of the information possessed by the Stevenses – in light of the facts in the record. The Stevenses' information was not "new" in 2001; investigators had it in 1988 and ignored it. (8CT 2172-2173.)

(c) The Delay in Charging and Prosecuting Goodwin Resulted in Tainted and Unreliable Identifications of Goodwin as the Man Who "Planned" the Thompson Murders by Allegedly "Scouting the Escape Route" and Deprived Goodwin of Alibi Evidence

Vagueness and uncertainty concerning the events preceding the Thompson killings worked constantly in the prosecutor's favor. Whether Goodwin was in that station wagon with the

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1070-1072.)

[39]See Argument IX, *infra.*

binoculars "perfectly planning" the murders was pivotal to the prosecutor's case. Fuzzy, unclear memories after so many years played into the prosecutor's hands. The passage of time also erased Goodwin's potential alibi evidence.

The Stevenses repeatedly contacted the police in 1988 and 1989 to report seeing a man outside their home near the Thompson property "casing" the neighborhood before the murders, but the LASD ignored them until 2001. (See fn. 48, *supra*; 11RT 4395-4396, 4398-4399.) In 2001, Lillienfeld contacted them and, for the first time, they identified Goodwin as the man they saw – thirteen years after having made their fleeting observations.[40] (11RT 4398-4399.) Again, the Stevenses' information was not "new" in 2001 because they attempted to give it to investigators in 1988.

By the 2004 trial, the Stevenses could not pinpoint the date they had seen the station wagon (11RT 4378-4379; 12RT 4564), and Goodwin's 1988 day-timers and personal notes were lost, depriving him of his opportunity to prove alibi. (8CT 2095.) The Stevenses' testimony was the only evidence the LADA offered to place Goodwin anywhere near the scene of the murders at any time and to suggest association between Goodwin and the killers.

The investigators' incompetence or neglect must not be characterized as "ongoing investigation," and cannot justify the delay. (See *People v. Nelson*, *supra*, 43 Cal.4th 1242, 1255-1256.) Investigators

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See detailed discussion of their flawed identifications of Goodwin in Argument II, *supra*.

chose to ignore information the Stevenses reported in 1988, when that information was fresh. Had investigators promptly followed up on the Stevenses' lead, there would have been fewer influences distorting the Stevenses' memories, and Goodwin would have been in a position to present an alibi.[41]

Jackson exploited the delay and Goodwin's inability to retrieve the necessary information to defend himself.[42] Jackson asked the jury to consider why Goodwin had not provided an alibi if he was not the man in the station wagon.[43] (23RT 8756-8757.) Recalling where one was thirteen years later is difficult enough, but proving where one was is nearly impossible with the passage of so many years and the inability of the witnesses to pin down the date they made their observations. Had investigators followed up on the calls the Stevenses made before and immediately after the murders, Goodwin would have been able to provide a defense to the charges. As it was, Goodwin was stripped of any opportunity to protect himself from the flimsy "evidence" drummed up against him years after the information had gone stale and been distorted by time and publicity.

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See detailed discussion in Argument II, *supra*, of the factors that influenced and distorted the Stevenses' ability to recall the men they saw in the station wagon to the point that their identifications of Goodwin became unreliable.

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See detailed discussion of the prosecutor's misconduct in Arguments XV and XVI, *infra*.

43 See discussion of *Griffin* error in Argument XV.D.6., *infra*.

(d) Gail Moreau-Hunter's Information Was Not "New" Evidence in 1999, and Ultimately Hunter's Claims Proved to Be Nothing More Than The Hallucinations of a Madwoman

The prosecutor's second justification for the delay was the "discovery" of witness Gail Moreau-Hunter, who testified at the preliminary hearing Goodwin "confessed" to the murders. (3CT 789-826; 8CT 2172.) Goodwin had openly lived with Moreau-Hunter in Aspen, Colorado from 1991 to 1993, using his true name. (3CT 789-791, 798; 24RT 10505.) Moreau-Hunter did not "come forward" as Jackson claimed – Lillienfeld located and interviewed her in March of 1999, and he believed investigators interviewed her before that. (OCPHRT 151-152, 154, 159; 24RT 10515.) Moreau-Hunter and police records confirmed an interview in January of 1993. (3CT 702, 795.) Therefore, all of the information about Hunter was available to prosecutors by 1993, had investigators only chosen to inquire.

A decision not to investigate is not a legitimate police purpose for purposes of evaluating prosecutorial delay. "Negligence on the part of police officers in gathering evidence or in putting the case together for presentation to the district attorney, or incompetency on the part of the district attorney in evaluating a case for possible prosecution can hardly be considered a valid police purpose justifying a lengthy delay which results in the deprivation of a right to a fair trial." (*People v. Nelson, supra,* 43 Cal.4th 1242, at pp. 1254-1255, citing *Penney v. Superior Court, supra,* at p. 953.)

Separate from the fact Moreau-Hunter's information was

not "new," the late "discovery" of Moreau-Hunter cannot legitimately be used as justification for the delay. In *Penny v. Superior Court*, *supra*, the Court of Appeal noted: "We believe it is also proper for the court in the balancing process to consider the possibility that the purported testimony of the deceased . . . witnesses has been fabricated. For this reason, all facts relevant to each petitioner's credibility, the relationship of the . . . witnesses to each petitioner and whether petitioners were in fact with the witnesses at the time of the crime, as claimed, should be carefully explored." (*Id.* at p. 954.) This rule should apply equally to prosecution witnesses, as fabrication is not limited to the defense.

The prosecutor represented Moreau-Hunter was a legitimate witness to some very damning facts – including Goodwin's full confession to hiring two black men to commit the murders. (OCPHRT 152-154.) Moreau-Hunter was, however, delusional. She claimed Goodwin had attempted to kill her, and that she had suffered multiple, serious injuries in the attempt, including a broken back and burns inflicted with a cigarette or iron. (4RT F-42.)

Jackson abandoned any effort to call Moreau-Hunter at trial once Goodwin obtained her medical and psychiatric records for the court's *in-camera* review. (See 4RT F-42 – F-44.) The records showed Moreau-Hunter had fabricated the injuries she claimed, she had been hospitalized numerous times for severe mental illness, and the hospitalization she claimed occurred after Goodwin attempted to kill her was instead a hospitalization for a drug overdose. (4RT F-40 – 45.)

While Moreau-Hunter's medical records do not appear in

the record, the inference is clear they so destroyed her credibility the prosecutor could not present to a jury his "best" piece of evidence – a full confession, including details about the crimes. Therefore, the court should have weighed all facts relevant to Moreau-Hunter's credibility, including her relationship to Goodwin, her psychiatric history going back to the time of her relationship with Goodwin and her 1993 hospitalizations, and whether Moreau-Hunter was prone to fantasy and fabrication. There is no indication the court did so. There is also no indication the court considered the time line proving Moreau-Hunter's lack of credibility was available to investigators no later than 1993. Rather, the court skipped the weighing process altogether.

The court did not question Jackson's assertions or ask for details regarding the "ongoing investigation," and did not weigh those assertions against the obvious prejudice to Goodwin. Therefore, the court entirely failed to perform the weighing process, to Goodwin's prejudice. Because the trial court failed to reach the third step of the analysis, the court failed to exercise its discretion, and Goodwin's conviction must be reversed. (*Ibarra v. Municipal Court* (1984) 162 Cal.App.3d 853, 858.)

3. In Addition to the Lost Evidence Discussed Above, The Trial Court Failed to Weigh Against the Prosecutor's Justification Other Material Defense Evidence Lost Due to the Delay in Charging Goodwin

(a) Evidence Campbell and Others Improperly Influenced the Investigation and Interfered With Griggs' Unbiased Investigation of Other Viable Suspects Was Destroyed a Year after Detective Griggs Retired on a Stress/Psychiatric Disability

The investigators' misconduct and the extent to which third parties had influenced them were central to Goodwin's defense. Just months prior to trial, the defense learned prosecutors had for years withheld from Goodwin information about Campbell's meddling in Griggs' investigation from March of 1988 through the end of 1992, when Griggs took a stress/psychiatric disability retirement. (See 5CT 1153-1154, 1187-1269; 4RT P-3 – 5, P-11 – 12, P-20, P-24 – 25; see generally Argument XVI, *infra*.)

When Goodwin pursued discovery on this issue, he found most of the information had been destroyed, and Griggs was uncooperative.[44] The LASD's motion to quash Goodwin's subpoena indicated: "Most of the records requested have been destroyed. Mr. Griggs was granted a service-connected disability retirement in 1993. LACERA[45] had an internal policy of destroying a disability retirement file one year . . . after the requested action was granted by the

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Defense counsel advised the court that when she went to speak with Griggs in Arizona, he indicated if the defense called him to the stand, he "would sit there and drool." (4RT P-8 – 9.)

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The abbreviation used by the parties for the Los Angeles County Employees Retirement Association.

Retirement Board except for those documents relied upon by the Board of Retirement in making its decision." (5CT 1383.) Weighed against the prosecutor's justification for delaying charging Goodwin past 1993, when all of the evidence presented at trial was available to the LADA by then, the loss of these records was extremely prejudicial to Goodwin.

(b) Telephone Records

Kathy Weese and Joel Weissler, the Thompsons' nephew, testified to having heard threats made by Goodwin over the telephone. (11RT 4316-4317, 4352; 19RT 6949, 6955, 6957-6962, 6964-6966.) Scott Hernandez testified to outbursts he heard in Goodwin's office after Goodwin finished phone calls Hernandez assumed were calls to Mickey Thompson. (11RT 4269-4271, 4278, 4283, 4291.) Weese even claimed she heard Goodwin threaten Thompson when Thompson called Goodwin's office, where Weese worked as a receptionist. (11RT 4316-4317; 4352.) None of the telephone records the police knew about – other than Goodwin's records – were retrieved or saved. (20RT 7547 [Thompson's records]; 20RT 7631 [Thompson's household employee's records].) By the time Goodwin was charged, the telephone companies had purged records from the relevant years. (8CT 2095; 20RT 7664-7665, 7675.) The records the defense would have sought in 1988 or 1989 – or any of the next 5 years – would have included Goodwin's home and business, Thompson's home and business, and Joel Weissler's home and office. (8CT 2095.) All such records were purged. (8CT 2095.)

(c) Goodwin's Personal Documents/Alibi

Goodwin could have established his whereabouts at the time the Stevenses claimed he was "casing" the neighborhood by producing personal and business credit card and financial receipts, but by the time the LADA charged Goodwin and Goodwin served subpoenas, the relevant documents had already been destroyed in the normal course of business. (8CT 2096.) The lost records would have served not only to establish an alibi for the week prior to the murders – they would have demonstrated a consistent spending pattern during the weeks prior to and after the Thompson murders and other periods in Goodwin's life. (8CT 2096.)

The Goodwins were in the habit of using credit cards for travel. (8CT 2096.) The credit card records would have established their whereabouts when witnesses claimed to have been with them, overhearing threats – especially witnesses who claimed to have heard threats while traveling with the Goodwins. (8CT 2096.) The loss of these materials prejudiced Goodwin's defense. (8CT 2096.)

(d) Police Reports, John Williams' Notes And the Writ of Execution He Claimed to Have Served

Deputy Marshal Williams testified he towed Goodwin's Mercedes from Goodwin's home to collect on Thompson's judgment. (10RT 3987-4037.) Williams claimed to have made notes about a verbal altercation that ensued, during which Goodwin threatened Thompson's life. (10RT 4004.) Williams testified he did not save his notes or a copy of the writ of execution, all of which were purged by his department.

(10RT 4005-4006, 4011.) While the defense was able to locate a very old receipt from the tow yard showing the tow had occurred in 1986 and not 1988, Goodwin was unable to impeach Williams with Williams' own notes. (8CT 2096-2097.) Williams' supervisor had no independent recollection of this event, and the records were destroyed by Orange County when the Marshal and the Sheriff's Department merged. (8CT 2096-2097; 10RT 4005-4006, 4011.)

Goodwin contended Williams was fabricating this evidence. Had the trial been conducted in a timely manner, Williams' notes and the writ of execution would have confirmed the tow occurred years – not weeks – before the homicides, and no altercation was noted.

(e) Fee Details - Lawyers

Lawyers for Thompson and the bankruptcy estate testified Goodwin had made threats during meetings. (8CT 2097; see, e.g., 10RT 4068.) At the preliminary hearing, Cordell was asked about fee details and records kept by her firm – which also employed Bartinetti. (1CT 169.) Cordell indicated she had searched for the records, but they were not available. (1CT 169.)

Coyne testified Goodwin threatened him during a meeting in early 1988. (10RT 4068.) The defense was unable to investigate whether such a meeting even took place, much less whether Goodwin was present, as the fee details and notes of the meeting had long since been destroyed. (8CT 2097.) The fee details about phone calls could have been used to impeach the witnesses who testified about outbursts heard after calls they assumed to be between Goodwin and his own or Thompson's attorneys. (8CT 2097.)

(f) Potentially Exculpatory Locksmith Records Were Lost or Destroyed

Detective Jansen testified Collene Campbell summoned him to Thompson's home after the murders to witness the forced opening of a safe in the garage. (22RT 8249-8250.) Jansen could not recall whether a locksmith pointed out pre-existing damage to the safe, or whether the locksmith himself had damaged the safe when forcing it open. (22RT 8256.) This issue was crucial because the court did not permit Goodwin to elicit evidence Thompson had purchased $250,000 worth of gold just before he was murdered, which deprived Goodwin of his ability to present fully his defense that the killers were at the Thompsons' home to steal the gold. (See full discussion on this point in Argument X, *infra*.)

Jansen attempted to explain away clear evidence of a robbery he had noted in his report. Jansen could not recall the name of the locksmith he claimed damaged the safe. (22RT 8253.) He had no notes identifying the locksmith. (22RT 8253.) Goodwin was unable after so many years to investigate Jansen's assertions and impeach him with records that would have been available had this case been brought to trial within a reasonable time. (8CT 2098.) Presumably the locksmith's records would have noted the date of service and any damage the company had caused to a private individual's safe. Goodwin was deprived of this valuable evidence as a result of the prosecution's unjustifiable delay in prosecuting him, and it cost him an acquittal.

(g) Allison Triarsi's Diary and The School Counselor's Records

Allison Triarsi was the only witness who testified to having seen the shootings. She indicated her memory of the incident was hazy until she reviewed entries in a diary she kept of her nightmares. (2CT 550; 20RT 7648-7649.) Goodwin served a subpoena on Allison's parents for the diary after Allison testified at the preliminary hearing. (2CT 551; 8CT 2098.) Phyllis Triarsi advised the defense she did not have the diary, had not seen it in years and had no idea where to look for it. (8CT 2098.)

Because Allison was the sole eyewitness to the shootings presented at trial, and because her testimony was based upon her diary, the loss of that document was extremely prejudicial. In *Ross v. United States* (D.C. Cir. 1965) 349 F.2d 210, 213-214, prejudice resulted from the fact that the sole prosecution witness testified – not from personal recollection – but with the aid of his official notebook, the only means of identification and prosecution of dozens of alleged narcotics offenders. Here, the passage of time was so great, and Allison's trauma at witnessing the murders so overwhelming, that the diary likely effectively superseded her memory of the events themselves. Goodwin's ability to cross-examine her using the diary was crucial to his defense, and he was deprived of that opportunity because of the prosecutor's delay.

Allison's school counselor's records were also unavailable. (8CT 2098; 12RT 4659.) Those records might have shown Allison to be fantasizing, as is suggested by her testimony she ran outside to Trudy

during the shooting, hid behind a wall at the murder scene, and saw something other than what the ballistics evidence proved to be true – both men shot the victims, instead of one.

(h) Evidence of the Gold Thompson Purchased Just Before The Murders

Goodwin uncovered original notes indicating several witnesses had told investigators Thompson discussed a large purchase of gold in the days and weeks before his murder. (7CT 1922; 8CT 2038; 20RT 7681, 7690.) Two witnesses told investigators Thompson told them he had "just taken possession" of $250,000 worth of gold coins the day before he was murdered. (7CT 1922; 8CT 2038; 20RT 7681.) Federal law at the time required purchasers to register gold acquisitions worth more than $10,000 with the IRS. (21RT 7988.) Those records are purged after 10 years and were unavailable to the defense. (24RT 10507.) Goodwin attempted to show the murders occurred during a robbery, based on witness reports the murderers escaped with white canvas bags on their backs. (8CT 2038; 19RT 7041-7045.) Gold dealer Robert Wiborg testified gold coins were often delivered in white canvas bags. (17RT 6436.) The prosecutor's witnesses were allowed to testify without foundation that "nothing of value" was taken from the home and there was no evidence of a robbery. (15RT 5208-5209; 5438-5450.) Had Goodwin been prosecuted in a timely fashion – before all records were destroyed – he would have had the opportunity to prove Thompson purchased gold, and the gold was unaccounted for after the murder. The loss of this evidence alone may have cost

Goodwin an acquittal.[46]

(i) There Was a Prejudicial Loss of Witnesses Prior to Trial

The evidence lost through faded memories and witnesses no longer available directly affected Goodwin's ability to present his defense.

(i) The People Who Investigated Joey Hunter

The Herald Examiner published a composite drawing of Joey Hunter soon after the murders. (4RT P-23.) Someone promptly called in and said, "That's my neighbor." (4RT P-23.) Others stopped at a roadblock and said, "I know that individual." (4RT P-23.) Hunter was placed in a lineup and people picked him out. (4RT P-23.) Investigators re-interviewed two eyewitnesses who said one of the killers might have been white. (4RT P-23.) Hunter was seen on a bicycle near the Thompson's home within an hour of the murders. (4RT P-23.) Original investigators followed up on Hunter and he was arrested. (4RT P-23.) Hunter failed a polygraph three times and gave a false alibi. (4RT P-23-24.) When Griggs retired, Joey Hunter suddenly and inexplicably ceased to be a suspect. (4RT P-24.) Goodwin was not arrested in Orange County until 2001. (4RT P-24.) By the time the LADA decided to prosecute Goodwin in 2004, people who were involved in the Joey Hunter investigation had died.

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[46]See Argument X, *infra.*

(ii) William Redfield [deceased] - Yacht Broker

William Redfield was the broker who assisted Diane Goodwin in her search for and eventual purchase of the yacht that inspired the prosecutor's "flight" theory. (8CT 2099.) Redfield died prior to trial. (8CT 2099.) Redfield would have testified Diane was searching for the right boat for months prior to the murders. (8CT 2099.) She was expecting the proceeds from a distribution of JGA/Whitehawk funds she anticipated would cover all her expenses. (8CT 2099.) Redfield would also have testified to the structure of the payments for the deposit on the boat, debunking the prosecutor's argument $20,000 was "unaccounted for." (8CT 2099-2100.)

(iii) Sable Reeves [deceased] - the Thompson's Housekeeper

Sable Reeves, who died before Goodwin's arrest, was the Thompsons' housekeeper. (8CT 2100.) The police called her to let them into the home after the murders. (8CT 2100.) Witnesses testified the Thompsons left for work together every morning, but Reeves indicated the couple rarely drove in the same car to work together and Trudy was often home alone when Reeves arrived. (8CT 2100.) Reeves would have contradicted the prosecution theories: 1) no robber comes to a house at 6 a.m. because he knows people will be home, and 2) the killers planned to attack Thompson at home (according to Reeves, Thompson usually had already gone to work by then). (8CT 2100.) Reeves would also have testified whether valuables were missing, as she was the person most familiar with the Thompsons' personal

belongings. (8CT 2100.)

(iv) Thomas Villeli - [deceased] - Rebuttal Witness to Baron Wehinger

Thomas Villeli, Baron Wehinger's stepfather, was gravely ill at the time the trial started, and passed away on January 23, 2006. (8CT 2100.) Wehinger testified he heard a conversation between Goodwin and his stepfather at Christmas, 1987, during which Goodwin said he would kill Thompson if Thompson won the civil suit. (8CT 2100-2101.) Wehinger never indicated before trial the conversation had occurred in 1984 and Goodwin and Villeli discussed the price of hit men. (8CT 2101.) The defense was prepared to impeach Wehinger with his prior statements and testimony because Goodwin was in the Bahamas during Christmas of 1987. (8CT 2101.) However, by the time the defense became aware Wehinger was claiming Villeli had discussed hit men with Goodwin, Villeli was very near death and unable to testify to rebut this claim. (8CT 2101.)

(v) Dorothy Keay - [deceased] Greg Keay's Mother and Goodwin's Aunt

Greg Keay testified he and his mother, Dorothy Keay, attended a family gathering at Goodwin's home when Goodwin made a threat against Thompson. (8CT 2101; 7RT 3147-3149.) Keay could not remember when the gathering took place or Goodwin's exact words. (8CT 2101.) Dorothy Keay could have testified to the date the gathering occurred, her son's lack of credibility and his bias against Goodwin. (8CT 2101.)

(vi) Charles Clayton - [deceased] Goodwin's Friend and Financial Advisor

Charles Clayton was Goodwin's financial advisor and friend. (8CT 2101.) Clayton would have testified Goodwin always intended to pay the Thompson judgment and planned accordingly. (8CT 2101-2102.) Clayton also structured Diane Goodwin's yacht purchase. (8CT 2102.) He could have addressed the timing and other circumstances surrounding the boat purchase, as well as the Goodwins' plan to live on the JGA/Whitehawk distributions. (8CT 2102.)

(vii) Ann Clarke - [unavailable] Close Friend of the Thompsons

Ann Clark was the Thompsons' close friend. (8CT 2102.) On February 15, 1989, Clark called a television show to leave a tip about a drug deal involving Thompson and questioning the investigators' failure to follow up on it. (8CT 2102.)

Lillienfeld did not interview Clark until May 22, 2002, and failed to mention Clark's call to the tip line in his report. (8CT 2102.) Prosecutors withheld the original notes of this interview from the defense. (8CT 2102.) When Goodwin sought to interview Clark in Las Vegas, caretakers had moved her to an undisclosed assisted-living facility because her dementia was so advanced she no longer recognized anyone. (8CT 2102.)

(viii) Frank Gullett - [deceased] Heard Joey Hunter's Confession

Frank Gullet spent time in jail with Joey Hunter when

Hunter was a suspect in the Thompson murders. (8CT 2102.) Hunter confessed his involvement in the murders to Gullett. (8CT 2102.) Gullet died before the LADA brought charges against Goodwin. (8CT 2102; 6RT 37.) Had Gullet been alive at the time of trial, he could have provided valuable testimony about Hunter's confession that would have supported Goodwin's attempt to present third party culpability evidence to the jury and impeached the investigation. (8CT 2102-2103.)

(j) The Witnesses Who Testified at Trial Suffered Substantial Memory Loss, and Crucial Documents Related to Their Testimony Were Lost or Destroyed

The witnesses suffered memory distortion and loss prejudicial to Goodwin. Their memories were tainted – or even created – by numerous television shows featuring the Thompson murders aired nationwide, starting in 1988. (20RT 7582.)

Nearly all witnesses forgot details. Much of that forgetting had to do with specific words spoken by Goodwin about Thompson and the dates alleged threats were made.

(i) Dale Newman

Newman was aboard a boat with Goodwin and his wife. Led by prosecutor Dixon, Newman testified the trip was in 1987 – just a few months before the murders – and he heard Goodwin tell his wife something to the effect of "Don't worry honey, I'll take care of him." (9RT 3752-3753, 10RT 3978-3979.) The original 1988 investigator notes show Newman told investigators the trip was in July 1986 – nearly two years, not weeks – before the murders. (8CT 2103.) Newman could not

pick Goodwin out in court (10RT 3787) and could not recall the exact words he heard – he remembered Goodwin's remark "only in context, not to quote it. I wouldn't quote it now. I wouldn't even try." (10RT 3788.)

The prosecutor used an April 17, 2001, police report to "refresh" Newman's recollection that Goodwin said about an unnamed person, "Don't worry, honey, I'm going to get them taken care of and they're not going to be bothering us anymore. Don't you worry about it." (9RT 3789-3791.) The 13-years-stale police report rendered Newman's "refreshed" recollection unreliable.

Goodwin attempted to impeach Newman through Griggs, but Griggs could not recall the interview or authenticate the notes he made in 1988. (8CT 2103.)

(ii) Bill Wilson

On March 16, 1988, immediately after hearing reports of the Thompson murders, Bill Wilson called the LASD homicide division, identifying himself as a former police commander who had information about the murders. By the time of trial, Wilson could not recall who he spoke with during that call. (6RT 2812-2813, 2819.) Lillienfeld was the first investigator to contact Wilson, about a decade after the murders. (6RT 2813-2814.) Wilson also could not remember when Goodwin and Thompson became business partners. Initially he testified he believed it was in 1986 or 1987, and then – led by the prosecutor – he testified it might have been in 1985. (6RT 2798.)

(iii) Nina Wilson

Nina Wilson could not recall precisely when the dinner

party at which Goodwin allegedly threatened Thompson took place. (6RT 2822, 2827-2828.) She could not remember why they hosted the dinner party and invited the Goodwins, or whether Goodwin and her husband were negotiating an upcoming event, or whether the two were still doing business at that time. (6RT 2823, 2831.) Nina also could not recall whether Lillienfeld was the first officer she spoke with about the case. (6RT 2833.)

(iv) Karen Dragutin

Karen Dragutin testified she first attempted to report Goodwin's "threat" while watching Unsolved Mysteries in 1989, by calling their tip line. (6RT 2841-2842.) She claimed she spoke to a detective in 1989, but could not remember who it was. (6RT 2842.) She also could not recall whether Unsolved mysteries broadcast Goodwin's picture, or whether the show announced a reward. (6RT 2845-2846.) She remembered 48 Hours offering a reward, but not the amount. (6RT 2846.) Dragutin could not remember Fred's last name (the man she testified was with her when she claimed Goodwin ranted and raved), nor the last name of Fred's son, who was also at that dinner. (6RT 2846, 2853.) Dragutin could not remember the date the dinner took place – depriving Goodwin of the opportunity to provide an alibi for that night. (6RT 2847.) Dragutin also could not remember the details of the lawsuit allegedly being discussed – only Goodwin's demeanor. (6RT 2847-2848.)

(v) Detective Griggs

Griggs could not recall the details of interviews that would have contradicted prosecution witnesses, including Verdugo and

Jansen, and was unable to authenticate his notes. (8CT 2103.) Griggs could not recall entering the Thompsons' home to determine whether personal property was missing, and Verdugo was permitted to testify no property was missing despite the absence of his original notes on that issue. (8CT 2103.)

(vi) Baron Wehinger and Greg Keay

Wehinger and Keay testified to threats purportedly showing motive. (8CT 2104.) They could not recall details such as dates, so Goodwin could not investigate or impeach them. (8CT 2104; see 8RT 3442, 3447-3448.) Had the prosecutor timely brought charges, Goodwin could have provided documents establishing his whereabouts and evidence establishing the context of the litigation at the time the threats were overheard, or witnesses to testify the conversations never occurred. (8CT 2104.)

(vii) The Financial Witnesses

The witnesses to financial issues suffered substantial memory lapses. Cordell's testimony about a nonexistent second Insport auction forced Goodwin to try to prove a negative decades after the fact. (8CT 2104.) Goodwin could not effectively rebut testimony about the purported sale of JGA/Whitehawk, and the down payments on the yacht were twisted to appear as if they were cash-outs and unaccounted-for money transfers. (8CT 2104.) When Goodwin presented documents rebutting those claims, the response was always, "I don't recall." (8CT 2104; see, e.g., 7RT 3212, 8RT 4534, 11RT 4234, 4246 [Coyne]; 18RT 6774, 19RT 6915 [Kingdon].) While "I don't recall" could have been exposed as a lie in 1989 or 1990, the 16-year delay

permitted the prosecutors to defeat nearly every exculpatory fact Goodwin offered.

The prosecutor's motive theory depended upon Goodwin's purported financial wrongdoing. The delay in prosecution allowed the prosecutors to present experts' opinions without regard to the facts, as Jackson and Dixon knew the original documents supplying the basis for these opinions were lost or destroyed years ago. (9RT 3749 [80 boxes of documents upon which Cordell relied in forming her expert opinions].) When confronted with the surviving documents, witnesses claimed missing documents would support the claim or they "didn't recall." These excuses for lack of memory, or testimony based on reconstituted memory, or worse, contrived recollection, would not have withstood scrutiny had the case been brought in 1989 or 1990.

(viii) Penn Weldon

Private investigator Penn Weldon could not recall precisely when he had key conversations with Goodwin. Weldon testified he kept appointment books, but he no longer had the materials from 1984. (7RT 3109-3111.)

(ix) Allison Triarsi

Allison Triarsi kept a diary after her school counselor told her to write down her nightmares. (12RT 4659.) Allison told Lillienfeld about the diary during their 1997 interview, but she eventually threw it away. (12RT 4660, 4668; 20RT 7670, 7674.)

Allison claimed things she might have heard after the killings did not influence her testimony. (12RT 4664-4665.) Defense counsel impeached her with her prior testimony she believed her

memory and testimony had been influenced by her mother, who had a strong personality. (12RT 4665.) However, because Allison's diary vanished before the LA preliminary hearing, Goodwin could not impeach her with it. Since Allison was the only eyewitness to the shootings the prosecutor presented at trial, and since she had been a 14-year-old child with a malleable memory at the time of the murders, the passage of time and outside influences no doubt affected her memory of the incident. Allison admitted she had reviewed her diary when she was 21, and "things became a lot more clear." (12RT 4665.) The loss of that diary, therefore, was highly prejudicial to Goodwin, as he was unable to show how Allison's "diary of nightmares" became her "memory" of the murders.

E. The Weighing Process, If Performed, Should Have Been Decided in Goodwin's Favor

Goodwin made a sufficient showing of prejudice to require the trial court to balance prejudice against the prosecutor's justification for the delay. The court's failure to do so is reversible error. (See *Ibarra v. Municipal Court, supra*, 162 Cal.App.3d 853, 858.)

Sometimes the charging of a case gone "cold" is triggered by some subsequent event. (See *People v. Johnson* (1991) 233 Cal.App.3d 425, 433, 435, 450-453, 462; *People v. Ruiz* (1988) 44 Cal.3d 589, 600.) This was not such a case. No new scientific test led to incriminating evidence, and no witnesses were unaware of the crime for years. Prosecutors delayed out of lack of interest and/or negligence. Once investigators reopened the case, they focused solely on finding evidence against Goodwin. This is best exemplified by the fact the

investigators tracked down and interviewed Goodwin's former employees some 15 years later, but ignored scientific evidence found at the crime scene capable of DNA testing from the very start of the investigation.

Other California cases finding permissible delay are similarly instructive for their contrast with Goodwin's prosecution. In *People v. Nelson, supra*, 43 Cal.4th 1242, the California Supreme Court explained that "'[t]he delay was the result of insufficient evidence to identify defendant as a suspect and the limits of forensic technology.'" (*Id*. at p. 1257.) The forensics at issue in *Nelson* was new DNA methodology that did not exist when the crime was committed in 1976; it was not until 2002 that a "cold hit" comparison of the defendant's DNA with crime scene evidence resulted in a match. (*Id*. at p. 1256.) While various methods for identification in "cold hit" cases had been suggested in the preceding decade (*Nelson*, at pp. 1260-1265), the prosecution was not required to give that defendant's case "higher priority" or "solve[] the case sooner." (*Id*. at p. 1257.)

In *People v. New* (2008) 163 Cal.App.4th 442, the murder of the defendant's third wife in 2004 triggered reopening a dormant investigation into the 1973 death of his previous wife. As the *New* court explained: "This fact constitutes new evidence that could be used to establish that New did not accidentally shoot [his first wife], as he claimed, but rather, that he shot her intentionally." (*Id.* at pp. 465-466; see also *People v. Archerd, supra,* 3 Cal.3d 615, 641-643.)

While the California constitution does not require a defendant to show the prosecutor delayed to gain a tactical advantage

(*People v. Boysen, supra*, 165 Cal.App.4th 761, 772), the delay here achieved that very purpose and was intentional. The prosecutor's justification only reinforced the delay's unreasonableness as a matter of law. As noted in *People v. Pellegrino* (1978) 86 Cal.App.3d 776, "'The People cannot simply place gathered evidence of insubstantial crimes on the 'back burner' hoping that it will some day simmer into something more prosecutable.'" (*Id*. at p. 781; see *People v. Hartman, supra*, 170 Cal.App.3d 572, 582.) The history of this case thus suggests the real purpose in delaying filing murder charges after all of those years – in addition to the lack of evidence connecting Goodwin to the crimes – was to weaken Goodwin's ability to defend himself.

Paraphrasing *People v. Boysen, supra*, 165 Cal.App.4th at page 781, "it is clear what has changed in the past [16] years is not the evidence but the willingness to proceed." The LADA made no move to prosecute Goodwin – indeed, that office rejected the case at least once before the OCDA filed charges – until the Court of Appeal, Fourth District, invited the LADA to take another look at the evidence. (See *Goodwin v. Superior Court*, case No. G031285.) The lack of justification evident from the record not only shows a violation of Goodwin's state due process rights, but under the possibly more demanding federal due process standard as well (as explained next in part F, *infra*).

"Purposeful delay to gain an advantage is totally unjustified, and a relatively weak showing of prejudice would suffice to tip the scales towards finding a due process violation." (*People v. Nelson, supra*, 43 Cal.4th at p. 1256.) The court failed to balance the prosecutor's justification for the delay against Goodwin's showing of

prejudice, thereby foreclosing its inquiry into the justification prong of the due process test and compounding its error in denying Goodwin's motion to dismiss. Goodwin's convictions must therefore be reversed.

F. The Pre-charging Delay Also Violated Federal Due Process

Goodwin argued the sixteen years of pre-charging delay denied him his right to federal due process in violation of the Fifth and Fourteenth Amendments under *United States v. Lovasco* (1977) 431 U.S. 783. (4CT 1040.) The California Supreme Court has explained the federal and state due process tests differ in one respect: "The prejudice to defendant must be balanced against the justification for the delay. The state and federal constitutional standards regarding what justifies delay differ. Regarding the federal constitutional standard, we have stated that '[a] claim based upon the federal Constitution also requires a showing that the delay was undertaken to gain a tactical advantage over the defendant.' (*People v. Nelson, supra*, 43 Cal.4th 1242, 1251, quoting *People v. Catlin, supra*, 26 Cal.4th at p. 107.)

The *Nelson* Court qualified this statement, however, acknowledging the exact standard under the federal "Constitution is not entirely settled." (*Ibid.*; see *People v. Boysen, supra*, 165 Cal.App.4th 761, 776 [reviewing federal case law and concluding "there is no controlling federal authority limiting such dismissal to situations in which the delay was deliberate and designed to disadvantage defendants"].)

In *People v. Boysen, supra*, Justice Benke noted while the majority of the lower federal courts require a showing of deliberate

delay and intent to gain a tactical advantage, three of the circuits do not read the United States Supreme Court's decisions that way. (*Boysen, supra,* 165 Cal.App.4th at pp. 765-766.) For example, in *Howell v. Barker* (4th Cir. 1990) 904 F.2d 889, the court found prejudice because a potential alibi witness had become unavailable to the defense. Rejecting the view the defense must show improper prosecutorial motive, the Fourth Circuit held "the court must balance the defendant's prejudice against the government's justification for delay." (*Id.* at p. 895.) The Eighth Circuit applied the same test in *United States v. Barket* (8th Cir. 1976) 530 F.2d 189, to find dismissal of charges was required when a delay of almost four years resulted in the loss of six witnesses. (*Id.* at pp. 194-195.) The Seventh and Ninth Circuits have also rejected the tactical advantage test. (See *United States v. Sowa* (7th Cir. 1994) 34 F.3d 447, 450-452; *United States v. Mays* (9th Cir. 1977) 549 F.2d 670, 675-677.)

This line of decisions accurately reflects the scope of the Fifth Amendment's guarantee, and should govern here because they are in line with California's own constitutional standard, and the courts of this state properly may choose to follow them. Based on the foregoing analysis, this Court should conclude the unjustified prejudicial delay in charging Goodwin violated the United States Constitution.

Assuming a federal constitutional claim requires "a showing that the delay was undertaken to gain a tactical advantage over the defendant" (*People v. Nelson, supra,* 43 Cal.4th at p. 1251), Goodwin has met that requirement. As noted above, leaving aside

meaningless generalities, the only specific justifications the prosecutor offered for the long delay in charging Goodwin was an "ongoing investigation" with new evidence being discovered "as recently as 2001." (8CT 2172.) As appellant has explained, that justification is incredible. The real result of the prosecutor's delay has been to put Goodwin at a severe disadvantage due to the disappearance of some witnesses, failed and/or tainted memories of others, and a wholesale loss of documents. Investigators possessed the Stevenses' information since the initial 1988 investigation, and they knew about Moreau-Hunter by January of 1993. (See section III.D.2.(d), *supra*.) These circumstances raise the inference the prosecutors intended the delay to gain a tactical advantage over Goodwin, and satisfies the requirements for a federal due process claim.

For the foregoing reasons, Goodwin's convictions must be reversed. However, again, even if substantial prejudice to the defense was not the tactical goal of the prosecution, that prejudice was the practical result. In either case, the constitutional violation requires reversal.

IV. THIS COURT MUST INDEPENDENTLY REVIEW THE SEALED RECORDS OF THE TRIAL COURT'S *IN CAMERA PITCHESS* REVIEWS OF OFFICER GRIGGS' PERSONNEL FILE TO DETERMINE WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN RULING THAT THERE WERE NO DISCOVERABLE MATERIALS

A. Overview

The trial court denied the first defense *Pitchess*[47] motion seeking information from Griggs' personnel file. Goodwin filed a second and third motion, all the while attempting to subpoena the records from other agencies, including the LASD. After conducting multiple hearings and *in-camera* reviews, the court found no discoverable materials. Since Goodwin never had access to the confidential sealed record of those *in camera* proceedings, this Court should independently review the record to determine if the trial court abused her discretion.

B. Factual Background

Goodwin filed multiple written motions seeking discovery of materials in Detective Griggs' personnel file.

1. The First *Pitchess/Brady* Motion

Goodwin filed his first motion on March 3, 2006, requesting disciplinary materials – such as complaints of excessive force, fabrication of charges, fabrication of evidence, and submission of any false reports – and attaching his trial attorney's declaration. (5CT

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47 *Pitchess v. Superior Court* (1974) 11 Cal.3d 531 (Superseded by statute as stated in *People v. Mooc* (2001) 26 Cal.4th 1216) (*Pitchess*).

1147-1183.) After describing Campbell's influence on the investigation, Griggs' protests and his sudden stress/disability retirement in 1992, defense counsel wrote:

> Deputy Griggs was . . . responsible for the initial interviews of several witnesses who will testify at trial and for directing the on scene investigation the morning of the murder. [Sic.] His psychiatric condition as well as his ongoing struggle with outside forces attempting to sway the investigation away from relevant suspects is highly relevant to Mr. Goodwin's defense. This is especially true in light of the fact that these charges are based wholly on circumstantial evidence. These records are necessary in order to determine Deputy Griggs' reliability at the time of the initial investigation and are also necessary to determine whether his dispute with the victim's family led to his termination and to what degree the initial investigation was compromised.

(5CT 1153-1154.)

On March 8, 2006, defense counsel filed an amended declaration attaching two exhibits inadvertently omitted from the original filing – the two memoranda authored by Griggs dated December 9 and December 10, 1988 (Exhibit A, 5CT 1187-1269), and the search warrant and affidavit Griggs signed on May 8, 1988. (Exhibit B, 5CT 1270-1307.) On March 9, 2006, the prosecutor filed his opposition. (5CT 1339-1341.)

(a) <u>The March 20, 2006 Hearing</u>

On March 20, 2006, the court heard argument. (5CT 1331-1332; 4RT P-1 - P-26.) Counsel explained the defense sought Griggs' personnel file based on his resignation as lead investigating officer under a cloud of suspicion regarding his claim outside forces

were interfering in the Thompson investigation, and his alleged problem with alcohol abuse. (4RT P-2.) Counsel further explained her belief the requested records would reveal an attempt on Griggs' part to investigate matters not related to Goodwin, and that those attempts derailed. (4RT P-3.) Counsel further explained her belief Griggs was either told he could not investigate other suspects, or there was some outside force that intervened and focused the investigation solely on Goodwin, and Griggs' inability or unwillingness to go along with that arrangement led to his retirement. (4RT P-3.)

Counsel further explained if the psychiatric reports and personnel file revealed Griggs was an alcoholic, those documents would be relevant as to why the direction of the investigation changed and investigators dropped Joey Hunter as a suspect. (4RT P-4.) Counsel asked the court to review these documents under both of those theories. (4RT P-4.)

When counsel for the Sheriff's Department argued Goodwin failed to demonstrate any misconduct by Griggs, defense counsel elaborated:

> [W]hile this is going on . . . according to the complaint that we have with the court, there are complaints coming into this officer wherein he is alleging internally in the memo, I would talk to this particular witness. This witness on one day told me "X." Outside forces intervened. I was told to reinterview this witness. The next time I interviewed this witness I was told "Y."

(4RT P-5.) The court questioned whether Goodwin had alleged misconduct by Griggs. (4RT P-6.) Defense counsel argued she was not

necessarily required to show Griggs' misconduct, but the records would show misconduct on the part of Griggs' supervisors or the department. (4RT P-6.) When the court asserted the defense must show Griggs did something improper for the court to grant an *in camera* review of his personnel file, counsel asserted the court could justify the review under *Brady* to obtain Griggs' declarations in support of his request for psychiatric leave. (4RT P-7-8.) Counsel explained she had tried to subpoena the records and was told she had to file a *Pitchess* motion to get them. (4RT P-8.)

LASD counsel asserted, "The *Brady* obligation rests with the prosecutor, not the court." (4RT P-10.) Prosecutor Jackson questioned defense counsel's motives. (4RT P-10 – 11.) Defense counsel advised the court the LADA had concealed Griggs' memoranda from Goodwin for two years, indicating the LADA believed there was a problem with the investigation. (4RT P-11 – 12.) In fact, the investigation of suspects other than Goodwin "just fell off the face of the earth" without explanation. (4RT P-11 – 12.)

The court agreed Goodwin should have the information, but disagreed *Pitchess* review was the right procedure, instead characterizing the issue as a *Brady* problem. (4RT P-12 – 13.) The court questioned why there was a dead-end as to Joey Hunter. (4RT P-13.) The parties agreed the prosecutor did not have Griggs' personnel records. (4RT P-13 – 14.) However, the court continued to balk at ordering the records produced via *Pitchess* because Goodwin had, in the court's opinion, failed to show Griggs had done anything wrong. (4RT P-15.) Defense counsel argued the court had authority under

Brady and under the 4th and 14th Amendments to order Griggs' personnel file produced for *in-camera* review. (4RT P-16.)

Defense counsel and the court reached the same conclusion – the issue was *Brady* disclosure. (4RT P-19, P-21.) Jackson complained defense counsel had a third-party culpability argument, and she should make it to a jury based on the information currently in her possession. (4RT P-19 – 20.) The court asked:

> I don't have all the discovery. I don't know why that stopped. I have a question. Why did that stop? Why was this person no longer looked at? Why did the investigation cease as to him?[48]

(4RT P-20.)

The court asked Jackson directly 1) if he had information indicating what happened to the investigation of other suspects, and 2) whether he had an obligation to get the answer. (4RT P-21.) Jackson responded:

> Well, your honor, I believe I do know the answer to that question. And it's contained in the same information that Ms. Saris has. Although the explanation she might not like it. [Sic.]
>
> ****
>
> . . . [T]he detectives finally came to a determination that nothing that they had followed up on concerning [Joey Hunter] was consistent with the physical evidence and the overwhelming number of witnesses who substantiated a completely different set of facts. To wit, dual individuals; dual guns used; two bicycles used, not one; going in a different direction, not the other;

[48]The answer to this question has never been provided.

> African/American, not white; et cetera. So I think the answer is they simply couldn't substantiate that Joey Hunter, this third person, was actually involved in the murders of Mickey and Trudy Thompson. Contrary they could substantiate that Mike Goodwin was involved in the murders of Mickey and Trudy Thompson. And the more investigation that was had kept pointing to Mike Goodwin. The threats beforehand; the threats to Mickey Thompson; the threats . . .

(4RT P-21 – 23.)

Defense counsel reiterated the following facts. Joey Hunter was identified by several people from a composite drawing published in the Herald Examiner the morning of the murders. (4RT -23.) At a roadblock set up near the area, several people stopped, viewed a photographic lineup with Joey Hunter's photograph in it, and said, "I know that individual." (4RT -23.) Joey Hunter was arrested and failed three polygraph tests. (4RT -23 – 24.) Two of the eyewitnesses indicated one of the killers could have been a white man. (4RT -24.) He was seen on a bicycle nearby within an hour of the murders. (4RT -24.) Hunter's alibi fell apart. (4RT -24.)

Defense counsel remarked, presciently: "I have a feeling the district attorney is going to fight . . . tooth and nail to keep . . . third-party culpability out of this trial because they have no evidence of Mr. Goodwin doing anything. They just have evidence of a motive. So third-party culpability would absolutely blow their case out of the water." (4RT P-24.)

The court denied the *Pitchess* motion, at the same time acknowledging a legitimate concern about *Brady* material and

suggesting defense counsel subpoena the material. (4RT P-24 – 27.) Defense counsel pointed out she had a *Brady* motion pending for two years, asking for all relevant interviews and all relevant reports, and the prosecutor had not disclosed anything. (4RT P-26.) The court responded she did not know about the problem until the issue was raised by Goodwin at this, the earliest opportunity. (4RT P-26.) The court again acknowledged the *Brady* issue and Jackson's claim he had complied. (4RT P-26.)

(b) The April 10, 2006 Hearing

On April 10, 2006, the court conducted a hearing on Goodwin's attempt to subpoena Griggs' information from the LASD. (5CT 1335-1336; 4RT R-1 – 19.) A lengthy discussion regarding *Brady* obligations ensued. Defense counsel advised the court Goodwin only had Griggs' memoranda because Griggs had secreted them in the evidence locker, describing how prosecutors had stonewalled the defense. (4RT R-13.)

The court declined to make a ruling under *Pitchess* and suggested counsel for the LASD and LADA let the court and Goodwin know if there was any *Brady* material. (4RT R-15.)

2. The Second Motion

On April 12, 2006, defense counsel filed a second *Pitchess/Brady* motion. (5CT 1339-1370.) This motion again requested Griggs' personnel file, and further requested "any other material which is exculpatory or impeaching within the meaning of *Brady v. Maryland, supra*, 373 U.S. 83. The motion cited *People v. Coddington* (2000) 23

Cal.4th 529, 589, overruled on other grounds in *Price v. Superior Court* (2001) 25 Cal.4th 1046, 1069, fn.13, for the proposition the California Supreme Court has specifically empowered trial courts to examine police personnel files for *Brady* material which is discoverable without regard to the five-year limitation applicable to *Pitchess* discovery. (*City of Los Angeles v. Superior Court (Brandon*) (2001) 29 Cal.4th 1, *Abatti v. Superior Court* (2003) 112 Cal.App.4th 39, 52-56.) (5CT 1344.)

Goodwin also cited *People v. Memro* (1985) 38 Cal.3d 658, 688-689, for the proposition the proper procedure for discovering police psychiatric records is for the trial court to review the records *in camera.* (5CT 1356.)

The LASD filed its opposition. (5CT 1371-1378.)

(a) <u>The April 19, 2006 Hearing</u>

On April 19, 2006, the court heard the second *Pitchess* motion. (5CT 1379-1380; 4RT S-1 – 13.) The court stated her recollection from the previous hearing was LASD's counsel was willing to assist the court in determining whether there was *Brady* information in Griggs' personnel file, or other records regarding Griggs. (4RT S-2.) The court also stated she understood the LASD had denied Goodwin's counsel access to the records. (4RT S-2.) LASD's counsel disagreed, explaining he had discussed the matter with county counsel, and had decided no one from LASD had the right or authority to "rummage through the personnel of records of any peace officer,"and it was the judge's responsibility to do that. (4RT S-2.) LASD counsel asserted he had advised defense counsel to file another *Pitchess* motion with a new declaration, focusing on the reasons for Griggs' early retirement. (4RT

S-2 - 3.) LASD counsel also advised that on the day of this hearing, the LASD learned the requested records were maintained by the county, not LASD. (4RT S-3.)

Defense counsel protested she was being sent in circles. (4RT S-3 – 4.) After further argument, the court ruled Goodwin had made a sufficient showing under *Pitchess*, even though this was not the typical *Pitchess* situation and was, in fact, "unprecedented." (4RT S-4 – 8.) The court requested another declaration from trial counsel to bring the matter under *Pitchess*, at which point the court would conduct an *in-camera* hearing. (4RT S-8 – 9.) Jackson confirmed he did not possess the original complaint from Campbell that had triggered Griggs' memoranda in response. (4RT S-9 – 10.)

Citing *People v. Mooc*, *supra*, 26 Cal.4th 1216, LASD counsel asserted the only documents the custodian would produce were complaints against *Griggs* in this case. (4RT S-10.) At defense counsel's insistence, the court ordered the sheriff to produce Griggs' personnel and disability files for *Pitchess* review. (4RT S-11, S-14 – 15.) The court set May 1, 2006 for the *in-camera* review.[49] (4RT S-16.)

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[49] On April 27, 2006, Goodwin's counsel served a subpoena on the LASD, which moved to quash it, setting May 1, 2006, for the hearing. (5CT 1381-1399.) The LASD's papers indicated: "Most of the records requested have been destroyed. Mr. Griggs was granted a service-connected disability retirement in 1993. LACERA had an internal policy of destroying a disability retirement file one year (changed in 2005 to three years) after the requested action was granted by the Retirement Board except for those documents relied upon by the Board of Retirement in making its decision. These documents were scanned into the LACERA computer system. They include the

(b) The May 1, 2006 Hearing

On May 1, 2006, counsel appeared for further proceedings, and the court reviewed a portion of Griggs' personnel file.[50] The court quashed the subpoena for Griggs' retirement records, and LACERA's counsel advised the defense would have to file another *Pitchess* motion for the records Goodwin wanted. May 23, 2006, was set for hearing the new *Pitchess* motion. (5CT 1402-1403.)

3. The Third Motion

On May 4, 2006, Goodwin's counsel filed a third, renewed, *Pitchess/Brady* motion set for hearing on May 23, 2006. (5CT 1401-1404; 6CT 1437-1454, 1468-1588.) On May 23, 2006, LACERA filed its opposition. (6CT 1455-1466, 1589-1598.)

(a) The May 23, 2006 Hearing

At the third *Pitchess/Brady* motion on May 23, 2006, the

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retirement application, the physician's statement, the investigator's report, newspaper articles involving the Thompson murder case and the medical report of the Board Panel Physician." (5CT 1383.) However, the LASD's moving papers acknowledged: "In addition to the investigator's report these records were provided to the Board Panel Physician and are discussed in his report. *In short, portions of these documents still exist*." (5CT 1386 [emphasis added].) A copy of Goodwin's subpoena was attached to the LASD's motion to quash. (5CT 1392-1394.)

50 Goodwin does not possess a copy of the sealed reporter's transcript of the May 1, 2006, *in-camera* hearing. The minutes for that date indicate: "Court grants the motion to quash. *Pitchess* motion is to be noticed for a future date. *In-camera* hearing is held on previously ruled upon *Pitchess*; court indicates that nothing is to be provided." (5CT 1400.)

court expressed concern about making a record of any complaints in Griggs' files regarding the way the Thompson investigation was handled. (4RT T-2.) The court noted Griggs' memoranda[51] indicated he had responded to a complaint, yet the May 1, 2006 *in-camera* review had revealed nothing. (4RT T-2.)

The court found Goodwin had made an adequate showing because the information in Campbell's complaint may have been connected to Griggs' disability retirement. (4RT T-2.) The court confirmed LACERA had destroyed all files regarding Griggs except for the disability retirement file. (4RT T-3.)

Defense counsel argued anything mentioning the Thompson homicides or Goodwin would be material for purposes of the *in-camera* hearing. (4RT T-3 – 5.) LASD's counsel responded there was "a whole world of complaints" against Griggs, but nothing to disclose. (4RT T-5-6.)

LACERA counsel stated there were no complaints in his file. (4RT T-6.) He represented there was a small amount of material in his file defense counsel wanted, including a medical report from the board panel doctor who examined Griggs in connection with his application for retirement, Griggs' application, and a physician's statement. Other than that, LACERA asserted there was nothing. (4RT T-6.)

The court granted Goodwin's motion and ordered the Sheriff to produce any documents referencing the Thompson

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[51]See Argument XVI.C.1.(a), *infra.*

investigation for *in-camera* review and set the hearing for June 7, 2006. (4RT T-11-13.)

(b) The June 7, 2006 *In-Camera* Review

On June 7, 2006, the court conducted an *in-camera* review of Griggs' personnel files, during which neither the prosecutor nor Goodwin's trial counsel was permitted to be present. The court sealed the record of that *in-camera* proceeding. (Sealed RT June 7, 2006.)

Following the *in-camera* review, in open court on the record, the trial court indicated it had found no discoverable materials to be disclosed to the defense, but the material was voluminous and the court needed time to go through it. The court assured defense counsel LASD and LACERA counsel would separate out the materials from 1988, the day of or shortly before the Thompson murders, up until the date of Griggs' retirement, and the court would review that material page by page. (4RT U-22 – 23.)

(c) The June 16, 2006 In-Camera Hearing

At a June 20, 2006 pretrial hearing, the court summarized the result of the June 16, 2006 *in-camera* hearing at which only LASD counsel and the custodian of records were present, and the record was sealed. (4RT V-2; see Sealed RT June 16, 2006.) The court ordered some documents from the files provided to Goodwin, staying its order until June 29, 2006, so the LASD could decide whether to seek a writ. (4RT V-2; see Sealed RT June 16, 2006.)

C. This Court Should Independently Review The Record To Determine If The Trial Court Abused Its Discretion In Finding No Discoverable Materials In Officer Griggs' Personnel File

When the trial court grants a *Pitchess* motion, conducts an *in-camera* review, but then denies disclosure of any materials, the appellate court reviews the record to determine whether the trial court abused its discretion. (*People v. Mooc*, *supra*, 26 Cal.4th 1216, 1232.)

In *Mooc*, the California Supreme Court described the procedure to follow once the trial court grants a *Pitchess* motion. The custodian of the personnel records is obligated to bring "all potentially relevant" materials to the court. (*Mooc, supra,* 26 Cal.4th at pp. 1228-1229.) The trial court then reviews these records *in camera*, with a court reporter present. (*Ibid*.) The custodian of records should state for the record what other documents contained in the personnel file were not brought to the trial court and why those documents were deemed irrelevant, or otherwise unresponsive, to the defendant's *Pitchess* motion. (*Id*. at p. 1229.)

Next, the trial court must make a record of the materials it reviewed to allow meaningful appellate review:

> Such a record will permit future appellate review. If the documents produced by the custodian are not voluminous, the court can photocopy them and place them in a confidential file. Alternatively, the court can prepare a list of documents it considered or simply state for the record what documents it examined. Without some record of the documents examined by the trial court, a party's ability to obtain appellate review of the trial court's decision, without to disclose or not to disclose,

would be nonexistent.

(*Mooc, supra*, 26 Cal.4th at p. 1229.)

If this Court reviews the record and finds the trial court failed to prepare the record as required by *Mooc*, the appropriate remedy is to remand the matter to the trial court "with directions to hold a hearing to augment the record with the evidence the trial court had considered in chambers when it ruled on the *Pitchess* motion." (*Mooc, supra,* 26 Cal.4th at p. 1231.)

Neither Goodwin nor his attorney has access to the transcript of the sealed *in-camera* review of Griggs' personnel file. Goodwin requests this Court conduct its own review to determine whether the trial court abused its discretion in finding no discoverable materials.

Should this Court determine the trial court abused its discretion in failing to turn over to the defense materials helpful to it, the proper remedy is to reverse Goodwin's conviction and order a new trial. (*People v. Gill* (1997) 60 Cal.App.4th 743, 751.)

V. THE TRIAL COURT PREJUDICIALLY ERRED BY ADMITTING KINGDON'S IRRELEVANT AND HIGHLY PREJUDICIAL "EXPERT" TESTIMONY THAT GOODWIN WAS ACTING "BEHIND THE SCENES" IN HIS WIFE'S FINANCIAL DEALINGS IN ORDER TO HIDE HIS ASSETS FROM THE BANKRUPTCY TRUSTEE

A. Overview

Over numerous and repeated defense objections, the court permitted Karen Kingdon[52] to provide her "expert" opinions Goodwin's wife, Diane, and Goodwin had commingled funds and Goodwin was acting "behind the scenes" in his wife's purchases. Jackson argued Goodwin showed consciousness of guilt by liquidating "his" assets in an attempt to flee the country after the murders. To this end, Kingdon detailed a trail of Diane Goodwin's assets.

The court overruled defense objections based on the court's prior ruling Kingdon – an employee of the OCDA – was an "expert" within the meaning of Evidence Code § 720.[53] (4CT 875-876.)

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The court reporter referred to Kingdon as Karen Stephens at places in the record. Appellant refers to her as "Kingdon."

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That section provides:

(a) A person is qualified to testify as an expert if he has special knowledge, skill, experience, training, or education sufficient to qualify him as an expert on the subject to which his testimony relates. Against the objection of a party, such special knowledge, skill, experience, training, or education must be shown before the witness may testify as an expert.

(b) A witness' special knowledge, skill, experience, training, or

Goodwin objected Kingdon's opinions were as irrelevant as an investigating officer's opinion as to who committed a crime and his reasons for that belief. (4CT 876.) Kingdon's reading of how and where Diane Goodwin used her personal income from real estate transactions was irrelevant as to whether or not Goodwin hired people to murder the Thompsons, and as such should not have been admitted.

B. Karen Kingdon's Testimony

Kingdon was a CPA and investigative auditor for the OCDA. (18RT 6725, 6783, 6788.) In 1992, Kingdon reviewed the Goodwins' financial dealings. (18RT 6726.) Kingdon testified from a flow chart created by the prosecutor purportedly showing where the funds from a purported "sale" of Diane Goodwin's interest in JGA Whitehawk went. (19RT 6945-6946; People's Exhibit 101.) The prosecutor's theory was Goodwin hid "his" money through his wife's investments and transactions, liquidated assets – including JGA Whitehawk and the Goodwin residence – sent some of the proceeds offshore, bought gold coins with the rest of the cash, and purchased a yacht so as to flee to parts unknown after the Thompsons were murdered, all because Goodwin refused to pay the judgment he owed Thompson.[54] (6RT 20; 6RT 2740-2742.)

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education may be shown by any otherwise admissible evidence, including his own testimony.

[54] All of this was in spite of the fact Goodwin was – immediately prior to the murders – negotiating a settlement that would have paid Thompson his judgment, and in fact entered into that settlement later in 1988. (9RT 3713-3721, 3743-3744; Defense Exhibit M.)

Kingdon looked at thousands of financial records, including personal and cashier's checks, financial statements, tax returns, bankruptcy court lists, letters and correspondence. (18RT 6760, 6790.) It appeared to Kingdon that prior to 1986, funds and assets were in both Goodwins' names, and then around the first quarter of 1986, funds and assets began to be transferred into Diane's name alone. (18RT 6761.)

Kingdon also looked at boat loan documents from 1988. (18RT 6761-6762; People's Exhibit 100.) On January, 20, 1988, Diane Goodwin wrote a check for a deposit on a yacht. (18RT 6762.) On April 28, 1988, Diane Goodwin took possession of the yacht. (18RT 6762-6763, 6791.) None of the yacht purchase documents were in Goodwin's name. (18RT 6763.) According to Kingdon, by April of 1988, nearly all of Goodwin's funds had been moved into Diane's name. (18RT 6763.)

Kingdon described "commingling" as a married couple putting earnings and income into a joint bank account, sharing expenses and combining incomes. (18RT 6763.) On cross-examination, Kingdon admitted that she was using the word "commingling" not in any technical or legal sense, but as a general term that "most people have some understanding of."[55] (19RT 6914-6915.) In Kingdon's

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Kingdon was not familiar enough with the term "transmutation" to be able to define it. (19RT 6915.) Kingdon could not recall anyone using that term during the course of her review of records and interviewing people as part of this investigation. (19RT 6915.) The term "transmutation" is defined as "The change of one thing into another.

opinion, the Goodwins were commingling their funds in January of 1988. (18RT 6764.) Kingdon's opinion was based on the Goodwins filing joint tax returns for several years, and all of their banking documents being in both of their names. (18RT 6764.)

Kingdon opined if funds were commingled as of January 1988, then even though the boat was purchased in Diane's name, it had been purchased with funds that had been commingled for so many years that the purchase was effectively for both Goodwins. (18RT 6765, 6791.)

Kingdon described the ownership of the Goodwins' home, their "liquidation" of some assets (including using rather than reinvesting interest and dividends) and various other transactions, sharing her conclusions and opinions with the jury.

On cross-examination, Kingdon admitted she wrote on a printout of a database her office had created, "number one source for info slash Collene Campbell's attorney" after the phrase "Dolores Cordell works there." (19RT 6938-6940; Defense Exhibit KKK.)

A graphic expression applied to agreements between spouses concerning the status and disposition of their property, particularly in reference to status as community property. [Citation.]" (Ballentine's Law Dict. (3d ed.1969) p. 1294, col. 2 .) Cal. Fam.Code § 852(a) provides that "[a] transmutation of real or personal property is not valid unless made in writing by an express declaration that is made, joined in, consented to, or accepted by the spouse whose interest in the property is adversely affected." California courts have defined "[a] transmutation [as] an interspousal transaction or agreement that works a change in the character of the property." *Cross v. Cross* (*In re Marriage of Cross*) (2001) 94 Cal.App.4th 1143, 1147 (citation omitted) (emphasis added).

Kingdon admitted Campbell's attorney, Cordell, was her primary source of information regarding this case. (19RT 6939.) Kingdon also admitted Cordell spelled out quite clearly where she believed Goodwin's money and assets had come from and where they had gone. (19RT 6939.)

Kingdon did not bring to court any of the documents she reviewed in the course of her investigation or about which she testified, not did the prosecutor ask her to produce them. (19RT 6945.)

C. Goodwin's Objections to Kingdon's Testimony

Goodwin objected to the exhibits the prosecutor had marked prior to Kingdon's testimony on the ground they were inadmissible hearsay. (18RT 6717-6719 [hearsay], 6736-6737 [hearsay]; 6738-6739 [hearsay]; 6742-6743 [hearsay; not a proper subject for expert testimony].)

Jackson asserted he wanted to elicit Kingdon's expert opinion as to what the Goodwins were doing financially from 1986 to the spring of 1988. (18RT 6739-6740.) The court interjected she was "troubled" by Jackson's leading questions to Kingdon, stating, "it's difficult for me to understand exactly what you're asking for if you're supplying the information. I mean I would rather hear from the witness. The witness is clearly an expert. The witness can testify to certain opinions that were formed based on her review of the thousands, tens of thousands of documents. I know I would feel more comfortable and I think it would be more helpful if the questions were not so suggestive and so leading." (18RT 6741.)

Defense counsel raised both foundational and hearsay

objections, explaining Kingdon could identify the types of records she relied on, but she was not allowed to refer to a specific document and inform the jury of its content and advise the jury of all the facts that she was relying on, and then express an opinion. (18RT 6741.) Defense counsel asserted Kingdon could not, for example, ask a question eliciting what a document indicated the fair market value of an asset might be because that content was hearsay; the same was true of the content of Goodwin's letters regarding Desert Investors and a loan. (18RT 6743, 6747-6749, 6752-6759.) Defense counsel also objected the word "liquidate" was argumentative and leading. (18RT 6743.)

The court overruled the objection Kingdon was not a qualified expert on the financial issues. (18RT 6743-6744.) The court sustained defense objections to questions calling for hearsay, but overruled the objection the documents themselves constituted hearsay. (18RT 6744, 6746-6747, 6755-6759.) Defense counsel requested the court instruct the jury could not rely upon the documents for the truth of the matters stated in them. (18RT 6746-6747, 6751.) Defense counsel disputed the authenticity of the escrow documents - Exhibits 98 and 99. (18RT 6749-6750.)

D. Standard of Review

A trial court's decision to admit expert testimony "will not be disturbed on appeal unless a manifest abuse of discretion is shown." (*People v. Kelly* (1976) 17 Cal.3d 24, 39.) "However, the discretion to admit or exclude evidence is not unlimited. 'The discretion of a trial judge is not a whimsical, uncontrolled power, but a legal discretion, which is subject to the limitations of legal principles governing the

subject of its action, and to reversal on appeal where no reasonable basis for the action is shown. [Citation.]' " (*Korsak v. Atlas Hotels, Inc.* (1992) 2 Cal.App.4th 1516, 1523.) "

E. The Trial Court Erred by Admitting Opinion Testimony That Could Not Assist the Jury in Understanding The Evidence and Brought Incompetent Hearsay Before The Jury

An expert's opinion is admissible only if "related to a subject that is sufficiently beyond common experience" and "would assist the trier of fact." (Evid. Code §801.) Expert opinion should be excluded " 'when "the subject of inquiry is one of such common knowledge that men of ordinary education could reach a conclusion as intelligently as the witness." ' " (*People v. McAlpin* (1991) 53 Cal.3d 1289, 1300, quoting *People v. McDonald* (1984) 37 Cal.3d 351, 367.) "[T]he courts have the obligation to contain expert testimony within the area of the professed expertise, and to require adequate foundation for the opinion." (*Korsak v. Atlas Hotels, Inc., supra,* 2 Cal.App.4th 1516, 1523.)

Kingdon's testimony was not "expert" testimony in that she did not merely interpret documents and relay their meaning to the jury. She overstepped her "expert" status when she offered opinion evidence as to what Goodwin was "trying to do" with his assets or whether he was "behind" purchases his wife made in her own name. Finally, Kingdon offered her opinion, over numerous defense objections, the Goodwins had "commingled" funds in order to move money offshore.

In addition, admission of Kingdon's testimony violated Evidence Code §1523, subdivision (d), which permits oral testimony

regarding the content of writings only where the writings offered are so voluminous as to preclude the court from reviewing the documents and the testimony is offered to explain the "general results of the whole."[56] An example of permissible use of this section would be an accountant having reviewed bankruptcy documents testifying as to the fact of the bankruptcy. Jackson's inquiry was limited to fewer than 20

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Evidence Code §1523 provides:

(a) Except as otherwise provided by statute, oral testimony is not admissible to prove the content of a writing.

(b) Oral testimony of the content of a writing is not made inadmissible by subdivision (a) if the proponent does not have possession or control of a copy of the writing and the original is lost or has been destroyed without fraudulent intent on the part of the proponent of the evidence.

(c) Oral testimony of the content of a writing is not made inadmissible by subdivision (a) if the proponent does not have possession or control of the original or a copy of the writing and either of the following conditions is satisfied:

(1) Neither the writing nor a copy of the writing was reasonably procurable by the proponent by use of the court's process or by other available means.

(2) The writing is not closely related to the controlling issues and it would be inexpedient to require its production.

(d) Oral testimony of the content of a writing is not made inadmissible by subdivision (a) if the writing consists of numerous accounts or other writings that cannot be examined in court without great loss of time, and the evidence sought from them is only the general result of the whole.

documents. (18RT 6729, 6747-6749.)

Neither Evidence Code §1523 nor §720 authorizes a witness to review documents not brought before the court and give an opinion regarding the defendant's purpose for his or his family member's financial dealings. The Evidence Code does not allow a witness – no matter what financial background he or she possesses – to testify to the state of mind and intent of a defendant based on his wife's financial dealings.

The error is analogous to that in *Kotla v. Regents of the University of California* (2004) 115 Cal.App.4th 283, where the trial court allowed a human resources management expert to opine that certain facts in evidence were "indicators" the defendant discharged the plaintiff for retaliatory reasons. The Court of Appeal held this testimony was inadmissible under Evidence Code section 801 because it improperly invaded the province of the jury to draw conclusions from the evidence and it lacked any reliable foundation in the expert's professional experience and expertise. The Court held, "The trial court implicitly recognized this when it barred Dr. Finkelman from opining in a direct fashion that the [employer] had acted out of a retaliatory motive. Unfortunately, by thereafter allowing Dr. Finkelman to testify that certain facts in evidence were "indicators" of retaliation, the court substantially undercut its earlier ruling and abused its discretion. This error was compounded by jury instructions that, in effect, encouraged jurors to give unwarranted weight to Dr. Finkelman's view of the evidence." (*Id*. at 291.)

Here, the issue was Diane Goodwin's motivation in

executing certain financial transactions, beginning approximately two years before the Thompson murders, as evidence of Mike Goodwin's "consciousness of guilt." Kingdon's testimony involved layers of speculation as to the nature of the funds (separate property, community property or "commingled" property), Diane's motivation in spending money that on its face was hers to spend, and Goodwin's motivation. As in *Kotla*, these motivations were not an appropriate subject of expert testimony.

Kingdon's testimony and opinions about the significance of Diane's financial transactions did not assist the jury in its fact-finding. Instead, that testimony created an unacceptable risk the jury paid unwarranted deference to Kingdon's purported expertise when in reality she was in no better position than they were to evaluate the evidence concerning Goodwin's "consciousness of guilt." Absent unusual facts, a court must presume jurors are capable of deciding a party's motive for themselves without being told by an expert which finding on that issue the evidence supports. That determination must remain solely within the province of the jury. Jackson should not have invaded the jury's province by polluting and truncating the jury's decision-making process with what purported to be the unrefuted conclusions of his "expert." Kingdon's expert testimony, therefore, should have been excluded.

F. <u>Kingdon's Testimony Was Irrelevant</u>

Evidence is relevant if it has "any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." (Evid. Code §210.) The prosecutor

contended the evidence at issue here was offered to prove "what Michael Goodwin and Diane Goodwin were doing financially from the period of 1986 to the spring of 1988." (18RT 6739-6740.) The prosecutor failed to explain, however, why Diane Goodwin's financial transactions were of any consequence to the determination of the criminal action against Goodwin. Absent an explanation, this Court must conclude the evidence was irrelevant. (See *People v. Scalzi* (1981) 126 Cal.App.3d 901, 906 [error to admit hearsay statement to prove why police officer arrested defendant because officer's "state of mind accounting for appellant's arrest, booking and charges was not an issue in the case"].)

Diane's financial transactions did not show a consciousness of guilt on Mike Goodwin's part. The inferences Jackson asked the jury to draw clearly show Kingdon's testimony was speculative and designed to add more depth and breadth to the mountain of bad character evidence.

G. Under Any Standard, Kingdon's Testimony Rendered Goodwin's Trial Fundamentally Unfair

1. Viewed under the *Watson* Standard, the Error Was Prejudicial

Under *People v. Watson*, *supra*, 46 Cal.2d 818, 836, this Court must examine the entire record to determine whether it is reasonably probable the jury would have reached a result more favorable to Goodwin in the absence of the error. (*People v. Clark* (1980) 109 Cal.App.3d 88, 90.)

"Probable" in the *Watson* context "does not mean more likely than not, but merely a reasonable chance, more than an abstract

possibility." (*College Hospital, Inc. v. Superior Court* (1994) 8 Cal.4th 704, 715; *People v. Watson, supra*, 46 Cal.2d at p. 837; see also *Strickland v. Washington* (1984) 466 U.S. 668, 693-694 ["reasonable probability" does not mean "more likely than not," but merely "probability sufficient to undermine confidence in the outcome"].)

It is reasonably probable the jury would have reached a result more favorable to Goodwin had jurors not heard Kingdon's "expert" evidence. Kingdon's testimony was prejudicial because it came from a purported "expert." A jury may believe an expert witness who is imbued with all the mystique inherent in the title of "expert." There is always a substantial danger the jury will simply adopt the expert's conclusions rather than making its own decision. (*Summers v. A.L. Gilbert Co.* (1999) 69 Cal.App.4th 1155, 1182.) Kingdon's testimony was not truly "expert" testimony in that she overstepped her "expert" status when she offered opinion evidence as to what Goodwin was "trying to do" with his assets or whether he was "behind" purchases his wife made in her own name. As such, Kingdon's expert testimony did not aid the jury, but supplanted the jury's fact-finding duty. The jury was fully capable of evaluating on its own where the money went, so Kingdon's "expert" status unfairly imbued her testimony with an unwarranted authority in the eyes of the jury.

The jury paid close attention to Kingdon's testimony, requesting the court read all of it back during deliberations. (7CT 1944-1945.) That request indicates the jury considered this a close case. (See, e.g., *People v. Washington* (1958) 163 Cal.App.2d 833, 846.) Kingdon's testimony also prejudiced Goodwin because there was scant

evidence he was involved in the murders. The prosecutor failed to produce any evidence Goodwin was connected to the men who killed the Thompsons. Instead, the case consisted almost entirely of motive and bad character evidence, and Kingdon's testimony was a significant factor in developing the bad guy theme. Kingdon's improper expert opinion prejudicially tipped the scales against Goodwin. The "evidence" of financial wrongdoing by the Goodwins served to make Goodwin look like a bad man who lived outside the law. In fact, the jury interpreted this evidence in exactly that manner, and it convinced the jury to convict on that basis:

> We discussed during the deliberations the character evidence that had been offered against Michael Goodwin. The tone of the deliberation in this regard was that Michael Goodwin lacked a "moral compass." The evidence that was offered by certain witnesses clearly painted Mickey Thompson as a good and honorable fellow and Michael Goodwin as just the opposite. The bad character of Michael Goodwin along with his ability to take everything he did (including other criminal activity) to an extreme level was very evident from the testimony of these witnesses. The jurors went over all of this in the deliberation room and we could not escape the reality that, coupled with his overtly stated hatred of Mickey Thompson, this guy was the kind of guy who was capable of coordinating this event.

(8CT 2082.) Therefore, without Kingdon's erroneous, subjective "expert" opinion about Goodwin's and Diane's finances, it is reasonably probable the jury would have reached a result more favorable to Goodwin, and the jury would not have convicted him of the murders.

2. Kingdon's Testimony Rendered Goodwin's Trial Fundamentally Unfair and Deprived Him of Due Process

State law errors rendering a trial fundamentally unfair violate the federal Due Process Clause. (*Estelle v. McGuire* (1991) 502 U.S. 62, 78-79.) A denial of fundamental fairness occurs whenever improper evidence "is material in the sense of a crucial, critical, highly significant factor." (*Snowden v. Singletary* (11th Cir. 1998) 135 F.3d 732, citing *Osborne v. Wainwright* (11th Cir.1983) 720 F.2d 1237, 1238.)

Goodwin was denied fundamental fairness. Kingdon's testimony was a highly significant factor in Goodwin's conviction. The prosecutor repeatedly suggested Goodwin was involved in other criminal activity - specifically bankruptcy fraud. (5CT 1409, 1420-1423; 4RT V-16; 10RT 1060; 17RT 6478.) The jury believed it. (8CT 2082.) Viewed in light of the entire record, Kingdon's "expert" testimony how Goodwin purportedly committed fraud during the bankruptcies was central to the prosecution case, and it misled the jury on a crucial and critical issue. Goodwin's convictions must, therefore, be reversed.

VI. THE TRIAL COURT ERRED BY ADMITTING WILKINSON'S IRRELEVANT AND PREJUDICIAL HEARSAY TESTIMONY THAT THOMPSON EXPRESSED FEAR OF GOODWIN

A. Overview

Over defense objection, the court permitted Kathy Wilkinson to testify that – months before the murders – she was in an upstairs room with Trudy Thompson when Mickey Thompson ran upstairs yelling at them to keep the windows closed because "Goodwin could have a sniper outside right now." (12RT 4614-4617.)

Originally the prosecutor offered Wilkinson's testimony as an excited utterance to show Thompson's fear of Goodwin. (9RT 3632-3633.) When the defense pointed out the testimony was not admissible on that basis, the prosecutor offered it to "show the level of the hostility of the litigation." (9RT 3633-3634.) Thompson's statement, however, did not refer to any litigation, and there was no conversation prior to the statement referencing any litigation. Wilkinson was unable to determine what Thompson was doing or could have seen before he ran up the stairs.

This testimony was irrelevant and prejudicial hearsay. The court committed reversible error by admitting it.

B. Procedural Facts

On October 19, 2006, the trial court heard Goodwin's Evidence Code § 402 motions, deferring ruling on the motion regarding Wilkinson's testimony. (7CT 1800; 3ART 626-635.)

On November 13, 2006, the court conducted another

Evidence Code § 402 hearing, at which Wilkinson testified she had no idea what had precipitated Thompson's concern about the windows or drapes being open. (9RT 3625-3632.) The prosecutor offered the testimony on an excited utterance theory, claiming it was relevant because it reflected Thompson's "state of mind," his fear of Goodwin, and "his fear of something like that happening to him at any given moment at his home." (9RT 3632-3633.)

Defense counsel argued Thompson's statement was not an excited utterance because it did not narrate or describe any event, the witness did not know what precipitated Thompson's running, and the victim's state of mind or fear of the defendant is irrelevant unless it proves something relevant to the case. (9RT 3633.) Defense counsel also noted courts have consistently ruled evidence of a victim's fear is inadmissible. (9RT 3633.)

On November 14, 2006, defense counsel filed points and authorities on the inadmissibility of Wilkinson's testimony and the court heard more argument. (7CT 1846-1854; 10RT 3901-3913.)

Jackson criticized Goodwin's points and authorities as "just wrong." (10RT 3902.) Contrary to the position he took the day before, Jackson claimed he was not offering the evidence to prove Thompson's fear, but to show the level of animosity and vitriol during the litigation to rebut Goodwin's defense he had no motive to kill the Thompsons because they were about to settle the case when the murders occurred. (10RT 3902-3903.) Jackson conceded the testimony was irrelevant to show Thompson's fear or his state of mind. (10RT 3902.)

Defense counsel countered that Dixon had, the day before, offered Wilkinson's testimony to show Thompson's fear until the court informed him it was not admissible for that purpose. (10RT 3903-3904.) Citing *People v. Hernandez* (2003) 30 Cal.4th 835, defense counsel pointed out the importance of distinguishing between the declarant's state of mind versus the declarant making a statement about the accused's state of mind. (10RT 3904.)

Defense counsel explained the statement purportedly made by Thompson did not address the level of hostility of the litigation. (10RT 3904.) Another level of hearsay was required to explain the source of Thompson's outburst, and that hearsay would have no exception. (10RT 3904.) There also was no foundation. (10RT 3906.)

If hostile litigation was the source, that would mean every comment Thompson uttered during that four-year period would have to be characterized as excited – a result not intended by Evidence Code section 1240. (10RT 3905.) In order to qualify, there would have to be an event associated with Thompson's statement indicating an objective level of spontaneity and excitement. (10RT 3905.)

Defense counsel also argued the evidence was cumulative and unduly prejudicial, and should be excluded under Evidence Code section 352. (10RT 3905.) Defense counsel objected admission of the statement would violate Goodwin's due process and Confrontation Clause rights under the state and federal constitutions. (10RT 3906-3907.)

Jackson argued the timing was "exactly in the middle of

this hostile litigation" and "in context given the fact that the litigation was ongoing;" Thompson referenced Goodwin specifically; and Thompson had "concern[] that the shade was open because Mike Goodwin was at issue." (10RT 3906-3907.) Defense counsel reiterated the absurdity of the prosecutor's theory that any statement Thompson uttered during the years of litigation was relevant and admissible as an excited utterance. (10RT 3907.)

Defense counsel concluded the statement had no probative value, pointing out the danger the jury would be confused and would consider Thompson's statement as evidence of Goodwin's guilt due to his bad character, not of the hostility of the litigation. (10RT 3907-3908.)

The court ruled there were two theories upon which Thompson's statement was admissible. (10RT 3908.) First, if the statement was hearsay, it was admissible under Evidence Code section 1240 as a spontaneous statement. (10RT 3908-3910.) The court found, however, that the statement was not offered for its truth, so that it was non-hearsay evidence relevant to the issue of the level of hostility surrounding the litigation, corroborating "the People's argument and the People's witnesses that this litigation was so vitriolic; this litigation was so intense and caused such animosity and hatred between the parties, *that Mr. Thompson truly believed that because of the litigation he was involved in with Mr. Goodwin, that his life was in danger*." (10RT 3909 [emphasis added].)

The court pointed out Goodwin had disputed the people's theory the hostile litigation was the motive for the murders, citing specifically Goodwin's cross-examination of Cordell as to whether the

lawsuit was coming close to being settled prior to the murders. (10RT 3909-3910.) The court concluded, "That is a real critical issue in this case. What happened during the course of the litigation between these parties is basically the entire people's case." (10RT 3910.)

The court repeated, ". . .it is circumstantial evidence that the litigation got so out of hand and was so intense that *there was a realistic belief on the part of Mr. Thompson that his life was in danger*. . . .And that belief has to be based on some fact or facts." (10RT 3910-3911.) The court found the statement "extremely probative" and the prejudicial effect "nonexistent" because, "quite frankly, we have heard nothing but statements from the people's witnesses attributed to Mr. Goodwin that he allegedly wants to kill Mr. Thompson." (10RT 3911-3912.)

Upon defense request, the court agreed to instruct the jury the statement was not being admitted for its truth, but as circumstantial evidence tending to show how the victim perceived the tenor of the litigation.[57] (10RT 3912.)

The court "took issue" with defense counsel's statement Goodwin did not dispute the level of hostility. (10RT 3912-3913.) Defense counsel responded the dispute was whether there was a settlement, not that there was no hostility prior to that time. (10RT

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After Wilkinson testified, the parties discussed a limiting instruction again, and defense counsel objected to the court's proposal. (12RT 4697-4702.) The jury was not given any limiting instruction. The court instructed the jury only "[p]resence of motive may tend to establish guilt." (7CT 1975; 23RT 8715.)

3912-3913.) The court responded she saw those issues as one and the same, because if the lawsuit gave Goodwin motive for the murders, that motive would be somewhat vitiated if the parties were about to settle just prior to the murders. (10RT 3913.)

C. Standard of Review

A trial court's relevance determination is ordinarily reviewed under the abuse of discretion standard. (*People v. Jablonski* (2006) 37 Cal.4th 774, 821.) The court's discretion is limited by the factors set forth in §352.

D. Thompson's State of Mind Was Irrelevant to Prove Goodwin's Motive

The threshold requirement is relevance. (Evid. Code §210; *People v. Riccardi* (2012) 54 Cal.4th 758, 814.) "A hearsay objection to an out-of-court statement may not be overruled simply by identifying a non-hearsay purpose for admitting the statement. The trial court must also find that the non-hearsay purpose is relevant to an issue in dispute." (*People v. Armendariz* (1984) 37 Cal.3d 573, 585.) Similarly, Evidence Code § 1250, which authorizes the admission of out-of-court statements to prove the declarant's state of mind, allows such evidence only if the declarant's state of mind "is itself an issue in the action" or if the evidence "is offered to prove or explain acts or conduct of the declarant." (Evid. Code §1250, subd. (a)(1)-(2).) "[R]elevant evidence is evidence 'having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action.'" (*People v. Jablonski, supra*, 37 Cal.4th 774, 821 (*Jablonski*), quoting Evid. Code §210.)

Evidence that "tends 'logically, naturally, and by reasonable inference' to establish material facts such as identity, intent, or motive" is generally admissible. (*People v. Garceau* (1993) 6 Cal.4th 140, 177.) Although motive is not an element of any crime, "evidence of motive makes the crime understandable and renders the inferences regarding defendant's intent more reasonable." (*People v. Roldan* (2005) 35 Cal.4th 646, 707.) "'Evidence tending to establish prior quarrels between a defendant and decedent and the making of threats by the former is properly admitted ... to show the motive and state of mind of the defendant.'" (*People v. San Nicolas* (2004) 34 Cal.4th 614, 668, quoting *People v. Cartier* (1960) 54 Cal.2d 300, 311.)

Under Evidence Code section 1250, a victim's out-of-court statements expressing fear of a defendant are relevant only when the victim's conduct in conformity with that fear is in dispute. (*Jablonski, supra*, 37 Cal.4th 774, 819–820; *People v. Hernandez, supra*, 30 Cal.4th 835, 872; *People v. Ruiz*, *supra*, 44 Cal.3d 589, 608 (*Ruiz*); *People v. Armendariz, supra*, 37 Cal.3d 573, 585–586; *People v. Arcega* (1982) 32 Cal.3d 504, 526–527; *People v. Green* (1980) 27 Cal.3d 1, 23, fn. 9; *People v. Ireland* (1969) 70 Cal.2d 522, 529–530.) The Supreme Court has allowed such evidence when the victim's fearful state of mind rebuts the defendant's claim the death was accidental (*People v. Lew* (1968) 68 Cal.2d 774, 778–780), or provoked (*People v. Spencer* (1969) 71 Cal.2d 933, 945–946), or that the victim voluntarily disappeared (*People v. Crew* (2003) 31 Cal.4th 822, 840), or when the victim's state of mind is relevant to an element of an offense (*People v. Sakarias* (2000) 22 Cal.4th 596, 629).

In *Jablonski, supra*, 37 Cal.4th 774, for example, the

defendant's estranged wife and her mother were assaulted and killed inside their home. Both had made statements to third parties describing their fear of the defendant. The California Supreme Court noted that, unlike the wife's statements, the mother's stated fear of the defendant had been communicated to him and that this circumstance rendered the evidence relevant to whether the defendant premeditated the murders. (*Id*. at p. 820.) Although that Court held the mother's statement was not admissible to prove that she was actually fearful under Evidence Code section 1250, it also held that this evidence was relevant for the non-hearsay purpose of its effect on the defendant. The Court explained that the mother's stated fear of the defendant was relevant to show its effect on him because such evidence "had some bearing on his mental state in going to visit the women" and as to how the defendant "planned to approach the victims (by stealth as opposed to open confrontation) both of which, in turn, were relevant to premeditation." (*Jablonski, supra,* at p. 821.)

Two cases, however, suggest a possible conflict as to whether a decedent's out-of-court statements expressing fear of a defendant are relevant under Evidence Code §1250 to prove the defendant's motive. In *Ruiz*, *supra*, 44 Cal.3d 589, the Supreme Court rejected the contention the victims' fear of the defendant was admissible to prove the relationships between the defendant and the victims were troubled, thereby supplying defendant with a motive to kill them. "[A] victim's prior statements of fear are not admissible to prove the defendant's conduct or motive (state of mind). If the rule were otherwise, such statements of prior fear or friction could be

routinely admitted to show that the defendant had a motive to injure or kill." (*Id*. at p. 609; see also *People v. Noguera* (1992) 4 Cal.4th 599, 622.) But a Court of Appeal decision in the O.J. Simpson case held the victim's state of mind and conduct were relevant to prove the defendant's motive in a wrongful death civil action because "[t]he proffered evidence explained how Nicole was feeling about Simpson, tended to explain her conduct in rebuffing Simpson, and this in turn logically tended to show Simpson's motive to murder her." (*Rufo v. Simpson* (2001) 86 Cal.App.4th 573, 594 (*Simpson*).) Without this evidence, "the jurors might believe there was nothing in the relationship between Simpson and Nicole which would precipitate a murder." (*Id.* at p. 595.)

Neither *Ruiz* nor *Simpson* cited any authority for their holdings concerning the relevance of a decedent victim's fear to prove a defendant's motive. Moreover, nothing in Evidence Code section 1250 expressly prohibits or allows the admission of such evidence to prove motive. However, the Assembly Committee on the Judiciary's comment to the statute notes that a decedent's statements describing "threats or brutal conduct by some other person" cannot be used to "prove the truth of the matter stated" or "as a basis for inferring that the alleged threatener must have made threats." (Assem. Com. on Judiciary com., reprinted at 29B pt. 4 West's Ann. Evid. Code (1995 ed.) foll. §1250, p. 282 (West's Ann. Evid. Code).)

In *Riccardi, supra*, the California Supreme Court reconciled the different conclusions reached by *Ruiz* and *Simpson* by identifying one additional foundational circumstance — whether the defendant

was aware of and reacted to the decedent victim's fearful state of mind and the victim's actions in conformity with that fear. *Riccardi* held this circumstance is crucial in determining a relevant connection between a defendant's motive and the victim's state of mind. (*People v. Riccardi, supra*, 54 Cal.4th 758, 818.)

In *Ruiz*, the three victims made statements to third parties they disliked the defendant, and were "frightened" and " 'scared to death'" of him. One victim reported the defendant had assaulted him. (*Ruiz, supra*, 44 Cal.3d 589, 600, 602.) Another victim told third parties she intended to move out of the defendant's household and warned, "'If you don't see me or hear from me in two weeks, I won't — I will be dead' " and that if she or her son " 'show up missing, raise hell with the police.' " (*Id*. at p. 602.) Unlike *Jablonski*, the Supreme Court's decision in *Ruiz* contained no suggestion the defendant was aware of these statements or that similar statements had been communicated to him. There also was no indication whether the defendant was aware of actions the victims had taken in conformity with their fears. In such circumstances, the victims' fear of the defendant, standing alone, was not relevant to prove anything about his conduct or state of mind.

In *Simpson*, the Court of Appeal described a wealth of evidence establishing the defendant was aware of the victim's fear – which explained her rejection of him – and was motivated by that rejection. (*Simpson, supra,* 86 Cal.App.4th at pp. 582–583, 587–590.) That awareness generated the defendant's anger and motive to kill, and thereby made relevant the evidence of fear. (*Id.* at pp. 593–594.)

Here, there is no foundational evidence suggesting

Goodwin was aware Thompson was fearful of him and took actions in conformity with Thompson's fear. Moreover, unlike *Jablonski* and *Simpson*, the evidence fails to reveal that Goodwin reacted to Thompson's fear and was motivated by it. There is no evidence Goodwin had any contact with Thompson after the litigation started; rather, Goodwin's contacts were indirect, though attorneys. The evidence establishes that by March of 1988, the situation had begun to de-escalate as the parties negotiated a settlement of the lawsuit. Therefore, Thompson's statement describing his fear of Goodwin – in the absence of any actions on his part in conformity with that fear, and the absence of any evidence Goodwin was aware of any actions by Thompson and responded to them – was irrelevant.

Under *Riccardi*, the trial court erred by admitting evidence of Thompson's state of mind, offered under Evidence Code §1250, because the evidence was irrelevant to Goodwin's motive. (*People v. Riccardi, supra*, 54 Cal.4th 758, and cases cited therein.) Those statements that go no further than to indicate the victim's fear of the defendant, even if known by a defendant, generally cannot be admissible unless they have some relevant effect on the defendant's behavior. (See *Ruiz, supra*, 44 Cal.3d 589, 608; see also *Commonqwealth v. Qualls* (Mass. 1997) 680 N.E.2d 61, 65 ["A murder victim's statement that he feared the defendant, even if made known to the defendant, sheds no light on whether the defendant had a motive to kill him, and therefore is not admissible in the defendant's trial for murder"].)

E. The Statement Related by Wilkinson Was Hearsay and Did Not Fall Within the Spontaneous Utterance Exception of Evidence Code §1240

Evidence Code §1240 creates a hearsay exception for statements that "purport to narrate, describe, or explain an act, condition, or event perceived by the declarant." The theory behind all exceptions to the hearsay rules is that certain conditions create an indicia of reliability. Courts interpreting §1240 agree there must be an occurrence startling enough to produce nervous excitement and render the utterance spontaneous and unreflecting. (See e.g. *People v. Garcia* (1986) 178 Cal. App. 3d 814.) The statement must relate to the circumstances of the occurrence preceding it. (*People v. Ramirez* (2006) 143 Cal. App. 4th 1512, citing *People v. Poggi* (1988) 45 Cal.3d 306.)

Thompson's statement, "Close the window, close the drapes, Goodwin could have a sniper out there right now" did not relate to any circumstance other than an open window. Goodwin and Thompson had been engaged in heated and vitriolic litigation for over three years at the time Thompson allegedly made the statement. There was no indication that on the day in question a hearing was held, a phone call was received, or any unusual activity pertaining to the litigation had occurred. Not all statements Thompson uttered during the pendency of the litigation can be characterized as "spontaneous." Jackson failed to produce any evidence that prior to that date Thompson had insisted on all windows and drapes being closed. There was no evidence at all to suggest Thompson's statement was in response to anything unusual so as to give the hearsay statement any

indicia of reliability. As such, the court erred in deeming it an "excited utterance" simply because a witness testified Thompson was upset. The specific exception carved out of the ban on hearsay is very narrow. The admission of the testimony violated the due process clause and the Confrontation Clause of both the State and Federal Constitutions.

F. The Court's Error Prejudiced Goodwin Because It Improperly Suggested to the Jury Goodwin Was the Killer Because Thompson was Afraid Goodwin Was Going to Hire a "Sniper" to Kill Him

The error was so prejudicial it denied Goodwin fundamental fairness under the Fourteenth Amendment to the United States Constitution; therefore, the issue must be reviewed under the *Chapman* standard, 386 U.S. 18. *Chapman* held a finding of a federal constitutional error at trial requires reversal unless the government can "prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." (*Id*. at p. 26.) This standard places a heavy burden on the government to show the guilty verdict "was surely unattributable to the error." (*Sullivan v. Louisiana* (1993) 508 U.S. 275, 279.) Respondent cannot meet that burden.

It is important to note the government cannot meet the heavy burden under a *Chapman* analysis by showing the existence of admissible, even strong, evidence against defendant. In fact, in *Chapman*, the U.S. Supreme Court found that the government failed to meet its burden even with overwhelming evidence against the defendants. A brief review of the facts of *Chapman*, found in the antecedent opinion of *People v. Teale* (1965) 63 Cal.2d 178, illustrates the

point.

In *Chapman*, the victim was killed by a weapon similar to a gun purchased by Chapman six days before the murder. A check signed by Chapman was found next to the victim's body. Blood matching the victim's type was found splattered all over Chapman's car and clothes. Hair matching that of the victim, fiber matching that of his shoes, and paint from the shoes were all found in the car. One of the co-defendants confessed the killing to a cellmate. Finally, Chapman's statement to the police that she was in San Francisco at the time of the murder was impeached by her signature on a registration form at a local motel not even two hours after the killing. (*Teale, supra,* 63 Cal.2d 178, 184-185.) Yet, despite all the above evidence, which was properly admitted, the Supreme Court reversed the judgment. (*Chapman, supra*, 386 U.S. 18, 24.)

In contrast, the evidence of Goodwin's involvement in the Thompson murders was non-existent. According to witnesses, two men committed the crimes. The men may have been black or white. The killers were never identified. The jury heard no evidence that connected Goodwin to the murders – only evidence that Goodwin hated Thompson and threatened to destroy him. Under the facts of this case, the impact of the hearsay evidence Thompson had expressed fear of Goodwin was extraordinarily damaging, especially since the fear expressed was that Goodwin might have hired a sniper to kill Thompson. The "hit man" theory was the prosecutor's case.

The jury foreman, Mark Matthews, summed up the damage resulting from Wilkinson's testimony:

> Regarding the statement of Nancy Wilkinson wherein she stated Mickey Thompson said Goodwin could have a sniper outside: The jurors openly discussed that this statement was important in that it showed Thompson was in fear and that Goodwin was the source of that fear. Thompson had directly mentioned Goodwin and a sniper. This was a statement of fear and specifically Thompson being fearful Goodwin could possibly kill him and Trudy. . .. Wilkinson was one of fifteen witnesses who testified about threats. She was one of several witnesses regarding the threats that we deemed credible.

(8CT 2081.) The irrelevant evidence, therefore, was used by the jury to support their verdict Goodwin was responsible for the murders. Goodwin's convictions must be reversed.

VII. THE TRIAL COURT PREJUDICIALLY ERRED BY PERMITTING THE PROSECUTOR TO PRESENT IRRELEVANT EVIDENCE OF GOODWIN'S BAD CHARACTER IN ORDER TO OBTAIN HIS CONVICTION

A. Overview

In *United States v. Kimsey* (9th Cir. 2011) 668 F.3d 691,"[t]he government characterized [the defendant] as a charlatan. 'Whether that is so or not, our legal system does not punish people simply because they have been proven unscrupulous in the past and are continuing to engage in dubious activities. That is why the government may not . . . prove that the defendant is a bad person, simply to show that in all likelihood he acted criminally on the occasion at issue.' *United States v. Martinez* (9th Cir. 1999) 182 F.3d 1107, 1111. Rather, the legal system punishes people for proven violations of specific laws." (*Id*. at p. 692.)

Despite this fundamental rule of evidence, over defense objection the court permitted the prosecutor to introduce multiple instances of irrelevant, highly prejudicial evidence of Goodwin's bad character in the form of threats he made to people other than Thompson and his "fraudulent" financial dealings.

The trial court's rulings were reversible error for several reasons. First, the evidence was inadmissible under Evidence Code §1101. Second, the evidence was inadmissible under Evidence Code §352. And third, the evidence was improper character evidence admitted to show Goodwin had a criminal propensity, which violated the due process clause of the federal constitution. The prior bad acts evidence violated Goodwin's right to a fair trial because it allowed the

jury to find him guilty of two murders because of the person he was, rather than what he actually did. (*McKinney v. Rees* (9th Cir. 1993) 993 F.2d. 1378, 1385). The jurors interpreted the threats to individuals other than Thompson as proof Goodwin "lacked a moral compass" and was the kind of guy who would engage in criminal conduct. Therefore, Goodwin's murder convictions must be reversed because he was deprived of his federal constitutional rights to due process and a fair trial under the Fifth and Fourteenth Amendments. (*Ibid*.)

B. Procedural History

On November 7, 2006, Jackson filed points and authorities urging admission of Goodwin's prior conduct pursuant to Evidence Code section 1101, subdivision (b). (7CT 1822-1828.) Specifically, Jackson sought to prove Goodwin "engaged in a pattern of criminal activity wherein he threatened and conducted surveillance upon Thompson, Phillip Bartinetti and Jeffrey Coyne." (7CT 1822.)

Jackson argued the evidence regarding Bartinetti and Coyne was relevant and admissible under Evidence Code section 1101, subdivision (b), because it tended to establish circumstantially that Goodwin hired the two gunmen who killed the Thompsons, citing the "very volatile and emotionally charged civil litigation" that compelled Goodwin to file personal and corporate bankruptcy. (7CT 1823.) Jackson argued Goodwin blamed his legal problems on Thompson, Bartinetti and Coyne. (7CT 1823.) Bartinetti was Thompson's attorney in the civil suit against Goodwin, and Coyne was the bankruptcy trustee in the corporate bankruptcy. (7CT 1823.)

Jackson contended Goodwin had engaged in a "pattern of

threats and surveillance" against Thompson, Bartinetti and Coyne, but did not explain the relevance of the material pertaining to Bartinetti and Coyne. (7CT 1826-1828.)

During the proceedings on November 7, 2006, defense counsel objected to Linkletter's testimony he overheard Goodwin say – on the day he entered into the contract with Thompson – he intended to rip Thompson off. (7RT 3006.) Counsel objected pursuant to Evidence Code §1101 the testimony was irrelevant "bad character evidence dressed up as some sort of proof of motive. It's basically saying Michael's a jerk and a crook," and was offered to prove conduct and conformity with the character. (7RT 3006, 3008, 3010-3011.) The prosecutor argued the testimony "goes to motive" and "shows the bad faith of this lawsuit and the hatred that was generated by the lawsuit right from the beginning." (7RT 3007.)

Defense counsel further objected pursuant to Evidence Code §352 Linkletter's testimony had nothing to do with the lawsuit because the alleged statement was made prior to the lawsuit, at the time Goodwin and Thompson entered into the partnership agreement. (7RT 3008, 3010.) The prosecutor argued he was offering the testimony "to show what the defendant's state of mind was in making those statements," denying he was using it to prove conduct in conformity with character. (7RT 3009.)

After pointing out Goodwin's threat was to Linkletter – not Thompson – the court ruled:

> I don't see it as character evidence. I see it as relevant and an admission on the part of Mr. Goodwin.

> And it tends to show his state of mind with respect to his business dealings with Mr. Thompson. In addition, the fact that he makes a threat, allegedly, to Mr. Linkletter, I can't imagine that that's being offered by the people as 1101 evidence to prove since he made the threat to someone on that occasion, therefore, he made a threat on – with respect to this occasion, the 1987/'88 litigation.
>
> ****
>
> But it seems to me that the defendant's statements prior to entering into the contract with the victim overheard by Mr. Linkletter is certainly relevant with respect to his state of mind, which if one were to believe the statements that he fully intended to rip off Mr. Thompson, which is similar to the claim, I guess, in the litigation that was pending at the time.
>
> So I do see its relevance and I don't see it as too prejudicial. I don't think the people are offering it to prove conduct in conformity with a character trait. I think they're offering it for a permissible purpose that does not violate 1101(b).

(7RT 3009, 3011.) Linkletter then testified he heard Goodwin say, "We're going to screw Mike out of everything" and engaged in a 45-minute diatribe about ripping Thompson off. (7RT 3027-3028.) At the end, Goodwin said to Linkletter, "Stew, if you ever say a word about this conversation to anybody, I will fucking kill you." (7RT 3028-3029.)

Defense counsel objected to bankruptcy trustee Coyne's testimony under Evidence Code §1101, subdivision (b). (7RT 3072.) The prosecutor's position was that Goodwin had a vitriolic relationship with Thompson and those who stood in his stead, legally and

otherwise, and this vitriol was relevant to prove Goodwin's motive and his hatred for Thompson. (7RT 3072-3073.) The prosecutor argued Coyne was the custodian appointed by the bankruptcy trustee and was going after some of the same assets Thompson sought. (7RT 3072-3073.)

Coyne was allowed to relate an incident during a meeting with Goodwin in the months prior to the Thompson murders where Goodwin "looked [him] dead in the eye and with tremendous anger said, "You better lighten up or things will get bad." (10RT 4067.) Goodwin also said, "If you fuck up my life, I'll fuck up yours." (10RT 4068.) Coyne also told the jurors he was so afraid of Goodwin he got a bullet-proof vest and a concealed weapons permit. Jackson offered Coyne's testimony to show the "hostility of the litigation." (9RT 3617.)

Jackson theorized that threats to Thompson's business associates were the equivalent of threats to Thompson. This theory was inaccurate: Thompson did not hire Coyne, and Coyne was not a member of Thompson's legal team; rather; Coyne was a court-appointed trustee for the Goodwin bankruptcy, and Thompson was but one of many creditors. Coyne himself testified he had the same fiduciary duties to all Goodwin's creditors and did not work on Thompson's behalf. (10RT 4057.)

Defense counsel objected to Penn Weldon's testimony pursuant to Evidence Code § 1101, subdivision (b). (7RT 3072.) Again, the prosecutor's position was that Goodwin had a vitriolic relationship with Thompson and those who stood in his stead, legally and otherwise, and this vitriol was relevant to prove motive to kill. (7RT

3072, 3080.) Defense counsel raised relevancy objections to the prosecutor asking Weldon about Bartinetti's address and getting dirt on him. (7RT 3075.)

Defense counsel objected to Lance Johnson's testimony he was at a court hearing eight years after the Thompsons were murdered, and he heard Goodwin say to Campbell, "You'll die, bitch." (12RT 4703-4704, 4708-4709.) The court ruled this statement an admission by Goodwin tending to show either he was responsible for the Thompsons' deaths, or because Goodwin believed Campbell was responsible for setting him up for prosecution, he threatened her, demonstrating consciousness of guilt. (12RT 4709.) The court found the prejudicial effect minimal "because this whole case has been basically statements of the defendant." (12RT 4709.)

Regarding Goodwin's threat to Coyne, the court restated the prosecutor's offer of proof as being that Goodwin made certain statements which circumstantially tended to indicate that Goodwin was going to cause harm to Thompson and did, in fact, cause the death. (7RT 3089.) When defense counsel attempted to clarify, the court stated:

> We're talking about statements that were made to everyone, all of the people's witnesses, including Penn Weldon. I have no problem with Mr. Weldon testifying to the conversation. I have no problem with Mr. Weldon indicating that a request for an address was made by Mr. Goodwin.

(7RT 3089.)

C. Standard of Review

"On appeal, the trial court's determination of this issue, being essentially a determination of relevance, is reviewed for abuse of discretion. [Citations.]" (*People v. Kipp* (1998) 18 Cal.4th 349, 369.)

D. Evidence of a Person's Character or Trait of his Character Is Inadmissible When Offered To Prove his Conduct on A Specific Occasion, and Evidence of Other Crimes Should be Scrutinized With Great Care and Received Only When the Connection With the Crime Charged is Clearly Perceived

The trial court prejudicially erred by allowing the prosecutor to present testimony attacking Goodwin's character in violation of Evidence Code §1101.

With statutory exceptions inapplicable here (Evid. Code §§ 1108 [sex offenses], 1109 [domestic violence, elder abuse]), "[e]vidence of crimes committed by a defendant other than those charged is inadmissible to prove criminal disposition . . . ." (*People v. Lenart* (2004) 32 Cal.4th 1107, 1123.) The inherent danger in using other-crimes evidence to prove a fact of a charged offense is that "[i]nevitably, it tempts 'the tribunal . . . to give excessive weight to the vicious record of crime thus exhibited, and either to allow it to bear too strongly on the present charge, or to take the proof of it as justifying a condemnation irrespective of guilt of the present charge.'" [Citations.] (*People v. Nottingham* (1985) 172 Cal.App.3d 484, 495.)

Evidence Code §1101 codifies the rule that protects a defendant from being judged guilty of present charges because of his

or her prior acts.[58] (*People v. Ewoldt* (1994) 7 Cal.4th 380, 393.) "The admissibility of other crimes evidence depends on (1) the materiality of the facts sought to be proved, (2) the tendency of the uncharged crimes to prove those facts, and (3) the existence of any rule or policy requiring exclusion of the evidence. [Citation.]" (*People v. Carpenter* (1997) 15 Cal. 4th 312, 378-379.) "Evidence of uncharged offenses is so prejudicial that its admission requires extremely careful analysis. Since substantial prejudicial effect is inherent in such evidence, uncharged offenses are admissible only if they have substantial probative value." (*People v. Ewoldt, supra*, 7 Cal.4th at 404, original italics; citations, internal quotations and brackets omitted.) "Because this type of evidence can be so damaging, '[i]f the connection between the uncharged offense and the ultimate fact in dispute is not clear, the evidence should be excluded.' [Citation.]" (*People v. Daniels* (1991) 52

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Evidence Code § 1101 provides in pertinent part:

(a) Except as provided in this section and in Sections 1102, 1103, 1108, and 1109, evidence of a person's character or a trait of his or her character (whether in the form of an opinion, evidence of reputation, or evidence of specific instances of his or her conduct) is inadmissible when offered to prove his or her conduct on a specified occasion.

(b) Nothing in this section prohibits the admission of evidence that a person committed a crime, civil wrong, or other act when relevant to prove some fact (such as motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident, or whether a defendant in a prosecution for an unlawful sexual act or attempted unlawful sexual act did not reasonably and in good faith believe that the victim consented) other than his or her disposition to commit such an act."

Cal.3d 815, 856; *People v. Butler* (2005) 127 Cal.App.4th 49, 60.)

The "hostility of the litigation" was not clearly connected to the Thompson murders. Even if hostility provided a motive to kill Thompson, hostility toward people other than Thompson did not prove anything related to the murders, and did not tend to prove Goodwin's identity as a co-conspirator. There was no relevant *modus operandi* to be derived from this evidence. The reasoning would have to be the threats established a pattern proving that after Goodwin threatened people, they were murdered. Only the Thompsons were murdered after Goodwin purportedly made threats, so threats to others did not prove a distinctive pattern. Threats against third parties did not prove motive to kill Thompson, or opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident within the meaning of §1101, subdivision (b).

The threat to Coyne was not the only instance of inadmissable character evidence. Lance Johnson was allowed to testify about alleged threats made to Campbell eight years after the murders. This hearsay testimony should have been excluded as there was no connection to the crime charged, and the potential for undue prejudice from such unreliable and irrelevant testimony was clear. Johnson testified he was present during a court proceeding in 1996 when he overheard Goodwin say to Campbell either "You'll die bitch," or "I'll get you, too." Campbell, the alleged target of this threat, did not testify, and she did not die. There was no connection to the murder itself and the comment did not speak to motive or intent as required by the Evidence Code. Rather, the comment served only to fuel the

prosecution theme Goodwin was a bad man and ought to be convicted based on his bad character, not any real evidence against him. The prior bad "act" was the threat to Thompson's sister eight years after the murders. Since the connection between the acts and the crime charged was not clear, the doubt should be resolved in favor of the accused. (*People v. Enos* (1973) 34 Cal.App.3d 25, 34 citing *People v. Kelly* (1967) 66 Cal.2d 232, 239). The principle is consonant with that stated in Evidence Code §352 that the court in its discretion may exclude evidence if its probative value is substantially outweighed by its prejudicial effect. (*People v. Enos, supra* at 34).

Here, the comment – which was not even clear in its content – did not prove any issue. Numerous witnesses testified Goodwin made threats against Thompson while Thompson was alive. The alleged threat to Thompson's sister eight years after his murder while the sister is alive and unharmed only served to cast Goodwin in a bad light and "prove" he is the kind of guy who would hire someone to commit murder.

Several people had already testified about Goodwin's comments and conduct that amount to evidence of bad character in the guise of showing "hostility" surrounding a lawsuit and dislike of the victims. Goodwin's character was not put in issue by the defense. Admitting this comment was error. The impact of this testimony cannot be overstated, as evidenced by the jury foreman's declaration. (8CT 2078-2082.)

The court prejudicially allowed Jackson to cast Thompson as the Great American Hero, while at the same time painting Goodwin

as "the kind of guy who would commit this crime" – precisely the evil Evidence Code §1101 was intended to prevent.

E. Even If The Evidence Had Some Minimal Relevance, The Relevance Was Outweighed By Its Prejudicial Effect

Evidence Code §352 gives a court discretion to exclude relevant evidence when its admission will necessitate an undue consumption of time or "create substantial danger of undue prejudice, of confusing the issues or of confusing the jury." The California Supreme Court has held evidence of uncharged misconduct is so prejudicial that its admission requires a careful analysis and it will be admitted only if it has substantial probative value. (*People v. Lewis* (2001) 25 Cal.4th 610, 637.)

Evidence of prior convictions or bad acts may create a risk of grave harm to a criminal defendant. (*People v. Rollo* (1977) 20 Cal.3d 109, 119; *People v. Ewoldt, supra,* 7 Cal.4th at p. 380, 404; *People v. Lewis*, *supra*, 25 Cal. 4th at p. 610, 637; *Old Chief v. United States* (1997) 519 U.S. 172 [117 S.Ct. 644].) Holding the prosecutor could not admit evidence to prove a prior conviction when the defendant offered to stipulate to it, the United States Supreme Court recognized that evidence of prior bad acts, although relevant, creates a risk the jury will convict for crimes other than those charged – or, uncertain of guilt, convict anyway because a bad person deserves punishment. This risk "creates a prejudicial effect that outweighs ordinary relevance." (*Id.* at 181, quoting *United States v. Moccia* (1st Cir. 1982) 681 F.2d 61, 63.) Likewise, in *People v. Ewoldt, supra*, 7 Cal. 4th 380, the California Supreme Court noted uncharged conduct has a substantial prejudicial effect and such

evidence is admissible only if it has substantial probative value. (*Id*. at 403.) The prosecutors made no such showing here. The harm of admitting Goodwin's bad acts is the jury believed he deserved punishment, regardless of his guilt in this case. The *Ewoldt* court also noted the potential for prejudice is heightened where, as here, the uncharged prior acts did not result in criminal convictions, because of the likelihood of confusing the jury. (*Id*. at p. 405.)

All of the evidence of threats to third parties should have been excluded because the threats did not result in convictions; they did not involve actual violence against anyone; they were cumulative on the issue of intent and motive; they confused the jury; and Goodwin's threats were dissimilar to the charged offenses in that nobody died after Goodwin uttered them. The bad acts were particularly cumulative on the issue of Goodwin's motive. As the court put it: "When you say it bears no relevance to the murder, I have to question what we're doing here with all the witnesses that are going to be called. I mean, the People's case rests primarily on the fact that they believe that there was a motive on the part of Mr. Goodwin to do harm to the Thompsons, or Mr. Thompson, because of a business dispute gone bad leading to a judgment." (7RT 3008-3009.) The prosecutor's stated reasons for admitting that highly prejudicial evidence were merely pretexts for getting a large quantity of highly prejudicial bad character evidence in front of the jury. (*McKinney v. Rees, supra*, 993 F.2d 1378, 1385.)

For these reasons, the bad character evidence was inadmissible under §1101 because the potential for prejudice

outweighed the limited probative value under § 352.

F. The Prejudicial Evidence Rendered Goodwin's Trial Fundamentally Unfair

"An important element of a fair trial is that a jury consider only relevant and competent evidence bearing on the issue of guilt or innocence. [Citation.] (*Bruton v. United States* (1968) 391 U.S. 123, 131, fn. 6.) Both California and federal courts have recognized the admission of prejudicial evidence might render a defendant's trial fundamentally unfair. (*People v. Albarran* (2007) 149 Cal.App.4th 214, 232; *McKinney v. Rees, supra,* 993 F.2d 1378.) In *McKinney*, the Ninth Circuit held where contested "other acts evidence" was not "relevant to an essential element in the prosecution's case" and its erroneous admission "rendered [the defendant's] trial fundamentally unfair [,]" due process may require reversal of a state conviction. (*Id*. at p. 1380; cf. *People v. Catlin* (2001) 26 Cal.4th 81, 123 [no constitutional violation where other crime evidence was properly admitted under state law]; *Dudley v. Duckworth* (7th Cir. 1988) 854 F.2d 967, 970 [due process violated if prejudicial effect of evidence so far outweighs probative value that defendant is denied fair trial].)

Here, the evidence of threats against third parties was so highly prejudicial and of such minimal probative value that it rendered the trial fundamentally unfair, violating Goodwin's due process rights. The prosecutor exploited the inadmissible evidence in argument:

> You certainly can't feel sorry for [Goodwin] because he had a judgment entered against him. He brought this on himself. He told Stewart Linkletter from day one, I'm going to cheat that guy out of everything he's got. I intend

> to rip him off. And, by the way, if you open your mouth about this, kiddo, I'll have you killed or I'll kill you too Stewart Linkletter. That's how he started his good faith dealings with Mickey Thompson.

(RT 8764-8765.)

"The rule excluding evidence of criminal propensity is nearly three centuries old in the common law." (*People v. Alcala* (1984) 36 Cal.3d 604, 630-631: *People v. Ewoldt, supra*, 7 Cal.4th 380, 392 [rule excluding disposition evidence derives from early English law].) In *McKinney v. Rees, supra*, 993 F.2d 1378, the Ninth Circuit explained that the prohibition against use of character "evidence is based on a fundamental conception of justice and the community's sense of fair play and decency." (*Id*. at p. 1384 [internal quotations and citations omitted].) Other federal circuit courts have held that the admission of other crimes evidence to show propensity or character, in the absence of an appropriate instruction, violates due process. (*Panzavecchia v. Wainwright* (5th Cir. 1981) 658 F.2d 337, 341.)

To determine whether an evidentiary ruling denied a defendant due process of law, "the presence or absence of a state law violation is largely beside the point" because "failure to comply with the state's rules of evidence is neither a necessary nor a sufficient basis" for granting relief on federal due process grounds. (*Jammal v. Van de Kamp* (9th Cir. 1991) 926 F.2d 918, 919-920.) Rather, under *Chapman v. California, supra*, 386 U.S. 18, 24, reversal is required unless the State can prove beyond a reasonable doubt the error did not contribute to the verdict. (See *People v. Boyette* (2002) 29 Cal.4th 381,428.)

The question at trial was whether Goodwin arranged a contract "hit" on the Thompsons. Goodwin's defense was he was falsely accused and was completely innocent of the crimes. The evidence of Goodwin's threats to third parties and his "guilt"of other crimes confused the jury; in fact, the jury was misled by the evidence for precisely the reason such evidence is disallowed, as explained by the jury foreman:

> We discussed during the deliberations the character evidence that had been offered against Michael Goodwin. The tone of the deliberation in this regard was that Michael Goodwin lacked a "moral compass." The evidence that was offered by certain witnesses clearly painted Mickey Thompson as a good and honorable fellow and Michael Goodwin as just the opposite. The bad character of Michael Goodwin along with his ability to take everything he did (including other criminal activity) to an extreme level was very evident from the testimony of these witnesses. The jurors went over all of this in the deliberation room and we could not escape the reality that, coupled with his overtly stated hatred of Mickey Thompson, this guy was the kind of guy who was capable of coordinating this event.

(8CT 2082.) Respondent, therefore, cannot can prove beyond a reasonable doubt that the error did not contribute to the verdict. This was a prosecution based on the lace fabric of suspicion and conjecture, made solid for the jurors by bad character evidence. Had that prejudicial evidence not been admitted, Goodwin would have been acquitted. His convictions must therefore be reversed, regardless of whether the prejudice standard for federal constitutional or state law error is applied.

VIII. THE TRIAL COURT PREJUDICIALLY ERRED BY PERMITTING THE PROSECUTOR TO PRESENT IRRELEVANT EVIDENCE OF THOMPSON'S GOOD CHARACTER

A. Overview

In an attempt to prejudice the jury against Goodwin, the prosecutors utilized beautiful photographs of Thompson and his wife, and Thompson as a young man posed in front of the car in which he broke speed records, grinning broadly. The prosecutor also elicited testimony about what a great person Thompson was, how much he loved his wife, and how kind and generous he was to others. None of this evidence was relevant, and all of it was highly prejudicial to Goodwin, requiring reversal of his convictions.

B. Relevant Facts

On the first day of the prosecution case, just following opening statements, Dixon displayed on the projector a nice family photograph of the Thompsons sitting with their dog, surrounded by flowers, smiling happily. (6RT 2786; People's Exhibit 1.) With that photograph as a backdrop, Dixon began questioning the first witness, Bill Wilson, about his relationship with the Thompsons, asking if Wilson knew them personally during the period 1984 through 1988. (6RT 2788.)

Over defense objection, Dixon elicited Wilson's testimony Mickey Thompson appeared to care deeply for his wife. (6RT 2789.) The first time the Wilsons met the Thompsons, all Mickey talked about was how much he loved Trudy and how she was the light of his life.

(6RT 2789-2790.) Mickey bought Trudy a "10" necklace with diamonds. (6RT 2790.) Wilson spoke of how Thompson "just glowed," and was obviously tremendously in love with Trudy. (6RT 2790.)

Dixon and Jackson left the Thompson family photograph on the projector for the jury to view during the entire first day's proceedings. (7RT 3915.) Defense counsel objected, pointing out it was misconduct for the prosecutor to display a sympathetic photograph of the victims, and asked the court to admonish the jury. (7RT 3014-3016.) The court refused. (7RT 3016.) Defense counsel argued it was prejudicial to Goodwin if the defense had to object to the photograph in the presence of the jury because "it would have been quite obvious that we objected to this nice family photo being up in front of the jury." (7RT 3016-3017.)

While questioning Greg Smith, the director of Anaheim's convention sports and entertainment department, Dixon asked whether, when selecting "partners" to work with him on events, Smith considered ease of dealing with them as a factor. (10RT 3971.) A defense objection was sustained. (10RT 3971.) Dixon continued to ask whether the partners were a factor in his plans. (10RT 3971.) Smith listed cooperation as a factor. (10RT 3972.) Over defense objections, Smith testified Thompson was very cooperative and was "a very easy, very honorable man to deal with." (10RT 3972.)

The prosecutor asked Bartinetti whether he had come to know Thompson as more than just a client. Bartinetti said he had, and, over a relevance objection, the prosecutor inquired how Bartinetti would describe his relationship with Thompson. (8RT 3386.) Bartinetti

testified he developed a very good friendship with Thompson and saw him socially. (8RT 3386.)

At the bench, defense counsel argued Jackson was eliciting irrelevant good character evidence that served only to inflame the jurors against Goodwin. (8RT 3386-3387.) The prosecutor claimed the testimony was relevant to show Bartinetti was more than a legal mouthpiece for Thompson, but a close friend, and Goodwin was attacking Bartinetti personally – not just because Bartinetti worked at the law firm representing Thompson, but because the two were "best friends." (8RT 3387.)

The court told Jackson to desist pending a ruling on §1101(b) evidence, but Jackson said he wanted to close with where and when Bartinetti had learned Thompson was dead. (8RT 3387-3388.) The court overruled defense relevance and §352 objections. (8RT 3388.)

Jackson then dramatically elicited Bartinetti's testimony he had known Thompson just short of three and a half years when Thompson was killed. (8RT 3388.) Over more defense objections, Bartinetti testified he was getting ready to go to work that morning when he received a phone call from Campbell advising him the Thompsons had been murdered. (8RT 2288-3389.)

C. Standard of Review

This error is reviewed for abuse of discretion. (*People v. Kipp, supra*, 18 Cal.4th 349, 369.)

D. Applicable Law

Evidence Code §350 provides no evidence is admissible unless it is relevant. Relevant evidence "means evidence having any

tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." (Evid. Code § 210.)

While there is no universal test for relevance, the general rule in criminal cases is whether the evidence "tends logically, naturally or by reasonable inference to establish any fact material for the prosecution or to overcome any material matter sought to be proved by the defense. . . Evidence is relevant when no matter how weak it may be, it tends to prove the issue before the jury." (*People v. Slocum* (1975) 52 Cal.App.3d 867, 891. A court lacks discretion to admit irrelevant evidence. (*People v. Benavides* (2005) 35 Cal.4th 69, 90.)

Evidence Code § 352 provides:

> The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury. The greater the probative value of the evidence, the greater must be the undue prejudice in order to justify exclusion.

A court has broad discretion under §352 to determine whether the probative value of evidence is outweighed by undue prejudice, confusion or consumption of time, and to exclude it. (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1124; *People v. Williams* (1997) 16 Cal.4th 153, 213.)

Error in admitting irrelevant evidence may result in a due process violation if it renders the trial fundamentally unfair. (*Estelle v. McGuire, supra,* 502 U.S. 62, 70; *Spencer v. Texas* (1967) 385 U.S. 554, 563.)

E. The Court Abused its Discretion by Allowing the Prosecutor to Elicit Irrelevant, Highly Prejudicial Testimony Thompson Was Regarded as a "Nice Guy" Who was Widely Liked

Evidence of the character of the victim is admissible under Evidence Code §1103, subdivision (a) if offered (1) "by the defendant to prove the conduct of the victim in conformity with the character or trait of character" or (2) "by the prosecution to rebut evidence adduced by the defendant under paragraph (1)." (*People v. Gurule* (2002) 28 Cal.4th 557, 623.) There is no justification for admitting evidence of good character under §1103. The evidence was irrelevant, and it was offered to make Goodwin look like a monster.

The trial court abused her discretion by allowing Jackson to elicit the irrelevant, highly prejudicial testimony Thompson was a "nice guy." The question is whether Thompson's status as a popular sports figure known for his friendliness and generosity was relevant to prove Goodwin's responsibility for his murder. The evidence was irrelevant since Thompson's popularity and witnesses' high regard for him did not tend to prove or disprove the disputed fact – whether Goodwin arranged to have him killed.

It is hard to imagine more prejudicial facts than that Goodwin – who was known for being loud, obnoxious and abusive – was allegedly responsible for the brutal murders of two such beloved individuals. This was a case based solely on motive, and Jackson constantly emphasized how wonderful the Thompsons were while improperly attacking Goodwin's character throughout the 35-day trial.

The court offered no reason for admitting this highly prejudicial testimony.

This is not an abuse of discretion case where the appellate court simply looks to see whether the trial court's ruling was arbitrary and capricious. (See *People v. Linkenauger* (1995) 32 Cal.App.4th 1603, 1614.) Unlike *Linkenauger*, the court did not carefully, methodically, and expressly articulate her thought processes in weighing potential prejudice against probative value of the good character evidence – the judge did not explain her rulings at all.

Courts have emphasized that the "arbitrary and capricious"pejorative boilerplate is misleading, since it implies that in every case where a court is reversed for abuse of discretion, its action is utterly irrational. "Although irrationality is beyond the legal pale it does not mark the legal boundaries which fence in discretion." (*City of Sacramento v. Drew* (1989) 207 Cal.App.3d 1287, 1297.) The scope of discretion has always resided in the particular law being applied, and an action that transgresses the confines of the applicable principles of law is outside the scope of discretion and therefore an abuse of discretion. And, as a more recent case notes, a court's discretion is subject to the limitations of the legal principles governing the subject of its actions, and to reversal where no reasonable basis for the action is shown. (*People v. Jacobs* (2007) 156 Cal.App.4th 728, 738.) Thus, "a court abuses its discretion when it acts contrary to law." (*In re Anthony M.* (2007) 156 Cal.App.4th 1010, 1016.) Even in abuse of discretion cases, an appellate court may conduct an independent review where it is in as good of a position as the trial court to decide the issue. (*Hurtado*

v. Statewide Home Loan Co. (1985) 167 Cal.App.3d 1019, 1024-1027.)

The court here acted contrary to law – specifically contrary to Evidence Code §1103. Because of that, and since there was no reasonable basis for the court's actions, the court abused her discretion. (*People v. Jacobs, supra*, 156 Cal.App.4th 728, 738, *In re Anthony M., supra*, 156 Cal.App.4th 1010, 1016.)

F. The Error Was Prejudicial Under both Chapman and Watson Standards

The error was so prejudicial it denied Goodwin fundamental fairness under the Fourteenth Amendment to the United States Constitution; therefore, the issue must be reviewed under the standard set forth in *Chapman v. California, supra,* 386 U.S. 18.

The evidence of Goodwin's involvement in the Thompson's murders was non-existent. According to witnesses, two men committed the crimes. The men may have been black or white. The killers were never identified. The jury heard no evidence connecting Goodwin to the murders.

From the beginning of the trial, Jackson unfairly set up a good guy/bad guy dichotomy between Thompson and Goodwin. As the jury foreman put it:

> We discussed during the deliberations the character evidence that had been offered against Michael Goodwin. The tone of the deliberation in this regard was that Michael Goodwin lacked a "moral compass." The evidence that was offered by certain witnesses clearly painted Mickey Thompson as a good and honorable fellow and Michael Goodwin as just the opposite. The bad character of Michael Goodwin along with his ability to take

> everything he did (including other criminal activity) to an extreme level was very evident from the testimony of these witnesses. The jurors went over all of this in the deliberation room and we could not escape the reality that, coupled with his overtly stated hatred of Mickey Thompson, this guy was the kind of guy who was capable of coordinating this event.

(8CT 2082.)

As the foreman acknowledged, the "good guy" versus "bad guy" theme was what clinched the case for the jury. The jury weighed the inadmissible good character evidence against Goodwin's bad character, and found that, even though there was no evidence Goodwin hired anyone to kill the Thompsons, he was the type of person who would do such a thing. The inadmissible evidence rendered Goodwin's trial fundamentally unfair, and his convictions must be reversed.

IX. THE TRIAL COURT DENIED GOODWIN'S FEDERAL DUE PROCESS RIGHT TO PRESENT A DEFENSE BY EXCLUDING POTENTIALLY EXCULPATORY EVIDENCE

Goodwin's defense was he is innocent, but was charged with the Thompson murders because the case had gone cold, the LASD was desperate to find a suspect, Campbell was pressuring investigators to arrest him, and investigators therefore focused on Goodwin, manufacturing incriminating and ignoring exculpatory evidence.

The trial court denied Goodwin's federal due process right to present a defense by excluding extensive evidence, obtained via the LASD investigators' files, indicating others were responsible for the Thompson murders, others had confessed, and investigators had failed to follow through once they had focused on Goodwin.

A. Goodwin Moved to Admit Evidence Showing Other People Had Motive to Kill Thompson

Goodwin moved to introduce evidence showing others were more likely responsible for the Thompson's murders, but investigators had deliberately or negligently failed to follow up on those leads, arguing the evidence both implicated the federal due process right to present a defense, and went to third party culpability. (6CT 1718-1733.) The prosecutor's opposition addressed only third-party culpability. (7CT 1739-1792; 6RT 1-60.)

1. Goodwin Offered Evidence to Show Dean Kennedy Ordered the Murders and Both Joey Hunter and John Young Had Confessed

Nobody disputes the fact Goodwin did not shoot the

Thompsons. While prosecutors failed to connect the physical evidence at the crime scene to anyone or to present any evidence of a payout, phone calls, letters or documents connecting Goodwin to the men at the crime scene or the crimes, the prosecutor's own files revealed the following.

(a) Thompson Had Underworld Connections With Motive to Kill Him

(i) The Scott Campbell Murder

Scott Campbell was Thompson's nephew, Collene Campbell's son, and a drug dealer. (6CT 1722; 6RT 9; 7CT 1775.) Larry Cowell was a long-time friend of the Thompson and Campbell families, and owned a Pantera sports car repair shop. (6CT 1723; 6RT 10; 7CT 1775.)

In 1976, Scott killed Wix, a drug dealer associated with the Vagos motorcycle gang. (6CT 1723; 6RT 9.) In 1979, Scott was convicted of manslaughter for that killing and sent to prison. (6CT 1723.) Upon his release, Scott resumed dealing drugs. (6CT 1723.) The Vagos gang never stopped threatening Scott from the time Scott killed Wix. (6CT 1723; 6RT 10.)

In 1982, Scott agreed to sell cocaine to a DEA informant. (6CT 1723; 6RT 9.) Cowell was to fly Scott by private plane to North Dakota to consummate the deal. (6CT 1723.) On the way, Cowell and paid assassin Donny DiMasio strangled Scott and threw him out of the airplane. (6CT 1723; 6RT 9-10.) DiMasio was a Vagos gang associate. (6CT 1723; 6RT 10.)

Thompson testified for the prosecution at DiMasio's and Cowell's trials for murdering Scott.[59] (6CT 1723.) Scott had left his Pantera in Cowell's shop for repairs just before Scott's departure on the North Dakota trip. (6CT 1723.) Cowell had attempted to create an alibi by telephoning Scott repeatedly during the weeks Scott was "missing," leaving messages advising Scott the repairs had been completed and asking him to pick up his car. (6CT 1723.) The police accompanied Thompson to Cowell's shop, where he determined the car had not been repaired at all – ruining the alibi. (6CT 1723.)

Cowell was convicted of murder, but the conviction was overturned because his confession was coerced.[60] (6CT 1723-1724.) Thompson was murdered before he could testify at Cowell's retrial.[61] (6CT 1724.)

Thus, material in the prosecutor's files supported a theory Cowell had motive to kill Thompson and had hired hit men to do it. Eyewitness accounts supported this theory, as explained below.

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Appellant requests this Court take judicial notice of the file in Court of Appeal, Fourth District, No. G005903.

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Anaheim law enforcement officers warned Griggs Campbell had "created problems" in the Anaheim investigation of Scott's murder. (6CT 1493-1494.)

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In press accounts, Campbell scoffed at the idea mobsters might have killed the Thompsons.
http://sportsillustrated.cnn.com/vault/article/magazine/MAG1127114/2/index.htm

(ii) The Connection Through Larry Cowell and Ed Losinski to Dean Kennedy

Larry Cowell's close friend, Ed Losinski – whom Thompson had also known for decades – was good friends with Dean Kennedy, who owned a business near Losinski's, and who was tried for several contract murders. (6CT 1724-1725.)

(b) The Defense Established a Time line of Drug-Dealer Executions Dean Kennedy Arranged and John Young and Kit Paepule Committed

(i) December 24, 1987 - Thomas Wilson

Kennedy sent John Young and Kit Paepule to kill Thomas Wilson, a drug dealer, and his girlfriend, if she happened to be present. (6CT 1721.) Kennedy often introduced Young as his "bodyguard" or "driver." (6CT 1722.) Thompson's neighbor, Larry Shaleen, knew Young and had seen him driving a maroon Volvo – the same vehicle Thompson neighbor Richard Passmore saw near Thompson's home just days before the murders. (6CT 1722; 6RT 8-9.)

On December 24, 1987 – ten weeks before the Thompson murders – Young killed Wilson at home, execution-style. (6CT 1721; 6RT 8.) The gun jammed before the girlfriend could be executed, so one of the killers stomped on her head and beat her. (6CT 1721.) Young confessed to this killing, implicating Paepule. (6CT 1721; 6RT 8.)

(ii) December 31, 1987 - Genoway/Brandt

On December 31, 1987 – eight weeks before the Thompson murders – Young killed Jerome Genoway and Susan Brandt in their

home in Blythe. (6CT 1721.) Genoway was being investigated for dealing drugs. (6CT 1721.) According to Young's confession, Kennedy hired him to kill Genoway. (6CT 1721.) Again, Kennedy instructed him also to kill Brandt, if she was present. (6CT 1721.) Young shot Brandt in the head from behind, at close range, and shot Genoway in the torso, then killed him with two execution-style shots to the head. (6CT 1721.)

The description of the two killers corresponds with what witnesses saw at the Thompson murders. Young is black, six feet, five inches tall and athletically built. (6CT 1721.) Paepule is a dark-skinned Samoan, five feet 10 inches tall, and very stocky. (6CT 1721.)

(iii) Kennedy's Murder Trial

Kennedy needed little reason to kill. (6CT 1725.) His alleged motive for killing Wilson was that Wilson had burglarized Kennedy's home, and even though Wilson had returned the stolen property and apologized, Kennedy viewed Wilson as disrespectful. (6CT 1725; 6RT 14-15.) Kennedy killed Genoway to avoid paying the balance owed on dune buggies Kennedy had purchased. (6CT 1725; 6RT 15.) Kennedy's association with Cowell as well as his need for money to pay the fall guy were more reasons to murder Genoway or Wilson. (6CT 1725.)

Some of the most damaging evidence against Kennedy consisted of secretly-recorded telephone calls between Kennedy and his crime partner, Biedenharn. (6CT 1724.) Biedenharn was involved in a drug smuggling operation moving cocaine from California to Hawaii. (6CT 1724.) He was given immunity in exchange for taping

the calls and testifying against Kennedy. (6CT 1724-1725.)

In the taped conversations Kennedy assured Biedenharn he was not worried about doing time for the murders described above because he had a friend who was willing to take the fall for him in return for cash. (6CT 1725.) Kennedy was in custody when the Thompsons were killed, but Young and Paepule were not. (6CT 1725.)

(c) Events Leading Up To, and After, The Thompson Murders Suggest Kennedy Hired Young and Paepule to Kill Them

During the weeks before the Thompson murders, Shaleen visited Kennedy at home, where Shaleen noticed two new ten-speed bicycles. (6CT 1722; 6RT 8.) As Kennedy was 5 feet 6 inches tall and weighed 350 pounds, Shaleen teased him about the bicycles because he thought it was physically impossible for Kennedy to ride them. (6CT 1722; 6RT 8.)

Kathy O'Neill and Linda Osborne lived down the street from Kennedy. (6CT 1722; 6RT 9.) Both recalled seeing bicycles in Kennedy's home before he was arrested. (6CT 1722; 6RT 9.) Kennedy bragged about knowing the Thompsons' and Scott Campbell's killers – Cowell and DiMasio. (6CT 1722; 6RT 9.)

Although few people would know the area around the Thompson home because it was in a gated community, the Thompsons' murderers apparently were familiar with it. (6CT 1724.) Losinski had built part of' the Thompsons' house and spent time on the property over the years. (6CT 1724.) He was building a wall there weeks before the murders. (6CT 1724.)

Passmore told investigators he saw two athletic black men near the Thompsons' home two days before the killings, removing new bicycles from a Maroon Volvo. One was tall and thin, the other short and stocky. (6CT 1722; 6RT 8-10.)

(i) The Black Bicyclists

Several witnesses reported seeing two black men escaping through Bradbury on bicycles immediately following the murders. (6CT 1572, 1579, 1720.) The prosecutor's theory was Goodwin had hired those men to kill the Thompsons. The men who did the killing were never identified. (6CT 1720.)

Several neighbors reported seeing two black men in the area on bicycles days before and the morning of the shootings. (6CT 1720.) The men were conspicuous in the racially homogenous neighborhood. (6CT 1720.) Witnesses described one as over six feet tall, and the other shorter and stockier. (6CT 1720.) Both appeared athletic and capable of handling what witnesses described as new ten speed bikes. (6CT 1720.)

Investigators created composite drawings of the riders. Young strongly resembles the man in some of those composites. (6CT 1722.) Paepule resembles the composite of the shorter and stockier hooded man. (6CT 1722.) Paepule habitually wore a hooded sweatshirt and was photographed wearing one when arrested for the Wilson murders. (6CT 1722.)

(ii) The White Hitchhiker

The Thompson murders occurred at approximately 6:15 a.m. (6CT 1726.) One eyewitness thought he saw a white male shooter.

(6RT 7.) According to material in the prosecutor's own files, five witnesses – Lenore McKinney, John McKinney, Burt Mumfell, Kimberly Wood and James Acosta – reported seeing a white man frantically hitchhiking at the intersection of Foothill and Irwindale at about 7 o'clock that morning, two miles from the crime scene. (6CT 1573-1582, 1725-1726.) The witnesses all gave the same general description of a white male, between 5 feet 10 inches and six feet tall, 160-180 pounds with blonde hair.[62] (6CT 1726.) Investigators published a composite drawing of this man in the newspaper. (6CT 1574-1575, 1580-1581.) An informant told investigators the drawing resembled Joey Hunter. (6CT 1575-1576, 1726.) Several witnesses concurred, and two identified Hunter from a photographic lineup. (6CT 1731; 6RT 7.)

Hunter fled to San Francisco after the murders but was arrested and returned to Los Angeles, where he failed three polygraph tests. (6CT 1575, 1583, 1726; 4RT P-23.) Hunter had no alibi. (6CT 1726.) While in custody, Hunter confessed to inmate Frank Gullet. (6CT 1584-1585, 1726.) Hunter also confessed to his cousin, Bonnie Dalton.[63] (6CT 1726.) Hunter told Dalton he was not worried about

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The Stevenses also described the man they saw in the station wagon as "blond" before they were subjected to multiple suggestive identification procedures. (3CT 623-624, 628; 12RT 4597-4598, 4601; see Argument II, *supra*.)

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The court did not hear or consider as part of this motion the fact Joey Hunter failed three polygraph examinations. (4RT P-5, P-23 – 24; 4RT Y-16; See Argument XI, *infra*.) The parties referred to the polygraphs

doing time because he worked for someone who promised if he took the fall he would only "get two years" and would receive $50,000 – the same arrangement Kennedy had described to Biedenharn. (6CT 1724-1726.)

(d) The Investigators Failed to Follow Up on the Clues Connecting the Wilson, Genoway/Brandt and Thompson Killings

In 1990 a clue arrived at LASD asking investigators to look closely at the similarities between the Wilson and Genoway/Brandt homicides. (6RT 12.) The ballistics expert determined the bullets from those cases matched, but they did not match the bullets from the Thompson murders. (6RT 12-13.) Young confessed that immediately after the Genoway/Brandt murders someone disassembled and disposed of that weapon. (6RT 13.) Kathy O'Neill and Linda Osborne said Kennedy had several guns at his home. (6RT 13.)

After the ballistics did not match, investigators dropped the clue, but looked at it again in 1995. (6RT 13.) In 1997 investigators reviewed those murders, hoping to connect Kennedy, Cowell, Young and Paepule to Goodwin, and dropped the clue again. (6RT 13.)

2. The Prosecutor Ridiculed the Defense Theory

Goodwin proposed to show through the testimony of Shaleen, Passmore, Osborne, O'Neill, the detectives who investigated the Wilson and Genoway/Brandt murders and others that Kennedy and his hit men were responsible for the Thompson murders. (6CT

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only obliquely during hearing on this motion. (See 6RT 50.)

1725.) Goodwin also proposed to introduce evidence showing Joey Hunter was their lookout. (6CT 1726.)

Jackson argued Goodwin's showing fell short of the requirements of *People v. Hall* (1986) 41 Cal.3d 826, in that the circumstances Goodwin described were "unrelated to Mickey and Trudy Thompson," and the motion lacked supporting declarations or other evidentiary proof. (7CT 1740.) Jackson claimed Goodwin provided "no evidence whatsoever" linking Kennedy, his "hit men," Cowell, or Hunter to the crimes. (7CT 1740.) The prosecutor asserted Goodwin could not "link the primary individuals to one another" and it was "glaringly obvious" there was "no evidence linking Dean Kennedy to Joey Hunter, linking Hunter to the Thompsons, or linking Kennedy to the Thompsons." (7CT 1740.)

Apparently missing the irony of charging Goodwin when the LADA could not connect Goodwin with the actual Thompson killers, Jackson argued, "Most pointedly, however, the defense cannot even establish a connection between Kennedy and Larry Cowell — the man, according to the defense offer of proof, who is supposed to have hired Kennedy to commit the murders." (7CT 1740.)

3. The Court Excluded the Evidence as More Prejudicial than Probative

At the hearing, defense counsel cited *Holmes v. South Carolina* (2006) 547 U.S. 319, pointing out this was a purely circumstantial evidence case in which there was no pay-out sheet, no contract, no money drop, no physical evidence, and the shooters were never identified. Defense counsel argued that to allow the prosecutor

to present his version of the circumstances and not permit Goodwin to present facts contradicting those circumstances was unfair. (6RT 16.)

Jackson again ridiculed Goodwin's motion, presenting a chart and a graph that mischaracterized the evidence. (7CT 1792; 6RT 17-32, 37.) Jackson admitted his entire case against Goodwin consisted of 1) motive, 2) threats and 3) purported consciousness of guilt evidence (6RT 19-20), yet Jackson dismissed the extensive connections Goodwin drew between the people described above without mentioning the powerful motives they possessed – such as revenge against Thompson for testifying against a Vagos gang member or perceived interference in Kennedy's and others' criminal enterprises – except to say the other suspects made no threats against Thompson. (6RT 19 ["Ms. Saris seems to conflate in her argument the difference between a motive and a threat. If I have is a reason [sic] to kill someone, judge, that's a motive. If I promise I'm going to do it, that's a threat."]; 6RT 20-32.)

Jackson admitted, under questioning by the court, that 1) five people provided descriptions of a third man at the Thompson crime scene who was white, 2) Joey Hunter matched that description, 3) Lenore McKinney and her son identified Joey Hunter from a photographic six-pack as the person seen hitchhiking with the bicycle, and 4) Joey Hunter's cousin, Bonnie Dalton, attributed inculpatory statements to Hunter, including a comment Hunter was not worried because someone had promised to give him $50,000 if he took the fall. (6RT 38-39.)

Jackson also argued Goodwin had confessed the crimes to

Gail Moreau-Hunter - a witness the prosecutor did not call because he knew she lacked any credibility due to her delusions[64] – at the same time mocking Joey Hunter's confession to his cousin that he had killed the Thompsons. (6RT 21; 28-29.)

After clearing up some of the prosecutor's factual misstatements (6RT 32-35), defense counsel pointed out Goodwin was not required to prove a case against Kennedy beyond a reasonable doubt, and was not even required to meet the threshold evidentiary standard for a preliminary hearing. (6RT 35-36.) Counsel reiterated all Goodwin had to do was demonstrate relevant evidence existed raising a doubt as to Goodwin's guilt, and the defense intended to demonstrate at trial the investigators intentionally ignored all evidence not implicating Goodwin. (6RT 35-36.)

Defense counsel emphasized it would be impossible for the jury to understand how biased the investigation was unless the jury knew about the other similar crimes, and how little was done to investigate the connections between Hunter, Young and Paepule where the modus operandi was the same; a gun malfunctioned; the perpetrators matched the descriptions provided by eyewitnesses; and Osborne and O'Neill identified Young from the composite of the black male seen at or near the Thompson home and said Young was often with Kennedy. (6RT 36.)

The court declared she could not see the connection between Kennedy and Larry Cowell and the two hit men, Young and

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[64]See Argument III.D.2.(d), *supra*.

Paepule, and did not "see even a remote theory . . . of relevance." (6RT 39.) The court could not perceive any connection between the Wilson and Genoway/Brandt murders and the Thompson case. (6RT 41-42.)

Defense counsel explained Hunter told Bonnie Dalton he was being paid to take the fall, which connected Hunter to Kennedy, who had articulated the exact same plan. (6RT 40-41.) When the court described the evidence as "tenuous," defense counsel pointed out if that evidence was combined with the maroon Volvo Young was seen driving in the Thompsons' neighborhood, the bicycles in Kennedy's possession – a man too huge to ride them – all within a couple of weeks of the murders, and these facts were combined with someone who had committed three brutal murders very similar to the Thompson murders, then the relevance should be apparent. (6RT 41.) The court asked about Hunter's confession to Gullet. (6RT 48.) Defense counsel explained Griggs had filed a search warrant, and when Hunter turned himself in, he was placed in a holding cell with Gullet. After Hunter confessed, Gullet called the task force hotline to report it, and Griggs and Jones interviewed Gullet. (6RT 49.)

Defense counsel asserted Goodwin could offer the evidence under more than one theory, and requested the court consider the Kennedy theory – including the modus operandi; the gun jamming; the maroon Volvo, the bicycles and the Young and Paepule connection — separate and apart from Joey Hunter. (6RT 43.)

The court asked defense counsel if she could connect Hunter to the Thompson murder scene physically. (6RT 51-52.) Defense counsel pointed out no physical evidence connected anyone

to the scene – not even Goodwin. (6RT 52-53.) Defense counsel also pointed out Anthony Triarsi and Hackman thought one of the men at the scene was white. (6RT 52-53.) Physical evidence suggested someone was at Woodlyn and Mt. Olive, as it appeared Trudy had run out of the driveway and turned back as though blocked – supporting the third-man-as-lookout theory. (6RT 52-53.) Counsel also pointed out the person standing on Woodlyn had to be white in order to avoid suspicion, and Hackman and Anthony Triarsi saw a white man. (6RT 53.)

Finally, defense counsel asked the court to consider the fairness required of all trials by both the federal and state constitutions, and to be more open to the idea of third-party culpability than the court might be in other cases because the case against Goodwin was so weak. (6RT 53-54.) Counsel argued the case rested entirely on circumstantial evidence, and the jurors were only going to hear one set of circumstances when they should hear everything and decide which set of circumstances was more believable. (6RT 54.)

After weighing the relevance against Evidence Code §352 factors, the court excluded the evidence. (6RT 39-40, 55.) The court added:

> If the witnesses or any of the witnesses that I hear at the trial refer to an individual who appears to match the description of Joey Hunter as a look-out, I'm certainly willing to change my mind. But at this point, I think it has marginal relevance. And the other side of that, under 352, just overwhelms and outweighs the marginal relevance I think it has.

(6RT 56.)

The prosecutor requested an order preventing the defense from mentioning Kennedy, Cowell, Young, Paepule, the Scott Campbell murder or the Wilson and Genoway/Brandt murders. The prosecutor requested a second order preventing the defense from mentioning Joey Hunter in opening statement or in front of the jury unless counsel first moved outside their presence for permission. (6RT 56-57.)

Defense counsel objected one reason Goodwin could not flesh out the connections between Kennedy and the others was because the LASD had conducted a wholly inadequate, botched investigation of the Thompson murders. (6RT 57.) To forbid Goodwin from mentioning certain people to support a theory of failure to investigate – apart from third-party culpability – would deny him due process, as the evidence was relevant in terms of leads that were not followed. (6RT 57.)

Defense counsel gave examples. Investigators never tested fingernail scrapings taken from the Thompsons because investigators dismissed them as lacking evidentiary value. (6RT 58.) Joey Hunter was arrested, but according to investigators his arrest had no evidentiary value, and investigators never contacted Hunter again after 1988. (6RT 58.) Griggs – who admitted he did a poor job in certain aspects of the case – failed to interview Joey Hunter. (6RT 58.) The presence of a hitchhiker with a bike near the murder scene was never investigated, and that fact was relevant to Goodwin's defense, apart from whether the defense blamed Joey Hunter for the murders. (6RT

58.) Separate from Hunter's actual involvement, the failure to investigate him was significant and relevant because Hunter would not lead to Goodwin. (6RT 58-59.) Excluding the evidence precluded Goodwin from presenting a defense. (6RT 59.)

The court ordered defense counsel not to refer to Joey Hunter or third party culpability in her opening statement. (6RT 59-60.)

B. Standard of Review

A trial court is vested with wide discretion in deciding relevance. (*People v. Sassounian* (1986) 182 Cal.App.3d 361, 402.) It is the exclusive province of the trial court to determine whether the probative value of evidence outweighs it prejudicial effect. (*Ibid*., citing *People v. Desmond* (1976) 59 Cal.App.3d 574, 586.) The standard of review under state law is abuse of discretion. (*People v. Sassounian, supra*, 182 Cal.App.3d at p. 402.)

Evidence Code § 351 provides that only relevant evidence is admissible in civil and criminal cases. Reversal for the erroneous exclusion of evidence on state grounds is appropriate only when there is a reasonable probability the error affected the verdict adversely to the defendant. (*People v. Humphrey* (1996) 13 Cal.4th 1073, 1089.)

The discretionary exclusion of evidence, however, "must bow to the due process right of a defendant to a fair trial and his right to present all relevant evidence of significant probative value to his defense." (*People v. Burrell-Hart* (1987) 192 Cal.App.3d 593, at pp. 599-600, citing *People v. Taylor* (1980) 112 Cal.App.3d 348, 364; *Holmes v. South Carolina, supra,* 54 U.S. 547 U.S. 319, 328-331; *People v. Reeder*

(1978) 82 Cal.App.3d 543, 553.)

A state court commits federal constitutional error, violating a defendant's Sixth Amendment's compulsory process and confrontation clauses and the Fifth and Fourteenth Amendments' due process clauses, when it excludes highly relevant and necessary defense evidence. (*Holmes v. South Carolina, supra*, 547 U.S. 319; see *Crane v. Kentucky* (1986) 476 U.S. 683, 690, 106 S.Ct. 2142, 90 L.Ed.2d 636; see also *Rock v. Arkansas* (1987) 483 U.S. 44, 53-56, 107 S.Ct. 2704, 97 L.Ed.2d 37.)

C. The Exclusion of This Exculpatory Evidence Violated Goodwin's Due Process Right to Present a Defense

A defendant's Sixth and Fourteenth Amendment rights to due process and compulsory process under the federal Constitution include the right to present witnesses and evidence in his own defense. (*Washington v. Texas* (1967) 388 U.S. 14, 18-19.) "The right to offer the testimony of witnesses . . . is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies. . . . This right is a fundamental element of due process of law." (*Id*. at p. 19.) The rights to present witnesses and evidence are also guaranteed by the California Constitution. (*People v. Cudjo* (1993) 6 Cal.4th 585, 638 [dis. opn. of Kennard, J.].)

The right to present defense witnesses and testimony is not absolute, and in appropriate circumstances must "bow to accommodate other legitimate interests in the criminal trial process." (*Michigan v. Lucas* (1991) 500 U.S. 145, 149, quoting *Rock v. Arkansas* (1987) 483 U.S.

44, 55, and *Chambers v. Mississippi* (1973) 410 U.S. 284, 295.) However, the state may not arbitrarily deny a defendant the ability to present testimony that is "relevant and material, and . . . vital to the defense." (*United States v. Valenzuela-Bernal* (1982) 458 U.S. 858, 867, quoting *Washington v. Texas, supra,* 388 U.S. at p. 16.) Moreover, the state may not apply a rule of evidence "mechanistically to defeat the ends of justice." (*Chambers v. Mississippi, supra*, 410 U.S. 284, at p. 302.)

The Ninth Circuit has outlined the test to be applied in evaluating whether excluding defense evidence amounts to a due process violation under *Chambers, supra.* (*Tinsley v. Borg* (9th Cir. 1990) 895 F.2d 520, 530.) The reviewing court must first consider five factors: whether the evidence 1) has probative value on the central issue; 2) is reliable; 3) can be evaluated by the trier of fact; 4) is the sole evidence on the point or "merely cumulative"; and 5) constitutes a major part of the defense. (*Id*.) Next, the court must "balance the importance of the evidence against the state interest in exclusion." (*Id*.)

The trial court mechanistically applied evidentiary rules to exclude crucial evidence that would have supported Goodwin's claim of innocence, compelling reversal of his convictions.

1. <u>The Trial Court Violated Goodwin's Right to Due Process and a Fair Trial by Excluding Testimony Regarding the Investigators' Failure to Pursue Other Leads</u>

The court violated Goodwin's due process rights by excluding the proposed evidence of what the police failed to do when investigating the Thompson murders. That evidence was reliable –

coming from the investigators' own files – and would have helped prove what defense counsel identified as the central issue of Goodwin's defense: if evidence did not point to Goodwin, then investigators would not look at it. The state's interest in excluding unreliable evidence certainly did not outweigh Goodwin's right to present evidence in his defense.

All five *Tinsley* factors support Goodwin's claim that excluding this evidence violated due process. The evidence was probative on the central issue in the case – whether Goodwin was responsible for the Thompson murders, or was the victim of a negligent and/or maliciously lax investigation. Moreover, the proposed evidence could have been evaluated by the jury, was not "merely cumulative," and was obviously a major part of Goodwin's defense. (*Tinsley, supra*, 895 F.2d at p. 530.) The only real issue is whether the evidence was reliable, and it clearly was, as it came from the files of the prosecutor's own investigators.

Thus, the proposed evidence should not have been excluded simply because the court deemed it too prejudicial because of "the undue consumption of time and the confusion of the issues." (6RT 55; see *Chambers v. Mississippi, supra*, 410 U.S. 284, 302.) Presentation of the evidence would not have been unduly time-consuming, as the LASD investigators could have been questioned about the information in their investigative reports - a normal process in a criminal case.

The Supreme Court has termed hearsay informants "presumptively reliable" as the source of information to support issuing a search warrant. (See *People v. Hill* (1974) 12 Cal.3d 731, 761.) The

sources of most of the evidence that other people committed the Thompson murders were the LASD's investigator's reports, and the Supreme Court has upheld the propriety of permitting police officers to relate the statements of out-of-court declarants from their police reports at preliminary hearing proceedings. (*Whitman v. Superior Court* (1991) 54 Cal.3d 1063, 1072-1074.)

The prosecutor's interest was to prevent introduction of unreliable evidence. (See *In re Cindy L.* (1997) 17 Cal.4th 15, 27.) However, evidence about the failure by Lillienfeld or any other officer to investigate the witness statements would not necessarily have involved admission of hearsay statements, and at any rate the statements were sufficiently reliable to be admitted. The exclusion of that evidence violated Goodwin's right to present his defense.

2. <u>The Evidence About the Other Possible Suspects</u>

To be admissible, evidence that a third party committed the crimes need not show "substantial proof of a probability" that the third person committed the act; it need only be capable of raising a reasonable doubt of defendant's guilt. (*People v. Hall, supra*, 41 Cal.3d 826, 833.) Applying the analysis in *Tinsley v. Borg, supra*, it was a due process violation to exclude the proposed evidence about the suspects described above.

This evidence had "probative value on the central issue" of this case, and "constituted a major part of the attempted defense" (*Tinsley*, 895 F.2d at p. 530), since the central issue at the trial was Goodwin's claim he did not commit the crime, and was the victim of a flawed investigation. Moreover, there is no reason to believe the jury

could not have evaluated that evidence or would have been confused by it, and it would not have been cumulative to any other evidence that was admitted. (*Ibid*.) So once again, the only point of contention is whether this evidence was reliable enough to meet the standard set out in *Tinsley*, and Goodwin submits it was.

First, most of the witnesses who would have testified about this evidence – Griggs and the other officers who initially participated in the investigation – were reliable sources of information about their investigation. Any bias those witnesses had would logically favor the prosecution, and the sympathies of any testifying police officers would presumably be with the prosecution. Any exculpatory and/or mitigating evidence from those witnesses would presumptively be reliable, since it would be contrary to their interest in seeing Goodwin convicted. (See *Chambers v. Mississippi*, *supra*, 410 U.S. at p. 300-301 [evidence of another suspect's confession to the crime, while hearsay, was reliable because against his penal interest].) Thus, Hunter's confessions to his cellmate and his cousin were admissible in Goodwin's defense. Further, unlike the evidence at issue in *Tinsley*, this proposed testimony was not contradicted by any other evidence in the record. (895 F.2d at p. 531.)

Moreover, the court's concern that the evidence would confuse the jury begged the questions raised by Goodwin's theory. If the jury heard about the other suspects never fully investigated – especially Hunter, who had been identified by several witnesses, had confessed to the Thompson murders on at least two occasions to two unrelated individuals, and who had failed three polygraphs – it would

be compelling evidence Goodwin was framed. But for Goodwin to have a fair opportunity to convince the jurors the investigation was biased and driven by Campbell's political influence, the court had to permit him to use any available evidence casting doubt on the fairness and veracity of the investigation and prosecution.

Finally, the point of this proposed evidence was not to show that a specific third party was guilty of the offense charged (*Hall, supra,* 41 Cal.3d 826, 829), but rather to show the investigators were given information about Joey Hunter and other likely suspects and did not even pursue it. (6RT 36, 57.) It was error to evaluate the admissibility of that evidence solely under the third party culpability standard of *People v. Hall*.

However, even under a strict third-party culpability analysis, the trial court erred by excluding the evidence. In *Holmes v. South Carolina, supra*, 547 U.S. 319, a state court found no error, adhering to its state rule"'where there is strong evidence of an appellant's guilt, especially where there is strong forensic evidence, the proffered evidence about a third party's alleged guilt does not raise a reasonable inference as to the appellant's own innocence.'" (*Holmes v. South Carolina, supra*, 547 U.S. 319, 324, quoting *State v. Holmes* (2004) 361 S.C. 333, 342-343, 605 S.E.2d 19, 24.) Applying the state evidentiary standard instead of a federal constitutional one, the *Holmes* court held the evidence was inadmissible because the defendant could not "'overcome the forensic evidence against him to raise a reasonable inference of his own innocence.'" (*Ibid.*) The Supreme Court held this evidentiary standard violated the defendant's constitutional right to

have "a meaningful opportunity to present a complete defense. (*Id*. at p. 330, following and explaining *Crane v. Kentucky*, *supra*, 476 U.S. 683, 690.)

Thus, in the context of a third party culpability defense, where the defendant seeks to show a specific third party committed the crime to establish the defendant could not have, it is appropriate to require "direct or circumstantial evidence linking [that] third person to the commission of the crime" because the accusation would otherwise be based on mere suspicion and thus insufficient to support a reasonable doubt of the defendant's guilt. (*Hall, supra*, 41 Cal.3d 826, 833.) However, when the defendant offers evidence about other possible suspects who were not investigated by the police to show that the investigating officers "zeroed in" on and were determined to convict him or her to such a degree that they lied about evidence – such as Goodwin's firearms[65] – and otherwise manipulated evidence – such as the Stevenses' eyewitness identifications – to do so, it is unreasonable to require Goodwin to show evidence directly linking those suspects to the crime.

Thus, if the police failed to investigate other suspects brought to their attention by apparently reliable witnesses, it is irrelevant that years later there is insufficient evidence to prove that suspect was involved in the crime. For example, when multiple unrelated witnesses reported Joey Hunter as a suspect, investigators could not know whether there was evidence linking him to the crime

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[65]See Argument XVI.C.3., *infra.*

because they declined to investigate those leads. That failure to investigate supported the defense theory Goodwin was targeted by a biased and incomplete investigation.

D. Reversal Is Required

The violation of Goodwin's due process right to present a defense, and his Fifth and Fourteenth Amendment rights to a fair and reliable trial, requires reversal unless it "was harmless beyond a reasonable doubt." (*Chapman v. California, supra,* 386 U.S. 18, 24; *In re Ruzicka* (1991) 230 Cal.App.3d 595, 601.) Given the importance of the erroneously excluded evidence to the basic theory of the defense, this Court cannot reasonably conclude the verdicts were "surely unattributable to the error." (*Sullivan v. Louisiana, supra,* 508 U.S. 275, 279.)

The trial court deprived Goodwin of crucial evidentiary support for his central argument – an argument any defendant will find inherently difficult to make persuasively, even if permitted to use all available relevant evidence. (See Colbert, Bifurcation of Civil Rights Defendants: Undermining Monell in Police Brutality Cases (1993) 44 Hastings L.J. 499, 549, fn. 263 [jurors are predisposed to believe police officer witnesses].)

When the jury foreman learned after the trial Goodwin was not allowed to present any evidence implicating others in the murders, he stated:

> The jurors did not believe that Mickey was forced to watch Trudy die as the only evidence that was offered to support this theory was speculative at best and did not point to Goodwin's guilt or innocence. I felt the "Mickey

> was forced to watch" theory to be inflammatory and in the end it was considered not provable and thus inconsequential by all. I find it frustrating that the prosecution was allowed to present this theory without the scantest of evidence to prove it and then later to learn that the defense was not allowed to present any evidence of alternative theories regarding other suspected perpetrators of this crime. This represents an imbalance to me. While I realize there has to be limitations on the amount of evidence presented in any proceeding, this jury was more than capable of sorting through any type of evidence efficiently and determining its credibility. Our deliberations were methodical, thorough, and unemotional. While I obviously cannot say for certain what effect this would have had on the final verdict, if any, we should have had the opportunity to view all the options, within reason, and evaluate relevant evidence regarding potential alternative suspects. It would have added quality and depth to the final verdict, in my opinion.

(8CT 2080-2081.)

The trial court's refusal to allow Goodwin to present available and reliable evidence to support his defenses, therefore, cannot be deemed to have been harmless beyond a reasonable doubt. His convictions must therefore be reversed.

X. THE TRIAL COURT ERRED BY EXCLUDING EVIDENCE THOMPSON HAD PURCHASED OR TALKED ABOUT PURCHASING A LARGE QUANTITY OF GOLD JUST PRIOR TO THE MURDERS

A. Procedural Facts

Goodwin sought to introduce the testimony of Eric Miller and other witnesses that – days before the murders – Thompson told them he had just taken delivery of $250,000 worth of gold, or he intended to buy gold.

Defense counsel asked Detective Verdugo whether his investigation revealed Thompson had recently made a large purchase of gold coins or bars. (15RT 5551.) When Verdugo said it had not, defense counsel asked whether such a fact would have been relevant to the investigation, and the court sustained Jackson's objections the question called for speculation, was irrelevant and assumed facts not in evidence. (15RT 5551.)

During the defense case, counsel offered Eric Miller's testimony that in the weeks and months before the murders, Thompson talked about buying gold, and told Miller he had just purchased gold. (20RT 7681.) Lee Haslam and Doug Stokes also reported Thompson's statements about gold to Deputy LaPorte. (20RT 7690.) Goodwin based his offer of proof on three theories: 1) Thompson's non-hearsay statements he had recently purchased a large quantity of gold rendered him a target for robbery, whether or not he made the purchases; 2) the statements were not hearsay, but impeached the investigation for failure to determine whether gold was missing after the murders, and

3) under Evidence Code §1250, subdivision (a), Thompson's statements were circumstantial evidence Thompson had acted on his plan to buy gold. (7CT 1921-1925; 20RT 7694.)

Goodwin also moved to admit evidence the investigating officers knew of the gold purchase within weeks of the murders, again offering Miller's statements as circumstantial evidence the motive was robbery, as opposed to a "hit," and pointing out evidence the safe in the garage had been damaged and had pry marks on it, yet investigators ignored evidence of a robbery. (20RT 7681-7694.)

The court was "troubled" by Thompson's statement to Miller the night before the murders he had just taken possession of $250,000 worth of gold. (20RT 7685.) The court's concern was the prosecutor's theory precluded a robbery, so any evidence of a robbery would have "a great deal of relevance," and if there was some rational connection between Thompson's statement and what actually occurred, then Goodwin should be able to present that evidence. (20RT 2688.)

After multiple objections and hearings (20RT 7683-7694; 21RT 7801-7813, 7838, 21RT 7987-7994), the court "sanitized" the evidence by excluding any direct reference to gold and directing the defense to refer to the gold as a "valuable item." (22RT 8222, 8230.)

Defense counsel then elicited testimony from Detectives Jansen and LaPorte that Eric Miller had told them Thompson said he had taken possession of a valuable item of a specific dollar amount, and LaPorte gave the information to Griggs. LaPorte did not look at Thompson's financial records at all. (21RT 8236-8237.) No mention of gold was made.

Eric Miller testified Thompson did not say, or Miller could not recall him saying, he had made a purchase, and Miller denied telling investigators Thompson said he had taken possession of the "valuable item." (22RT 8226-8227.) Miller testified the passage of time since the murders had affected his memory. (22RT 8227.)

By "sanitizing" the gold evidence, the court deprived Goodwin of key evidence supporting his theory the killers were there to rob, not execute, the Thompsons, and investigators ignored this lead in their zeal to see Goodwin prosecuted. The court's errors violated Goodwin's right to present a defense. (U.S. Const., 6th and 14th Amends.; *Washington v. Texas, supra*, 388 U.S. 14, 18-19; *People v. Cudjo, supra*, 6 Cal.4th 585, 638 [dis. opn. of Kennard, J.].)

B. The Trial Court Erred In "Sanitizing" the Evidence of Thompson's Purchase of Gold and Otherwise Limiting Reference to Theft of Gold as a Motive for the Killers

1. Standard of Review

"The trial court's exercise of discretion in admitting or excluding evidence is reviewable for abuse and will not be disturbed except on a showing the trial court exercised its discretion in an arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice." (*People v. Rodriguez* (1999) 20 Cal.4th 1, 9 [citations omitted].) The trial court's discretion is circumscribed both by the factors set forth in § 352 and also by the constitutional imperative: application of state evidentiary rules to exclude defense evidence must on occasion yield to an accused's right to a fair trial. (See, e.g., *Chambers v. Mississippi, supra*, 410 U.S. at p. 302.) "Evidence

Code §352 must bow to the due process right of a defendant to a fair trial." (*People v. Reeder, supra*, 82 Cal.App.3d 543, 553.)

2. Thompson's Statements About Buying or Having Received Gold Were Statements of Intent by a Declarant to Perform an Act and Admissible to Prove Thompson Bought and Received Gold

A statement of intent or plan is an exception to the hearsay rule. (*People v. Alcalde, supra*, 24 Cal. 2d. 177, 185-186.) The Legislature codified *Alcade* in Evidence Code section 1250. (See *People v. Jones* (1996) 13 Cal.4th 535, 548.) Section1250, subdivision (a), provides a hearsay exception where the declarant states an intention to do a certain act as proof he did as he said.

In *Alcalde*, the California Supreme Court considered the admissibility of a decedent's statement she was planning to go out with the defendant on the night she was killed. The Court held "[e]lements essential to admissibility are that the declaration must tend to prove the declarant's intention at the time it was made; it must have been made under circumstances which naturally give verity to the utterance; it must be relevant to an issue in the case." (*Id*. at p. 187.) Applying this test, the *Alcade* Court concluded the decedent's statement was admissible because "it was a natural utterance made under circumstances which could create no suspicion of untruth in the statement of her intent . . . . Unquestionably the deceased's statement of her intent and the logical inference to be drawn therefrom, namely, that she was with the defendant that night, were relevant to the issue of the guilt of the defendant." (*Id*. at 187-188.)

Thompson's statements about gold met all three elements set out in *Alcalde*. First, the declarations tended to prove Thompson's intention at the time they were made – he intended to purchase a large quantity of gold, and he received that gold shortly before the murders. Second, the statements were made under circumstances which naturally gave verity to the utterances, in that Thompson was talking to friends about his investments, and he was specific about quantity and price. Third, the statements were relevant to several issues, as described below.

The first basis for relevance was to rebut Detective Verdugo's unsupported "expert" testimony nothing of value was stolen from the Thompson home the morning of the murders, and his "expert" opinion there was no robbery. The second was the purchase of such a large quantity of gold would explain why the killers left behind cash and jewelry – they were after a much larger score. Third, Thompson's open discussion of these purchases with several people would have made him a target for a robbery. Fourth, the police investigation was relevant to show that – despite numerous officers' knowledge Thompson said he intended to buy gold – investigators failed to take even the most basic of steps to see if he went through with the purchase. Fifth, Thompson's statements of intent were relevant and admissible to prove Thompson carried out his intent and bought the gold and received it at his home.

Although corroboration was not required, prosecution witnesses independently corroborated Thompson's statements, reporting the escaping bicyclists had white canvas bags on their backs.

(13RT 4899-4900; 19RT 7040-7045; 20RT 7623-7624.) The owner of Gold 'N Coins, confirmed he used bags made of white canvas or cloth to transport gold. (17RT 6436.) Such a bag was found on the floor of the Thompsons' van on the day of the murders, but investigators did not follow up on that item. (16RT 6018-6020; People's Exhibit 57.)

All of this was relevant, admissible circumstantial evidence that something was stolen from the Thompson home at the time of the murders, and investigators ignored those leads.

3. The Court Had No Authority to "Sanitize" the Nature of the "Valuable Item" Thompson Said He Had Purchased

The court allowed Miller to testify to his discussion with Thompson about purchasing a "valuable item," and permitted the defense to impeach his testimony with the statements he made to the detectives – but only in a "sanitized" fashion that precluded mention the "valuable item" was gold. The court had no authority to "sanitize" the statement, and there was no reason to "sanitize" it.

There could be no more chance of juror confusion over Thompson's statements about a gold purchase than there was over Wilkinson's testimony regarding Thompson's hearsay declaration about Goodwin having snipers outside the Thompson home, yet the court allowed that statement into evidence over defense objection and trusted the jurors would be sophisticated enough to use it only for a limited purpose.[66] Nonetheless, when Goodwin offered Thompson's

[66]See Argument VI, *supra.*

statements about gold, the court did not trust the jurors enough to utilize the statements for the purpose for which they were offered, forcing the defense to engage in a word game that vitiated the meaning and the impact of the evidence.

C. The Errors Were Prejudicial

The court's error was of constitutional magnitude and violated Goodwin's rights to present a defense, to confront witnesses, and to due process. (*Olden v. Kentucky, supra*, 488 U.S. 227, 231; *Crane v. Kentucky, supra*, 486 U.S. at p. 690.) Prejudice is evaluated under the *Chapman* standard, that is, whether this Court is able to conclude beyond a reasonable doubt that the error did not contribute to Goodwin's conviction. (*Chapman v. California, supra,* 386 U.S. 18, 24.) This standard "presumes prejudice and places the burden . . . on the beneficiary of the errors to prove beyond a reasonable doubt that the errors did not contribute to the verdict." (*Brown v. Dugger* (11th Cir. 1987) 831 F.2d 1547, 1554.) Respondent cannot meet this standard.

Investigating officers were permitted to testify "nothing of value was missing from the home." (15RT 5208-5209; 5438-5450.) Goodwin was deprived of vital evidence – Thompson's statements about buying and receiving gold – that would have impeached the officers' testimony "nothing was missing" where the officers never bothered to investigate. The court expressed this very concern, noting the prosecutor's theory precluded a robbery, so any evidence of a robbery would have "a great deal of relevance." (20RT 7688.)

The error was compounded by prosecutorial misconduct during argument. Jackson started off by arguing, "Why would the

defense spend so much time talking about a robbery? What do they care? Let me put it to you this way, because the defense is going to formulate this argument as follows: if this was a robbery, which they desperately, desperately want you to think, if this was a robbery, then Michael Goodwin isn't guilty." (23RT 8786-8792.)

Jackson then capitalized on the exclusion of the gold evidence, exploiting in particular the portability of gold the defense was so concerned about:

> Now Ms. Saris will bring up this canvas bag, this little bag that Sandra Johnson and Lance Johnson described. Now think about this for a second. They had a little bag, they had bicycles, and they had guns. And that's it. And Ms. Saris is going on say, well, of course, they're robbers; of course, they're thieves; they had a bag.
>
> Well, you heard the description of the bag. The description of the bag was like eight inches by, what, 12 or 14 inches. It was about the size of my legal pad. Hang on. That's what we will do. We're going to go up to a big mansion, up to a huge house and we're going to loot that whole place, some rich guy, with all kinds of stuff in there, all kinds of goodies, god knows what he's got. TV's, VCR's, silverware and all kind of stuff and we're going to take this (indicating). Got the bag. You've got the bike? I got the bag. Are you kidding? That's their evidence of a robbery. That's their evidence of a burglary. This?

(23RT RT 8787-8788.) On closing Dixon also exploited the absence of the very defense evidence of a robbery the prosecutor had excluded[67]:

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See discussion of Jackson's and Dixon's misconduct on closing argument in Argument XV.D.2., *infra*.

> . . . In the opening statements the defense told you I'm going to prove this is a robbery. This is a robbery gone bad. . . . Well, it could have been. If it could have been a robbery, then my guy is not guilty.
>
> Well, if that's the choice that you have . . .. But if this is really a robbery, it's not an execution. It's not a hit. You know, he didn't do that. He didn't rob these people.
>
> But there is really an important concept here as we talk about this. And that is, what is reasonable and what is unreasonable? What is evidence and what is speculation? When you hear someone say, well, you know, it could have been. It could have been a robbery. There could have been a video camera there. They are asking you - - Ms. Saris is asking you to speculate as to what might have been. As to some evidence that doesn't exist. Could have been.
>
> The judge has told you in her opening jury instructions . . . that this decision, your verdict, has to be based on evidence. . . .
>
> So on one hand, is this just a robbery gone bad? Or was it a hit? Was it a contract hit? Was it an execution? An assassination with a very detailed plan? Because if that's what it is, and ladies and gentlemen, I suggest to you that the evidence shows that's the truth, that's what it is.

(23RT 9007-9008; see also 23RT 9012.) Dixon repeatedly emphasized the robbery theory made no sense because "nothing was taken" and the killers left behind cash and expensive jewelry. (23RT 9011-9012.) However, had the jury heard there was at least $250,000 worth of gold at the Thompson house – a fungible item that would have been easier to fence because it is not unique, unlike expensive jewelry – the jury

might have considered it made more sense to take the less easily identifiable gold rather than the jewelry, and that was why the killers were there – they knew about that substantial purchase of gold. The jurors were not given the opportunity to consider that theory. In the absence of the defense evidence, it really was more "speculative" to conclude the motive for the killings was robbery gone wrong, rather than assassination.

Jackson's and Dixon's arguments cut to the heart of the defense and the jury was duly and prejudicially mislead. According to the jury foreman:

> The jury rejected the robbery theory because it seemed that there was nothing so valuable that could have been stolen that would make killers leave behind the amount of jewelry and cash found at the crime scene. In order to be thorough in its consideration of the robbery versus murder theory, the jury was forced to speculate what else could have been the "item of value" that was presented in testimony. One juror even mentioned that it might have been something large like an engine. Because there was no clarification as to what the item could possibly be, any "item of value" testimony didn't support the robbery theory. We also considered and rejected the idea that this crime was a random act of violence because of the remoteness of the location of the crime.
>
> Once we determined that it was not a robbery, or random act of violence, we had no evidence to consider regarding anyone other than Michael Goodwin who would have wanted to harm Mickey or Trudy Thompson. I asked, "If not Goodwin then who else could have done this?" We were presented with no evidence of other suspects."

(8CT 2080 [declaration of jury foreman Mark Matthews].)

Having excluded the evidence Thompson had purchased $250,000 worth of gold just prior to the murders and had told several people about the purchase, Jackson and Dixon made these arguments, knowing full well Goodwin's robbery theory had nothing to do with moving trucks and VCR's, as suggested, but with small transportable items such as gold coins or bullion that could well have fit in the bags whose small proportions the prosecutors derided as unfit to carry the proceeds of a robbery.

Respondent cannot show beyond reasonable doubt this error did not contribute to the verdict. Had the jury been provided with complete information about Thompson's intended gold purchase, that evidence would have been sufficient to raise a reasonable doubt, as the jury would have understood the "valuable item" was highly portable, and likely was in the specialized canvas bags eyewitnesses observed on the bicyclist's backs. Thus, Goodwin was deprived of evidence crucial to his defense, the error was prejudicial, and his convictions must be reversed.

XI. THE TRIAL COURT ERRED BY EXCLUDING EVIDENCE JOEY HUNTER FAILED THREE POLYGRAPH EXAMINATIONS, VIOLATING GOODWIN'S RIGHT TO A FAIR TRIAL UNDER THE SIXTH AND FOURTEENTH AMENDMENTS

A. Overview

The prosecutor's strategy at trial was to block all evidence demonstrating the LASD failed to investigate suspects other than Goodwin, gutting Goodwin's defense. Following this strategy, Jackson declined to stipulate to admitting evidence Joey Hunter had failed multiple polygraphs, and the court granted the prosecutor's motion to exclude it. The court's error prejudiced Goodwin because it prevented him from impeaching Griggs, Lillienfeld and the other investigators on a crucial issue – whether the murders were fully and fairly investigated.

B. Procedural Background

The prosecutor moved to prevent Goodwin from presenting evidence of, or referring to, polygraph examinations conducted by investigators while investigating the Thompson murders, arguing the test results were inadmissible under Evidence Code § 351.1 for any purpose. (6RT 1710-1711; ACT 117A; Sealed motion.) Goodwin filed opposing papers. (7CT 1737; Sealed Opposition.)

At the hearing (Sealed RT [October 16, 2006, I-90 - I-99]), Goodwin contended it was unfair to exclude the evidence because "a jury is going to be misled as to the level of . . . incompetence on the part of the Sheriff's Department to not follow up with Joey Hunter in light

of this result subsequent to 1988." (Sealed RT [October 16, 2006] I-97.) Defense counsel explained she was offering the evidence to show "the detectives gave Joey Hunter a polygraph .. [which] was a tool in their investigative arsenal in 1988. He failed that test in their opinion. All that's relevant is . . . their belief . . .he failed that test." (Sealed RT [October 16, 2006] I-98.) Counsel elaborated:

> When I mentioned to [the investigators] that another individual had failed a polygraph, immediately they snapped to attention. The sacredness of polygraph tests among the law enforcement community, again, cannot be underestimated. For them to ignore Joey Hunter, it's not the same thing as ignoring a jailhouse confession. It's ignoring evidence that they had and they did it because it wouldn't lead to . . . Goodwin.

(Sealed RT [October 16, 2006] I-92.)

Finding the evidence irrelevant, the court ordered the defense not to mention polygraph examinations. (Sealed RT [October 16, 2006] I-90 - I-99.) "I'm not precluding the defense from following up on the general issue that . . . Goodwin was the focus of attention perhaps and that other leads were not pursued. But anything more specific gets into the third-party culpability issue, which we are not going to get into." (Sealed RT [October 16, 2006] I-96.) The trial court erred.

C. Standard of Review

The standard of review is abuse of discretion. (*People v. Sassounian, supra,* 182 Cal.App.3d 361, 402.) The discretionary exclusion of evidence, however, "must bow to the due process right of a defendant to a fair trial and his right to present all relevant evidence

of significant probative value to his defense." (*People v. Burrell-Hart, supra,* 192 Cal.App.3d 593, 599-600; *People v. Reeder, supra,* 82 Cal.App.3d 543, 553.) "'[A] defendant's due process right to a fair trial requires that evidence, the probative value of which is stronger than the slight-relevancy category . . . cannot be excluded . . ..'" (*People v. Jackson* (1991) 235 Cal.App.3d 1670, 1679, quoting *People v. Reeder, supra*, 82 Cal.App.3d 543, at p. 552.)

D. The Trial Court Erred by Excluding Relevant Evidence Joey Hunter Had Failed Three Polygraph Examinations Early in the Investigation, and Yet Investigators Failed To Pursue Him as a Suspect

The trial court erred by excluding the operative facts 1) the LASD used polygraph tests to investigate the Thompson murders, and 2) LASD investigators ignored the polygraph results in their zeal to convict Goodwin. The court's error violated Goodwin's rights to a fair trial and a reliable verdict under the Sixth and Fourteenth Amendments.

1. The Legislative Intent Underlying Evidence Code § 351.1 Does Not Preclude Admission of the Operative Facts Polygraph Examinations Were Employed as an Investigative Tool or Police Disregarded the Results of Such Tests

Evidence Code § 351.1 provides:

> (a) Notwithstanding any other provision of law, the results of a polygraph examination, the opinion of a polygraph examiner, or any reference to an offer to take, failure to take, or taking of a polygraph examination, shall not be admitted into evidence in any criminal proceeding, including pretrial and post conviction motions and

> hearings, or in any trial or hearing of a juvenile for a criminal offense, whether heard in juvenile or adult court, unless all parties stipulate to the admission of such results.
>
> (b) Nothing in this section is intended to exclude from evidence statements made during a polygraph examination which are otherwise admissible.

Ordinarily, Evidence Code § 351.1 prohibits the admission of polygraph evidence in criminal cases absent a stipulation. (*People v. Wilkinson* (2004) 33 Cal.4th 821, 842, 845–846; accord, *People v. Samuels* (2005) 36 Cal.4th 96, 128.) This section "codifies a rule . . . that polygraph test results 'do not scientifically prove the truth or falsity of the answers given during such tests.' " (*People v. Espinoza* (1992) 3 Cal.4th 806, 817.) The ban "'is a "rational and proportional means of advancing the legitimate interest in barring unreliable evidence." ' " (*People v. Hinton* (2006) 37 Cal.4th 839, 890, quoting *People v. Maury* (2003) 30 Cal.4th 342, 413, 133; see also *U.S. v. Scheffer* (1998) 523 U.S. 303, 314, 118 S.Ct. 1261, 140 L.Ed.2d 413.)

The legislative intent underlying Evidence Code § 351.1's ban on polygraph evidence is to bar scientifically unreliable evidence to show the subject of the polygraph was truthful or untruthful – not to bar evidence a polygraph was an investigative tool or the police acted or failed to act on the results of a polygraph.

2. The Operative Facts that Polygraph Examinations Were Employed as an Investigatory Tool and The LASD Disregarded the Results of Such Tests Was Relevant, Admissible Evidence

(a) The Evidence Was Relevant to Discredit the Investigation and the Decision to Charge Goodwin, Even Without Mentioning Joey Hunter

The evidence investigators ignored Joey Hunter's polygraph results and pursued Goodwin instead was strongly relevant to Goodwin's defense. When the probative force of evidence depends on the circumstances under which it was obtained, indications of conscientious police work will enhance its probative force and slovenly work will diminish it. (See *Kyles v. Whitley*, *supra,* 514 U.S. 419, 446-447.) "A common trial tactic of defense lawyers is to discredit the caliber of the investigation or the decision to charge the defendant. . .." (*Bowen v. Maynard* (10th Cir. 1986) 799 F.2d 593, 613.) Evidence showing investigators knew another suspect had failed three polygraph examinations when asked about his involvement in the Thompson murders would have demonstrated for the jury the lack of thoroughness or good faith of the investigators. (*Ibid*.)

The court's concern about "third-party culpability" evidence was misplaced,[68] but even if it were a concern, defense counsel offered to make the evidence generic by not mentioning Joey

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See Argument IX, *supra*, regarding the court's error in excluding evidence other suspects were not fully and fairly investigated.

Hunter's name. The operative fact police believed Joey Hunter had failed multiple polygraph examinations was relevant, admissible evidence in Goodwin's defense.

(b) Operative Fact Evidence Is Not Precluded by Evidence Code § 351.1

While use of the results of a psychological examination to impeach or enhance a witness's credibility is disfavored, and the results of a polygraph examination have no evidentiary effect (see *People v. Ayala* (2000) 23 Cal.4th 225, 263-264), the operative fact investigators used such tests and ignored the results should not fall within the proscription of Evidence Code § 351.1, which is concerned with the scientific validity of the test itself. (See *U. S. v. Bowen* (9th Cir. 1988) 857 F.2d 1337, 1341.)

Evidence of polygraph examinations is admissible when the examination is an operative fact in the dispute before the court. (See, e.g., *Thorne v. City of El Segundo* (9th Cir.1983) 726 F.2d 459, 469–471 and n. 11 [admitting polygraph questions into evidence in action by employee against employer and polygraph examiner for sexual discrimination in firing and in administration of the polygraph]; *Smiddy v. Varney* (9th Cir.1981) 665 F.2d 261, 265 [polygraph evidence admitted when polygraph examination of defendant was cause of unlawful arrest of plaintiff].)

> A polygraph examination, however, is not an operative fact simply because it is administered before the cause of action is filed. The key inquiry is for what purpose the polygraph is being introduced. If the polygraph evidence is being introduced because it is relevant that a polygraph

> was administered regardless of the results, or because the polygraph examination is the basis of the cause of action as in *Thorne* or *Smiddy*, then the polygraph evidence may be admissible as an operative fact. If, on the other hand, the polygraph evidence is offered to establish that one party's version of the events is the truth, the polygraph evidence is being introduced for its substantive value and is inadmissible absent a stipulation between the parties prior to administration of the polygraph.

(*Brown v. Darcy* (9th Cir. 1996) 783 F.2d 1389, at p. 1397 [overruled on other grounds in *United States v. Croft* (9th Cir. 1997) 124 F.3d 1109, 1120].)

Goodwin did not seek to admit polygraph evidence to endorse or attack the credibility of the answers Joey Hunter gave during his polygraph examinations, but as an operative fact to demonstrate 1) investigators did not follow their own protocols, and 2) investigators did not follow facts pointing to other suspects, because the investigators had already fixed on Goodwin as the perpetrator. Thus, because the evidence was not offered to prove the truth or falsity of the polygraph results, but was offered to prove operative facts evidencing the highly relevant sloppiness and bias of the investigation, the trial court abused her discretion in excluding it. (*U. S. v. Bowen*, *supra*, 857 F.2d 1337, at p. 1341.)

E. The Error Prejudicially Deprived Goodwin of Crucial Evidence Impeaching the Investigation Itself

The state may not apply a rule of evidence "mechanistically to defeat the ends of justice." (*Chambers v. Mississippi*, *supra*, 410 U.S. at p. 302; see also *Green v. Georgia* (1979) 442 U.S. 95, 99

S.Ct. 2150.) Here, the court did just that, consistent with her rulings throughout this case preventing Goodwin from effectively defending himself.

The court's ruling violated Goodwin's constitutional rights to present a defense, to confront witnesses, and to due process. (*Olden v. Kentucky, supra*, 488 U.S. 227, 231 [109 S.Ct. 480, 102 L.Ed.2d 513]; *Crane v. Kentucky, supra*, 486 U.S. at p. 690.) The standard of prejudice is the *Chapman* standard, that is, whether this Court, is able to conclude beyond a reasonable doubt the error did not contribute to Goodwin's conviction. (*Chapman v. California*, *supra,* 386 U.S. 18, 24 [87 S.Ct. 824, 17 L.Ed.2d 705].) This standard presumes prejudice and places the burden on the beneficiary of the errors to prove beyond a reasonable doubt the errors did not contribute to the verdict. (*Brown v. Dugger, supra,* 831 F.2d 1547, 1554.)

Respondent cannot meet that burden. The jury was not permitted to hear specific, relevant, credible evidence impeaching the investigation. The investigators' failure to investigate Joey Hunter following the polygraphs violated standard police protocols. (See *State v. Clifton* (1975) 271 Or. 177, 181, 531 P.2d 256 [polygraph is a proper tool for use by the police in interrogating persons suspected of a crime].) The violations of standard police procedures were central to Goodwin's defense the investigation was incompetent or deliberately compromised. Respondent cannot show that, had the jurors heard this evidence, it would not have raised a reasonable doubt of Goodwin's guilt, especially in light of the prosecutor's failure to prove any connection between Goodwin and the killers.

The prejudice is demonstrated by Mark Matthews' declaration he was "initially reluctant to vote for conviction" because he "had heard no credible evidence connecting . . .Goodwin to the actual killers, even though most of the other evidence pointed towards guilt." (8CT 2079.) Matthews found it "frustrating" to "learn that the defense was not allowed to present any evidence of alternative theories regarding other suspected perpetrators of this crime" and found an unfair imbalance in the presentation of the case. (8CT 2080-2081.) Given that actual and perceived unfair imbalance, respondent cannot prove beyond a reasonable doubt the error did not contribute to the verdict. Goodwin's convictions must therefore be reversed.

XII. DEFECTIVE CONSPIRACY INSTRUCTIONS PERMITTED CONVICTION WITHOUT PROOF OF CONNECTION AND AGREEMENT BETWEEN GOODWIN AND THE KILLERS

A. Overview

Under certain circumstances a court may instruct a jury on conspiracy even where no conspiracy was charged; however, a judge cannot instruct a jury on conspiracy where the prosecutor has produced no evidence of a conspiracy.

Goodwin did not kill the Thompsons. The killers were never identified or arrested. The prosecutor theorized – without substantial evidence – Goodwin hired people to assassinate the Thompsons. The prosecutor did not prove any connection between the shooters and Goodwin. Instead, the prosecutor presented testimony Goodwin had made threats against Thompson and was generally a bad person. The court instructed the jury on conspiracy, even though the prosecutor had not charged conspiracy and presented no evidence of a conspiracy.[69]

However, the judge gave only partial instructions on conspiracy. As given, the instructions permitted the jury to draw an improper inference bridging the evidentiary gap between the charges and the evidence presented. The instructions vitiated the presumption of innocence and lowered the prosecutor's burden of proof. Goodwin's convictions on both counts must, therefore, be reversed.

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[69]See Argument II, *supra*.

B. The Standard of Review

"[A]ssertions of instructional error are reviewed *de novo*." (*People v. Shaw* (2002) 97 Cal.App.4th 833, 838.)

C. The Court is Duty Bound to Give Full, Accurate Instructions

The court must instruct *sua sponte* on those general principles of law commonly or closely and openly connected with the facts, and that are necessary for the jury's understanding of the case. (*People v. Mayfield* (1997) 14 Cal. 4th 668, 773, as modified on denial of reh'g [Mar. 19, 1997]; *People v. Hovarter* (2008) 44 Cal. 4th 983, 1021; *People v. Hudson* (2006) 38 Cal. 4th 1002, 1012, as modified, (Aug. 23, 2006).)

"[T]he correctness of jury instructions is to be determined from the entire charge of the court, not from a consideration of parts of an instruction or from a particular instruction." (*People v. Young* (2005) 34 Cal.4th 1149, 1202; *People v. Smithey* (1999) 20 Cal.4th 936, 963.) If a jury instruction appears ambiguous, the reviewing court must "inquire whether there is a reasonable likelihood that the jury misunderstood and misapplied the instruction. [Citations.] ... The reviewing court also must consider the arguments of counsel in assessing the probable impact of the instruction on the jury. (See *People v. Garceau* (1993) 6 Cal.4th 140, 189, disapproved on another ground in *People v. Yeoman* (2003) 31 Cal.4th 93, 117–118; *People v. McPeters* (1992) 2 Cal.4th 1148, 1191.)

D. Based on the Evidence Presented, No Conspiracy Instructions Should Have Been Given

"It is an elementary principle of law that before a jury can be instructed that it may draw a particular inference, evidence must appear in the record which, if believed by the jury, will support the suggested inference." (*People v. Valdez* (2004) 32 Cal.4th 73, at p. 137, quoting *People v. Hannon* (1977) 19 Cal.3d 588, 597; see also *People v. Saddler* (1979) 24 Cal.3d at 671, 681.) Moreover, when a court fails to make the preliminary factual determination as to whether the record supports the inference, it commits error as it then passes the question of law to the jury for determination. (*People v. Hannon, supra*, 19 Cal.3d 588, 597.)

Even in the absence of conspiracy charges, the jury may be instructed on the law of conspiracy upon a *prima facie* showing of the existence of a conspiracy by independent evidence. (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1134.) Here, the prosecutor failed to present *a prima facie* showing Goodwin conspired with anyone to kill the Thompsons.[70] (Contrast *People v. Jurado* (2006) 38 Cal.4th 72, 121 [sufficient evidence of conspiracy based on co-defendant's shared motive, presence at scene, and post-crime conduct such as failing to separate from defendant, failing to report crime, and lying]; *People v. Rodrigues*, *supra*, 8 Cal.4th 1060, 1135 [*prima facie* evidence of conspiracy to rob shown where defendant and accomplice forcibly entered

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70 Appellant incorporates by reference his detailed discussion in Argument II regarding the prosecutor's failure to prove a conspiracy.

apartment together with weapons and attacked the two occupants, and accomplice acted on defendant's commands to "finish" the victim with whom he was fighting and flee before the police arrived].) The jury did not believe the prosecutor established a connection between Goodwin and the men who killed the Thompsons. (8CT 2078.)

Given the prosecutor's failure to prove any conspiracy, the trial court erred by giving conspiracy instructions. Therefore, Goodwin's convictions must be reversed.

E. Even if Found Not to be Erroneous, Deficient Or Misleading on their Face, The Court's Jury Instructions Were Erroneous, Deficient and Misleading Under the Facts

Even instructions that "are not crucially erroneous, deficient or misleading on their face, may become so under certain circumstances." (*People v. Brown* (1988) 45 Cal.3d 1247, at p. 1256.) The court here gave jury instructions that erroneously led the jury to believe it could infer a connection between Goodwin and the Thompsons' killers in the absence of any evidence to connect them.

1. Instructions Given and Instructions Refused

Defense counsel objected to the court giving any instruction on conspiracy in addition to CALJIC No. 6.10.5, pointing out the use note to that instruction. (22RT 8448-8451.) Defense counsel argued:

> On the 6.10.5 is the only conspiracy instruction that's relevant when conspiracy isn't charged. This is an aiding and abetting case. And specifically the use notes of 6.10.5 say that this is the instruction to give when conspiracy is not charged. 6.11, 6.12 and 6.14 are only

> applicable when there is one of three things. Either a person with whom there is an agreement that there has been testimony about [sic]; testimony regarding the agreement; or some sort of question of derivative liability.
>
> I.e., Michael Goodwin hired these people to kill Mickey and Trudy, but Lance Johnson was killed. And therefore Michael Goodwin would be charged with a natural and probable consequence resulting therefrom. The aiding and abetting covers all theories against Mr. Goodwin. And 6.10.5 is the only conspiracy that's relevant. The other three – or not relevant [sic], without conspiracy being charged.

(22RT 8448-8449.) Defense counsel referred the court to *People v. Villa* (1957) 156 Cal.App.2d 128 and *People v. Brigham* (1989) 216 Cal.App.3d 1039. (22RT 8450.)

The court acknowledged her doubts about the prosecution employing a conspiracy theory[71], but proceeded to instruct the jury in the language of CALJIC 6.10.5, as follows:

> A conspiracy is an agreement between two or more persons with the specific intent to agree to commit the crime of murder, and with the further specific intent to commit that crime, followed by an overt act committed in this state by one or more of the parties for the purpose of accomplishing the object of the agreement. Conspiracy is a crime, but is not charged as such in this case.

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[71] "Well, let me just say this, I view this case – obviously, it's totally irrelevant how I view the case. But I mean I questioned earlier, I think, or yesterday the people utilizing a conspiracy theory. To me, you know, personally if I were in their shoes, which I'm not, I agree that the aiding and abetting theory is really the least confusing." (22RT 8449.)

> In order to find a defendant to be a member of a conspiracy, in addition to proof of the unlawful agreement and specific intent, there must be proof of the commission of at least one overt act. It is not necessary to such a finding as to any particular defendant that defendant personally committed the overt act, if he was one of the conspirators when the alleged overt act was committed.
>
> The term "overt act" means any step taken or act committed by one or more of the conspirators which goes beyond mere planning or agreement to commit a crime and which step or act is done in furtherance of the accomplishment of the object of the conspiracy.
>
> To be an "overt act," the step taken or act committed need not, in and of itself, constitute the crime or even an attempt to commit the crime which is the ultimate object of the conspiracy. Nor is it required that the step or act, in and of itself, be a criminal or unlawful act.

(7CT 1922; 23RT 8722-8723.)

The court also instructed the jury in the language of CALJIC No. 6.12 – Conspiracy—Proof of Express Agreement Not Necessary, as follows:

> The formation and existence of a conspiracy may be inferred from all circumstances tending to show the common intent and may be proved in the same way as any other fact may be proved, either by direct testimony of the fact or by circumstantial evidence, or by both direct and circumstantial evidence. It is not necessary to show a meeting of the alleged conspirators or the making of an express or formal agreement.

(7CT 1994.) The court further instructed the jury in the language of CALJIC No. 2.72 Corpus Delicti Must Be Proved Independent of

Admission or Confession, as follows:

> No person may be convicted of a criminal offense unless there is some proof of each element of the crime independent of any confession or admission made by him outside of this trial.
>
> The identity of the person who is alleged to have committed a crime is not an element of the crime nor is the degree of the crime. The identity [or degree of the crime] may be established by a confession or admission.

(7CT 1981.)

Finally, over defense objection the court instructed the jury in the language of CALJIC No. 2.11.5, unjoined perpetrators of the crime:

> There has been evidence in this case indicating that a person other than a defendant was or may have been involved in the crime for which that defendant is on trial. There may be many reasons why that person is not here on trial. Therefore, do not speculate or guess as to why the other person is not being prosecuted in this trial or whether he has been or will be prosecuted. Your sole duty is to decide whether the People have proved the guilt of the defendant on trial.

(7CT 1967; 23RT 8712.)

The court did not instruct the jury in the language of CALJIC 6.22[72] or 6.18.[73]

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CALJIC No. 6.22 provides "[e]ach defendant in this case is individually entitled to, and must receive, your determination whether [he] was a member of the alleged conspiracy. As to each defendant you must determine whether [he] was a conspirator by deciding whether [he] willfully, intentionally and knowingly joined with any other or others

2. The Court Erred by Giving Incomplete and Misleading Conspiracy Instructions

The court's incomplete jury instructions did not make clear for the jury that a conspiratorial agreement must be proved beyond a reasonable doubt. By including CALJIC 6.12, but failing to instruct in the language of CALJIC No. 6.22, the court misled the jurors into believing that they could convict Goodwin simply by finding through circumstantial evidence he wanted Thompson dead.

The trial court had a *sua sponte* duty under the circumstances of this case to instruct in the language of CALJIC No. 6.22 where the prosecution relied on conspiracy principles to establish Goodwin's liability for the murders. CALJIC No. 6.22 must be given *sua sponte*, where, as here, conspiracy is not charged, but is merely relied on to establish a defendant's liability for a charged offense. While there is no direct authority CALJIC No. 6.22 must be given in a single-defendant, single-jury case where a conspiracy is not charged but is merely relied on to establish a defendant's vicarious liability for another crime, in *People v. Fulton* (1984) 155 Cal.App.3d 91, the Court of Appeal held CALJIC No. 6.22 and 17.00 should be given *sua sponte* where multiple defendants, charged with conspiracy, are tried before

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in the alleged conspiracy."

[73] CALJIC No. 6.18 states: "Evidence of the commission of an act which furthered the purpose of an alleged conspiracy is not, in itself, sufficient to prove that the person committing the act was a member of the alleged conspiracy."

the same jury. (*Id*. at p. 101.) The *Fulton* court's holding was based on the "unfairness inherent in a conspiracy charge, especially '[t]he psychological reality that in a trial against a number of conspirators, a weak case against one defendant will be strengthened by a mass of evidence relevant only to his co-defendants.' " (*Ibid*.)

Courts have routinely held " '[c]onspiracy principles are often properly utilized in cases wherein the crime of conspiracy is not charged .... In some cases, for example, ... the prosecution properly seeks to show through the existence of conspiracy that a defendant who was not the direct perpetrator of the criminal offense charged aided and abetted in its commission. [Citations.]' [¶] In such instances, the function of offering proof of the uncharged conspiracy is simply evidentiary, as those facts tend to prove the crime charged." (*People v. Brigham, supra*, 216 Cal.App.3d 1039, 1049–1050, citing and discussing *People v. Durham* (1969) 70 Cal.2d 171, 180–181, footnote 7.)

Conspiracy requires proof of an agreement between two or more parties with the specific intent to commit a crime, and an overt act by one or more of the parties for the purpose of accomplishing the object of the agreement. (*People v. Herrera, supra*, 70 Cal.App.4th 1456, 1464.) The prosecutor must prove these elements of the crime both where conspiracy is charged, and where, as here, the prosecutor has not charged conspiracy, but relies on proof of a defendant's membership in a conspiracy to show he aided and abetted in committing another crime. (See *People v. Williams* (2008) 161 Cal.App.4th 705.)

In a multi-defendant, single-jury trial, the danger a strong

case against one co-conspirator will strengthen a weak case against another is just as likely when the prosecutor charges a conspiracy than when a prosecutor relies upon a conspiracy theory to establish a co-conspirator's liability for another crime. The separate determination of a defendant's membership in a conspiracy is a general principle of law openly and closely connected with the facts of any multiple-defendant, single-jury case, whether the conspiracy is charged, or whether the prosecutor relies on an uncharged conspiracy to show that the defendants aided and abetted in committing another crime.

Therefore, both a modified version of CALJIC Nos. 6.22 and 17.00 should be given, *sua sponte*, in a multi-defendant, single-jury trial, where conspiracy is relied on to establish a defendant's vicarious liability for other, charged offenses allegedly committed by one or more co-defendants. CALJIC No. 6.11 does not instruct jurors to separately determine whether each defendant was a member of an uncharged conspiracy. Thus, CALJIC No. 6.11 does not satisfy the purpose of CALJIC No. 6.22. The court here should have instructed Goodwin's jury, *sua sponte*, it had to make a separate determination Goodwin was a member of the conspiracy the prosecutor described as operating between the two black shooters who killed the Thompsons.

F. <u>The Instructional Errors Were Prejudicial</u>

In analyzing the prejudicial effect of instructional error, an appellate court must view the evidence in a light most favorable to the defendant. (*People v. King* (1978) 22 Cal.3d 12, 15-16; *People v. Wilson* (1967) 66 Cal.2d 749, 763; *People v. Matthews* (1994) 25 Cal.App.4th 89, 94 fn. 1.)

The standard of reviewing prejudice for instructional error giving rise to a mandatory presumption on an element of the offense is whether the error was harmless beyond a reasonable doubt. (*Rose v. Clark* (1986) 478 U.S. 570, 577, 106 S.Ct. 3101, 3105, 92 L.Ed.2d 460; *People v. Hedgecock* (1990) 51 Cal.3d 395, 410; *People v. Reyes–Martinez* (1993) 14 Cal.App.4th 1412, 1418–1419.)

Respondent cannot prove the errors here were harmless beyond a reasonable doubt. The jury would have reached a more favorable result had CALJIC Nos. 6.22 and 17.00 been given. The failure to give CALJIC No. 6.18 as well as the district attorney's erroneous explanation of 6.12 during his closing argument compounded this error.[74] The court had already instructed on aiding

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"A couple of notes on conspiracy. The formation in existence of a conspiracy can be proved through circumstantial evidence and the circumstances surrounding the totality of the evidence.

In other words, you don't have to dissect this case to figure out if there is a conspiracy to commit murder. You can look at the totality of the circumstances. As a matter of fact, the jury instruction tells you to do exactly that. These two men, the two killers were acting in concert with one another.

It was well timed, well coordinated and almost perfectly executed. The killers got away. You can infer from that, you have to infer from that the only reasonable explanation is they were working together. These aren't two people who happened upon the same house at the same time and just happened to kill Mickey and Trudy Thompson.

Everybody agrees these people were obviously working together. There was an agreement there. And if the totality of the

and abetting. Goodwin made timely objections to the conspiracy instructions, noting these instructions under these circumstances, where no perpetrator is named or present, would allow for a verdict based on conjecture and innuendo. The juror's declaration bears out that the jury did not correctly apply the burden of proof. (8CT 2078 ["There was no evidence offered that showed a direct connection between the people who in fact killed Mickey and Trudy Thompson and Michael Goodwin. The judge's instructions regarding conspiracy allowed the jurors to skip this step and find Michael Goodwin guilty."].) Even without the corroboration provided by the declaration, the error is clear and objectively it is apparent that this instruction was misapplied.

In argument to the jury, the prosecutor relied specifically on conspiracy as an alternate theory. He emphasized the jury need not agree on the theory. (23RT 8760-8761 ["But from the totality of the whole case, we can determine, we're convinced that he's responsible for the murders and it was a conspiracy. And then the folks over on this side can say, you know what, I think it's both. A conspiracy and aiding and abetting. They're not mutually exclusive. And you don't have to agree."].)

Because of the erroneous conspiracy instructions, the jurors were permitted improperly to draw an inference a link existed between the killers and Goodwin that was never proved. As jury

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circumstances suggest that Michael Goodwin is responsible for the killings of Mickey and Trudy Thompson, then Michael Goodwin is a conspirator along with the two actual killers." (23RT 8758-8759.)

foreman Mark Matthews explained:

> All of the jurors were convinced that Goodwin had made several threats against Mickey Thompson. Some witnesses who testified about these threats were deemed credible by the entire jury. Others were not. The threats that we felt were credible, combined with other evidence, pointed towards Goodwin's guilt. The evidence was clear that Goodwin did not personally kill the Thompsons. There was no evidence offered that showed a direct connection between the people who in fact killed Mickey and Trudy Thompson and Michael Goodwin. The judge's instructions regarding conspiracy allowed the jurors to skip this step and find Michael Goodwin guilty.

(8CT 2078.)

Without the erroneous conspiracy instructions, Goodwin would not have been convicted of the acts of the purported co-conspirators. There is nothing in the record indicating Goodwin necessarily shared the intent or even the knowledge concerning the murders, which he did not personally commit. He was convicted as a co-conspirator.

Even without considering the insights of the jury foreman, the prosecutor told the jurors they need not agree on the theory - conspiracy or aiding and abetting. (23RT 8760-8761.) For this reason it is impossible to say that the convictions were not based on the improper ground of conspirator liability. There was an instruction on an erroneous ground of conviction, a legal -- not factual -- error. (See *People v. Guiton* (1993) 4 Cal.4th 1116, 1129.) Goodwin's convictions must be reversed since the error cannot be found to be harmless beyond a reasonable doubt. (*Chapman v. California, supra,* 386 U.S. 18.)

In the alternative, the use of an erroneous theory of culpability is structural error, not subject to harmless error analysis (*Martinez v. Garcia* (9th Cir. 2004) 379 F.3d 1034), and the conviction must be reversed for that reason as well, without an assessment of prejudice. (*Arizona v. Fulminante, supra*, 499 U.S. 279.)

XIII. THE TRIAL COURT VIOLATED GOODWIN'S RIGHT TO FEDERAL AND STATE DUE PROCESS WHEN IT INSTRUCTED THE JURY IT COULD CONSIDER THE WITNESS' LEVEL OF CERTAINTY WHEN EVALUATING THE EYEWITNESS IDENTIFICATION

A. Overview

In *Neil v. Biggers* (1972) 409 U.S. 188, the Supreme Court set forth a five-factor test for determining the reliability of eyewitness identification. The factors were:

> [T]he opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of the witness' prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation.

(*Id*. at pp. 199–200.)

That test was reaffirmed in *Manson v. Braithwaite, supra,* 432 U.S. 98, 177. Subsequent research, however, has shown the certainty with which the witness makes the identification has little correlation with the accuracy of that identification. (See e.g. Wells, G.L. & Quinlivan, D.S. (2009) Suggestive Eyewitness Identification Procedures and the Supreme Court's Reliability Test In Light of Eyewitness Science 30 Years Later, Law and Human Behavior, 33: 1, 11-12 and the authorities cited therein.)

The California Supreme Court has approved CALJIC No. 2.92. (*People v. Johnson* (1992) 3 Cal.4th 1183, 1231–1232.) The instruction includes "certainty" as a factor the jury may consider to assess the reliability of the eyewitness identification. The *Johnson*

Court, however, did not consider whether the "certainty factor" violated the California or federal Constitutions.

In *Johnson, supra,* 3 Cal.4th 1183, the defendant claimed the court erred by instructing the jury on the certainty factor because, given the evidence, the jury would have found the instruction confusing. As in this case, an eyewitness identification expert had testified a witness' confidence in an identification did not positively correlate with the accuracy of the identification. (*Id*. at p. 1231.) The Court held the instruction was proper because the jury was free to reject the expert's opinion. (*Id*. at p. 1232.) Because the *Johnson* Court did not consider the due process implications raised here, *Johnson* does not control. (*People v. Scheid* (1997) 16 Cal.App.4th 1, 17 [A case is not authority on an issue not decided].)

B. Facts

Ron and Tonyia Stevens testified they observed a station wagon parked in front of their house a few days before the 1988 murders. (11RT 4564.) Thirteen years later, Lillienfeld showed Ron a photographic six-pack with Goodwin's picture in it. (3CT 636.) At trial, Ron claimed he picked Goodwin out of that lineup. (11RT 4400; 12RT 4503.) On cross, however, Ron admitted he was unable to narrow his selection down to Goodwin's photograph. (12RT 4514-4517; 7CT 1859-1861; Defense Exhibits Z and Z-1, AA and AA-1.) Ron said, "This type of nose," and "that type of hair" and "this type of complexion," as he pointed to three different individuals. (12RT 4515; Defense Exhibits Z and Z-1.) Lillienfeld asked him, "Yeah, but the guy you saw in the wagon that day most resembles who in this photo array now?" (12RT

4517; 7CT 1862.) Goodwin was the only man in the photographic lineup with a ruddy, pockmarked complexion. (12RT 4512-4513, 4519.) Ron then positively identified Goodwin at the live lineup, at the preliminary hearing and at trial. (3CT 636, 11RT 4395; 12RT 4504.) At the 2004 preliminary hearing and the 2006 trial, Ron testified he had "no doubt" Goodwin was the man he saw in the driver's seat of the car. (3CT 623; RT 4512.)

Tonyia also identified Goodwin at the live lineup, at the preliminary hearing and then at trial, having "no doubt" Goodwin was the man she saw. (3CT 656-657; 12RT 4584, 4586.)

The court instructed the jury in the language of CALCRIM No. 2.92 in pertinent part as follows:

> Eyewitness testimony has been received in this trial. In determining the weight to be given eyewitness identification testimony, you should consider the believability of the eyewitness as well as other factors which bear upon the accuracy of the witness' identification of the defendant, including, but not limited to . . .:
>
> ****
>
> *The extent to which the witness is either certain or uncertain of the identification*;

(7CT 1986-1987; 23RT 8719-8721; [emphasis added].)

The instruction violated Goodwin's right to due process.

C. <u>The Issue Is Cognizable On Appeal</u>

Goodwin did not object to the instruction or ask to remove the reference to certainty. This Court may review the issue, despite

Goodwin's failure to raise the issue below. (Pen. Code §1259; 6 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Reversible Error, 36, p. 497; *People v. Williams* (1998) 17 Cal.4th 148, 161-162, fn. 6.) Because much of the prosecution's case centered around the Stevenses' eyewitness identification of Goodwin, listing certainty as a factor that the jury could consider to assess the reliability of the identification affected Goodwin's substantial rights. (Pen. Code §1259.)

In any event, if the trial court believed *Johnson* controlled, any waiver is excused because any objection would have been futile. (E.g. *People v. Hill* (1998) 17 Cal.4th 800, 820; *People v. Abbaszadeh* (2003) 106 Cal.App.4th 642, 648-649; see also *People v. Birks* (1998) 19 Cal.4th 108, 116, fn.6 [no waiver where lower court was bound by higher court on issue] *People v. Black* (2007) 41 Cal.4th 799, 810 [no forfeiture where the law changes unforeseeably].)

Accordingly, forfeiture should not apply in this situation.

D. Scientific Research Has Cast Doubt On the Correlation Between Confidence and Accuracy

Recent studies confirm the weak correlation between confidence and accuracy. (See e.g. Gary L. Wells & Elizabeth A. Olson, Eyewitness Testimony, 54 Annu. Rev. Psychol. 277, 285-290 (2003) [reviewing major developments in experimental literature relating to the accuracy of eyewitness identification. This article may be found at http://www.psychology.iastate.edu/~glwells/annual_review_2003.pdf].)

A 2002 survey concluded 74 percent of eyewitness experts agreed confidence does not predict accuracy. (Neil Brewer, Amber

Keast & Amanda Rishworth, "The Confidence-Accuracy Relationship in Eyewitness Identification: The Effects of Reflection and Disconfirmation on Correlation and Calibration," 8 J. Experimental Psycol. 44 (2002).) Some studies suggest a negative correlation between a witness' memory of details surrounding the incident and the accuracy of identification. (Brian L. Cutler et al., "The Reliability of Eyewitness Identification," 11 L. & Hum. Behav. 233, 253-54 (1987); Melissa Pigott & John Brigham, "The Relationship Between the Accuracy of Prior Description and Facial Recognition" J. Applied Psychol. 547 (1985).) Nonetheless, California clings to an outdated notion and instructs juries that a witness who is certain of his or her identification is likely to be correct. In a case such as Goodwin's, where his liberty hinges on tainted eyewitness' identification, this erroneous instruction violates due process.

E. In The Years Following *Biggers*, The Courts of Sister States Have Questioned the Validity of the Certainty Factor

In the years following *Biggers,* other state courts have concluded the certainty factor is no longer reliable, and therefore, application of the *Biggers* factors cannot protect a defendant's due process rights.

For example, in Utah, jurors may consider the certainty factor, but not without a cautionary instruction. (*State v. Guzman* (Utah 2006) 133 P.3d 363; *State v. Long* (Utah 1986) 721 P.2d 483.) In *State v. Long, supra*, the Supreme Court of Utah recognized courts have been slow to adopt scientific findings confirming the unreliability of witness

identification:

> We tend to comfortably rely upon settled legal precedent and practice, especially when long-settled technical rules are concerned, and to largely ignore the teaching of other disciplines, especially when they contradict long-accepted legal notions.

(*State v. Long, supra*, 721 P.2d 483, 491 [citations omitted].) The Utah Court specifically noted research had undermined the certainty factor. (*Id.* at p. 490.) Thus, the Court held trial courts must give a cautionary instruction to a jury that hears eyewitness identification evidence. (*Id*. at p. 492.)

Some courts have entirely rejected instructing juries on the certainty factor. In *Brodes v. State* (Ga. 2005) 279 Ga. 435, 614 S.E.2d 766, the Georgia Supreme Court held the certainty factor should be omitted from pattern instructions on eyewitness identification because studies show no correlation between certainty and accuracy. (*Id.* at p. 440.) The *Brodie* court noted, "the law will always lag behind the social sciences to some degree" but "appellate courts have a responsibility to look forward and a legal concept's longevity should not be extended when it is established that it is no longer appropriate." (*Id*. at p. 442, cites omitted.)

Similarly, in *Commonwealth v. Santoli* (1997) 424 Mass. 837, 680 N.E. 1116, the Supreme Judicial Court held that in the future, the portion of the jury instruction permitting the jury to consider the strength of the identification should be omitted because the correlation between witness confidence and accuracy is questionable. (*Id*. at pp. 845 – 846.) That Court relied on its earlier findings in *Commonwealth*

v. Johnson (Mass. 1995) 420 Mass. 458, 650 N.E.2d 125, where the Court cited scientific literature and acknowledged the threat mistaken identifications pose to the "truth-finding process of criminal trials." (*Id*. at p. 465.) Rejecting the reliability test set forth in *Biggers* and *Manson*, the Court held the Massachusetts Constitution requires *per se* exclusion of suggestive identifications.

It is time for California courts to recognize that eyewitness identifications are unreliable by nature, there is no reliable correlation between witness confidence and accuracy, and to instruct a jury otherwise is misleading.

F. The Error Was Prejudicial and Requires Reversal

The erroneous instruction colored a significant portion of Goodwin's case – the certainty of the Stevenses' identifications of him as the man supposedly conducting surveillance or planning the escape route for the killers – thus offering a tenuous connection between Goodwin and the murders. Rather than bolstering the identifications, that factor should have undermined the reliability of the Stevenses' identifications. Instead of cautioning the jury the Stevenses' expressed certainty should have been a factor arguing *against* the reliability of those identifications, the court used this factor to increase it. The instruction, therefore, violated Goodwin's right to due process of law. Because this was federal Constitutional error, the prosecution must show that the error was harmless beyond a reasonable doubt. (*Chapman v. California*, *supra*, 386 U.S. 18.) The prosecution cannot meet that burden.

Respondent may argue that the instructional error should be reviewed under the standard set forth in *People v. Watson, supra,* 46 Cal.2d 818. (See *People v. Elize* (1999) 71 Cal.App.4th 605, 616.) *Watson* requires the defense to show it is reasonably probable that absent the error, Goodwin would have obtained a better result. Under either standard, the error was prejudicial.

In *College Hospital, Inc. v. Superior Court, supra*, 8 Cal.4th 704, the California Supreme Court found that under *Watson*, "probability… does not mean more likely than not, but merely a reasonable chance, more than an abstract possibility." (*Id.* at p. 715; see *Cassin v. Allstate Ins. Co.* (2004) 33 Cal.4th 780, 800 – 802.)

In *People v. Ross* (2007) 155 Cal.App.4th 1033, the court reversed a conviction for a faulty instruction under the *Watson* standard and found the likelihood the defendant would have achieved a better result absent the error to be more than "merely a reasonable chance," and considerably more than an "abstract possibility." (*Id.* at pp. 1054–1055.)

As argued more fully in Argument II, *supra*, the Stevenses' identifications of Goodwin were suspect. They observed the man in the station wagon for a matter of seconds before he drove away. Their stories changed about whether they saw him only in profile. Their descriptions of the man changed substantially over time and with suggestion by Lillienfeld. Ron Stevens at first could not pick anyone with certainty out of a photographic six-pack, being able to pick only three photos as possibilities. After seeing Goodwin in a live lineup in which Goodwin was the only person repeated from the photographic

lineup, Ron selected him without difficulty. Tonyia Stevens picked Goodwin out of the live lineup after having seen him on television. Instructing the jury to consider the certainty of the Stevenses' identifications, therefore, unfairly bolstered what were, essentially, memories created after the fact by suggestive identification techniques. The instruction also unfairly undermined the defense expert's testimony that where confidence increases over time, that is an indicator something improperly influenced the witness. (22RT 8135-8136.)

In addition, the jury heard that the Stevenses had unequivocally identified Goodwin both at the preliminary examination and at trial. (3CT 636, 656-657; 11RT 4395; 12RT 4504, 4584, 4586.) The United States Supreme Court has recognized, however, that once a witness views a photographic lineup, he "is apt to retain in his memory the image of the photograph rather than of the person actually seen, reducing the trustworthiness of the subsequent lineup or courtroom identification." (*Simmons v. United States* (1968) 390 U.S. 377, 383-384.)

The record establishes there was a thirteen-year period in which the Stevenses' memories would have faded significantly, with or without the post-event influences, rendering the identification of Goodwin as the man in the station wagon unreliable. Of particular importance here is the suggestiveness of both the photographic and live lineups, which included only one individual exhibiting the single unusual characteristic Ron had described – pock-marked skin – and that individual was Goodwin. (See People's Exhibit 35 [photographic lineup].) Thus, Lillienfeld's actions when presenting the photographic

and live lineups rendered the lineups unreliable, yet both Stevenses told the jury they were sure.

The prosecutors spent a great deal of time in their arguments on the reliability of the Stevenses' identifications, which constituted the heart of their conspiracy theory. (23RT 8754-8755, 8757, 8778, 8780-8782, 9022-9026.) The jury requested read-back of all of the Stevenses' testimony (7CT 1944-1945; 23RT 9309), indicating the case was close. (See, e.g., *People v. Washington*, *supra*, 163 Cal.App.2d 833, 846.)

In sum, a properly instructed jury might have doubted that the Stevenses' identifications of Goodwin were correct, undermining the prosecution case, and there is far more than a reasonable probability Goodwin would have obtained a better result. Goodwin's convictions must be reversed.

XIV. THE TRIAL COURT ERRED BY INSTRUCTING THE JURY IT COULD CONSIDER GOODWIN'S DEPARTURE FROM THE COUNTRY FIVE MONTHS AFTER THE MURDERS AS "FLIGHT" AND CONSCIOUSNESS OF GUILT EVIDENCE

A. Overview

It was error to give the flight instruction because the instruction improperly focused the jury's attention on "flight" evidence where little evidence connected Goodwin to the killings. The instruction was also defective in that it omitted the word "immediate" from the statutory language governing flight instructions, and Goodwin had not been accused by law enforcement at the time he went sailing. Giving the instruction was also error because the court excluded evidence Goodwin had, through his counsel, offered to make himself available in Los Angeles should his presence be required by investigators – a fact vitiating an inference Goodwin "fled" to avoid arrest. Because the error cannot be found harmless beyond a reasonable doubt, reversal is required.

B. Relevant Facts

On January, 20, 1988, Diane Goodwin wrote a check for a deposit on a yacht. (18RT 6762.) The Thompsons were murdered on March 16, 1988. (7RT 3021; 12RT 4607.) On April 28, 1988, Diane Goodwin took possession of the yacht. (18RT 6762-6763, 6791.) On June 28, 1988, Michael Goodwin hired Victor Utsey in South Carolina to work on the yacht. (7RT 3040-3042.) The yacht was at Utsey's marina for about six weeks, or until around the first week of August, 1988. (7RT 3057.) This evidence suggests Goodwin and Diane

departed Utsey's marina on the yacht – at the earliest – five months after the Thompson murders. Jackson succeeded in excluding from evidence the facts no warrant had issued for Goodwin's arrest, Goodwin had met with investigators, Griggs had informed Goodwin he was considered a "witness" – not a suspect, and Goodwin's counsel had written to Griggs in October of 1988, offering to make Goodwin available in Los Angeles should his presence be required. (20RT 7551-7556; 7513-7528.)

Jackson argued Goodwin's refusal to be interviewed "flies directly in the face of the defense contention that Mr. Goodwin was, in fact, available for all contact with the police." (20RT 7514.) Defense counsel countered Goodwin did not "flee" because his attorney wrote to Griggs requesting investigators notify him if they needed Goodwin to return to LA. (20RT 7515.)

Griggs testified he never caused a case to be filed against Goodwin and never arrested Goodwin. (20RT 7551, 7556-7557.) There was never a time Griggs sought to arrest Goodwin and could not find him, and Griggs never went to Florida to bring Goodwin back to California. (20RT 7557, 7567-7568.)

During argument over proposed jury instructions, defense counsel again objected to the flight instruction. (22RT 8436.) Jackson argued the court should give the instruction because there was no indication why Goodwin left the country, and the burden was on Goodwin to prove he did not flee.[75] (22RT 8437, 8438.)

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Once again, Jackson misstated the law in order to obtain an advantage

Defense counsel argued the prosecutor had only tangentially suggested Goodwin ever left the country. (22RT 8437.) Goodwin was in Florida toward the end of 1988, and the implication was he then got on his boat and went to the Bahamas; however, the prosecutor failed to produce customs forms or any other evidence to prove Goodwin was out of the country. (22RT 8437-8438.)

Jackson pointed to Karen Dragutin's testimony Goodwin said his only way out of the mess was for Thompson to die. (22RT 8438.) Jackson also asserted – falsely – that Dragutin testified Goodwin said, "And they will never catch me because I'll be out of the country sailing in Bermuda."[76] (22RT 8438.) Jackson argued this non-existent

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over the defense. The burden of proving "flight" or "consciousness of guilt" was always on the prosecutor. (*U.S. v. Fowlie* (9th Cir. 1994) 24 F.3d 1070, 1072 ["The government met its burden of proving flight by showing that Fowlie knew he was wanted by the authorities and intentionally thwarted arrest by remaining abroad."].)

[76] This was Dragutin's entire testimony about the boat, during which the prosecutor improperly led her:

"Q And was there any other conversation about trips or planning trips or anything like that?

A He was talking about a boat and going to Bermuda. And it was still in the context of that conversation. So my conclusion was he was going away.

Q So it was in the same part of the conversation as the taking care of this mess and Mickey had to die; is that right?

A Yes. Yes.

testimony was "direct evidence" from Goodwin admitting his intention to flee the country. (22RT 8438.)

The court granted Goodwin's request to modify the flight per *People v. Hill* (1967) 67 Cal.2d 105. (7CT 1933; 20RT 7515, 7524, 7527-7528, 7555; 22RT 8439.)

The court instructed the jury:

> The flight of a person after the commission of a crime or after he is accused of a crime is not sufficient in itself to establish his guilt but is a fact which if proved may be considered by you in the light of all other proved facts in deciding whether a defendant is guilty or not guilty. Whether or not evidence of flight shows a consciousness of guilt and the significance to be attached to such a circumstance are matters for your determination.

(7CT 1976; 23RT 8715-8716.)

C. Standard of Review

Allegations of instructional error involve a trial court's ruling on an issue of law and are therefore reviewed *de novo*. (*People v. Waidla* (2000) 22 Cal.4th 690, 733; *People v. Alvarez* (1996) 14 Cal.14th 155, 217; *People v. Berryman* (1993) 6 Cal.4th 1048, 1089.)

D. Giving the Flight Instruction Was Prejudicial Error

Penal Code § 1127c provides:

> In any criminal trial or proceeding where evidence of

Q The boat and going to Bermuda; is that right?

A Yes. Yes."

(6RT 2840-2841.)

> flight of a defendant is relied upon as tending to show guilt, the court shall instruct the jury substantially as follows:
>
> The flight of a person *immediately* after the commission of a crime, *or after he is accused of a crime* that has been committed, is not sufficient in itself to establish his guilt, but is a fact which, if proved, the jury may consider in deciding his guilt or innocence. The weight to which such circumstance is entitled is a matter for the jury to determine.[77]
>
> No further instruction on the subject of flight need be given.

(Emphasis added.)

Before the court can instruct a jury it may draw a particular inference, evidence must appear in the record which, if believed by the jury, will support the suggested inference. (*People v. Valdez, supra*, 32 Cal.4th 73, 137.) When a court fails to make that preliminary factual determination, it errs by passing a question of law to the jury. (*People v. Hannon, supra*, 19 Cal.3d 588, 597.)

Penal Code section 1127c purportedly mandates giving an instruction such as CALJIC No. 2.52 where there is evidence of flight the prosecutor relies upon as tending to show guilt. "Flight" exists where there is evidence the defendant "departed the crime scene under circumstances suggesting that his movement was motivated by a consciousness of guilt." (*People v. Bradford* (1997) 14 Cal.4th 1005, 1055.

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[77] Here, the court gave the instruction without the word "immediately." (7CT 1976; 23RT 8715-8716.)

Citations and internal quotation marks omitted; *People v. Mendoza* (2000) 24 Cal.4th 130, 179.) '[F]light requires neither the physical act of running nor the reaching of a far-away haven. [Citation.] Flight manifestly does require, however, a purpose to avoid being observed or arrested.' " (*People v. Bradford, supra*, 14 Cal.4th 1005, at p. 1055, quoting *People v. Visciotti* (1992) 2 Cal.4th 1, 60.) It is error to give the instruction in the absence of any evidence from which a jury could reasonably infer that the defendant left to avoid being observed or arrested. (*People v. Carrington* (2009) 47 Cal.4th 145, 188 ["An instruction that permits the jury to draw an inference of guilt from particular facts is valid only if there is a rational connection between the fact proved and the fact inferred."]; *People v. Crandell* (1988) 46 Cal.3d 833, 869-870 [abrogated on other grounds in *People v. Crayton* (2002) 28 Cal.4th 346, 364-365.)

However, ". . . the due process clauses of the Fifth and Fourteenth Amendments set limits upon the power of Congress or that of a state legislature to make the proof of one fact or group of facts evidence of the existence of the ultimate fact on which guilt is predicated." (*Tot v. United States* (1943) 319 U.S. 463, 467.) In fact, the United States Supreme Court has ruled "a statute authorizing the inference of one fact from the proof of another in a criminal case must be subject to scrutiny by the courts to prevent 'conviction upon insufficient proof.'" (*Turner v. United States* (1970) 396 U.S. 398, 404.)

Goodwin acknowledges that, though often criticized and challenged, the California Supreme Court has generally upheld flight instructions. (See E.g. *People v. Avila* (2009) 46 Cal.4th 680, 710 [*Avila*];

People v. Mendoza, supra, 24 Cal.4th 130, 180-181; *People v. Smithey*, *supra*, 20 Cal.4th 936, 982-983.) This includes rejection of challenges similar to those Goodwin raises here concerning the impact of a flight instruction on the jury's finding of a culpable mental state. (See *People v. Smithey*, *supra*, 20 Cal.4th 936, 983, and cases cited therein.) Nevertheless, the instruction here permitted an unjustified inference, violating Goodwin's state and federal rights to due process of law. (U.S. Const., 6th and 14th Amends.; Cal. Const., art. I, §16.)

Although evidence of flight may be of some use in distinguishing the perpetrator of an offense from those who are not involved, it should not be applied so broadly as to be given in every case, regardless of the facts, and left to the jury to sort out as to its applicability. Defense counsel argued Goodwin could not have been said to have "fled" at all, and there was no evidence he was involved with the murders. (See, e.g. 23RT 8804, 8824, 8903, 8902, 8906-8907.) The primary issue for the jury was whether Goodwin paid assassins to kill the Thompsons. The question here is whether the jury could properly use evidence the Goodwins went sailing five months after the murders to draw inferences regarding Goodwin's mental state concerning the Thompson murders to find him guilty.

1. <u>There Was No Evidence From Which the Jury Could Reasonably Infer an "Admission by Conduct"</u>

The uncontroverted evidence established that, following the murders, Goodwin did not immediately leave Los Angeles. He did not run or flee from the scene of the crimes because he was not there.

Goodwin promptly met with investigators, was told he was considered a witness – not a suspect – and declined to be interviewed. Roughly five months later he went sailing with his wife, and his lawyer notified Griggs where Goodwin was, offering to produce Goodwin if the LASD needed him in Los Angeles. Goodwin lived his life in the open and did not attempt to conceal his whereabouts. In *Avila*, by contrast, the defendant fled the scene of the crimes, and police searched for him, ultimately arresting him at an airport years after the crimes. The Supreme Court held "[t]his is sufficient evidence to warrant instructing the jury to determine whether flight occurred." (*Avila, supra*, 46 Cal.4th 680, at p. 710.)

Analytically, flight is an admission by conduct. (E. Clearly McCormick on Evidence § 271, p. 655 (rev. ed. 1972).) Its probative value as circumstantial evidence of guilt depends upon the degree of confidence with which four inferences can be drawn: (1) from the defendant's behavior to flight; (2) from flight to consciousness of guilt; (3) from consciousness of guilt to consciousness of guilt concerning the crime charged; (4) from consciousness of guilt concerning the crime charged to actual guilt of the crime charged. (*United States v. Myers* (1977) 550 F.2d 1036, 1049.)

Courts have criticized using evidence of flight to prove consciousness of guilt because "the second and fourth inferences are not supported by common experience and it is widely acknowledged evidence of flight or related conduct is "'only marginally probative as to the ultimate issue of guilt or innocence.' [Citations.]" (*Myers, supra,* 550 F.2d at p. 1049.)

The California Supreme Court has recognized, in non-flight cases, that evidence of concealment following a crime does not reveal the perpetrator's state of mind at the time of the crime. For example, in *People v. Anderson* (1968) 70 Cal.2d 15, where the defendant lied to the victim's relatives about the crime, the Court explained: "Although this type of evidence may possibly bear on defendant's state of mind after the killing, it is irrelevant to ascertaining defendant's state of mind immediately prior to, or during, the killing. Evasive conduct shows fear...." (*Id*. at p. 32.) Fear, evidenced by flight or other evasive action, is not especially probative of guilt. (*Alberty v. United States* (1896)162 U.S. 499, 511; *Wong Sun v. United States* (1963) 371 U.S. 471, 483, fn 10 .)

Although the California Supreme Court has stated the flight instruction does not address a defendant's mental state at the time of an offense (see e.g., *People v. Welch* (1999) 20 Cal.4th 701, 757) this is not apparent from the instruction itself. The flight instruction broadly told the jury it could use Goodwin's "flight" to determine Goodwin's guilt or innocence. The instruction did not limit the jury's use of this evidence to any particular element of murder or conspiracy. Thus, Goodwin's jury would have assumed from the instruction's language they could infer Goodwin had the *mens rea* of an aider and abettor or co-conspirator at the time of the murders from the fact he took a sailing trip five months later. The prosecutor exploited this ambiguity when he argued Diane's purchase of the yacht prior to the murders evidenced Goodwin's planning and intent. (23RT 8783.)

Another problem with the flight instruction is it unfairly

focuses the jury's attention on this evidence. "Because the probative value of flight evidence is often slight, there is a danger that a flight instruction will isolate and give undue weight to such evidence." (*United States v. Williams* (7th Cir. 1994) 33 F.2d 876, at p. 879.) A flight instruction "...inevitably carries with it the potential of being interpreted by the jury as an intimation of opinion by the court that there is evidence of flight and that the circumstances of flight imply the guilt of the defendant; this is especially true since the trial court does not give specific charges on other circumstances from which guilt or innocence may be inferred." (*Renner v. State* (1990) 260 Ga. 515, 518, 397 S.E.2d 683.)

As recently explained by another state's Supreme Court:

> ...although evidence of flight may, under appropriate circumstances, be relevant, admissible, and a proper subject for counsel's closing argument, it does not follow that a trial court should give a discrete instruction highlighting such evidence. To the contrary, instructions that unnecessarily emphasize one particular evidentiary fact, witness or phase of the case have long been disapproved. [Citing a number of Indiana cases.]

(*People v. Dill* (2001) 741 N.E.2d 1230, at p. 1232.)

2. <u>It Was Error to Give the Instruction Without the Word "Immediate," and in the Absence of Evidence of Immediacy</u>

Although section 1127c includes the word "immediate" as a limitation, the court omitted that limitation from Goodwin's flight instruction.

In some cases the flight instruction should not be given

unless the defendant fled immediately following the crime. The immediacy requirement "generally only becomes important in those cases where the defendant does not know, or his knowledge is doubtful, about the charges and accusations made against him." (*U.S. v. Hernandez* (9th Cir. 1979) 601 F.2d 1104, 1106.) In *U.S. v. Jackson* (7th Cir. 1978) 572 F.2d 636, 640, for example, the court stated, "[W]e are immediately troubled by the weakness of the third inference set forth in *Myers*, from consciousness of guilt to consciousness of guilt concerning the crime charged. The defendant's attempt to flee in the present case occurred when the agents knocked on his door just prior to his arrest. This was nearly 3 ½ months after the crime. The record fails to reflect that Jackson had any reason to believe that the was being sought for the crime charged." Goodwin's purported "flight" was not immediate, and the LASD had not accused Goodwin of the murders at the time Goodwin went sailing.

In *People v. Goodwin* (1927) 202 Cal. 527, a murder case, the California Supreme Court held instructing the jury under circumstances similar to this case was reversible error because there was no evidence in the record showing flight. (*Id*. at p. 539.) As in this case, the defendant in *Goodwin* had been planning and discussing a journey to a destination across the country long before the crime was committed. He intended to "try out" a play he had written, and which he had rehearsed and played in Los Angeles. The defendant left Los Angeles the day after the unidentified body of the victim was found. A couple of weeks later, he wrote to his friends from New York and told about the progress he was making with his play. He presented the

play publicly in New York and appeared in it.

The Supreme Court noted the circumstances surrounding flight are placed before a jury as admissions by acts tending to show guilt, but there was nothing in the defendant's conduct in leaving Los Angeles and his subsequent whereabouts to justify any inference of a consciousness of guilt. (*Id*. at p. 540.) The Supreme Court historically frowned upon giving flight instructions because the instruction clearly invaded the jury's province in weighing evidence and could cause considerable injury and prejudice to a defendant's case. (*Ibid*.)

As in *Goodwin*, considering the conclusive evidence Mike Goodwin gave notice to everyone he was going sailing, and Diane had purchased the yacht for that purpose long before the Thompsons were killed; that Goodwin left Los Angeles months after the murders and when he had not been accused; that he announced his departure and did not conceal his whereabouts, and did what he said he was going to do, the instruction was not based upon evidence before the jury and the trial court erred by giving it. (See *People v. Goodwin, supra*, 202 Cal. 527, 540-541.)

E. <u>The Error Requires Reversal</u>

Instructional errors violate the due process when they effectively reduce the prosecutor's burden of proof, and reversal is required unless the People demonstrate the error was harmless beyond a reasonable doubt. (*Carella v. California* (1989) 491 U.S. 263, 271; *Chapman v. California, supra*, 386 U.S. at p. 24; U.S. Const. 14th Amend.)

The flight instruction authorized a permissive inference. (*People v. Pensinger* (1991) 52 Cal.3d 1210, 1243-1244.) The constitutional

validity of such instructions "depends upon the rationality of the connection 'between the facts proved and the ultimate fact presumed.'" (*United States v. Gainey* (1965) 380 U.S. 63, 66; see also *Ulster County v. Allen* (1979) 442 U.S. 140, 157.) A permissive inference "affects the application of the 'beyond a reasonable doubt' standard only if, under the facts of the case, there is no rational way the trier [of fact] could make the connection permitted by the inference." In such a situation, there is the risk that "an explanation of the permissible inference to a jury, or its use by a jury, has caused the presumptively rational factfinder to make an erroneous factual determination." (*Ulster County v. Allen, supra*, 442 U.S. 140, 157.)

The primary issue in Goodwin's case was whether he hired hit men to kill the Thompsons. Jackson argued flight as evidence of planning and intent:

> He had a plan in mind. He was going to have him killed. He was going to have him wasted, as he said. So he gets the yacht. And you think it was a coincidence that Mickey Thompson and Trudy Thompson met their fate the week of March 16th? It wasn't a coincidence. Look at when the boat was approved. The boat loan was approved six days before they were killed. That boat loan got approved on the 10th and within six days Mickey Thompson and Trudy Thompson were shot to death.

(23RT 8783.) However, as explained above, flight evidence has no value in determining a defendant's mental state at the time of an offense. The jurors could not properly infer that Goodwin's sailing trip five months after the Thompson murders meant Goodwin was an aider and abettor or conspirator in the murders; however, the flight

instruction authorized the jury to draw reach this very conclusion.[78] The instruction undermined the presumption of innocence and violated Goodwin's right to due process of the law.

As explained in detail in Argument II, there was no evidence Goodwin had the intent of an aider and abettor or conspired with the shooters at the time of the murders, which was the crucial issue for the jury to decide. In addition, the jury never heard Goodwin had, through his counsel, offered to make himself available in Los Angeles should investigators require his presence – a fact vitiating the inference Goodwin "fled" to avoid arrest. (20RT 7515.) Thus, the jury heard a skewed version of the facts that omitted crucial, relevant information bearing on Goodwin's "state of mind" at the time he went sailing. The flight instruction provided the jury with an improper basis from which to infer Goodwin had a culpable mental state at the time of the offense. It cannot be said beyond a reasonable doubt that the error complained of did not contribute to the verdict. (*U.S. v. Neder* (1999) 527 U.S. 1, 7.) Goodwin's convictions must therefore be reversed.

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Ironically, had the trial court not erroneously excluded the evidence the prosecutors had a far better suspect in Joey Hunter, the defense would have been entitled to an instruction as to the effect of Hunter's flight. (*People v. Henderson* (2003) 110 Cal.App.4th 737, 741-742.) After people identified Hunter as the person they observed with a racing bike just after the murders, making him a suspect, Hunter fled to San Francisco but was arrested and returned to Los Angeles, where he failed three polygraph tests. (6CT 1575, 1583, 1726.)

XV. THE PROSECUTORS COMMITTED PREJUDICIAL MISCONDUCT, VIOLATING THEIR DUTY TO FULLY AND FAIRLY PRESENT THE EVIDENCE MATERIAL TO THE CHARGES UPON WHICH GOODWIN STOOD TRIAL

The prosecutors violated their duty to fully and fairly present the evidence material to the charges against Goodwin. Instead of calling all of the relevant witnesses and permitting the evidence to unfold, the prosecutors presented a very narrow, carefully tailored version of events, following a script. Where the evidence did not fit the script, the prosecutor ignored it. The result was an unfair trial and unjust conviction.

A. DDA Jackson Committed Misconduct During His Opening Statement by Promising Evidence He Failed to Produce

It is misconduct during opening statement for a prosecutor to refer to evidence he fails to produce, tell the jury about facts the prosecutor knows are inadmissible, prejudicially misstate the evidence, or engage in argument. (See 5 Witkin, Cal. Crim. Law 3d (2000) Crim Trial, § 519, p. 740; *People v. Carr* (1958) 163 Cal.App.2d 568, 574-576.)

The Second District has held a prosecutor's opening statement will be grounds for a claim of prejudicial misconduct only in exceptional cases.[79] (*Ibid*.) The purpose of the opening statement is to outline the state's evidence against the defendant and to inform the jury what the prosecutor intends to prove. (*Id*. at p. 575.)

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The bad faith requirement for a finding of prosecutorial misconduct has since been abandoned. (*People v. Hill*, *supra*, 17 Cal.4th 800, 822.)

"Remarks made in an opening statement cannot be charged as misconduct unless the evidence referred to by the prosecutor 'was "so patently inadmissible as to charge the prosecutor with knowledge that it could never be admitted." ' " (*People v. Wrest* (1992) 3 Cal.4th 1088, 1108.) This was an exceptional case in which, as in *Carr*, the case against Goodwin was weak, and Jackson made numerous bad faith and prejudicial statements during his opening statement ultimately not supported by the record that constituted improper argument.

1. The Prosecutor Promised to Produce Key Witnesses Who Never Testified, and Nobody Testified to Jackson's "Dance of Death"

Jackson told the jury – stressing the importance of the evidence – Phyllis and Anthony Triarsi would testify they looked out their front window and saw one gunman at the top of the driveway and the other gunman shooting at the van, and then Trudy Thompson either being pulled from or falling out of the van, getting down to her knees, and crawling down the driveway as the second gunman followed, "covering" her. (6RT 2730-2731.) Jackson elaborated on how these witnesses watched as Trudy was shot first while Mickey was forced to watch, and then they saw the gunman jump on bicycles and ride away. (6RT 2731-2732.) However, Phyllis and Anthony Triarsi did not testify at trial, and no witness testified to any of these "facts."

Jackson also told the jury, "All the blood that Mickey Thompson was losing at the top of the driveway will suggest that he was crawling in circles in this area (indicating). And ultimately was

shot to death right where the white sheet is." (6RT 2734.) No witness testified to these "facts."

The "dance of death" fantasy was a key part of Jackson's case, intended to inflame and prejudice the jury against Goodwin; however, the prosecutor presented no evidence that supported these dramatic events Jackson promised to prove.

2. The Prosecutor Failed to Present Any Evidence that "Trudy Died First" or the Shooter Held Her Head Up by Her Hair Before Shooting Her

Jackson did not present any evidence to support his improper argument during opening statement that Trudy Thompson died first. (6RT 2710 ["The evidence will prove . . . Trudy Thompson was actually killed first."]; 6RT 2731-2732 ["Once they were in a position that they could see each other and Mickey Thompson could clearly watch, the second gunman put the gun to the back of Trudy's head and fired a bullet through her brain. The evidence will show that Mickey Thompson's last vision on this planet was that of his wife being executed."].) Griggs, the original investigator, testified there was no evidence Trudy's head was held up before she was shot. (20RT 7539.) The coroner's testimony did not support this theory; neither did the original statements of the percipient witnesses. Lance Johnson denied telling 48 Hours such a story or relating it to anyone else, since he did not witness the shooting, although he testified it was his "understanding" that was what happened. (13RT 4903, 4905, 4908-4909.)

This was a gruesome story intended to inflame the

passions and prejudices of the jury, and it constitutes misconduct.

3. There Was No Evidence a Gun Was "Screwed Into [Mickey Thompson's] Left Ear" or Thompson Was Shot to Incapacitate Him but Kept Alive so He Could Watch Trudy Die

During opening statement, Jackson grossly misstated the evidence of the wounds inflicted on Mickey Thompson, the timing of the wounds, and argued why the wounds were inflicted as they were.

Jackson asserted ". . . the first gunman screwed that .9 millimeter pistol into [Thompson's] left ear and fired a shot through Mickey's brain." (6RT 2710.) Jackson later repeated this falsehood. (6RT 2732.) Jackson possessed the coroner's report before arguing the gun was "screwed into Mickey Thompson's ear," and presumably knew the statement was false. The coroner's report and testimony indicated the entry wound for the gunshot to Mickey Thompson's head was "just behind the right ear." (17RT 6448.) There was no soot or stippling near the wound, and the coroner testified the range was "indeterminate." (17RT 6449.)

On cross, defense counsel asked the coroner if there was any evidence someone walked up to Mickey Thompson, screwed a gun into his ear and fired a bullet. (18RT 6656.) The coroner answered, "Absolutely not," and confirmed there was nothing in the report to suggest that happened. (18RT 6656.) Detective Verdugo also confirmed Mickey Thompson was not shot in the ear, and there was no evidence of a gun being "screwed into" Thompson's ear before he was shot. (15RT 5521.) This Court can only conclude Jackson deliberately

misstated the evidence, since Jackson possessed copies of the coroner's report and Verdugo's reports prior to trial.

There was no evidence Mickey Thompson was shot to incapacitate him, but kept alive so he could watch Trudy die, as Jackson claimed. (6RT 2710, 2731.) The coroner testified Mickey was shot a total of seven times and died of multiple gunshot wounds. (17RT 6397-6398.) There were three gunshot wounds to his abdomen near his navel in quick succession, one of which was rapidly fatal due to blood loss causing shock. (17RT 6398-6399, 6407-6410.) Two of those wounds were so close together the coroner could not determine what damage each had caused separately, but those gunshots injured the bowel. (17RT 6401-6402.) The coroner testified generally a medical examiner cannot determine the order in which gunshot wounds were inflicted. (17RT 6398, 6450.) While the coroner indicated the head wound was likely the last of the wounds inflicted on Thompson (17RT 6450), there was no testimony and no evidence the killer shot Mickey in order to incapacitate him so that he would have to watch his wife die; rather, the evidence indicates Thompson was shot multiple times and died rapidly.

4. <u>The Prosecutor Failed to Prove Goodwin Committed Bankruptcy Fraud; In Fact, Goodwin Was Acquitted of Bankruptcy Fraud in Federal Court Prior to This Trial</u>

The prosecutor failed to prove Goodwin committed bankruptcy fraud. The prosecutor asserted Thompson was "going . . . to show the bankruptcy court that [Goodwin] engaged in fraud,

deceit, lying on the court, and the bankruptcy court [would not] discharge any of [Goodwin's] debt," and that was why Goodwin had him killed. (6RT 2723-2724.)

The facts are that on September 19, 1986, Goodwin declared Chapter 11 bankruptcy on behalf of Stadium Motor Sports. (RT 3196; 3196-3197 3197-3198; 19RT 6923-6924; People's Exhibit 14.) On November 9, 1986, Goodwin declared personal bankruptcy. (7RT 3197-3198; 8RT 3473-3479; People's Exhibit 15.) On May 17, 1989 – well after the murders – Cordell sent a memo to George Griffith, United States Trustee, regarding the Goodwins' conduct in connection with the bankruptcies and attached a criminal referral form. (5CT 1424-1429.) Following an investigation, no bankruptcy charges were sustained, and Goodwin was never convicted of bankruptcy fraud. (4RT V-16 – V-17.)

5. The Prosecutor Failed to Prove Goodwin Made Threats in the Presence of Deputy John Williams

The prosecutor failed to prove Goodwin made threats in Deputy Williams' presence. (6RT 2726 ["I told you about that prized Mercedes, that 1982 SL coupe Mickey Thompson went after that as a personal asset. It was ultimately seized by authorities. . . .He will tell you that when he walked up to notify Mike Goodwin that he was going to have to seize his car, he had legal documentation that entitled him, John Williams, to seize the car, Mike Goodwin flew into one of his famous violent rages."].)

Williams claimed in January of 1988 he knocked on Goodwin's door and served him with a writ, informing Goodwin he was taking the car based on Thompson's judgment (10RT 3998-3999),

and a very heated exchange ensued, during which Goodwin told Williams there was "no way in hell" Williams was going to take the car. (10RT 3999-4002.) Williams' testimony was false because Goodwin was in bankruptcy at the time, and it would have been impossible for Williams to seize Goodwin's car in satisfaction of Thompsons' judgment. (10RT 3994-3998, 4012-4016.)

Cordell directly contradicted Williams' testimony. She levied on the Mercedes in June or July of 1986; however, because the bank had a lien on the car and the car was "upside down," Cordell released it back to Goodwin. (8RT 3464-3465.) Goodwin relinquished his Mercedes to the bankruptcy estate in January 1988. (10RT 4064-4065, 11RT 4237, 4246, 4251.)

6. The Prosecutor Falsely Promised Witnesses Would Testify to Seeing the Gunmen "Jump on Bicycles," and That Goodwin Planned and Confessed to the Murders

The prosecutor asserted, "[Mickey Thompson] was killed. Witnesses that saw this, then watched as the gunman jumped on bicycles and began to pedal off. [Sic.] And that too will become important." (6RT 2732.) Nobody testified to seeing the gunmen jump on bicycles and pedal off.

Jackson also asserted the evidence would show Goodwin planned the murders (6RT 2738-2739), but no such evidence was presented.

Jackson asserted he would produce evidence Goodwin confessed or admitted to the murders (6RT 2742 ["[Goodwin] would

see that Mickey Thompson was killed before he ever got a dime of his money. And how do we know that? Because we got it from the absolute, most reliable source. Michael Goodwin said so."]), but no confession was presented to the jury.

Jackson claimed "[e]very single witness, every witness who heard anything, from the Johnsons to the Hackmans to the Triarsis, every witness that heard anything heard the same thing from Mickey Thompson." (6RT 2734.) Only one Triarsi testified, and that was Allison; the Hackmans did not testify.

7. Jackson Promised to Produce Evidence Ron Stevens Picked Only Goodwin's Picture Out of a Photographic Lineup, When Jackson Knew That Statement Was False

Jackson stated Ron Stevens "looked at the photographs and he pointed to a particular picture." (6RT 2737-2738.) Jackson knew at the time he made this statement it was false because he possessed a recording of that identification procedure, during which Ron indicated he was unable to narrow his choice down to fewer than three men; in fact, this was why Lillienfeld suggested a live lineup. (7CT 1859-1861; 12RT 4514-4518; Defense Exhibits Z and Z-1, AA and AA-1.)

8. Jackson Falsely Asserted "Goodwin Sold Whitehawk Investments," Knowing This Asset Was Never Sold; Falsely Promised to Prove Goodwin "Skimmed" or "Stole" from Thompson; and Falsely Promised to Prove Goodwin Was "Never, Ever Going to Pay Mickey Thompson"

Jackson promised he would prove "[Goodwin] sold Whitehawk Investments." (6RT 2740.) The evidence showed Diane

Goodwin – who was the owner of the shares in JGA Whitehawk – received dividends or distributions from her investment, and it was never sold. (9RT 3702-3705, 18RT 6711-6712 [stipulation the check to Diane Goodwin dated May 6, 1988 was a distribution from JGA Whitehawk], 6735-6736, 6770-6771, 6774, 6780; 19RT 6921, 6927-6928.) In fact, JGA Whitehawk was brought into the bankruptcy estate as an asset, and it constituted the bulk of the funds in the estate. (9RT 3702-3705.) Whitehawk was never sold.

Jackson also told the jury – without proof – Goodwin had "skimmed" or "stolen" money from Thompson. (6RT 2716-2717.) The dispute between Thompson and Goodwin – according to Thompson's own lawyer – was over Goodwin's refusal to advance cash to put on Mickey Thompson Entertainment Group (MTEG) and Stadium Motor Sports events. (7RT 3181-3183.) Bartinetti explained Thompson filed suit because Goodwin indicated he was going to run MTEG and Stadium Motor Sports, and Thompson would have no say in, or revenue from, the operations. (7RT 3184-3185.) Part of the dispute involved interpretation of the contract's salary and stock provisions. (8RT 3392-3395.) These issues do not amount to "skimming" or "stealing."

Jackson falsely asserted, "The evidence in this case will show that Michael Goodwin was never ever, ever going to pay Mickey Thompson what he owed him." (6RT 2741.) In fact, the evidence showed – although Goodwin could have discharged Thompson's entire judgment in bankruptcy – in the weeks leading up to the murders, their attorneys worked out a settlement that would have paid

Thompson the entire judgment, and after Thompson was murdered Goodwin signed that agreement. (9RT 3713-3721, 3743-3744; Defense Exhibit M.)

9. The Proseuctor Failed to Prove Goodwin "Lost the Insport Agreement"

Jackson asserted during opening statement he would prove Goodwin "lost the Insport Agreement" that made it possible for him to put on his events. (6RT 2718-2719.) Jackson argued, "Mickey Thompson went after the Insport agreement. Mike Goodwin fought it. Mike Goodwin lost." (6RT 2719.) To the contrary, the evidence established the Insport agreement became the primary asset of the bankruptcy estate, and was put up to bid in the bankruptcy court. (8RT 3525.) Diane Goodwin and Charles Clayton were the highest bidders – not Thompson – so it was not true that Goodwin "lost" the Insport agreement to Thompson. (9RT 3700.) While Cordell claimed there was a second auction in 1987 where Thompson purchased the Insport agreement (9RT 3722), Cordell had to admit she was wrong. (9RT 3723-3726.)

B. The Prosecutor Violated the Court's Order Not to Refer to Bankruptcy "Frauds" as Separate Criminal Conduct and Misrepresented the Facts And the Law Regarding the Bankruptcy and Fraud Charges Previously Litigated Against Goodwin

Goodwin objected to the prosecutor's attempt to present evidence Goodwin had committed fraud during the course of his bankruptcy proceedings. (4RT V-16 – V-17.) Defense counsel explained Goodwin was investigated for bankruptcy fraud, but not

convicted. (4RT V-16; 17 RT 6480.)

During opening statement Jackson – talking about the bankruptcy – referred to fraud. (6RT 2723; see Argument XV.A.4., *supra*.)

Defense counsel objected to Coyne expressing his opinion whether the transfer of assets between E.S.I. and S.X.I. during the bankruptcy was fraudulent. (10RT 4047-4048.) Coyne was not a prosecutor, and the terminology "this is fraudulent" was objectionable because Goodwin was never convicted of bankruptcy fraud, and the word "fraud" in the context of bankruptcy proceedings is a term of art. (10RT 4048-4050.) While the court overruled Goodwin's objection that "fraud" is a legal term, the court ordered Jackson not to elicit testimony about fraudulent activity "as separate criminal conduct." (10RT 4050.)

Just before Kingdon testified, Goodwin again objected to any reference to bankruptcy fraud and the prosecutor promised not ask about that. (17RT 6476-6478.) Nonetheless, Jackson repeatedly used the words "fraud" and "fraudulent" when questioning witnesses about the bankruptcy proceedings. (See 8RT 3459-3460, 3472 [Cordell]; 10RT 4047; 4054-4058 [Coyne opined that the activity between Goodwin, his wife, E.S.I, S.X.I., Clayton and the Insport agreement was fraudulent]; 11RT 4214-4215, 4223, 4244-4245, 4254-4255 [Coyne]; 7RT 3183-3184, 3193-3195 [Bartinetti]; see Argument V, *supra* [Kingdon].) This was misconduct. (*People v. Mendoza* (2007) 42 Cal.4th 686, 702-703 [cert. den. 128 S.Ct. 1715, 170 L.Ed. 2d 523 (2008); *People v. Hill*, *supra*, 17 Cal.4th 800, 829-830.)

Furthermore, the prosecutor's claim Goodwin engaged in

"fraudulent" activity was contrary to the meaning of "fraud" in connection with bankruptcy. Title 18 of the United States Code defines bankruptcy fraud. (See 18 USC §§ 151–157.) Bankruptcy fraud under 18 USC § 157 requires a specific intent to defraud an identifiable victim or class of victims. (*United States v. Milwitt* (9th Cir. 2007) 475 F3d 1150, 1156–1158.) There could be no generic "fraud" related to bankruptcy that the jury would understand as "not criminal," the jury was not instructed as to what the word "fraud" means in connection with bankruptcy, and it was impossible for the jury to sort out the meaning on its own. The jury was not told Goodwin had been accused of bankruptcy fraud and cleared of that charge. The prosecutor's obfuscation regarding "fraud" was intended to confuse the jurors and convince them Goodwin had committed crimes in connection with the bankruptcies.

That is exactly how the jury interpreted the references to fraud: "The bad character of Michael Goodwin along with his ability to take everything he did (*including other criminal activity*) to an extreme level was very evident from the testimony of these witnesses. The jurors went over all of this in the deliberation room and we could not escape the reality that, coupled with his overtly stated hatred of Mickey Thompson, this guy was the kind of guy who was capable of coordinating this event." (8CT 2082 [emphasis added].)

C. The Prosecutors Committed Misconduct by Constantly Leading Their Own Witnesses, Effectively Testifying Themselves

During jury selection defense counsel moved to prohibit

bad faith questions and prosecutorial misconduct – specifically, leading questions, use of "preambles" to questions that improperly served to argue to jurors and to alert witnesses to the matters the prosecutor deemed to be important, personal attacks on defense counsel, and appeals to passion or prejudice. (7CT 1803-1807.) Defense counsel referenced instances of such misconduct that had occurred during the preliminary hearing and hearings on pretrial motions. (7CT 1805, lines 24-27, 31-34; 7CT 1806, lines 31-34; 7CT 1807, lines 1-2.) Defense counsel also requested a curative instruction should such misconduct occur. (7CT 1807.)

The prosecutors blatantly ignored the court's repeated rulings and admonitions to stop leading witnesses. Starting with the first witness, both Jackson and Dixon constantly engaged in leading.[80]

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See 6RT 2790 [objection sustained], 6RT 2835 [overruled]; 6RT 2841 [overruled]; 7RT 3002 [discussion during bench conference re Dixon's habit of leading and repeating answers as argument]; 7RT 3013 [no ruling]; 7RT 3042 [sustained], 7RT 3055 [sustained]; 7RT 3059 [two objections sustained]; 7RT 3066 [sustained]; 7RT 3100 [sustained]; 7RT 3114 [sustained]; 7RT 3126 [overruled]; 7RT 3171[sustained]; 7RT 3184 [sustained]; 7RT 3185 [sustained]; 7RT 3186 [sustained - court instructs Jackson to stop leading witnesses]; 8RT 3386 [sustained]; 8RT 3390 [sustained - court instructs Jackson to stay away from leading questions]; 8RT 3423 [sustained]; 8RT 3431 [sustained]; 8RT 3462 [overruled]; 8RT 3475 [sustained; answer stricken]; 8RT 3477 [sustained]; 8RT 3484 [sustained]; 8RT 3488-3493 [sustained]; 9RT 3630 [sustained]; 9RT 3733-3734 [overruled]; 9RT 3734 [sustained]; 9RT 3753 [sustained]; 9RT 3758 [overruled]; 9RT 3780 [sustained]; 9RT 3786 [sustained]; 10RT 3944 [sustained]; 10RT 3971 [overruled]; 10RT 3993 [sustained]; 10RT 4059 [sustained]; 10RT 4062 [sustained]; 10RT 4063 [sustained]; 10RT 4066 [sustained]; 11RT 4254 [sustained]; 11RT 4255

As the defense pointed out, the leading was usually as to a key point, and the method was Jackson or Dixon would ask the obviously leading question, counsel would object, Jackson or Dixon would ask a non-leading question, and the witness would answer with the content

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[sustained]; 11RT 4257 [sustained]; 11RT 4266 [sustained]; 11RT 4272-4273 [two objections sustained]; 11RT 4308 [sustained and answer struck]; 11RT 4311 [sustained]; 11RT 4313 [overruled]; 11RT 4317 [overruled]; 11RT 4323 [sustained]; 11RT 4379 [sustained]; 11RT 4383 [sustained]; 11RT 4389 [sustained]; 11RT 4391 [overruled]; 11RT 4392-4393 [two objections sustained]; 11RT 4406 [detailed objection and request for admonition to jury re misconduct, overruled]; 12RT 4505 [sustained]; 12RT 4507 [sustained]; 12RT 4547 [sustained]; 12RT 4550 [overruled]; 12RT 4552 [two objections sustained]; 12RT 4505 [sustained]; 12RT 4554 [sustained]; 12RT 4555 [sustained]; 12RT 4558 [sustained]; 12RT 4567 [sustained]; 12RT 4571 [overruled]; 12RT 4576 [sustained]; 12RT 4615 [overruled]; 12RT 4616 [overruled - but prosecutor admonished to "try to phrase the questions in a non-leading manner"]; 12RT 4638 [sustained]; 12RT 4642-4646 [defense counsel says, "The questions are so close to the opening statement, they can only be willful. And therefore, I'm asking the court to give the admonishment to the jury that we requested pretrial;" court declines to cite Jackson for misconduct]; 13RT 4843 [overruled]; 13RT 4875 [sustained]; 13RT 4881[sustained]; 13RT 4890 [sustained]; 13RT 4928 [overruled]; 13RT 4929 [sustained, answer struck]; 14RT 5631[sustained]; 16RT 6052 [sustained]; 16RT 6055 [overruled]; 16RT 6095 [sustained]; 17RT 6324 [sustained]; 17RT 6365 [overruled]; 17RT 6438 [sustained]; 18RT 6680 [sustained]; 18RT 6683 [sustained]; 18RT 6729 [overruled]; 18RT 6733 [sustained]; 18RT 6737 [sustained]; 18RT 6741 [the court is troubled by the leading questions - says Jackson is supplying the information in his questions]; 18RT 6781 [overruled]; 19RT 6926 [sustained]; 19RT 6929 [overruled]; 19RT 6943[sustained]; 19RT 6953 [sustained]; 19RT 6976 [overruled]; 19RT 6977 [sustained]; 19RT 6978 [overruled]; 20RT 7648 [sustained]; 20RT 7666 [sustained].

suggested by the improper leading question. For example, as to the men in the station wagon – Jackson's sole "evidence" Goodwin "planned" the murders, Jackson asked Ron Stevens:

> Q As you sit here right now you can see the defendant's complexion; correct?
>
> A Yes.
>
> Q Would you describe his complexion as ruddy and pock marked?
>
> MS. SARIS: Objection. Leading.
>
> THE COURT: Sustained.
>
> Q BY MR. JACKSON: How would you describe this man's complexion that I'm pointing to? The defendant, Your Honor.
>
> A As ruddy and pock marked.

(12RT 4505.)

At the outset of proceedings on November 7, 2006, the court overruled Goodwin's objections to the prosecutor's leading questions. (7RT 3002, 3014.) On the same date, during Bartinetti's testimony, defense counsel requested a sidebar and stated:

> Your honor, I'm asking the court to finally after seven witnesses now cite this prosecutor for misconduct. Give an instruction to the jury that leading questions are inappropriate.

(7RT 3185.) The court declined counsel's requests, but admonished the prosecutor to try not to lead the witnesses, warning "if it continues, we

may get to that step, but we're not anywhere close to that yet." (7RT 3186.)

On November 8, 2006, during Cordell's testimony, Jackson requested a bench conference after the court sustained Goodwin's objection to his leading questions. (8RT 3488.) The court warned Jackson "There has been a consistent problem with maybe your definition of leading and my definition of leading. I think a lot of these questions have been leading and that's why I have been sustaining the objections." (8RT 3489.)

While questioning witness Allison Triarsi on a key prosecution theory – that the killers deliberately executed Trudy in front of Mickey in order to make Mickey suffer – Jackson asked: "From your prospective where you — from your view, I should say, was it your impression – being familiar with that driveway – that Mickey Thompson was in a position to see Trudy Thompson?" Defense counsel again objected and requested an admonition, pointing out how – regarding the most important points Jackson and Dixon were trying to make – the prosecutors had a willful pattern of feeding the witnesses the lines they were supposed to speak through leading questions. (RT 4642-4647)

Although the typical instances of misconduct occur in argument, it is also misconduct to deliberately offer inadmissible evidence or to ask questions calling for inadmissible and prejudicial answers. (See *People v. Williams* (1951) 104 Cal.App.2d 323, 324; *People v. Robarge* (1952) 111 Cal.App.2d 87, 97; *People v. Figueiredo* (1955) 130 Cal.App.2d 498, 505; *People v. Gill* (1956) 143 Cal.App.2d 46, 50.) A

prosecutor is not permitted to testify through his witnesses.

The proper form of direct examination is to propose simple, direct and specific questions, to which specific answers may be given. A direct examiner is permitted to ask: "Who? What? Where? When?" A leading question is one that asks the witness to acknowledge facts stated or suggested in the question. (Evidence Code § 764.) It is objectionable because in effect, the questioner is doing the testifying and simply asking the witness to affirm what the questioner has stated. (Evid. Code § 767(a)(1); see 1 McCormick 5th, §6; 3 Wigmore (Chadbourn Rev.) §769; cf. Model Code., Rule 105(g) and Comment.)

It should be obvious that Jackson and Dixon were testifying through their witnesses in an effort to follow their script and compensate for evidentiary deficiencies. This prosecutorial testifying was prejudicial to Goodwin, as it filled in the gaps in the prosecutors' extraordinarily weak case.

D. The Prosecutor Repeatedly Committed Misconduct on Closing Argument

"A prosecutor's closing argument is an especially critical period of trial. (*People v. Alverson* (1964) 60 Cal.2d 803, 805, 36 Cal.Rptr. 479, 388 P.2d 711.) Since it comes from an official representative of the People, it carries great weight and must therefore be reasonably objective. (*People v. Talle* (1952) 111 Cal.App.2d 650, 677, 245 P.2d 633.) An argument by the prosecution that appeals to the passion or prejudice of the jury is improper. (*People v. Haskett, supra*, 30 Cal.3d at p. 863, 180 Cal.Rptr. 640, 640 P.2d 776; *People v. Talle, supra*, 111

Cal.App.2d at p. 676, 245 P.2d 633.)" (*People v. Pitts* (1990) 223 Cal.App.3d 606, at p. 694.)

1. The Prosecutor Repeatedly Misstated the Burden of Proof

On closing the prosecutor argued a "totality of the circumstances" burden of proof of a conspiracy, and as the standard for proving that Goodwin murdered the Thompsons. (23RT 8759 ["Everybody agrees that these people (the men observed at the scene) were obviously working together. There was an agreement there. And if the totality of the circumstances suggest that Michael Goodwin is responsible for the killings of Mickey and Trudy Thompson, then Michael Goodwin is a conspirator along with the two actual killers"].) Jackson also argued: "As long as you are convinced that Michael Goodwin is responsible in any way shape, form or fashion for the murders of Mickey Thompson and Trudy Thompson, he is liable for everything that the actual killers did." (23RT 8754; see also 23RT 8760 ["As long as the totality of the circumstances proves that Michael Goodwin was responsible for the murders of Mickey and Trudy Thompson, we don't have to show that he even knew the killers."].) Jackson also argued: "– as long as you're convinced through both circumstantial and direct evidence or one or the other that Michael Goodwin is responsible for the deaths of Mickey and Trudy Thompson, that's all that's required." (23RT 8764.)

Defense counsel did not contemporaneously object to these arguments, but, at the earliest opportunity – arguing in connection with her earlier objection to the prosecutor's comment on Goodwin's

failure to testify (23RT 8755) – asked the court to instruct the jury the word "responsibility" is a civil term and the burden of proof in this criminal case was beyond a reasonable doubt. (23RT 8797.)

The "totality of the circumstances" is not the burden of proof for establishing a defendant's participation in a conspiracy. The burden is proof "beyond a reasonable doubt." (*United States v. Alvarez, supra*, 358 F.3d 1194, 1201; *United States v. Penagos, supra*, 823 F.2d 346, 348.)

2. The Prosecutor Improperly Exploited the Exclusion of Evidence Other People Had More Motive to Kill Thompson, and The Killings Were A Result of a Robbery Gone Bad

Prior to and during the trial, defense counsel presciently warned that the prosecutor was going to say, "If not Goodwin, who else would have done this?" (13RT 4805-4806; see also 6RT 35.)

Jackson devoted a portion of his opening argument and Dixon dedicated the bulk of his closing argument to Goodwin's failure to prove someone other than Goodwin was responsible for the Thompson murders, or that the killers were at the Thompson home for purposes of a robbery. (See, e.g., 23RT 8773, 8786-8792; 23RT 9007-9010 [defense is asking jury to speculate where there is no evidence]; 23RT 9011-9016 ["Nothing was taken"]; 23RT 9012; 23RT 9015 ["Could have; might have been" is not evidence.]; 23RT 9016 [not a burglary]; 23RT 9018 [mocking the notion of burglars on bicycles]; 23RT 2019 [Capitalizing on exclusion of evidence of the highly portable gold: "They weren't there to take anything. No could have been might have

been, Ms. Saris. I don't think so. These men were there to kill them. They weren't there to steal anything. They didn't back up a pickup truck to take the radio and the stereo and the whatever. . . ."]; 23RT 9020 [could not carry out the loot on bicycles]; 23RT 9021 [not a robbery gone bad - no evidence of a robbery]; 23RT 9020 ["If it is a hit, if it's an execution, ladies and gentlemen, the only evidence you have heard in this trial of a man who hated Mickey Thompson that much was the defendant."].) Because Jackson and Dixon had obtained exclusion of such evidence[81], this was devastating prosecutorial misconduct.

In *People v. Daggett* (1990) 225 Cal.App.3d 751, the defendant unsuccessfully sought to present evidence the child molest victim had reported being molested previously by persons other than the defendant. The prosecutor then argued to the jury the victim must have learned about sex when the defendant molested him. The court found prosecutorial misconduct, holding a prosecutor is not permitted to mislead the jurors by suggesting they draw inferences they might not otherwise draw had they heard the excluded evidence. Finding the prosecutor took unfair advantage of the trial court's ruling, the court stated, "Vigorous advocacy is admirable, but when it turns into a zeal to convict at all costs, it perverts rather than promotes justice." (*Id*. at 758.)

In *People v. Castain* (1981) 122 Cal.App.3d 138, 146, the prosecutor successfully excluded a prior act of assault by an officer. The Court of Appeal held the evidence should have been admitted, and

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[81]See full discussion of these issues in Arguments IX, X, and XI, *supra*.

further noted the "obvious misconduct" in the prosecutor's arguing about the lack of evidence when he had successfully urged its exclusion. (*Id.* at p. 146.)

Finally, in *People v. Varona* (1983) 143 Cal.App.3d 566, the prosecutor kept out evidence the victim was a prostitute. The court found the evidence was erroneously excluded and held:

> We agree that, in a proper case, a prosecutor may argue to a jury that a defendant has not brought forth evidence to corroborate an essential part of his defensive story. But we know of no case where such argument is permissible except where a defendant might reasonably be expected to produce such corroboration. Here the prosecutor not only argued the "lack" of evidence where the defense was ready and willing to produce it, but he compounded that tactic by actually arguing that the woman was not a prostitute although he had seen the official records and knew that he was arguing a falsehood. The whole argument went beyond the bounds of any acceptable conduct.

(*Id*. at p. 570; see also *People v. Rodrigues, supra*, 8 Cal.4th 1060, 1125.)

Here, it was nothing short of outrageous for the prosecutor to tell the jury there was no evidence of a robbery and nobody else hated Thompson enough to kill him when the prosecutor himself had successfully barred admission of evidence supporting a robbery theory and evidence Vagos gang members, Kennedy and others also had motive to kill Thompson.

By asking the jurors to draw inferences they might not have drawn had they heard the evidence the judge excluded, the prosecutors unfairly took advantage of the judge's rulings. (*People v.*

Daggett, *supra*, 225 Cal.App.3d 751, at pp. 757-758.)

Having successfully excluded all evidence investigators ignored leads to other viable suspects,[82] the prosecutor argued:

> The evidence that you have heard in this courtroom points to *only one person who hated Mickey Thompson so much that he wanted to end his life*. And make sure that Mickey Thompson saw the person he loved the most die in front of him before he died. And that is Mike Goodwin. And that's I think the choice that you have here.

(23RT 9008 [emphasis added].)

On closing the prosecutor exploited the absence of the very defense evidence of a robbery the prosecutor had excluded:

> But there is really an important concept here as we talk about this. And that is, what is reasonable and what is unreasonable? *What is evidence and what is speculation?* When you hear someone say, well, you know, it could have been. It could have been a robbery. There could have been a video camera there. They are asking you – Ms. *Saris is asking you to speculate as to what might have been. As to some evidence that doesn't exist*. Could have been.

(23RT 9007-9008 [Emphasis added]; see also 23RT 9012.) The prosecutor went on to emphasize that the robbery theory made no sense because the killers left behind cash and expensive jewelry. (23RT 8791, 9011, 9019.) However, had the jury heard there was at least $250,000 worth of gold at the Thompson house – a fungible item that would have been easier to fence because it is not unique, unlike expensive jewelry – the jury might have considered it made more sense

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[82]See Arguments IX, X and XI, *supra.*

to take the less easily identifiable gold rather than the jewelry. The jurors were not given the opportunity to consider that theory. In the absence of the defense evidence, it really was more "speculative" to conclude the motive for the killings was robbery gone wrong, rather than assassination.

This Court should note a prosecutor's comments constitute prejudicial misconduct when there is a reasonable likelihood the jury misconstrued or misapplied the comments in an improper or erroneous manner. (*People v. Frye* (1998) 18 Cal.4th 894, 970; *People v. Clair* (1992) 2 Cal.4th 629, 662-663.) As intended by the prosecutor, the jury here misapplied his comments in the desired erroneous manner. (8CT 2080 [declaration of jury foreman Mark Matthews].)

3. Jackson Argued Facts Not in Evidence

Jackson committed misconduct when he repeatedly argued facts not in evidence. Such practice is "clearly ... misconduct" (*People v. Pinholster* (1992) 1 Cal.4th 865, 948), because such statements "tend[ ] to make the prosecutor his own witness — offering unsworn testimony not subject to cross-examination. It has been recognized that such testimony, 'although worthless as a matter of law, can be "dynamite" to the jury because of the special regard the jury has for the prosecutor, thereby effectively circumventing the rules of evidence.' [Citations.]" (*People v. Bolton* (1979) 23 Cal.3d 208, at p. 213; *People v. Benson* (1990) 52 Cal.3d 794 ["a prosecutor may not go beyond the evidence in his argument to the jury"]; *People v. Miranda* (1987) 44 Cal.3d 57, 108; *People v. Kirkes* (1952) 39 Cal.2d 719, 724, 249 P.2d 1.)

Jackson argued, "Mickey Thompson stood on the top of the driveway and watched in horror as the love of his life, Trudy Thompson, had a bullet put through the back of her head." (23RT 8734; see also 23RT 8744, 8747 [Trudy had to die first].) As to this false scenario, Jackson argued, "Exactly how Michael Frank Goodwin said he wanted it to happen. Exactly." (23RT 8734.) Nobody testified to Goodwin making such a statement.

Jackson argued, "[Goodwin] lost the Insport agreement. Ms. Saris might stand up and say, well, there is no proof that Mickey Thompson got it. Who cares who got it. All we care about is who lost it. Michael Goodwin lost it." (23RT 8766.) No evidence was produced that Goodwin "lost" the Insport agreement. Extensive testimony established E.S.I., Goodwin's company, represented by Diane Goodwin and Charles Clayton, purchased the Insport agreement from the bankruptcy estate, and Thompson never owned it. (See discussion in XVI.A.9.)

Jackson argued, based on no facts in the record, that Goodwin or his wife sold JGA Whitehawk and "dumped" all of their assets. (23RT 8783-8784; see detailed discussion in VXI.F.1(h), *supra*.) JGA Whitehawk was not sold, but became the primary asset in the bankruptcy estate.

Jackson's misconduct on closing was intended unfairly to prop up an extraordinarily flimsy case, and it worked – Jackson got his conviction.

4. The Prosecutor Misrepresented the Law of Bankruptcy In Order to Make His Case Goodwin's Motive And Intention Was to Avoid Paying the Civil Judgment He Owed Thompson

" '[I]t is improper for the prosecutor to misstate the law generally [citation], and particularly to attempt to absolve the prosecution from its *prima facie* obligation to overcome reasonable doubt on all elements. [Citation.]' [Citation.]" (*People v. Hill*, *supra*, 17 Cal.4th 800, 829–830, overruled on on another ground in *Price v. Superior Court*, *supra*, 25 Cal.4th 1046, 1069, fn. 13.) If an allegation of prosecutorial misconduct " ' "focuses upon comments made by the prosecutor before the jury, the question is whether there is a reasonable likelihood that the jury construed or applied any of the complained-of remarks in an objectionable fashion." [Citation.]' " (*People v. Carter* (2005) 36 Cal.4th 1215, 1263 (Carter).) " 'In conducting this inquiry, we "do not lightly infer" that the jury drew the most damaging rather than the least damaging meaning from the prosecutor's statements. [Citation.]' [Citation.]" (*People v. Brown* (1988) 31 Cal.4th 518, at pp. 553–554.)

Stopping just short of using the words "bankruptcy fraud," Jackson argued on closing what had previously improperly been called "fraud" in reference to the bankruptcy and Jackson's theory that what Diane Goodwin owned was really owned by Goodwin, and that Goodwin was hiding assets from the bankruptcy estate and liquidating them. (23RT 8783-8784; see detailed discussion of these misrepresentations during the evidentiary phase in Argument V,

supra.)

5. Dixon Vouched For His Witnesses

A prosecutor may not vouch for the credibility of his witnesses, either by putting his own prestige behind the witness, or by indicating that extrinsic information not presented in court supports the witness' testimony. (*People v. Alvarado* (2006) 141 Cal.App.4th 1577, 1584; see *United States v. Rudberg* (9th Cir. 1997) 122 F.3d 1199; *United States v. Roberts* (9th Cir. 1980) 618 F.2d 530, 533; *People v. Sully* (1991) 53 Cal.3d 1195, 1235; *People v. Anderson* (1990) 52 Cal.3d 453, 479.) Nor is a prosecutor permitted to offer the impression that he or she has taken steps to assure a witness's truthfulness at trial. (*United States v. Roberts, supra,* 618 F.2d 530, 536–537.)

When a statement by the prosecutor is challenged as misconduct, the appellate court must examine the prosecutor's statement in the context of the whole argument and all the instructions in order to determine whether there is a reasonable likelihood the jury construed or applied the statement in an objectionable way. (*People v. Morales* (2001) 25 Cal.4th 34, 44; *People v. Hill, supra*, 17 Cal.4th at p. 832.) Here, Dixon vouched for John Williams on closing, stating, "John Williams is an elected official in Orange County, a long time public servant. At the time of the repossession of the car, he was a deputy marshal in Orange County." (23RT 9004-9005.) The prosecutor's vouching about Williams' status as an elected official and a marshal – a person whose position the jury might easily identify with the integrity of the State – presents vouching in a very powerful form. Dixon also expressed his personal belief in Williams' credibility: "You

saw this man on the stand. You'll have to make that judgment. But I would submit to you that what he told you and how this went down and what Mike Goodwin said about Mickey Thompson is absolutely true." (23RT 9005.)

6. Goodwin Was Deprived of his Fifth and Fourteenth Amendment Rights to be Free From Improper Self Incrimination Under *Griffin v. California* (1965) 380 U.S. 609, by the Prosecutor's Repeated Comments on His Failure to Present Alibi Evidence

(a) Facts

Ron and Tonya Stevens testified they saw a man sitting in a station wagon outside their home with binoculars days prior to the Thompson murders. They could not recall the exact date or time of the incident, but 13 years later they believed it was related to the Thompson murders and identified Goodwin as one of the individuals sitting in the station wagon.

Goodwin attacked the Stevenses' eyewitness identifications based on a number of factors, including the length of time between the observation and the identification, and the fact Goodwin's face had been on television and in the news several times over the years in connection to the murders.

On closing, prosecutor Jackson asked the jurors to convict Goodwin based in part on this evidence, exhorting the jurors to consider that if Goodwin had not been in front of the Stevenses' home that day, he would have provided an alibi:

. . . I expect that [Ms. Saris is] going to stand up here

> and say, wait a minute, you can't believe the Stevenses identification. Michael Goodwin was never out there. He was never at that scene.
>
> Well, where is his alibi?

Goodwin did not testify in his defense. Defense counsel immediate interposed an objection raising *Griffin* error, and the court deferred ruling, permitting the prosecutor to continue in the same vein. (23RT 8754-8756.)

During a break in the proceedings the court heard further argument on the *Griffin* objection:

> MS. SARIS: Yes. Our objection was to counsel commenting on the defendant's refusal to testify by implication. If Mr. Goodwin were to present an alibi, that would require him to testify. He tried to backtrack after the illegal comment on the evidence, but the damage was done. We would like to cite it as prosecutorial misconduct. Ask the court to instruct the jury that it was misconduct; that Mr. Goodwin does not have to testify at all; does not have to provide an alibi.

The court overruled counsel's objection. (23RT RT 8795-8798.)

Jackson continued to compound the error, telling the jurors if someone wanted to know where he was ten years from now, he would be able to tell people that at that moment he was standing on that piece of carpet exactly in front of that exact jury box. (23RT 8756.)

The prosecutor's argument focused the jury on Goodwin's failure to testify to an alibi defense, and violated *Griffin v. California, supra*, and its progeny.

(b) The Prosecutor's Comments Violated Goodwin's Federal Constitutional Right Not to Testify at Trial

A defendant in a criminal trial has an absolute right not to testify, and the exercise of that right cannot be held against him at trial. The United States Supreme Court held in *Griffin v. California, supra*, 380 U.S. 609, that the "Fifth Amendment, in its direct application to the Federal Government, and in its bearing on the States by reason of the Fourteenth Amendment, forbids either comment by the prosecution of the accused's silence or instructions by the court that silence is evidence of guilt." (*Id.* at p. 615).

In determining whether *Griffin* error has occurred, the California Supreme Court has made it clear the particular choice of words is not dispositive; the question is whether the remarks act to draw attention to the fact the defendant did not testify. (*People v. Murtishaw* (1981) 29 Cal.3d 733, 757.)

California courts have issued numerous opinions distinguishing between comments that merely refer to the state of the evidence and comments that in fact illegally comment on the failure of the defendant to testify on his own behalf. Jackson's argument falls squarely into the latter category and constitutes prejudicial prosecutorial misconduct. Jackson's very first comment – the one with the most impact – was, "Well, where is his alibi?" (23RT 8755.) The remark did not distinguish between Goodwin's testimony and testimony of third parties, and it was phrased to grab the jury's attention. Although Jackson immediately backtracked following

defense counsel's objection, he made no effort to clear up the distinction between Goodwin himself testifying and others testifying on his behalf, and he did not mention Goodwin's Fifth Amendment right not to take the stand to testify in his defense. (See 23RT 8756-8757.)

California courts have addressed this same issue in several cases. In *People v. Vargas* (1973) 9 Cal.3d 470, the California Supreme Court explained the difference between fair comment on the evidence and prosecutorial misconduct amounting to *Griffin* error, which is that, although *Griffin* prohibits reference to a defendant's failure to take the stand in his own defense, that rule "does not extend to comments on the state of the evidence or on the failure of the defense to introduce material evidence or to call logical witnesses." (*Id*. at p. 475; accord, *In re Rodriguez* (1981) 119 Cal.App.3d 457, 468; *People v. Rodgers* (1979) 90 Cal.App.3d 368, 371.)

In *People v. Crawford* (1967) 253 Cal.App.2d 524, the Court held a prosecutor's comment "the only thing we have heard from the defendant is this roundabout story from these relatives" constituted *Griffin* error. The comment was not only "improper," but "reprehensible" because it was "an obvious attempt to direct the jury's attention to the fact that appellant had not testified on his own behalf." (*Id.* at p. 535).

Here, Jackson did not merely comment on the evidence, but specifically asked the jurors to find Goodwin was the man outside the Stevens home. (23RT 8755.) Jackson proceeded to query how he would explain his own whereabouts if questioned about them. (23RT 8756.) This argument suggested the jurors consider how an accused

could explain where he was at any given time – by implication suggesting Goodwin should have been able to do the same.

In effect, the argument was an attempt on Jackson's part to shift the burden of proof to Goodwin by inviting the jury to forget the unbelievable eyewitness identifications and look to Goodwin himself for a simple explanation – where was he at the time? The argument was also particularly unfair in that it would have been impossible for anyone to provide an alibi for every minute over the time frame to which the Stevenses testified, especially so many years after the incident. The Stevenses were unable to pin down the time at which they purportedly observed Goodwin in the car beyond a period of about a week to two days before the murders. (See 11RT 4378-4379; 12RT 4564.)

E. **The Errors Were Prejudicial**

A court will not reverse a judgment absent a clear showing of a miscarriage of justice. (Cal. Const., art. VI, § 13; see also *Chapman v. California, supra*, 386 U.S. 18, 24 [review of federal constitutional error].) However, a series of trial errors, though independently harmless, may in some circumstances cumulatively rise to the level of reversible and prejudicial error. (*People v. Hill, supra,* 17 Cal.4th 800, 832 [combination of "relatively unimportant misstatement[s] of fact or law," when considered on the "total record" and in "connection with the other errors," required reversal]; *People v. Herring* (1993) 20 Cal.App.4th 1066, at pp. 1075–1077 [cumulative prejudicial effect of prosecutor's improper statements in closing argument required reversal].) *Griffin* error is prejudicial where, as here, the evidence

against the defendant is not overwhelming. (*People v. Williams* (1971) 22 Cal.App.3d 34, 39.)

In *Williams, supra*, 22 Cal.App.3d 34, the Court of Appeal cited the prosecutor's comments in the *Crawford* case on the failure of the defendant to provide an alibi as an example of an evil the *Griffin* rule sought to eliminate. (*Id*. at p. 44). The court found the cumulative effect of the errors required reversal because the question of guilt was a close call. So it was here; the prosecutor's case was speculative, depended on extreme inferences instead of facts, and ultimately never tied Goodwin to the killers. (See 8CT 2079.)

The question is whether the *Griffin* error served to fill an evidentiary gap in the prosecution's case or "at least touch a live nerve in the defense . . .." (*People v. Vargas, supra,* 9 Cal.3d 470, at p. 481.) The "where is his alibi?" argument did just that – it shifted the burden to Goodwin in response to his attack on the stale and tainted eyewitness identifications supplied by the Stevenses. Goodwin's alleged presence at the scene of the Stevenses' home was the only "fact" even remotely connecting him to the crime scene, and the prosecutor argued the Stevenses' identifications established Goodwin "planned" the escape route the shooters took – thus circumstantially connecting Goodwin to the murders. By shifting the burden of proving Goodwin was not at the Stevenses' house when the Stevenses said he was, Jackson obtained an advantage.

Goodwin was unable to offer witnesses from 1988, the year the murders were committed; therefore, based on the state of the evidence, the only person who could have failed to provide an alibi

was Goodwin himself. Neither the prosecutor nor the court ever explained to the jury Jackson's comment was based on the state of the evidence and not on Goodwin's failure to testify. Nor did the court or Jackson explain the inappropriateness of shifting any burden to the defense. (See *People v. Bradford* (1997) 15 Cal. 4th 1229.) Since the *Griffin* error was substantial and its effect on the jury unknown, the question of prejudice must be resolved in Goodwin's favor.

The other instances of misconduct must also be deemed prejudicial. The prosecutor's misstatement of the burden of proof, along with the defective jury instructions on conspiracy, were prejudicial.[83] The prosecutors misled the jury into finding Goodwin guilty on less than proof beyond a reasonable doubt by bolstering their speculative circumstantial evidence case against Goodwin with "evidence" that was never produced, introducing their own testimony through leading questions, vouching for their witnesses, and exploiting the excluded defense evidence that would have raised a reasonable doubt. This was a miscarriage of justice, and Goodwin's convictions must be reversed.

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See full discussion of the instructional error in Argument XII, *supra*, and see 8CT 2080.

XVI. THE GOVERNMENT'S MISCONDUCT DURING THE INVESTIGATION OF THIS CASE WAS SO OUTRAGEOUS AND SO DAMAGING TO THE TRUST AND INTEGRITY OF THE JUDICIAL SYSTEM THAT DISMISSAL IS REQUIRED

A. Overview

A prosecutor is not permitted to target a person for prosecution in the absence of evidence to establish his guilt, and then unfairly ignore, manufacture or manipulate evidence to obtain a conviction. Rather, the prosecutor has a unique role in the criminal justice system, and prosecutors are held to an elevated standard of conduct. (*People v. Hill, supra,* 17 Cal.4th 800, 819.) The prosecutor's duty is not to obtain convictions, but to fully and fairly present to the court the evidence material to the charge upon which the defendant stands trial. (*In re Ferguson* (1971) 5 Cal.3d 525, 531) The goal of a trial is the "ascertainment of truth," (*ibid*) and the goal of the prosecutor is to seek justice. (*Ibid*.)

Since 1992, numerous wrongful convictions have been overturned, due to the work of the Innocence Project.[84] Perjury has been a major cause of wrongful convictions.[85] The prosecutor here

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See The Innocence Project, http://innocenceproject.org (last visited May 25, 2012). The Innocence Project was founded by Barry Scheck and Peter Neufeld at the Benjamin N. Cardozo School of Law in 1992. It has since expanded into the national Innocence Network and has exonerated over 200 people.

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See, for example, Steven Clark, Procedural Reforms in Capital Cases Applied to Perjury, 34 J. Marshall L. Rev. 453, 453 (2001) [finding the

relied heavily upon false evidence created by LASD's investigators in order to arrest and convict Goodwin. Because the investigation and resulting trial were tainted by false testimony and misconduct, Goodwin's convictions must be reversed.

B. The Issues Are Not Forfeited For Lack of Objection

Lack of objection does not forfeit these issues on appeal.

Defense counsel at the Los Angeles trial was not in a position to object to all of the misconduct committed by Lillienfeld during the investigation. Counsel attempted to dismiss the case for prosecutorial misconduct in large part related to Lillienfeld's known misconduct. (See Argument I, *supra*.) Rather, having become aware of Lillienfeld's actions and that Jackson and Dixon had no intention of calling Lillienfeld to testify at trial – even though Lillienfeld was the lead investigator – counsel called Lillienfeld as a defense witness and attempted to impeach him with his prior false statements in his various affidavits supporting the Orange County search and arrest warrants, for a live lineup, at grand jury proceedings and at the Orange County preliminary hearing – among other sworn statements – that Goodwin owned a gun that was consistent with the weapons used in the Thompson murders. (See 20RT 7584-7585.) The trial court sustained the prosecutor's objections to this impeachment. (20RT 7600 - 7619.)

Further, a defense objection to an investigator's misconduct prior to trial is not required in order to preserve that issue

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most common cause of capital wrongful convictions in Illinois is perjury].

for appeal if the objection, or the court's subsequent admonition to the jury to disregard the misconduct, would have been futile. (*People v. Hill, supra*, 17 Cal.4th 800, 820-823; *People v. Williams, supra,* 17 Cal.4th 148, 161, fn.6; *People v. Arias* (1996) 13 Cal.4th 92, 159; *People v. Bradford, supra*, 15 Cal.4th 1229, 1333.) Here, Goodwin's counsel unsuccessfully 1) moved to dismiss the entire case due to misconduct, including Lillienfeld's misconduct (see Argument I, *supra*), and 2) attempted to question Lillienfeld regarding his false testimony over Jackson's objection, and was precluded from doing so. (20RT 7600 - 7619.) It would have been futile for Goodwin to object that Lillienfeld's prior sworn statements were misconduct because they were false, given the court's refusal to permit cross-examination of Lillienfeld with those same sworn statements.

If Goodwin's motion to dismiss and his unsuccessful attempt to impeach Lillienfeld with his false statements are insufficient to preserve the issue, this Court may still review it. The reviewing court has discretion whether to consider issues not raised at the trial (*Canaan v. Abdelnour* (1985) 40 Cal.3d 703, 723, fn. 17), if to do so would be in the interests of justice. (*Conservatorship of Waltz* (1986) 180 Cal.App.3d 722 [pertains to issues not raised on appeal, but by analogy should be applicable to issues not raised during trial].)

Finally, "objection in the trial court is not required to preserve a federal constitutional issue." (*People v. Vera* (1997) 15 Cal.4th 269, 279; accord, *People v. Santamaria* (1991) 229 Cal.3d 269, 279, fn. 7 (1991) [errors "of... magnitude" are cognizable on appeal in absence of objection]; *People v. Mills* (1978) 81 Cal.App.3d 171, 176 ["The Evidence

Code section 353 requirement of timely and specific objection before appellate review is available 'is, of course, subject to the constitutional requirement that a judgment must be reversed if an error has resulted in a denial of due process of law' "].)

C. The OCDA, Relying Upon the LASD's Improper Investigation, Brought this Case Despite the Absence of Good Evidence And The LADA Later Took the Case Back, Notwithstanding Manufactured Evidence

The LADA brought this case against Goodwin following sixteen years of an ineffective investigation that intermittently halted entirely for years at a time, and knowing there was no substantial, reliable evidence connecting Goodwin to the killers.[86] The LADA pursued Goodwin with full knowledge investigators had ignored far more damning evidence against other individuals developed within the year the murders occurred.[87]

1. Facts Pertaining to the Investigation and Resulting Prosecutions

(a) Lead Detective Griggs' Investigation Was Derailed by Campbell's Interference

Investigators suspected Goodwin from the outset of the investigation in March of 1988, found nothing to incriminate him, then revived a cold case investigation under pressure from Thompson's politically-connected sister, Collene Campbell. (1CT 11-15, 5CT 1154,

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[86]See Argument II, *supra*.

[87]See Arguments IX, X and XI, *supra*.

1157; 6CT 1487-1517.) Early on, when Detective Griggs – the first lead investigator – did not pursue the investigation to Campbell's liking, she hired her own team of investigators and actively interfered with Griggs' work.[88] (1CT 15-16; 5CT 1153-1154, 1192-1201; 1205-1206; 6CT 1493-1517.)

From the start of the investigation, Campbell insisted Goodwin had the Thompsons killed. (5CT 1198-1199.) After Campbell lobbied her personal friend and attorney, former Deputy OCDA – now OCDA – Tony Rackauckas to help pursue Goodwin, a deputy from the OCDA's office contacted Griggs and directed him to cooperate with Campbell. (6CT 1503-1505.)

In late 1988, Campbell filed complaints against Griggs because he was not focusing solely on Goodwin. (5CT 1154; 6CT 1487, 1512.) In December 1988, Deputy Griggs responded in two written and taped memoranda asserting Campbell was interfering with his investigation and attempting to direct the investigation on her terms. (5CT 1154, 1195; 6CT 1487-1569; 4RT P-2 – P-3.) Griggs secreted his memoranda in the evidence locker, apparently concerned the material

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Campbell's investigator was former Orange County Sheriff's homicide investigator Bernie Esposito. (6CT 1493.) In a 1988 memorandum, Griggs stated that after his first meeting with Campbell, members of law enforcement warned him Campbell had "created problems" in the Anaheim investigation of the murder of Scott Campbell, Collene Campbell's son. (6CT 1493-1494.) Esposito met with Griggs, and the two of them agreed Esposito would channel information from Campbell to Griggs in an attempt to avoid tainting the case. (6CT 1494-1495.)

would disappear if it went through normal Sheriff's Department channels. (4RT R-13.)

Campbell first telephoned Griggs in March or April of 1988, telling him she wanted to do whatever she could to help find the killers. (5CT 1189.) She said she had ways of obtaining phone and other records the police could not get. (5CT 1190.) When Griggs told Campbell he was bound by the rules of search and seizure and discovery, she assured him she had experience in these matters and had assisted the Anaheim police when they investigated her son Scott's murder. (5CT 1190-1191.)

Griggs met with Campbell the first time at the Thompsons' house in early April 1988, informing him she was working on telephone records from Goodwin's residence. (5CT 1191.) Campbell told him if he really could not use the records she gave him, they were just "for information," and Griggs responded once he received them they were open to discovery. (5CT 1191.) Griggs advised Campbell if her information broke the case he would have to reveal his source at any discovery hearing, leaving Campbell open to a civil suit. (5CT 1192.)

Around May 1, 1988, Griggs first met with Campbell's investigator, Esposito, at the Norwalk police station, where Griggs presented an overview of the case. (5CT 1193-1194.)

In mid-May of 1988, Campbell contacted Griggs to tell him a cousin had checked on Goodwin's brother, Mark, and had some information. (5CT 1196; 6CT 1539.) Griggs met with the cousin, who gave him Mark's mug shot and rap sheets. (5CT 1196.) Campbell said

Mark resembled the white male suspect in the Thompson case, and she had phone toll information about calls from California to Pensacola, Florida just prior to the murders. (5CT 1196-1197; 6CT 1538-1539.) Griggs investigated Mark, ruling him out as a suspect. (6CT 1540-1542.)

On June 2, 1988, Campbell gave Griggs the names of two witnesses who had seen two black men near the Thompson house. (5CT 1195.) The witnesses told him they had seen a white male in a Toyota on the road leading to the Thompsons' neighborhood. (5CT 1195; 6CT 1554.) Griggs prepared a flyer and walked the neighborhood with Detectives Verdugo and Jansen. (5RT 1195, 1198; 6CT 1554.)

In June of 1988, Campbell told Griggs she might need security because she wanted to tape a conversation with one of Goodwin's employees. (5CT 1200.) Griggs asked Campbell if this person had some information, because if so, Griggs would conduct an interview. (5CT 1200.) Campbell became annoyed, saying she had made tapes before. (5CT 1201.) Griggs again advised Campbell about the rules regarding discovery. (5CT 1201.) Griggs told Campbell he would not risk tainting the investigation without a solid reason to use her in as an agent. (5CT 2001.)

Griggs discussed Campbell with Lt. Chausse and Captain Grimm, who said the LASD would not take part in a "fishing expedition" by a police agent without first establishing its importance to the case. (5CT 1201-1202.) LADA Deputy Dale Davison advised Griggs the police agent guidelines were strict. (5CT 1202.)

On July 7, 1988, Griggs met with Esposito and Campbell,

but Campbell refused to allow Griggs to tape-record the meeting. (5CT 1205.)

On July 8, 1988, Campbell gave Griggs two clues. (5CT 1207; 6CT 1557-1558.) First, Campbell claimed Ross Olney had information about Goodwin's connections in Jamaica who may have provided the "hit men." (6CT 1557.) An investigator contacted Olney, who indicated the "hit man" comment was just speculation among race drivers. (6CT 1557-1558.) Second, Campbell claimed the Thompsons' neighbor, Scott Smith, had been involved in litigation with Goodwin, and that Smith had expressed fear for his safety; Smith denied this. (6CT 1558.)

Two or three weeks later, LADA Deputy Dale Drusin contacted Griggs, saying Deputy OCDA Snethen had called the Chief Deputy in Los Angeles to talk to him about the Thompson murder investigation. (5CT 1202.) Griggs called the OCDA, and the deputy told him to listen to Campbell's "important information." (5CT 1204.)

In September of 1988, Campbell reported taping conversations with Jeanne Sleeper [sic] and Larry Huffman. (5CT 1210.) Griggs reminded Campbell about discovery rules and contacted Esposito, who told him the tapes did not contain any useful information. (5CT 1210.)

Griggs spoke with Campbell about the script for the "Unsolved Mysteries" program on the Thompson murders. (5CT 1209, 1211.) Detective Burbau disagreed with Campbell's theory on how the murders occurred, and how Campbell found out about the murders through a friend in the Sheriff's Department. (5CT 1211.)

On October 6, 1988, Griggs and Deputy Lyons went to the Thompson residence for the filming of the Unsolved Mysteries program. (5CT 1212.) Campbell told Lyons she had problems with Griggs and hoped to get along with Lyons. (5CT 1212.) Lyons told Griggs Campbell was being manipulative.

Also on October 6, 1988, Campbell reported her husband Gary had taken a call from someone who said the Goodwins had put a contract out on her. (6CT 1560.) Campbell discussed this "threat" with Tony Rackauckas. (6CT 1560.)

On October 7, 1988, Griggs spoke with Gary Campbell, who confirmed having received a call from an investigator about a threat. (6CT 1560.) The investigator never identified the source of the threat or mentioned the Goodwins. (5CT 1209; 6CT 1561.) Griggs confirmed Gary's version with Rackauckas and the investigator. (6CT 1561-1562.)

Griggs noted he had had no negative contacts with Campbell since July of 1988, and he did not know why she went to the District Attorney to complain about him and the investigation. (5CT 1214.)

Campbell interviewed witnesses both before and after law enforcement interviewed them. (5CT 1216.) Campbell would give information to Griggs for clues, and then when he interviewed the witnesses they said something quite different from what Campbell had reported. (5CT 1216.)

(b) Lillienfeld Permitted Campbell to Direct His Investigation

In January of 1992, Griggs took a psychiatric-stress disability retirement, and the investigation of suspects other than Goodwin abruptly ceased. (5CT 1154.) Somewhere between January of 1992 and 1997 – depending on which of his sworn statements and testimony one believes – Lillienfeld picked up the investigation where Griggs left off. (See, e.g., OCPHRT 68; 20RT 7569, OC Grand Jury[89] Lillienfeld RT 881-882; sealed Exhibit B to sealed 1538.5 motion.)

In addition to the omissions and misconduct described in previous arguments, Lillienfeld conducted a non-objective investigation. He participated in a crime-scene "reconstruction" for the television show America's Most Wanted, fictionalizing the "facts" to which witnesses later testified (20RT 7583.) He falsely declared under penalty of perjury in multiple affidavits, at the preliminary hearing, and possibly at Grand Jury proceedings that Goodwin owned guns consistent with the weapon used to kill the Thompsons. (20RT 7585-7594; 20RT 7600-7619; OCPHRT [4-15-2002] 288-289; sealed Exhibit B to sealed 1538.5 motion.) This was a key piece of "evidence" Lillienfeld manufactured to obtain orders for the live lineup, search and arrest warrants, and upon which Goodwin was subsequently held to answer in Orange County. (See OCPHRT [4-15-2002] 288-291; OCPHRT [4-18-2002] 340.) He falsely testified during the Orange County preliminary hearing that Gail Moreau-Hunter had not

[89]Hereinafter referred to as "OCGJ."

attempted suicide. (OCPHRT 155-156.)

Because in 1998 the LADA declined to prosecute Goodwin due to insufficient evidence, Lillienfeld went forum-shopping to Orange County, personally lobbied the OCDA to prosecute Goodwin, attended and testified at grand jury proceedings with Deputy OCDA David Brent, and directed the investigation on Campbell's terms. (OCPHRT 29; OCGJ Lillienfeld RT, 885-886.)

(c) The Los Angeles Prosecution

The LADA attempted to inhibit all information that did not support the theory Goodwin was responsible for the Thompson murders. The passage of 16 years since the murders helped in this effort.[90] At the LA preliminary hearing the prosecutor presented the testimony of Gail Moreau-Hunter – a person who appeared to be delusional, who had repeatedly been hospitalized due to severe mental illness, and who may have been hearing voices – as evidence Goodwin had "confessed" to the Thompson murders. (3CT 789-826; 4CT 872; 2RT F-39 – F-47, 2RT P-30 – P-31.) During this proceeding the prosecutor repeatedly objected to cross-examination regarding Moreau-Hunter's substance abuse and numerous commitments in mental institutions and rehabilitation centers during the period she claimed to have heard Goodwin's "confession." (3CT 803-818; 4CT 870-875.) Ultimately – after Moreau-Hunter's psychiatric records were obtained by the defense – the prosecutor did not present Moreau-Hunter's testimony at trial. (4RT P-30 – P-31.)

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[90]See Argument III, *supra*.

The LADA resisted discovery of materials generated by investigators and the OCDA of other potential suspects in the Thompson murders and jeered at the notion that others might have been more viable suspects. (2RT A-2 – A-9.)

Lillienfeld's and the prosecutors' conduct was inconsistent with a "search for truth." (*Drake v. Kemp* (11th Cir. 1985) 762 F.2d 1449, 1479.) Outrageous government misconduct pervaded this case.

2. Pursuing a Course of Action That Shocks the Conscience, Lillienfeld Engaged in Forum-Shopping In Order To Assist a Private Citizen In Her Personal Vendetta Against Goodwin

Detective Lillienfeld improperly went forum-shopping by taking this case to the OCDA after the LADA rejected it in 1998 for lack of evidence to connect Goodwin to the crimes. (OCGJ RT Lillienfeld testimony, 885-886.)

(a) Detective Lillienfeld Usurped Power

The California Constitution identifies California sheriffs as county officials. "[T]he California Constitution does not list sheriffs as part of 'the state executive department.' " (*Streit v. County of Los Angeles* (9th Cir. 2001) 236 F.3d 552, 561, cert. denied, 534 U.S. 823, 122 S.Ct. 59, 151 L.Ed.2d 27 (2001) [quoting *McMillian*, 520 U.S. at 787, 117 S.Ct. 1734 internal quotation marks omitted.].) "Instead, Article XI, § 1(b) of the California Constitution designates sheriffs as county officers." (*Id*.)

Several provisions of the Government Code support the conclusion the sheriff acts for the county when conducting investigations. "Under California law, monetary damages for §1983

claims are paid by the County and not the state." (*Id.* at 562 [citing Govt. Code § 815.2].) California law places liability for a sheriff's misconduct on the county – not the state. (Cal. Gov. Code § 815.2; *Streit,* 236 F.3d at 562.) California sheriffs are elected county officers. (Govt. Code § 24000(b); Elec. Code § 314].) Sheriffs are required to maintain their offices at the county seat with other county officers. (Govt. Code § 24250). Sheriff vacancies are filled in the same manner as other elective county officers. (Govt. Code § 24205.) The services of the sheriff may be contracted out by the county – not the state. (Govt. Code §53069.8.) "These various state provisions lead inexorably to the conclusion that the [sheriff] is tied to the County in its political, administrative, and fiscal capacities." (*Streit, supra*, 236 F.3d 552, at p. 562.)

Finally, California authorities support a county's liability for a sheriff's actions. (See *Sullivan v. County of Los Angeles* (1975) 12 Cal.3d 710, 716-717; *Beck v. County of Santa Clara* (1988) 204 Cal.App.3d 789, 251.) The sheriff acts as the final policymaker for the county when administering the County's release policy." (*Streit, supra*, 236 F.3d 552, 564-565.)

A sheriff's jurisdiction in law enforcement matters extends throughout his county, and he has concurrent jurisdiction with that of the city police within the boundaries of any city within his county. (Pen. Code § 830.1; *People v. Pina* (1977) 72 Cal.App.3d Supp. 35, 39-40.) Those powers are limited, with a few statutory exceptions, to actions within the deputy's county of employment. (*Ibid.*) The powers of a deputy sheriff when acting beyond his territorial limits, except under circumstances specified by statute, are those conferred on a private

citizen under the same circumstances. (*People v. Pina, supra*, 72 Cal.App.3d Supp. 35, 39.) If an investigative agency acts outside the scope of its investigatory powers, it is precluded from showing it acted with a law enforcement purpose. (See *Ramo v. Department of Navy* (N.D. 1979) 487 F.Supp. 127, 130; *Weissman v. Central Intelligence Agency* (D.C. Cir. 1997) 565 F.2d 692.)

Based on the above authorities, it appears Lillienfeld lacked authority to expand his investigation into Orange County after the LADA initially rejected this case, and it appears Lillienfeld was acting as a rogue officer in doing so. Lillienfeld's attempt at having Goodwin prosecuted by the OCDA constituted a personal end-run around the authority of the LADA and the Los Angeles courts done at Campbell's behest. As such, Lillienfeld's actions constituted a usurpation of power outside of his authority as a Sheriff's deputy, ratified by the OCDA and later by the LADA. Lillienfeld's actions, and the OCDA and LADA's ratification of those actions, shock the conscience and constitute outrageous government misconduct.

(b) Lillienfeld Impermissibly Went Forum-Shopping In His Quest to Put Goodwin Behind Bars

Los Angeles unquestionably was the county with jurisdiction over this case. (See unpublished decision in *Goodwin v. Superior Court*, Court of Appeal, Fourth District, case No. G031285.) The appellate record does not disclose directly how Lillienfeld, a LASD deputy, came to investigate this case on behalf of the OCDA, or how he presented this case to the OCDA for prosecution, other than that the LADA refused to prosecute the case after Lillienfeld presented it to that

office.[91] It is reasonable to assume that if the LADA believed there was a case to be brought against Goodwin, the LADA would have brought that case instead of repeatedly rejecting it, and the LADA would not have authorized Lillienfeld to go outside the jurisdiction to shop for a prosecutor.

Judge-shopping and forum-shopping are evils "that should be prevented." (*People v. Preciado* (1978) 78 Cal.App.3d 144, at p. 149.) California and federal courts generally consider such conduct unethical and sanctionable. (See *Fields v. Gates* (C.D. Cal. 1999) 184 F.R.D. 342; *Hernandez v. City of El Monte* (9th Cir. 1998) 138 F.3d 393, 398-399 ["Judge-shopping clearly constitutes 'conduct which abuses the judicial process.'"]; *Standing Committee on Discipline of U.S. Dist. Court for Cent. Dist. of California v. Yagman* (9th Cir. 1995) 55 F.3d 1430, 1443 ["Judge-shopping doubtless disrupts the proper functioning of the judicial system and may be disciplined."].)

"[V]enue provisions applicable to criminal proceedings serve a variety of purposes." (*People v. Simon* (2001) 25 Cal.4th 1082, 1095.) "[F]rom the perspective of a defendant, statutory enactments that provide for trial *in a county that bears a reasonable relationship to an alleged criminal offense* also operate as a restriction on the discretion of the prosecution to file charges in any locale within the state that it chooses, an option that, if available, would provide the prosecution with the considerable power to choose a setting that, for whatever reason, the

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See Lillienfeld's explanation during the Orange County Grand Jury proceedings. (OCGJ RT Lillienfeld testimony pp. 884-886.)

prosecution views as favorable to its position or hostile or burdensome to the defendant's." (*Ibid.* [emphasis added].) "[V]enue provisions also serve to protect the interests of the community in which a crime or criminal activity occurs, 'vindicat[ing] the community's right to sit in judgment on crimes committed within its territory.' (*People v. Guzman* [1988] 45 Cal.3d [915,] 937 [248 Cal.Rptr. 467, 755 P.2d 917].)" (*Ibid.*, italics added.) Here, Lillienfeld sought to have Goodwin prosecuted in Orange County, a setting more favorable to Campbell due to her personal connection with the OCDA and that office's willingness to prosecute Goodwin.

Lillienfeld's decision to seek a forum in Orange County when he could not obtain one in Los Angeles for lack of evidence against his intended target was a usurpation of his power as a member of the LASD, and in acting as he did Lillienfeld was a rogue officer proceeding under the political influence of a private citizen, Campbell. (*Ibid.*)

Nonetheless, the fact that Lillienfeld was able to obtain the cooperation of the OCDA in convening a grand jury, charging Goodwin and proceeding through a preliminary hearing to holding Goodwin to answer on charges of conspiracy to commit murder and murder for financial gain, lent credibility to Lillienfeld's pursuit of Goodwin such that the LADA was convinced to bring a case against Goodwin it had previously declined to prosecute.

3. The OCDA Used False Evidence In Order To Arrest and Charge Goodwin in Orange County, Setting in Motion the Juggernaut That Resulted in Goodwin's Conviction

(a) Relevant Facts

Prior to seeking the warrant for the live lineup to procure the Stevenses' identifications of Goodwin as the man in the station wagon "planning" the murders, the search warrant, and the arrest warrant for Goodwin, Lillienfeld possessed a ballistics report dated May 23, 1988, indicating a three-digit model Smith & Wesson firearm such as that owned by Goodwin could *not* have been used in the Thompson murders. (20RT 7600-7603.) Lillienfeld also knew at the time he drafted his affidavits in support of the warrants seeking the live lineup, the search warrant, and the arrest warrant that Goodwin had legally purchased a three-digit Smith & Wesson. (20RT 7587.)

Lillienfeld claimed he misunderstood the ballistics report, but his claim is incredible – especially after he ordered his own ballistics tests in July of 2001 and obtained the same results excluding Goodwin's firearms. Lillienfeld repeatedly falsely swore the gun legally registered to Goodwin could have been the murder weapon. (20RT 7587-7588, 7604-7606.) Based largely on this falsehood, Goodwin was arrested for the Thompson murders, setting in motion the process that resulted in Goodwin's conviction. (20RT 7588.)

On March 28, 2001, the same day Goodwin held a press conference in Orange County to proclaim his innocence, Lillienfeld sought an order from the LA County Superior Court, *ex parte*,

compelling Goodwin to attend a live lineup at the LA County jail. (*Goodwin v. Superior Court* (2001) 90 Cal.App.4th 215, 218-219.) In support of the request, Lillienfeld filed an affidavit under seal repeating the lie about Goodwin's firearms. (*Id.* at p. 219.) The superior court issued the requested order, which directed the Sheriff to conduct a lineup on April 17, 2001, in which Goodwin would be a participant. (*Ibid*.)

In July of 2001, Lillienfeld had a Smith & Wesson three-digit model firearm tested, and the general rifling characteristics report came back indicating five lands and grooves with a twist to the right – which again ruled Goodwin's firearm out as one of the murder weapons. (20RT 7601.) Nonetheless, in mid-April of 2002, at the Orange County preliminary hearing, Lillienfeld testified, falsely, that Goodwin's three-digit Smith & Wesson firearm could have been the murder weapon. (20RT 7601; OCPHRT 218-219.)

Lillienfeld also relied in earlier proceedings and in sworn affidavits upon what he knew was unreliable, incompetent testimony from Gail Moreau-Hunter that Goodwin had confessed to committing the Thompson murders. (See Argument III.D.2(d), *supra*.)

(b) Governing Law

"More than 30 years ago this Court held that the Fourteenth Amendment cannot tolerate a state criminal conviction obtained by the knowing use of false evidence. There has been no deviation from this established principle." (*Miller v. Pate* (1967) 386 U.S. 1, 7.) "A defendant has a due process right to a fair trial. Government agents may not manufacture evidence and offer it against

a criminal defendant." (*Doswell v. City of Pittsburgh*, No. 07-0761, 2009 U.S. Dist. LEXIS 51435 (W.D. Pa. June 16, 2009) (quoting *Stepp v. Mangold*, No. 94-2108, 1998 U.S. Dist. LEXIS 8633, 1998 WL 309921, at (E.D. Pa. June 10, 1998.)

Due process is denied when a prosecutor uses perjured testimony to obtain a conviction. (*Napue v. Illinois* (1959) 360 U.S. 264, 269; *In re Imbler* (1963) 60 Cal.2d 554, 560.) At the time *Napue* and *Imbler* were decided, it was necessary for an accused to establish by a preponderance of the evidence a) perjured testimony was elicited at his trial, b) the prosecutor knew or should have known of its falsity, and c) the false testimony may have affected the outcome of the trial. (*In re Imbler, supra*, 60 Cal.2d 554, 560; see also Pen. Code § 1473, subd. b [writ of habeas corpus available when substantially material false evidence was presented at trial]; *People v. Gordon* (1973) 10 Cal.3d 460, 473, fn.7 [when alleged perjury appears from the record, same test applies on appeal as in habeas corpus proceedings].)

In *People v. Gordon, supra*, 10 Cal.3d 460, 473 (disapproved on other grounds in *People v. Ward* (2005) 36 Cal.4th 186, 212), the California Supreme Court explained if the alleged perjury is apparent on the appellate record, it may be raised on direct appeal rather than in a habeas corpus proceeding. The same test is applied in either proceeding:

> The petitioner [i.e., Appellant] must show by a preponderance of substantial, credible evidence that perjured testimony was knowingly presented by the prosecution and that such testimony established an essential element of her conviction.

(*Id*. at p. 473.) More recent California decisions no longer require a showing the testimony was perjurious or the prosecutor knew of its falsity. (*In re Hall* (1981) 30 Cal.3d 408, 424 [Penal Code section 1473 revised and expanded the category of prosecution evidence subject to challenge on this ground. The new law requires only that the evidence be "false" and "substantially material or probative on the issue of guilt or punishment]; *In re Wright* (1978) 78 Cal.App.3d 788, 809, fn. 5.) This authority should also apply to a defendant's direct appeal.

In *People v. Morales* (2003) 112 Cal.App.4th 1176, the Court explained that to prevail on a claim of prosecutorial misconduct such as this, a defendant must show a) "the testimony was, in fact, false", and b) the prosecutor did not make "full disclosure of the falsity." (*Id*. at pp. 1195-1196.)

Goodwin acknowledges that issues involving the credibility of witnesses are normally deemed questions of fact to be resolved by the jury. However, in certain circumstances it is readily apparent erroneous details in a witness' testimony are not honest mistakes of fact, and that in certain circumstances the contradictory testimony of witnesses cannot be explained away as innocent misrecollection or confusion. If the prosecutor cannot reconcile any of the witness' statements or anticipated testimony with the truth, allowing that witness to testify without correcting the falsehood is misconduct. (*People v. Morales*, *supra*, 112 Cal.App.4th 1176, 1195.) In fact, occasionally the testimony of a witness can be so "inherently improbable" that a reviewing court may find the witness' testimony to be unbelievable as a matter of law – regardless of whether the

prosecutor claimed to believe the witness or not. Further, if the only properly admitted evidence is the "inherently improbable" testimony of a witness, the evidence is insufficient as a matter of law to support the conviction. (*People v. Headlee* (1941) 18 Cal.2d 266, 267-268.)

In *People v. Headlee, supra*, after asserting it is not an appellate court's function to weigh evidence, the Supreme Court stated, "Where, however, the evidence relied upon by the prosecution is so improbable as to be incredible, and amounts to no evidence, a question of law is presented which authorizes an appellate court to set aside a conviction. [Citation.] Under such circumstances an appellate court will assume that the verdict was the result of passion and prejudice. [Citation.] To be improbable on its face the evidence must assert that something has occurred that it does not seem possible could have occurred under the circumstances disclosed. The improbability must be apparent; evidence which is unusual or inconsistent is not necessarily improbable." (*People v. Headlee, supra*, 18 Cal.2d at pp. 267-268; accord *People v. Thornton* (1974) 11 Cal.3d 738.) The burden of proof is by a preponderance of evidence that the testimony affirmatively presented by the prosecution was false. (*People v. Gordon, supra*, 10 Cal. 3d 460, 473.)

If the testimony of a witness is deemed "inherently improbable" by the reviewing court, the reasonable inference is the witness was either mistaken or the witness intentionally presented false testimony. If the witness' "inherently improbable" testimony was of such a nature it is clear the witness was not simply mistaken, the only other reasonable conclusion is that the witness intentionally testified

falsely. Here, Lillienfeld repeatedly falsely swore under oath Goodwin's firearms were consistent with the weapon used to kill the Thompsons, and Goodwin had confessed to Gail Moreau-Hunter. It is inherently improbable that Lillienfeld did not realize Goodwin's weapon could not have been the murder weapon, given Lillienfeld's years of experience as a homicide detective and the fact that Lillienfeld himself subsequently ordered testing of a Smith & Wesson three-digit model firearm like Goodwin's, conclusively determining the type of gun Goodwin owned could not have been the murder weapon. (20RT 7592, 7601.) In spite of this finding, in December of 2001 Lillienfeld declared under penalty of perjury in his affidavit in support of Goodwin's arrest warrant that Goodwin's firearm was consistent with the murder weapon. (20RT 7592.) Clearly Lillienfeld was not mistaken when he made these statements on behalf of the prosecution - he was lying.

Based on Lillienfeld's investigation, the prosecutor held Gail Moreau-Hunter out as a legitimate witness to some damning facts – including a full confession by Goodwin to hiring two black men to commit the murders. (OCPHRT 152-154.) Lillienfeld made false statements in affidavits – and Gail Moreau-Hunter testified at the preliminary hearing – that Goodwin "confessed" to arranging for the Thompson murders. (3CT 789-826; 8CT 2172.) Moreau-Hunter was, however, delusional. She claimed Goodwin had attempted to kill her, and that she had suffered multiple, serious injuries in the attempt, including a broken back and burn marks made with a cigarette or an iron. (4RT F-42.) Lillienfeld testified during the Orange County

preliminary hearing that Gail Moreau-Hunter had not attempted suicide, and then admitted he had never obtained Gail Moreau-Hunter's medical records. (OCPHRT 155-156.) Moreau's medical records showed Hunter had fabricated injuries she claimed she suffered; she had been hospitalized numerous times for severe mental illness; and the hospitalization she claimed occurred after Goodwin attempted to kill her was, in fact, a hospitalization for a drug overdose. (4RT F-40 – 45.) Moreau's statements, therefore, were inherently improbable and demonstrably false, yet Lillienfeld repeatedly used them in his attempt to have Goodwin prosecuted and both the OCDA and LADA relied upon Moreau's false testimony in prosecuting Goodwin.

Finally, under California law, a defendant who presents a claim of perjured testimony or a claim the prosecution presented false evidence must show that the falsity was not apparent to the trier of fact from the trial record, and the defendant had no opportunity at trial to show the evidence was false – usually because the prosecution suppressed evidence. (*In re Waltreus* (1965) 62 Cal.2d 218, 221.) Here, pursuant to the prosecutor's objection, the trial court prevented Goodwin from impeaching Lillienfeld with his false sworn statements that Goodwin's Smith & Wesson firearm was consistent with the murder weapon. (20RT 7600 - 7619.) The jury never heard about Gail Moreau-Hunter because the prosecutor abandoned her as a witness after Goodwin obtained her medical records. (See 4RT F-42 – 44.) Therefore, Lillienfeld's perjury – on the force of which the investigation and Goodwin's prosecution was propelled – ultimately was not

apparent to the trier of fact, the jury that convicted Goodwin.

(c) The Meaning of "Material Evidence"

False evidence is "substantially material or probative" (Penal Code § 1473) "if there is a 'reasonable probability' that, had it not been introduced, the result would have been different. [Citation.]" (*In re Roberts* (2003) 29 Cal.4th 726, 742; *People v. Coddington, supra*, 23 Cal.4th 529, 589-590; *In re Sassounian* (1995) 9 Cal.4th 535, 546.) The Supreme Court defined "reasonable probability" as "a chance great enough, under the totality of the circumstances, to undermine our confidence in the outcome. [Citation] The [appellant] is not required to show that the prosecution knew or should have known that the testimony was false. [Citations]" (*In re Roberts, supra*, 29 Cal.4th 726, 742.)

The governing principles of materiality were discussed by the California Supreme Court in *In re Brown, supra,* 17 Cal.4th 873:

> First, ... materiality does not require demonstration by a preponderance that disclosure ... would have resulted ultimately in ... acquittal.... [T]he touchstone of materiality is a reasonable probability of a different result, and the adjective is important....
>
> Second, it is not a sufficiency of evidence test.... The possibility of an acquittal ... does not imply an insufficient evidentiary basis to convict....
>
> Third, once a ... court applying *Bagley* has found constitutional error, there is no need for further harmless-error review. The one subsumes the other for while ... undisclosed evidence is evaluated item by item, its cumulative effect ... must be considered collectively....

(*Id.* at pp. 886-887.)

Lillienfeld's false statements were material. Lillienfeld falsely swore in multiple affidavits and during multiple court proceedings that the gun legally registered to Goodwin could have been the murder weapon, and that Goodwin had "confessed" to Gail Moreau-Hunter. (See, e.g., Exhibit B, pp. 8-9, to the 1538.5 motion filed under seal; OCPHRT 151-152, 217-219; 20RT 7587-7588.) There is a reasonable probability that, had Lillienfeld's false sworn statements not been utilized by investigators and prosecutors, the prosecution team would not have been able to obtain the search warrant, the live lineup warrants, and Goodwin's arrest warrant. Based in significant part on Lillienfeld's manipulations, Goodwin was arrested for the murders and held to answer on charges in Orange County. (20RT 7588.) There is also a reasonable probability that, had the jury been informed of Lillienfeld's falsehoods and how they had been utilized to obtain Goodwin's prosecution, Goodwin would have obtained a different result at trial. Lillienfeld's falsehoods were undeniably material.

(d) <u>If False Evidence Presented by the Prosecution Was "Material" to the Guilt or Innocence of the Accused, the Conviction Must Be Reversed Without Weighing the Degree of the Prejudice to the Accused</u>

Although the Supreme Court in *People v. Ruthford* (1975) 14 Cal.3d 399, 406-407, dealt with evidence withheld from the defense, its language regarding the test to be applied is pertinent to this case:

> We note preliminarily, that when the evidence which is suppressed or otherwise made unavailable to the

> defense by conduct attributable to the state bears directly on the question of guilt, our initial inquiry is whether such conduct resulted in denial of a fair trial. If so, the judgment of conviction must be reversed without weighing the degree of the prejudice to the accused.

(*People v. Ruthford, supra*, 14 Cal.3d 399, 406-407)

Federal law is in harmony with California law in this regard. Under the federal Constitution, the intentional or inadvertent suppression of material evidence, whether or not specifically requested by the defense, requires reversal of a conviction. (*Giglio v. United States*, *supra,* 405 U.S. 150, 153.) If the evidence the investigator or the prosecutor affirmatively presented was false and it bore directly on the question of the defendant's guilt, the same rule applies. Lillienfeld's statements were false, and they bore directly on the question of Goodwin's guilt. (Exhibit B, pp. 8-9, to the 1538.5 motion filed under seal; 20RT 7587-7588; OCPHRT 151-152, 217-219.) Because Lillienfeld – and later the prosecutor – presented false and material testimony against Goodwin, Goodwin's convictions must be reversed.

D. Collene Campbell's Influence in This Case Violated The Rule that Prosecution of Criminal Offenses on Behalf of the People is the Sole Responsibility of the Public Prosecutor

"In California, all criminal prosecutions are conducted in the name of the People of the State of California and by their authority. (Gov. Code § 100, subd. (b).) California law does not authorize private prosecutions. Instead, "[t]he prosecution of criminal offenses on behalf of the People is the sole responsibility of the public prosecutor .... [¶]

[who] ordinarily has sole discretion to determine whom to charge, what charges to file and pursue, and what punishment to seek. [Citation.] No private citizen, however personally aggrieved, may institute criminal proceedings independently [citation], and the prosecutor's own discretion is not subject to judicial control at the behest of persons other than the accused." (*People v. Eubanks*, *supra*, 14 Cal.4th 580, at pp. 588-589, citing *Dix v. Superior Court* (1991) 53 Cal.3d 442, 451.)

Between 1972 and 1988, Tony Rackauckas was a deputy OCDA. In 1988 Tony Rackauckas left the OCDA to practice in a private firm, and in that capacity he represented the Thompson family, including Campbell, in Thompson's probate proceedings. (OCPHRT 25; 9RT 3695-3696.) One of the issues in the probate was who died first during the murders, Trudy or Mickey Thompson. (OCPHRT 14.)

During most of the 1990's Campbell was mayor of San Juan Capistrano, California.[92] (11RT 4295.) Rackauckas left private practice in 1990 when he was appointed to the bench, serving until becoming District Attorney of Orange County in 1999.[93]

During his tenure as OCDA, Rackauckas has maintained a professional and personal relationship with Campbell and her family. (OCPHRT 15.) Rackauckas assisted Campbell in establishing her victims' rights organization, MOVE; has served as its treasurer; and was a treasurer of the Mickey and Trudy Thompson Memorial Fund.

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[92] http://articles.latimes.com/2001/aug/30/local/me-40177

[93] http://members.calbar.ca.gov/fal/Member/Detail/51374

(OCPHRT 15, 26.)

The district attorney of each county is the public prosecutor, vested with the power to conduct on behalf of the People all prosecutions for public offenses within the county. (Govt. Code §26500; *Hicks v. Board of Supervisors* (1977) 69 Cal.App.3d 228, 240.) Subject to supervision by the Attorney General (Cal. Const., art. V, § 13; Govt. Code §12550), therefore, the district attorney of each county independently exercises all of the executive branch's discretionary powers in the initiation and conduct of criminal proceedings. (*People ex rel. Younger v. Superior Court* (1978) 86 Cal.App.3d 180, 203; *People v. Municipal Court (Pellegrino)* (1972) 27 Cal.App.3d 193, 199–204.)

The district attorney's discretionary functions extend from the investigation of and gathering of evidence relating to criminal offenses (*Hicks v. Board of Supervisors, supra*, 69 Cal.App.3d 228, 241), through the crucial decisions of whom to charge and what charges to bring, to the numerous choices the prosecutor makes at trial regarding "whether to seek, oppose, accept, or challenge judicial actions and rulings." (*Dix v. Superior Court, supra,* 53 Cal.3d 442, at p. 452; see also *People v. Superior Court (Greer), supra,* 19 Cal.3d 255, 267.)

The importance, to the public as well as to individuals suspected or accused of crimes, that these discretionary functions be exercised "with the highest degree of integrity and impartiality, and with the appearance thereof" (*People v. Superior Court (Greer), supra*, 19 Cal.3d 255, at p. 267) cannot be overstated. The public prosecutor " 'is the representative not of any ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as

its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer.' " (*Id*. at p. 266, quoting *Berger v. United States, supra,* 295 U.S. 78, 88.)

The nature of the impartiality required of the public prosecutor follows from the prosecutor's role as representative of the People as a body, rather than as individuals. "The prosecutor speaks not solely for the victim, or the police, or those who support them, but for all the People." (Corrigan, On Prosecutorial Ethics (1986) 13 Hastings Const. L.Q. 537, 538–539.) Thus the district attorney is expected to exercise his or her discretionary functions in the interests of the People at large, and not under the influence or control of an interested individual. (*People v. Superior Court (Greer), supra*, 19 Cal.3d 255, 267.)

While the district attorney has a duty of zealous advocacy, "both the accused and the public have a legitimate expectation that his zeal ... will be born of objective and impartial consideration of each individual case." (*People v. Superior Court (Greer), supra*, 19 Cal.3d 255, at p. 267.) A prosecutor is "not disinterested if he has, or is under the influence of others who have, an axe to grind against the defendant, as distinguished from the appropriate interest that members of society have in bringing a defendant to justice with respect to the crime with which he is charged." (*Wright v. United States* (2d Cir.1984) 732 F.2d 1048, 1056.)

The purpose of Penal Code § 1424, *Eubanks, supra*, and due process is to insure prosecutorial independence from the undue influence of private parties. Goodwin's ability to be treated fairly was fatally compromised by the prosecutors both in LA and Orange County ceding essential prosecution functions to Campbell, and prosecuting Goodwin based on Campbell's political power, influence and connections rather than untainted facts obtained in an unbiased manner.

The Supreme Court has determined the word "conflict" in §1424 refers to "evidence of a reasonable possibility" that the district attorney's office may not be able to exercise its discretionary function in an evenhanded manner. (*People v. Conner, supra*, 34 Cal.3d 141, 148.) There was most certainly a conflict even before charges were brought because of Campbell's influence on the investigation and the decision to charge Goodwin, as described above. Because the investigation and decisions to charge Goodwin, both by the OCDA and the LADA, were so tainted, this Court should reverse Goodwin's convictions.[94]

E. Members of the OCDA's Office Committed Misconduct By Acting as Investigators Searching for Clues and Corroboration That Might Give Them Probable Cause to Arrest Goodwin

In the civil context, courts recognize "acts undertaken by a prosecutor in preparing for the initiation of judicial proceedings or for trial, and which occur in the course of his role as an advocate for the State, are entitled to the protections of absolute immunity." (*Buckley v.*

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[94]See discussion in section XVII. F, *infra*.

Fitzsimmon (1993) 509 U.S. 259, at p. 260.) However, in endeavoring to determine facts normally left to police investigators, prosecutors act "not as advocates but as investigators searching for clues and corroboration that might give them probable cause to recommend an arrest." (*Ibid*.) Civil courts recognize such activities constitute misconduct and are not immune from liability. (*Ibid*.)

Here, having been influenced by Campbell, Deputy OCDA Snethen indirectly contacted LASD investigator Griggs and pressured him to follow up on leads offered by Campbell, in order to develop probable cause to arrest Goodwin for the Thompson murders. (5CT 1202.) OCDA investigator Hodges told Griggs an unnamed source in the OCDA's office had spoken with Campbell and then turned the information over to Hodge's supervisor, who ordered Hodges to call Griggs. (5CT 1208.) These influences on Griggs' investigation should be taken into account as part of the quantum of evidence supporting a dismissal in this case.[95]

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Goodwin anticipates he will be able, if necessary, to develop facts supporting this issue and others in habeas corpus proceedings.

XVII. REVERSAL IS REQUIRED BASED ON THE CUMULATIVE EFFECT OF THE ERRORS

Even if no single error in isolation is sufficiently prejudicial to warrant reversal, the cumulative effect of multiple errors in this case is so harmful that reversal is required. (See *Cooper v. Fitzharris* (9th Cir. 1987) 586 F.2d 1325, 1333 (en banc); see *Greer v. Miller* (1987) 483 U.S. 756, 765 [cumulative errors may so infect "the trial with unfairness as to make the resulting conviction a denial of due process"].) Indeed, where a number of errors occur at trial, "a balkanized, issue-by-issue harmless error review" is far less meaningful than analyzing the overall effect of all the errors in the context of the evidence introduced at trial against the defendant. (*United States v. Wallace* (9th Cir. 1988) 848 F.2d 1464, 1476.) This Court must apply the Chapman standard to the totality of the errors because errors of federal constitutional magnitude are combined with the other errors. (*People v. Williams* (1971) 22 Cal.App.3d 34, 58-59 *Chapman v. California, supra*, 386 U.S. 18, 24; *People v. Williams* (1971) 22 Cal.App.3d 34, 58-59.)

The delay in prosecuting Goodwin doomed his opportunity for a fair trial from the beginning. (Arguments III and IV.)

Aside from the violation of Goodwin's speedy trial right, the proceedings were tainted by the investigators' wholesale invasion of the defense camp by seizing Goodwin's attorney-client privileged communications – a *per se* violation of the Sixth Amendment right to counsel, for which dismissal is the sole appropriate remedy. (Argument I.)

The lack of evidence requires *per se* reversal. (Argument

II.)

The bad character evidence (Argument VII) and Kingdon's incompetent "expert" testimony the Goodwins had commingled funds and Goodwin was acting "behind the scenes" in his wife's purchases so that the two of them could "flee" on a yacht (Argument V), painted Goodwin as a man of bad character who displayed a consciousness of guilt. Kingdon's testimony was a crucial, critical, highly significant factor in Goodwin's conviction. The prosecutor repeatedly suggested to the jury Goodwin was involved in other criminal activity - specifically bankruptcy fraud – even though Goodwin had been acquitted of the federal fraud charges, fact the jury never heard – and the jury believed it. (8CT 2082 ["The bad character of Michael Goodwin along with his ability to take everything he did (including other criminal activity) to an extreme level was very evident . . . ."].) The error in admitting Wilkinson's irrelevant testimony that Thompson was afraid of Goodwin and thought there might be a sniper outside just compounded the jury's belief Goodwin was a bad guy who deserved to be convicted. (Argument VI.) The prejudice emanating from the bad character evidence (Argument VII) was exacerbated by the court's error in admitting evidence of Thompson's good character. (Argument VIII.)

In addition to maintaining an all-out, unfair attack on Goodwin's character, the prosecutors successfully gutted Goodwin's defenses by excluding evidence others were more likely responsible for the murders (Argument IX), Thompson had purchased a large quantity of gold and told others about it just before he was killed (Argument X), and Joey Hunter failed three polygraph examinations (Argument XI).

Compounding all of the damage from the evidentiary errors, the flawed conspiracy instructions permitted the jurors to convict Goodwin even though the jurors agreed the prosecutor had failed to prove any connection between Goodwin and the killers (Argument XII). In addition, the version of CALJIC No. 2.92 given to the jury violated Goodwin's right to due process, to meaningfully present his defense, violated his right to the effective assistance of counsel, and resulted in the jury's failure to fully consider the evidence where Goodwin's conviction depended significantly upon uncorroborated eyewitness identifications. (Argument XIII.) The court's error in giving the flight instruction compounded all of the other errors by allowing the jurors to draw the unwarranted inference that the Goodwins' departure on a yacht five months after the Thompson murders showed consciousness of guilt. (Argument XIV.)

Finally, the many and inexcusable instances of misconduct committed by the investigators and prosecutors from the beginning of the investigation to the guilty verdicts added to the overwhelming cumulative error. (Arguments XV and XVI.) Lillienfeld's creation of false evidence against Goodwin and the prosecutor's knowing use of it at trial, combined with the other outrageous government conduct Goodwin has described requires reversal of Goodwin's convictions and dismissal of any further proceedings against him.

The cumulative effect of these errors so infected appellant's trial with unfairness as to make the resulting conviction a denial of due process. (U.S. Const. 14th amend.; Cal. Const. art. I, §§ 1, 7, 15, 16 & 17; *Donnelly v. DeChristoforo* (1974) 416 U.S. 637, 643.) Goodwin's

convictions, therefore, must be reversed. (*Killian v. Poole* (9th Cir. 2002) 282 F.3d 1204, 1211 ["even if no single error were prejudicial, where there are several substantial errors, 'their cumulative effect may nevertheless be so prejudicial as to require reversal'"]; *Harris v. Wood* (9th Cir. 1995) 64 F.3d 1432, 1438-1439 [cumulative effect of the deficiencies in trial counsel's representation requires habeas relief as to the conviction]; *United States v. Wallace, supra*, 848 F.2d 1464, 1475-1476; *People v. Holt* (1984) 37 Cal.3d 436, 459.)

Finally, a court may dismiss a case or reverse a conviction based a unique doctrine developed by the United States Supreme Court in *Rochin v. California* (1952) 342 U.S. 165, 172-173. In *Rochin* the Supreme Court reversed a criminal conviction on substantive due process grounds because the police action of forcibly pumping a suspect's stomach was an action "that shocks the conscience" and violates the "decencies of civilized conduct." (*Rochin v. California, supra*, 342 U.S. 165, at pp. 172-173.) Various Ninth Circuit decisions have found a prosecution could be dismissed or reversed on this basis, and three California cases have actually done so. (*Morrow v. Superior Court, supra*, 30 Cal.App.4th 1252, 1259-1261; *Boulas v. Superior Court, supra*, 188 Cal.App.3d 422, 429, 434; *People v. Moore, supra*, 57 Cal. App. 3d 437, 442.)

Goodwin's prosecution for the Thompson murders should shock the conscience of any appellate court or lay observer, because the proceedings went so wrong on multiple levels and violated Goodwin's fundamental rights in so many ways. In their zeal to prosecute and convict Goodwin, members of the LASD and OCSD, the OCDA and the

LADA permitted themselves to be influenced by Thompson's politically well-connected sister, Collene Campbell, to the point investigators and prosecutors at the very least proceeded in a grossly negligent manner, and at worst acted deliberately to satisfy Campbell's personal vendetta against Goodwin.

To gain reversal under *Rochin*, a defendant must show the governmental conduct "shocks the conscience" and violates the "decencies of civilized conduct." (*County of Sacramento v. Lewis* (1998) 523 U.S. 833, 846, citing *Rochin v. California, supra*, 342 U.S. 165, at pp. 172-173.) If the defendant is able to satisfy this enormously difficult burden, the Fourteenth Amendment substantive due process doctrine requires the prosecution be dismissed, despite the lack of any showing of prejudice. (*Rochin v. California, supra,* 342 U.S. 165, 172-173; *Morrow v. Superior Court, supra,* 30 Cal.App.4th 1252, 1263; *Boulas v. Superior Court, supra*, 188 Cal.App.3d 422, 429.)

In *Morrow v. Superior Court, supra*, 30 Cal.App.4th 1252, 1259-1261, *Boulas v. Superior Court, supra*, 188 Cal.App.3d 422, 429, 434; and *People v. Moore, supra*, 57 Cal.App.3d 437, 442, the courts unambiguously found that *per se* reversal should be applied if outrageous governmental conduct is found because "proceedings against the accused are thereby rendered improper." (*People v. Tribble, supra*, 191 Cal.App.3d 1108, 1116; *Boulas v. Superior Court, supra*, 188 Cal.App.3d 422, 422.) "Dismissal is occasionally used by the courts to discourage flagrant and shocking misconduct by overzealous governmental officers." (*Ibid*.)

There is no question that both procedural due process and

prosecutorial misconduct require a showing of prejudice. (*People v. Zapien* (1993) 4 Cal.4th 929, 967; *United States v. Valenzuela-Bernal, supra,* 458 U.S. 858, 872.) The gateway to *Rochin* relief, however, is not prejudice, but the high showing required to assert it. "Arbitrary official action can violate a defendant's substantive due process rights, but 'only the most egregious official conduct can be said to be 'arbitrary in the constitutional sense.' " (*People v. Alexander* (2010) 49 Cal.4th 846, at p. 892, quoting *County of Sacramento v. Lewis, supra*, 523 U.S. 833, at p. 846.) *Lewis* further explained the inquiry:

> Thus, in a due process challenge to executive action, the threshold question is whether the behavior of the governmental officer is so egregious, so outrageous, that it may fairly be said to shock the contemporary conscience. That judgment may be informed by a history of liberty protection, but it necessarily reflects an understanding of traditional executive behavior, of contemporary practice, and of the standards of blame generally applied to them.

(*County of Sacramento v. Lewis, supra,* 523 U.S. 833, at p. 847.)

Effectively, what *Rochin* established was a constitutional grant of power to the court in those truly exceptional "shocking" circumstances where such additional power is necessary. While the *Rochin* doctrine is only intended to be utilized in exceptional circumstances, the circumstances here are so exceptional that the case appears to be unprecedented in the sheer number and magnitude of substantive due process violations. For that reason, Goodwin asks this Court to reverse his convictions for the Thompson murders and dismiss this case to preclude any further prosecution.

CONCLUSION

As demonstrated above, Goodwin's prosecution was infected by fundamental error. Starting with Lillienfeld's involvement in the case, Goodwin's prosecution devolved into a Kafkaesque exercise in incompetent evidence presented to a jury by prosecutors who engaged in reprehensible misconduct from the beginning of the investigation to verdict. The prosecution employed tainted and unreliable eyewitness testimony as the only evidence suggesting Goodwin was involved in a "conspiracy" to murder the Thompsons.

Goodwin's convictions must be reversed.

Dated: Respectfully submitted,

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Attorney for Appellant
MICHAEL GOODWIN

CERTIFICATE OF WORD COUNT

I, Gail Harper, counsel for appellant, certify pursuant to the California Rules of Court, that the word count for this document is 99,371 words, excluding the tables, this certificate, and any attachments. This document was prepared in WordPerfect X3, and this is the word count generated by the program for this document.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed at San Francisco, California, on November 26, 2012.

_____

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