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 Superior
MICHAEL FRANK GOODWIN,	)	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 REPLY BRIEF

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by appointment of the Court of
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INTRODUCTION

Defendant and appellant Michael Frank Goodwin hereby replies to certain points made by respondent. Goodwin believes that a further discussion of these points will be helpful to the Court in deciding the issues presented. Goodwin's failure to discuss any particular point means only that he has concluded that no further discussion is necessary and should not be misconstrued as an abandonment, waiver, or concession. (*People v. Hill* (1992) 3 Cal. 4th 959, 995, footnote 3)

Because respondent extensively failed to address important facts of the case, Goodwin has attached Appendices to alert the court to specific areas and facts which respondent has omitted or distorted in its brief. Many of these omissions and distortions will also be addressed in the body of this brief.

ARGUMENT

I. THE TRIAL COURT PREJUDICIALLY ERRED IN DENYING GOODWIN'S MOTIONS TO DISMISS AND TO RECUSE THE LADA[1]

Respondent admits the LADA and Los Angeles County Sheriff (LASD) violated Goodwin's attorney-client privilege, but disagrees the trial court erred by denying Goodwin's motions to dismiss the case and to recuse the LADA. Respondent contends Goodwin was required to

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[1] See Appendix II for respondent's factual misstatements and omissions regarding this issue.

show prejudice resulted from the violation of his fundamental rights and urges this Court to find none.[2] (RB 40-84.)

Respondent contends that, pared to their essence, Goodwin's contentions under §1424 fail because, even though the LADA violated attorney-client privilege, Goodwin failed to prove a "recusable conflict of interest." (RB 41.) Respondent ignores the trial court's characterization of the violation here as not precisely a "conflict of interest," but a potentially recusable "taint" brought about by the invasion of Goodwin's attorney-client privilege.

More specifically, respondent argues:

(1) Goodwin "has never identified any privileged document that the prosecution relied on to his prejudice," and

(2) DDA Jackson "declared that none of the documents were used to make any prosecutorial decision" and "there is no evidence he did otherwise."

Respondent concludes no errors resulted. (RB 41.) Respondent is wrong. 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.

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[2] Respondent abandons on appeal the prosecutor's claim Goodwin waived attorney-client privilege. (RB 71.)

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

1. Respondent Disputes the Standard of Review for Denial of a Motion To Dismiss a Case for Denial of Due Process Due to Outrageous Government Misconduct, Ignoring the Conflicts Between *Uribe* And Federal Authorities, and Conflicts Between Uribe And Other California Courts

Respondent relies on the standards of review set out in *People v. Uribe* (2011) 199 Cal.App.4th 836, and contends Goodwin must demonstrate prejudice to justify a dismissal. (RB 55-57.)

Respondent contends:

(1) Goodwin has failed to controvert the trial court's finding that the prosecutors did not engage in misconduct;

(2) There is no evidence the LADA "had anything to do with the Los Angeles Sheriff's seizure of privileged materials;"

(3) Goodwin did not "substantially dispute" DDA Jackson's representations he did nothing wrong;

(4) Goodwin failed to show that the privileged documents contained his strategy for defending the charges;

(5) Goodwin failed to show the prosecutors discovered the defense strategy by reviewing privileged materials; and

(6) Goodwin failed to demonstrate the prosecutors gained an unfair advantage by reviewing specific privileged documents. (RB 57.)

Respondent is wrong on all points.

2. Presumption of Prejudice and Burden of Proof

Respondent contends Goodwin is required to show prejudice for the violation of his attorney-client privilege. To the contrary: "Where ... the state has engaged in misconduct, the burden falls upon the People to prove, by a preponderance of the evidence, that sanctions are not warranted because the defendant was not prejudiced by the misconduct. [Citations.]" (*People v. Zapien* (1993) 4 Cal.4th 929, 967; see also *Nix v. Williams* (1984) 467 U.S. 431, 444, 104 S.Ct. 2501, 2509, 81 L.Ed.2d 377, 387; *People v. Herring* (1993) 20 Cal.App.4th 1066, 1077.) Although not expressly stated in *Zapien, supra,* the People also have the burden to show that there was no substantial threat of demonstrable prejudice. (*Morrow v. Superior Court* (1994) 30 Cal.App.4th 1252, 1258.)

Here the People did not meet that burden; instead, respondent repeatedly points to DDA Jackson's unsworn "representations that [he] would not use any privileged materials." (RB 62, 79, 44, 47.) This is the equivalent of saying the fox is permitted to guard the henhouse, provided the fox promises not to eat the hens. Or, as the Court put it in *Morrow, supra*, "Where a prosecutor orchestrates courtroom eavesdropping on a privileged attorney-client communication and the witnesses thereto invoke the privilege against self-incrimination, the prosecution may not successfully oppose a motion to dismiss on the ground that no prejudice has been shown." (*Id*. at p. 1258.)

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

Respondent contends the court properly found Jackson and Dixon were absolved of wrongdoing because the initial violation of Goodwin's privilege occurred in Orange County, and the Orange County District Attorney (OCDA) turned the privileged documents over to the LADA without advising the LADA there were attorney-client privileged documents in the seized material. (RB 55-56, 67-70; see 2RT D-28 – 29; 4RT O-12.)

Respondent mischaracterizes Goodwin's argument regarding the Sheriff's and the LADA's joint responsibility for the violation of Goodwin's attorney-client communications as a "vicarious liability" argument. (RB 55-56, 67-70.) Respondent contends Goodwin must prove the LADA was directly involved in or had knowledge of the LASD's seizure of Goodwin's privileged documents at the time of the seizure in order for the LADA to be accountable for violating Goodwin's attorney-client privilege.[3] (RB 68.) Respondent argues the rationale of *Brady v. Maryland* (1963) 373 U.S. 83, 83 S.Ct. 1194, 1196, 10 L.Ed.2d 215, applies only to cases where the prosecution withholds exculpatory evidence, and does not extend to other forms of

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[3] Respondent cannot reasonably argue the LADA was unaware of the violation prior to trial.

prosecutorial misconduct. Respondent asserts Goodwin "identifies no authority in which one prosecutorial agency has been held 'accountable' for misconduct committed by another under circumstances even remotely analogous." (RB 68.) All of these arguments fail.

(a) Respondent Misreads *People v. Shrier* (2010) 190 Cal.App.4th 400

Respondent relies primarily on *People v. Shrier* (2010) 190 Cal.App.4th 400, for the proposition the LADA should not be held accountable for misconduct committed by LASD Deputy Lillienfeld or members of the OCDA's office. (RB 68.) In fact, the *Shrier* Court held the prosecutor responsible for the misconduct of the Attorney General's agents when they listened in to privileged conversations. *Shrier* involved a question of remedy only; the Court of Appeal upheld the finding of misconduct against the prosecution based on the Attorney General's agents' deliberate invasion of privileged communications, holding only that the misconduct was not egregious enough to warrant dismissal of the entire case. (See *Id*. at pp. 418-419.)

In *Shrier,* as here, there was no reasonable dispute that the intercepted communications were protected by attorney-client privilege. (*Id*. at pp. 412-413.) The violation of the privilege occurred while the defendants and their counsel were examining the medical files seized during a search of their clinic. The Attorney General "required that state law enforcement agents assigned to the case be

present for examination of the medical files to ensure the integrity of the evidence." The parties agreed that the agents' "visual monitoring of the files would not include monitoring of the conversations between clients and attorneys." (*Id*. at p. 406.) The agents listened in on and prepared a report documenting the confidential communications between the defendants and their counsel. Defense counsel became aware of the eavesdropping when they received the agent's report containing "confidential attorney-client conversations, including those that took place in Russian." (*Ibid*.)

The Court of Appeal held dismissal of the complaint against five defendants was not an appropriate remedy for a Department of Justice (DOJ) special agents' violation of the defendants' attorney-client privilege in eavesdropping on privileged communications, where the prosecutor was unaware of the eavesdropping plan, the eavesdropping occurred at the Attorney General's office rather than within a courtroom, the defendants did not call the agents or prosecutor to testify, and the content of the attorney-client conversations was set forth in a confidential report under seal. More specifically, the *Shrier* court distinguished *Morrow* because the eavesdropping in *Shrier* was orchestrated by DOJ Agent Wilbur, not the prosecutor who was unaware of the eavesdropping plan. The *Shrier* court found the prosecutor did not strike "a foul blow" by "conspiring to violate respondents' constitutional rights." (*Id*. at p. 417.)

To the extent the *Shrier* Court stopped short of dismissal,

Goodwin submits the case was wrongly decided. On the *Shrier* facts, the prosecutor *did* conspire to violate the defendants' constitutional rights, even if he entered the conspiracy after the privilege was violated. After a conspiracy is established, it is unnecessary to prove each conspirator personally participated in each of several overt acts, since members of a conspiracy are bound by all acts of all members committed in furtherance of the conspiracy. (*People v. Cooks* (1983) 141 Cal.App.3d 224, 312.) Tacit consent as well as express approval will suffice to hold a person liable as a coconspirator. (*Wyatt v. Union Mortgage* (1979) 24 Cal.3d 773, 784-785.)

While the prosecutor in *Shrier* offered his unsworn statement he did not "orchestrate" the eavesdropping, he ratified the eavesdropping immediately after the violation occurred and deliberately sought to benefit from it. After the defendants and their counsel left the conference room where the violation occurred, Agent Wilbur told the prosecutor the agents had overheard conversations between the defendants and counsel, and the prosecutor told Agent Wilbur to prepare a report about the intercepted attorney-client privileged communications the agents overheard. (*Id.* at pp. 407-408.) The *Shrier* prosecutor argued the defendants had no reasonable expectation of privacy in their communications because they "spoke too loud . . .when they knew that a law enforcement officer was so close by and would overhear." (*Id*. at p. 408.) The Court noted in a footnote:

> This argument borders on absurdity. The magistrate did not credit it. Neither do we. No reasonably competent defense attorney would "take a chance" like this. It is one thing to inadvertently overhear a confidential statement or hear a defendant blurt something out in a loud tone of voice. It is quite another thing to position oneself to intentionally listen to confidential attorney-client conversations. No prosecutorial agents should position themselves so they can intentionally eavesdrop upon attorney-client conversations.

(*Ibid*.) Given the *Shrier* prosecutor's dismissive attitude toward the defendants' constitutional rights, his ratification of the violation and his attempt to benefit from it, the Court of Appeal should have upheld the remedy of dismissal of that case.

The prosecutors here made substantially the same argument the prosecutor in *Shrier* made: another agency – the LASD or the OCDA -- violated the privilege, so we cannot be held accountable for further violating the privilege by reading the documents once the OCDA turned them over to us. The trial court erroneously adopted the prosecutor's position.

(b) <u>The LASD is Part of the LADA's Prosecution Team</u>

According to respondent, this case raises an issue of first impression: whether a law enforcement agency is treated as part of the "prosecution team" for purposes of holding a prosecutor accountable for misconduct arising out of the violation of a criminal defendant's

constitutional rights other than *Brady* violations.[4] (RB 68, 70.) Respondent argues "the *Brady* line of cases provides no authority for the notion that a prosecutor is 'accountable' for misconduct he or she did not authorize or exploit because *Brady* is not primarily concerned with misconduct. Its concern is with disclosure." (RB 70.)

First, respondent's argument the LASD is somehow not a part of the LADA's team in this case is absurd. The United States Supreme Court definitively ruled in *Kyles v. Whitley* (1995) 514 U.S. 419, 115 S.Ct. 1555, 131 L.Ed.2d 490 (*Kyles*) the "prosecution team" includes the police or other investigative agencies involved in the prosecution. *(Kyles*, *supra*, 514 U.S. at 437–438, 115 S.Ct. at 1567.)[5] The Sheriff is the

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[4] Respondent also cites *Rochin v. California* (1952) 342 U.S. 165, 166, 172, and *People* v. *Alexander* (2010) 49 Cal.4th 846, 892, for the proposition that "decisions from California and the United States Supreme Court have consistently reserved findings of egregious prosecutorial misconduct to those cases in which the prosecutors authorized the misconduct or exploited it to the defendant's prejudice." (RB 68.) Neither case addresses the "prosecution team" concept. Furthermore he *Alexander* case is distinguishable from this case on its facts because the intercepted call's contents were not disclosed to the prosecutors (*id*. at p. 887) , whereas in this case the seized communications were not only disclosed to the LADA, but members of that office repeatedly reviewed them, knowing they were privileged, instead of immediately taking them to a judge to ensure Goodwin's privilege was protected.

[5] Respondent simply ignores Goodwin's citation to other cases holding agencies analogous to the LASD are "part of the prosecution team." See *U.S. v. Endicott*, 869 F.2d 452, 455–456 [Bureau of Alcohol, Tobacco and

investigative arm of law enforcement, specifically of the LADA, and the LASD was the investigative agency in this case from the day the Thompsons were murdered. When the LADA would not prosecute Goodwin, LASD deputy Lillienfeld took it upon himself to shop for a prosecutor in Orange County. (See AOB, Argument XVI.C.2.) Lillienfeld did not magically become any less a part of the LADA's prosecution team when he crossed the border into Orange County.

Second, respondent distorts the facts establishing the LADA's participation in the chain of events constituting the privilege violation. Respondent argues "appellant can identify no evidence that the [LADA]'s office had any involvement in the Sheriff's Department's seizure of appellant's documents. Nor does appellant identify any evidence that the [LADA] had any knowledge of the documents while the [OCDA] was prosecuting its action." (RB 68.) Respondent overlooks the LADA's ethical duty to protect the privilege once the documents arrived in the LADA's office, and entirely fails to address Goodwin's argument or authorities cited on that point at pages 59 through 65 of his opening brief.

As Goodwin argued in his opening brief, a prosecutor has a duty to protect a defendant's constitutional rights, including a defendant's

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Firearms agents – even though the prosecutor may have been unaware of their actions]; *United States v. Steel* (9th Cir.1985) 759 F.2d 706, 714 [FBI agents]; and *United States v. Butler* (9th Cir.1978) 567 F.2d 885, 889–891 [DEA agents].

Sixth Amendment right to counsel and his attorney-client privilege. (*People v. Trevino* (1985) 39 Cal.3d 667, 681; *People v Sherrick* (1993) 19 Cal.App.4th 657, 660; *Upjohn Co. v. United States* (1981) 449 U.S. 383, 389, 101 S.Ct. 677, 682, 66 L.Ed.2d 584.) It follows that when Jackson or Dixon or any other member of the LADA's office discovered the cache of correspondence between Goodwin and his attorneys in the materials turned over by the OCDA, they should immediately have done something to assure the material was placed back in the hands of Goodwin's counsel or in the hands of the court so as not to violate the privilege. The trial 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."].)

The trial court's error was in failing to apply the same rule to Jackson and Dixon. An ethical prosecutor would have protected Goodwin's privilege. (See *State Compensation Insurance Fund v. WPS, Inc*. (1999) 70 Cal.App.4th 644, 656-657 ["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."].) Jackson and Dixon behaved unethically, retaining and reviewing the documents and deflecting blame onto the LASD and OCDA.

Respondent fails to address *United States v. Wood* (9th Cir.1995) 57 F.3d 733, which extended the "prosecution team" concept to

knowledge held by an agency "interested in the prosecution." Here, the LASD was clearly "interested" in the prosecution, because from the beginning the LASD was the investigative agency in the Mickey Thompson murders. The OCDA was also "part of the prosecution" because the OCDA brought charges against Goodwin for the murders when the LADA would not.

Finally, complaining that Goodwin did not cite to the record, respondent claims Goodwin "overlooks the prosecution's showing that the documents seized were responsive to the terms of the magistrate's order (4CT 916), and the trial court's finding that the search warrant was properly executed (2RT D-32)." (RB 69, fn. 36.) Respondent cites to a page in Jackson's opposition to the motion to dismiss. (4CT 916.) It does not matter whether or not the documents Lillienfeld seized fell generally within the categories the magistrate authorized for the search; what matters is that Lillienfeld deliberately seized numerous boxes of what he knew were attorney-client privileged documents from what he knew was Goodwin's office.[6] (See Sealed Exhibit C to Motion to Dismiss; 2RT D-14, to which Goodwin cited at page 68 of his opening

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[6] This Court should note the page of Jackson's motion to which respondent cites contains one of the major falsehoods Lillienfeld repeatedly made when seeking search and arrest warrants: "[T]he affidavit related that the defendant may have possessed many documents that chronicle the defendant's ownership of guns consistent with the murder weapons used in the Mickey Thompson murders. (Def. Exhibit "A" p. 54)." (4CT 916.)

brief.) As Goodwin pointed out at page 59 of his opening brief, 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.

As for the trial court's finding that the search warrant was properly executed (2RT D-32), respondent ignores the trial court's earlier finding that, despite that "proper execution," the OCDA should have obtained some guidance from the court once Deputy OCDA Brent realized he was in possession of attorney-client privileged communications, and he failed to do so. (2RT D-28 – D-29.)

(c) Because The LASD And the OCDA Were Part of the LADA's Prosecution Team, The LADA is Bound by the LASD's and The OCDA's Misconduct, No Matter What Variety of Constitutional Violation is Involved

Respondent disagrees the principles governing a prosecutor's accountability for *Brady* violations committed by law enforcement officers apply equally to other constitutional violations by law enforcement. (RB 69-70.) Respondent argues the *Brady* line of cases is distinguishable from prosecutorial violations of attorney-client privilege because (1) "*Brady* is not primarily concerned with misconduct," but with "disclosure;" and (2) respondent was unable to find United States Supreme Court or California authority "applying

Brady's 'prosecution team' concept for the purpose of expanding the reach of prosecutorial misconduct implicating a defendant's due process rights." (RB 69-70.)

Respondent's argument that *Brady* principles cannot be applied to other prosecutorial misconduct implicating a defendant's due process rights makes no sense. In *Brady v. Maryland* (1963) 373 U.S. 83, 83 S.Ct. 1194, 1196, 10 L.Ed.2d 215 (1963), the United States Court held that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or punishment." (*Id*. at p. 87.) In *U.S. v. Bagley* (1985) 473 U.S. 667,105 S.Ct. 337, 587 L.Ed.2d 481, the United States Supreme Court noted that a prosecutor, as a representative of the state, "must place foremost in his hierarchy of interests the determination of truth. Thus, for purposes of *Brady*, the prosecutor must abandon his role as an advocate and pore through his files, as objectively as possible, to identify the material that could undermine his case." (*Id*. at pp. 696-697.) Lower federal courts have held that, although the appropriate remedy for *Brady* and *Giglio* violations will usually be a new trial, a district court may dismiss the indictment when the prosecution's actions rise to the level of flagrant prosecutorial misconduct. (*U.S. v. Chapman* (2008) 524 F.3d 1073, 1086.) Therefore, this Court must reject respondent's argument that *Brady* violations are qualitatively different from other due process violations.

Citing no authority, respondent urges the "prosecution team" .

. . "concept makes perfect sense in the *Brady* context because a *Brady* violation can be remedied only by providing the defendant with the information needed to prepare his or her defense,[7] but it has no logical application when the alleged wrong is an unjustified incursion into defense communications." (RB 70.) Respondent concludes that in non-*Brady* cases, "our courts have consistently applied prosecutorial misconduct (rather than *Brad*y) authorities, which do not recognize vicarious liability or the 'prosecution team' concept." (RB 70.) Respondent fails to cite to any such cases.

Respondent disregards the fact the "prosecution team" concept has been applied outside the realm of suppressed evidence, at the very least in the context of a prosecutor presenting false evidence. In this context respondent fails to address the authorities Goodwin cited in his opening brief: *Morris v. Ylst*, 447 F.3d 735, 744 (9th Cir. 2006) [prosecution cannot avoid responsibility for false testimony by willfully avoiding knowledge of facts]; *United States v. Vozzella* (2d Cir. 1997) 124 F.3d 389, 392-93 (2d Cir. 1997) [noting the prosecution's willful

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Not so. A court may exercise its supervisory power "to implement a remedy for the violation of a recognized statutory or constitutional right; to preserve judicial integrity by ensuring that a conviction rests on appropriate considerations validly before a jury; and to deter future illegal conduct." *United States v. Simpson* (9thCir. 1991) 927 F.2d 1088, 1090 [abrogated on other grounds as recognized by *United States v. W.R. Grace*, 526 F.3d 499, 511 n. 9 (9th Cir.2008)]; See *U. S. v. Chapman, supra.*

ignorance in support of holding that defendant was entitled to relief]. See also Bennett L. Gershman, Litigating Brady v. Maryland: Games Prosecutors Play, 57 Case W. Res. L. Rev. 531, 555-56 (2007) (hereinafter Gershman, Games Prosecutors Play) [discussing prosecution willful blindness to exculpatory evidence]; Modern Federal Jury Instructions--Criminal §5.06 [stating that "[n]o one can avoid responsibility for a crime by deliberately ignoring what is obvious" and defining willful blindness as "aware[ness] of a high probability" of the fact or circumstance, or "consciously and deliberately avoid[ing] learning" about it].)

Respondent distorts the rationale underlying the "prosecution team" approach to *Brady* violations. Courts decline to draw a distinction between different agencies under the same government, focusing instead upon the "prosecution team" because a contrary rule would enable the prosecutor to avoid disclosing exculpatory evidence by the simple expedient of leaving such evidence in the custody of another agency while utilizing his access to it in preparing his case for trial. (*Martinez v. Wainwright* (5th Cir. 1980) 621 F.2d 184, 188; *United States ex rel. Smith v. Fairman* (7th Cir. 1985) 769 F.2d 386, 391-392; *United States v. Auten* (5th Cir. 1980) 632 F.2d 478, 481.) 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 LASD's deputy 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*, *supra*, 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.

4. Respondent Expressly Abandons The People's Contention at Trial That Goodwin Waived Attorney-Client Privilege

Although 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 (see 2RT A-2; D-19 – 23; 4RT O-9), respondent expressly abandons that position on appeal. (RB 71.)

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

Respondent argues Goodwin suffered no prejudice because "anything material in the seized documents was available to the prosecution from non-privileged sources." (RB 71.) Respondent cites to Jackson's opposition to Goodwin's motion to dismiss, where the prosecutor analyzed only the 35 documents Goodwin had submitted with his motion as samples, out of at least 200 and potentially thousands of pages of correspondence with his attorneys and other documents.[8] (RB 71; see 4CT 927; 2RT D-35.) Jackson filed the opposition on March 7, 2005. (4CT 913.)

Respondent ignores the fact that in June of 2005, the trial court's perception of the situation was that the parties were litigating – not a true recusal motion – but a motion to address a situation where the LADA's office possessed information it should not have. (RT 6-2-2005, 13-15.) The court at that point – three months after Jackson filed his opposition that respondent claims disposes of the prejudice issue –

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[8] Defense counsel pointed this fact out to the court during the March 17, 2005 hearing, explaining that she had submitted a small sample of documents that she believed were the least damaging to Goodwin in terms of revealing to the court attorney-client privileged communications. (2RT D-33 - D-35.) The violation was not limited to those 35 documents, as Jackson and now respondent seem to suggest.

found much of that material was privileged. (RT 6-2-2005, 15.) The trial court at that point denied Goodwin's motion in part because the prosecutor had agreed not to use the privileged material at trial – not because the court found the prosecutor's review of the documents was not prejudicial, or because the defense strategy had not been revealed to the prosecutors via the privileged documents. (RT 6-2-2005, 26-29.) Respondent reasserts the fox guarding the henhouse argument, arguing the trial court relied upon Jackson's "representation that he had obtained all information from independent sources." (RB 71-72.)

Respondent improperly shifts to Goodwin the People's burden of rebutting prejudice by asserting Goodwin "makes no serious effort to contradict the prosecution's representations and evidence, much less make any attempt to show the trial court's findings were unsupported by substantial evidence." (RB 72; *People v. Zapien, supra,* 4 Cal.4th 929, 967; *Nix v. Williams*, *supra,* 467 U.S. 431, 444, 104 S.Ct. 2501, 2509, 81 L.Ed.2d 377, 387; *People v. Herring, supra,* 20 Cal.App.4th 1066, 1077.)

As defense counsel pointed out below, it would be impossible, given the massive invasion by the investigators and prosecutors into Goodwin's privileged documents, to say which of the hundreds or thousands of seized privileged documents the prosecutors might have used to formulate their theory of the case. (2RT D-35.) The prosecutor relied on a motive associated with the litigation between Thompson and Goodwin, and Goodwin's bankruptcy, and presented witnesses at trial – including Bartinetti, Cordell, Coyne and Kingdon – who 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]; and Argument V of Goodwin's opening brief [Kingdon].) Many of the seized documents and much of the seized correspondence between Goodwin and his lawyers had to do with those proceedings and that purported motive for the murders. Jackson's analysis of 35 sample documents does not rebut that prejudice.

Respondent attacks Goodwin's reliance on *State v. Lenarz* (2011) 301 Conn. 417, 22 A.3d 536[9], first, because the case is from a foreign jurisdiction, and second, because respondent claims "[t]he holding in *Lenarz* is predicated on a crucial finding not present in this case—the disclosure of defendant's trial strategy." (RB 72-73.)

While it is true this Court is not bound by decisions of other jurisdictions, this Court may consider such cases if they might assist the Court in rendering a decision. (See, e.g., *Leupe v. Leupe* (1942) 21 Cal.2d 145, 150-151; *Trammell v. Western Union Tel. Co.* (1976) 57 Cal.App.3d 538, 553.)

The question whether the violation disclosed Goodwin's trial

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[9]See full discussion at AOB pages 70 through 74.

strategy is before this Court, so respondent's bald assertion that the trial court found against Goodwin does not end the inquiry; Goodwin contends the documents did reveal his trial strategy. Respondent simply ignores the similarities between *Lenarz* and this case and substantially fails to address Goodwin's argument. What is significant about *Lenarz* is that the appellate court (1) placed the burden on the prosecutor of rebutting a presumption of prejudice to the defendant where the prosecutor invaded attorney-client privilege by reading privileged materials containing trial strategy; (2) held "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;" and (3) 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 pp. 425-426.).

Although the trial court here recognized Goodwin suffered the same type of "taint" as the appellate court found to be *per se* reversible error barring retrial in *Lenarz*, the trial court here attempted to remedy the LADA's overwhelming violation of Goodwin's attorney-client privilege and Sixth Amendment right to effective assistance of 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 bankruptcy and federal criminal proceedings against Goodwin in formulating the prosecution's case for motive (D-29 – 31), Jackson and Dixon did exactly that. Jackson's rebuttal to the 35 sample documents provided by Goodwin does not rebut the presumption of prejudice. (RB 71-72.)

Respondent does not even attempt to address the fact 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 or did not "prejudice" Goodwin because they addressed Goodwin's prior federal criminal case, not Goodwin's prosecution for the murders. (5CT 1408-1409; ASR 88-116.) As explained above, the prior federal criminal case had to do with alleged bankruptcy fraud, to which Bartinetti, Cordell, Coyne and Kingdon testified at trial that Goodwin was engaged in fraudulent transactions to avoid paying Thompson his judgment. (See 8RT 3459-3460, 3472 [Cordell]; 10RT 4047; 4054-4058 ; 11RT 4214-4215, 4223, 4244-4245, 4254-4255 [Coyne]; 7RT 3183-3184, 3193-3195 [Bartinetti]; and Argument V of Goodwin's opening brief [Kingdon].) Therefore,

Goodwin's privileged communications regarding the federal criminal proceedings were part of the defense strategy. In fact, the communications Goodwin discussed with his attorneys went to the heart of the prosecutor's theory of the case, which was based on motive, "fraud," and Goodwin's bad character.

Respondent again cites *People v. Shrier, supra,* 190 Cal.App.4th, 418, for the proposition Jackson "proved" neither he nor Dixon obtained useful information from the privileged documents. (RB 72.) As established above, Jackson proved nothing of the kind, and ultimately the court relied upon Jackson's unsworn promise not to use the privileged materials in prosecuting Goodwin. 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 Goodwin's opening brief in argument I.C.2., 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, respondent fails to address *People v. Poe* (1983) 145 Cal.App.3d 574, 578; *Boulas v. Superior Court* (1986)188 Cal.App.3d 422 ["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]; *People v. Moore* (1976) 57 Cal.App.3d 437, 442; *Briggs v. Goodwin* (D.C. Cir. 1983) 698 F.2d 486, or *United States v. Levy* (3d Cir.1978) 577 F.2d 200. (See Goodwin's discussion of these cases at pages 75 through 79 of his opening brief.) Respondent also fails to address *Shillinger v. Haworth* (10th Cir.1995) 70 F.3d 1132, 1141–1142. (See discussion at AOB p. 78.)

It is highly unlikely that this or any other Court could arrive at a certain conclusion as to how Jackson's or Dixon's knowledge of any part of the defense strategy might have benefitted the prosecutors in their further investigation of this case, "in the subtle process of pretrial discussion with potential witnesses, in the selection of jurors, or in the dynamics of trial itself." (*United States v. Levy*, *supra,* 577 F.2d 200, at p. 208; see also *Briggs, supra*, 698 F.2d 486, 494–495.)

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, Dixon and now respondent have displayed toward Goodwin's constitutional rights is outrageous and must not go unchecked. This Court should employ dismissal to vindicate Goodwin's rights and discourage future

misconduct of this type.

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

Respondent denies the trial court abused its discretion by failing to recuse the individual prosecutors from Goodwin's prosecution. (RB 73-84.) Respondent contends:

(1) Goodwin failed to address the relevant statutory standard for recusal,

(2) Goodwin failed "to show how any of the trial court's underlying factual findings lacked substantial evidence;"

(3) Goodwin failed to show how the prosecutor's examination of Goodwin's privileged materials caused a conflict within the meaning of section 1424;

(4) Goodwin failed to show prejudice; and

(5) Goodwin's argument is "grounded on the mistaken premise that he had a due process right to recusal independent of section 1424." (RB 73.)

Respondent is wrong.

1. Recusal Was Required Under Penal Code § 1424

Respondent misstates Goodwin's argument, claiming Goodwin contends Penal Code §1424 "merely" provides the procedural framework for bringing a motion to disqualify a district attorney. (RB 74-75.) At pages 79 through 80 of his opening brief, Goodwin

acknowledged the statute 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).) Both parties also discuss the analysis required by *People v. Eubanks* (1996) 14 Cal.4th 580. (See AOB 79-80; RB 74.)

Goodwin acknowledged the California Supreme Court's rejection of the *Vuitton* plurality's arguments for structural error. (AOB p. 93, citing *People v. Vasquez* (2010) 39 Cal.4th 47, 69.) Respondent concedes the failure to recuse under section 1424 may lead to due process violations in some cases. (RB 75.)

Respondent denies Code of Civil Procedure section 128 authorized the trial court to order the recusal of Jackson and Dixon and claims Goodwin cited no authority for that proposition. (RB 75.) Goodwin did cite authority - section 128 itself and *People v. Superior Court (Greer)* (1977) 19 Cal.3d 255, 266 – which respondent fails to address. (See AOB pp. 82-83.)

Respondent admits the "ultimate focus of the section 1421 inquiry is on protection of the defendant's rights, not whether recusal may be just or unjust for the prosecutor" (RB 76), yet finds no conflict of interest in the prosecutor's wholesale invasion of Goodwin's attorney-client privileged communications; in fact, respondent does not even discuss whether such an invasion constitutes a conflict of interest. Instead, respondent jumps to a discussion of structural error. (RB 76.)

2. The Trial Court Abused Her Discretion in Denying Goodwin's Motion

Quoting *Hollywood v. Superior Court* (2008) 43 Cal.4th 721, respondent asserts "section 1424 is not an alternative, 'free-form vehicle through which to express judicial condemnation of distasteful, or even improper, prosecutorial actions'" but requires a conflict of interest. (RB 78.) Earlier in its brief, however, respondent admitted the Supreme Court reviewed the propriety of ordering recusal in a setting analogous to this case. (RB 75.) Goodwin has established such a conflict of interest here.

Respondent criticizes Goodwin's reference to decisions of the lower federal courts and the Federal Rules of Evidence. (RB 78-79.) Again, this Court may consider such authority if it might assist the Court in rendering a decision. (See, e.g., *Leupe v. Leupe*, *supra,* 21 Cal.2d 145, 150-151; *Trammell v. Western Union Tel. Co.*, *supra*, 57 Cal.App.3d 538, 553.)

Respondent substantially fails to address Goodwin's arguments at pages 80 through 82 and 83 through 90 of his opening brief, that there was a conflict of interest in the massive violation of Goodwin's attorney-client privilege. (See *People v. Bouzas* (1991) 53 Cal.3d 467, 480 [respondent's failure to engage arguments operates as concession].)

Instead, respondent asserts "the trial court repeatedly found that [Goodwin] failed to show how the prosecution's privileged documents resulted in a conflict for purposes of section 1424" (RB 78) and asserts

"none of [Goodwin's] authorities are on point." (RB 78.) At the places respondent cites, the trial court repeated the same erroneous thinking in considering Goodwin's motion to recuse that she displayed regarding Goodwin's motion to dismiss – such as absolving the prosecutor of responsibility for retaining and reviewing obviously privileged documents. (See, e.g., 2RT O-12.) Goodwin's citation to *State Compensation Insurance Fund v. WPS, Inc.* (1999) 70 Cal.App.4th 644 pertains to that error. 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 AOB, Argument I.C.2.)

Respondent asserts "there is no evidence to controvert the trial court's finding that Deputy Jackson's exposure was inadvertent and that the prosecution did not rely on privileged materials to [Goodwin's] disadvantage." (RB 78.) Again, respondent simply ignores the facts. (See discussion of those facts in Goodwin's AOB, page 59.) The exposure was not "inadvertent." After Lillienfeld knowingly seized obviously privileged documents, the OCDA retained them and knowingly transferred the privileged documents to the LADA, and the LADA, knowing what they were, retained, reviewed and considered privileged documents in building its case against Goodwin.

Respondent asserts the trial court did not abuse her discretion because she "credited Deputy Jackson's declaration that the prosecution's pretrial and trial decisions and strategies were based on sources independent of the privileged materials and information. (4CT

1003-1004.)" Respondent asserts the trial court also found credible the deputy's representation that he did not remember looking at any of the privileged materials, except in his preparation for the defense motions," and so forth. (RB 79.)

Respondent asserts Goodwin "makes no serious effort to show ay of those findings was unsupported by substantial evidence." (RB 79.) Relying again on the *Hollywood* case, respondent argues the prosecutor's assurances alone are "substantial evidence" supporting the trial court's ruling. (RB 79-80.)

Hollywood is distinguishable from this case. In *Hollywood*, the question was whether a prosecutor's consulting with the makers of a major motion picture based on a criminal defendant's story create a conflict sufficient to require recusal of the prosecutor when the defendant was finally brought to trial. The lead prosecutor, bent on tracking down the fugitive defendant in this capital case, gave his case files to a screenwriter/director to make a movie based on the defendant's alleged life and crimes and consulted with the filmmakers during the film's subsequent production. The defendant was ultimately captured and brought to trial. He moved to recuse the prosecutor, arguing that "the prosecutor's involvement with Hollywood, the film industry, precluded his prosecution of Hollywood, the capital defendant." (*Id*. at p. 74.)

The *Hollywood* Court held trial courts are genuinely in the best position "to assess witness credibility, make findings of fact, and

evaluate the consequences of a potential conflict in light of the entirety of a case." (*Id*. at p. 729.) Here, however, the trial court had more than the prosecutor's unsworn factual representations to consider. The trial court also had to make a determination whether Jackson and Dixon had an ethical duty to turn over obviously attorney-client privileged documents to a judge or magistrate in order to protect the privilege – an act that would have stopped the violation of privilege at an early stage of the proceedings. (See discussion at pages 59 through 65 of Goodwin's AOB.) *Hollywood* is also distinguishable in that the prosecutor there did not discover any new information damaging to the defense as Jackson and Dixon did here; instead, the *Hollywood* prosecutor turned his own files over to some filmmakers

Here, it is simply impossible to excise the taint of the government's transgressions from Goodwin's prosecution, no matter how many times Jackson represented he did not mean to invade the privilege or he would not use the information he had received. The taint infected all phases of the investigation and prosecution. (See *United States v. Marshank* (N.D. Cal. 1991) 777 F.Supp. 1507, 1523–1524, 1530; *State v. Lenarz, supra,* 301 Conn. 417, 451; 22 A.3d 536; see Goodwin AOB, Argument XVI. [*Rochin* error].) The trial court therefore abused her discretion in refusing to recuse Jackson and Dixon from this case and permitting the matter to go to trial.

Respondent argues that, because the trial court found against Goodwin on the issue whether Lillienfeld invaded the defense camp

through wiretaps and his spying on Goodwin through Butch Jones, and those findings are "supported," Goodwin's claim should be rejected by this Court. (RB 80-81.) Goodwin disagrees. The violation included not only the wiretaps and the use of Butch Jones for spying on the defense, but the seizure, retention and review of Goodwin's privileged documents. (See discussion at AOB pp. 79-82.)

Again, recusal should have been granted because Goodwin established the massive violation of his attorney-client privilege affecting his right to effective counsel gives rise to a conflict so grave as to render it unlikely that he could receive fair treatment. (*People v. Hollywood, supra*, 43 Cal.4th 721, 730-731; *People v. Vasquez, supra*, 39 Cal.4th 47, 56.) The prosecutors' review of Goodwin's documents necessarily affected Jackson's and Dixon's ability to exercise discretionary functions in an evenhanded fashion and rendered a fair trial impossible.

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

Respondent fails to address Goodwin's argument the trial court's failure to recuse the district attorney's office infringed upon his due process right to a fair and impartial trial, ignoring Goodwin's citation to *Greer, supra*, 19 Cal.3d 255, 266, citing U.S. Const., 5th & 14th Amends.; Cal. Const., art. I, § 7, subd. (a), and the other authorities in that section of Goodwin's opening brief. (See AOB pp. 83-86.)

Goodwin stands by his argument that his due process rights were violated by the prosecutors' actions.

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

Respondent fails to address this portion of Goodwin's opening brief. Goodwin stands by this argument, presented at pages 87 through 91 of his opening brief.

5. Because the Error is Structural, Reversal is Required

Respondent substantially fails address Goodwin's argument that the trial court's error in denying Goodwin's recusal motion was structural and requires reversal *per se*. (See AOB pp. 91 through 94.) Respondent dismisses the argument at pages 76 through 77 of its brief. Goodwin stands by his position the error should be treated as structural and reversible *per se*.

6. The Trial Court Abused Its Discretion In Finding No Prejudice

Respondent contends Goodwin "cannot point to specific evidence to controvert the prosecution's evidence and representations that it did not rely on privileged materials either to present or to formulate its case against appellant. He therefore cannot show the trial court lacked substantial evidence to inform its discretionary ruling."

(RB 81-84.)

Contrary to respondent's contention, 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 AOB section I.C.4.) Respondent ignores the fact that, 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.)[10]

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

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Respondent again objects to this Court taking judicial notice of any part of the Orange County record. (RB 82-83.) Goodwin maintains this Court may properly take judicial notice, as – contrary to respondent's assertion – the trial court repeatedly referred to those proceedings. (See Goodwin's request for judicial notice and his reply to respondent's opposition.)

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. Respondent asserts that Goodwin "makes no showing that the prosecution (or Detective Lillienfeld, for that matter) showed privileged [documents] to [prosecution] witnesses." (RB 82.) To the contrary, this Court may fairly draw the inference from this record that Lillienfeld and the prosecutor did share at least some of those documents with the prosecution witnesses who testified to Goodwin's purported financial motive. 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

Respondent disagrees there was insufficient evidence to support Goodwin's convictions for murder. (RB 84-106.) Respondent argues:

(1) Goodwin was not charged with or convicted of conspiracy, but was only convicted by use of a conspiracy theory;

(2) The *corpus delicti* rule does not apply to uncharged liability theories;

(3) There was overwhelming evidence of both murders and special circumstances independent of Goodwin's "admissions;"

(4) Even without Goodwin's "admissions," there was substantial evidence Goodwin conspired with the killers because

(a) the evidence proved "a highly planned operation,"

(b) Ron and Tonyia Stevens identified Goodwin as having been "present at the shooting scene" three days before the murders (RB 85), and

(c) Goodwin had motive to kill the Thompsons.

Finally, respondent argues Goodwin's attack on the Stevenses' identifications fails as an "improper challenge to witness credibility."

Respondent is wrong on all counts.

A. Respondent Omits Governing Law Defining the Standard of Review

Respondent omits the rule that, in assessing whether sufficient evidence exists to support a judgment, the reviewing court may not 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* (1980) 26 Cal.3d 557, 577.)

Respondent also omits the rule 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*.) "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.)

Respondent substantially fails to address Goodwin's argument that any eyewitness identification – and especially one that potentially implicates a defendant who was not at the scene during the killing and otherwise does not appear to be connected to the killers – must be held to the standards of reliability mandated by federal law.

Respondent mischaracterizes Goodwin's argument regarding the eyewitnesses as an improper attack on their "credibility." It is not; the issue is the substance and reliability of the testimony of "eyewitnesses" whose identifications have been affected by the passage of time and subjected to outside influences. (See *United States v. Smith* (9th Cir. 1977) 563 F.2d 1361, 1363 and Argument II. D. in Goodwin's opening brief.) In other words, the issue is not the credibility of any particular witness, but the inherent unreliability of eyewitness identifications obtained under circumstances that corrupt human memory. Because the science challenging the reliability of eyewitness identifications is relatively new, this Court must address the issue in light of those recent developments instead of dismissing it as a "reweighing" of "credibility."

B. Where the Prosecutor Relies Upon a Conspiracy Theory to Convict, The Prosecutor is Required to Establish the *Corpus Delecti* To Prove the Conspiracy

Citing no authority, respondent asserts the *corpus delicti* rule only applies in cases where the defendant is formally charged with a conspiracy; therefore, the prosecution in this case was not required to prove beyond a reasonable doubt the underlying conspiracy upon which it relied to convict Goodwin of the murders. (RB 86-100.) The problem is that – in the absence of any evidence Goodwin murdered the Thompsons – the prosecutor created a "conspiracy" out of thin air in order to hold Goodwin accountable for two murders where the killers were never identified and the witnesses could never decide so much as what race they were. Goodwin was, in fact, falsely convicted, by his words alone, of a conspiracy to murder the Thompsons that never existed.

Respondent also wrongly conflates *corpus delicti* for the uncharged conspiracy with *corpus delicti* for the murders, which is not an issue here. (See RB 87.) Clearly there was sufficient *corpus delicti* to find a murder was committed by someone; the issue here is the lack of a *corpus delicti* for a conspiracy that would connect Goodwin to those murders.

Respondent admits the prosecution is required to prove the "*corpus delicti,* or the body of the crime itself. . . ." (RB 87.) Respondent also admits "the body of a crime refers to its elements." Because

respondent does not address the issue of lack of *corpus delicti* of a *conspiracy*, respondent's argument regarding the *corpus delicti* for a murder (RB 88-90) is irrelevant and does not require a reply.

Goodwin was convicted of special circumstance murder charges and sentenced to life without possibility of parole despite a lack of proof that he committed the homicides or intended to kill, in a trial riddled with unfairness. The evidence was insufficient to support the charges and special circumstances of which Goodwin was convicted, but the prosecution successfully employed an uncharged and unproven conspiracy. Thus, the ephemeral, uncharged allegation of a "conspiracy" became a surrogate for actual proof of the charges.

1. Respondent Offers No Authority to Support Its Argument a Prosecutor Need Not Establish the *Corpus Delicti* for Conspiracy in a Case That Depends on an Uncharged Conspiracy to Connect Goodwin to the Thompson Murders

Respondent offers no authority for its argument the prosecutors were not required to establish the *corpus delicti* for the uncharged conspiracy. Respondent merely concludes, "given the rule's logic and purpose, it would make little sense to make such an unprecedented extension." (RB 87.)

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.

The uncharged conspiracy theory was urged as a way for jurors to infer, despite the lack of evidence, that Goodwin hired hit men to kill the Thompsons. Portraying Goodwin as a willing co-conspirator with the unknown killers was a way of filling evidentiary gaps in the prosecution case.

The conspiracy "evidence" and the prosecutors' argument show they did not regard themselves bound by the usual burden of proof. Rather, the uncharged conspiracy afforded Jackson and Dixon latitude to argue expansively that Goodwin's bad character and business conflicts with Mickey Thompson, purported "threats" against Thompson, and the unreliable eyewitness testimony attempting to establish Goodwin's presence – not at the crime scene, as respondent states (RB 85) – but some distance from it, some three to ten days before the murders, amounted to Goodwin's criminal responsibility for premeditated special circumstances murder. The confusion engendered by instructions on the uncharged conspiracy afforded the jury reasons to accept the prosecutors' point of view, whether or not the existence of a conspiracy to murder was ever proven.

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[11] insofar as it provides that every conviction must be supported by some proof of the *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.)

Respondent argues the "logic and purpose" of the *corpus delecti* rule precludes its use when an uncharged conspiracy is used as a theory of liability. (RB 87-88.) However, respondent admits the *corpus delicti* rule requires the prosecution prove the body of the crime itself, and "the body of a crime refers to its elements." (RB 87.) Respondent also admits that when a prosecutor does not charge conspiracy as an offense, but introduces evidence of a conspiracy to prove liability, the trial court must give conspiracy instructions requiring the jury to find each element of the crime of conspiracy. (RB 86-87; see 7CT 1922; 23RT 8722-8723.) As respondent points out, the *corpus delicti* rule is meant "to ensure that one will not be falsely convicted, by his or her words alone, of a crime that never happened." (RB 87.) In other words, the prosecutor here had to make a *prima facie* showing a conspiracy existed in order to use conspiracy as a means of holding Goodwin liable for the Thompson murders, and threats and motive are insufficient to make

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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."

that showing.

2. There is Insufficient Evidence to Establish A Conspiracy Between Goodwin and the Shooters

Respondent admits that, even though the prosecutor did not charge a conspiracy to commit murder, because the theory of liability was a conspiracy between the killers and Goodwin, the prosecutor was required to show: (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. (RB 87; *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.)

Respondent contends there is sufficient evidence to prove a conspiracy between Goodwin and the shooters because "the conduct, relationship, interests and activities of appellant and the two shooters before, during and after the murders provided a strong evidentiary basis from which to infer that the three had reached a tacit agreement to commit the murders." (RB 92.) The first problem with that statement is that the theory upon which the prosecution proceeded was murder for hire – and that type of agreement would, by definition,

have to be something more than "tacit," because it would involve a contract by which the killers would have to be compensated for killing the Thompsons.[12] There is no evidence of any such agreement.

Respondent ignores the rule "'[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.) Respondent dismisses the court's[13] remark at the end of the preliminary hearing summing up the utter lack of evidence against Goodwin demonstrating the error in drawing an inference from the nonexistence of a fact: "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." (RB 98; 3CT 846.)

Respondent describes how the shooting was carried out and concludes the evidence shows "the existence of an agreed-upon plan." (RB 92-93.) Nothing in this recitation of facts connects Goodwin to the "plan." Any inference of such a connection constitutes forbidden "suspicion alone, or imagination, speculation, supposition, surmise,

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[12] "Tacit" means "implied or inferred without direct expression."

[13] Judge Schwartz presided over both the preliminary hearing and the trial. (1CT 3; 2RT D-33.)

conjecture or guesswork." (*People v. Stein*, *supra,* 94 Cal.App.3d 235, 239.) Yet respondent reasons "as *nothing* indicates that the shooters knew the Thompsons, it would be reasonable to infer that they were informed how to recognize them by someone, like appellant, who did." (RB 93 [emphasis added].) Respondent's conclusion again violates the rule that a legal inference cannot flow from the nonexistence of a fact; it can be drawn only from a fact actually established, and the prosecutor failed to establish who the shooters were, let alone whether they knew or did not know the Thompsons. Goodwin cannot be convicted on the basis of the inference "if not Goodwin, then who?" because "nothing indicates the shooters knew the Thompsons." (See detailed discussion of the court's error in excluding third-party culpability or biased investigation evidence, in Goodwin's AOB, Argument IX, for a discussion of who else might have committed the murders.)

Next, respondent "connects" Goodwin to the "conspiracy" by citing to the "evidence" the Stevenses saw him "two to five" days before the murders looking through binoculars "and parked close to the Thompson residence." (RB 93.) The Stevenses' identifications of Goodwin simply cannot be considered reliable evidence when viewed in light of the scientific evidence Goodwin discussed in his opening brief, and the impermissibly suggested methods Lillienfeld used to obtain them. (See AOB, Argument II.D.)

All that is left is what respondent characterizes as "strong

evidence of appellant's interest in, and motive for, killing the Thompsons." (RB 93-94.) No matter how strong Goodwin's motive or rage might be, it is not, in the absence of substantial, reliable evidence Goodwin conspired with someone – meaning evidence which is reasonable, credible and of solid value – sufficient to support his convictions for the Thompson murders.

Respondent cites *People v. Rodrigues* (1994) 8 Cal.4th 1060, 1135, in support of its argument that "the evidence of appellant's and the shooters' conduct and activities prior to and during the shooting incident and escape, coupled with appellant's interest in killing the Thompsons, gave the jury a reasonable basis for inferring the existence of a tacit agreement to carry out the murders according to a plan [Goodwin] helped formulate." (RB 94.) There is no reasonable comparison between *Rodrigues* and this case. In *Rodrigues* a co-conspirator and a surviving victim testified to the defendant's participation in planning and carrying out a robbery/murder. (*Id*. at pp. 1095-1096.) The participants were identified by the co-conspirator, who knew them well and drove them to the scene of the crime. Neighbors of the victims provided a description of the two men involved in the killing to corroborate the accomplice testimony. Several witnesses also testified to seeing an injury to the defendant that had been incurred during the crimes. The defendant's car was used to commit the crimes, and blood consistent with that of the victims was found in the car. The murder weapon was produced at trial. (*Id*. at pp.

1095-1102.) Here, no evidence even remotely connected Goodwin to a "conspiracy" with the unknown shooters – the prosecutor never claimed Goodwin was present at the time of the shootings, and the Stevenses' identifications of Goodwin as having been parked in front of their house are so tainted by the passage of time and manipulation by Detective Lillienfeld as to be worthless as evidence.

Respondent also relies upon *People v. Vu* (2006) 143 Cal.App.4th 1009 – a gang killing – in support of its argument there is sufficient evidence of "agreement" between Goodwin and the Thompsons' unknown killers. (RB 94.) Again, there is no comparison between the two cases. Goodwin is not a member of a gang from which agreement to kill can be inferred. From citation to *Vu*, respondent jumps to cataloging the testimony about Goodwin's threats and concludes "the inference of appellant's complicity in a conspiratorial agreement and understanding with the shooters becomes almost inescapable." (RB 94-96.) Respondent cites to no authority for its conclusion that "from [Goodwin's] statements, the jury could reasonably infer not only appellant's motivation and intent to kill Thompson (and his 'family'), but also his intent to do so by means of a plan that involved hiring persons to do the actual killing." (RB 96.) What remains lacking is evidence of association between Goodwin and the killers.

Again, there simply is no evidence of association between Goodwin and the unknown shooters such that his anger and purported "threats" against Mickey Thompson would support an inference he

reached an agreement with those people to commit murder. Goodwin's examination of the cases discussing the quantum of evidence necessary to support such a conviction defeats respondent's argument. (See AOB pages 103-107.)

Respondent dismisses the jury foreman's comment echoing the court's error 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?" (RB 97-98; see 8CT 2080.) However, the comment echoes Judge Schwartz's erroneous belief "if not Goodwin, then who else" was a permissible inference sufficient to prosecute and convict Goodwin of murder. Ultimately, "if not Goodwin, then who else" was the state of the evidence upon which the jury reached verdicts of guilt in this case, and it is not sufficient. (*People v. Long* (1907) 7 Cal.App. 27, 33, 93, as followed in *Davis v. Superior Court* (1959) 175 Cal.App.2d 8, 23; see *People v. Herrera* (2006) 136 Cal.App.4th 1191, 1204-1205.)

(a) <u>There Was No Substantial, Reliable Evidence of Association Between Goodwin and the Killers, or Anyone Associated With the Killers</u>

Respondent acknowledges Goodwin's contention the jury could only speculate as to an association or agreement between Goodwin and

the shooters. (RB 84.) However, respondent fails to address the key omission by the prosecutor here – the failure to show evidence of participation or interest in the commission of the offense, *coupled with evidence of association*, sufficient to support an inference of a conspiracy to commit the offense. In keeping with this omission, respondent fails to address *People v. Miller (*1960) 185 Cal.App.2d 59, 72-74, or *People v. Kefry (*1950) 166 Cal.App.2d 179, 186. (See Goodwin's discussion of *Miller* at page 104 of his AOB.)

Respondent and Goodwin agree on the law governing proof of a conspiracy. (See RB 90-92.) The problem for the People is the lack of evidence Goodwin had any connection with the shooters The People cannot identify the shooters, let alone connect them to Goodwin by direct or circumstantial evidence. In light of the quantum of evidence demonstrated in prior hired-hit cases and the lack of "evidence" mustered in this case, respondent attempts to create a dangerous precedent.

Respondent argues "the conduct, relationship, interests and activities of appellant and the two shooters before, during and after the murders provided a strong evidentiary basis from which to infer that *the three* had reached a tacit agreement to commit the murders." (RB 92 [emphasis added.])

As a preliminary matter, respondent cannot fairly represent there were two people at the scene of the murders. The prosecutors could not establish the number of men at the scene or their race(s). The ballistics

evidence proved the bullets found in the victims came from one firearm, indicating only one person killed both of the Thompsons. (16RT 6063, 6089, 6093-6094.) The killer was never identified, nor were any of the individuals described as fleeing the scene. (6CT 1720.) One eyewitness – who did not testify at trial – thought he saw a white male shooter. (6RT 7.) Only Allison Triarsi testified to witnessing the shooting, and she never mentioned the shooters' race at trial. 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 they saw a white man at the foot of the driveway. (6RT 34, 52, 53; 22RT 8245-8246.)

Respondent catalogs the evidence of "an agreed-upon plan" and concludes "[a]s nothing indicates the shooters knew the Thompsons, it would be reasonable to infer that they were informed how to recognize them by someone, like appellant, who did." (RB 92-93.) 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.

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

Respondent dismisses Goodwin's survey of cases involving contract "hits" (AOB pp. 104-107) as having "no bearing on this appeal" because Goodwin discusses out-of-state decisions. (RB 96-97.) While it is true this Court is not bound by decisions of other jurisdictions, this Court may consider such cases if they might assist the Court in rendering a decision. (See, e.g., *Leupe v. Leupe* (1942) 21 Cal.2d 145, 150-151; *Trammell v. Western Union Tel. Co.* (1976) 57 Cal.App.3d 538, 553.) The decisions Goodwin discusses have value in that they provide a sense of what is required to establish the proof of association element of a conspiracy, and a context in which to view the paucity of evidence in Goodwin's case. Respondent also complains that none of the cases Goodwin discusses hold that "any particular type of proof" is necessary to prove a conspiracy. (RB 96-97.)

Respondent again asserts the Stevenses' unreliable identifications and Goodwin's statements of intent are sufficient to show association. (RB 97.) Respondent fails to explain how a statement of intent is evidence of association. The Stevensens' identification – even if they were reliable – would not alone be sufficient to prove association between Goodwin and the unknown killers. Because respondent fails to address the cases Goodwin cited at pages 104 through 107 of his opening brief, Goodwin asks this Court to consider that portion of his

brief in order to understand how far the evidence the prosecutor presented falls short of proving association – i.e. - there was no testimony of a co-conspirator; or 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. (See *Commissioner v. Mayhue* (Penn. 1994) 536 Pa. 271, 639 A.2d 421; *State v. Marshall* (NJ 1992) 130 N.J. 109, 613 A.2d 1059; *State v. Yarbrough* (Ohio 2002) 95 Ohio St.3d 227, 767 N.E.2d 216; *Sutton* v. *State* (Ind. 1986) 495 N.E.2d 253; *State v. Davis* (Ohio 1991) 62 Ohio St.3d 326, 581 N.E.2d 1362; *State v. Clausell* (N.J. 1991) 121 N.J. 298, 580 A.2d 221

There was no evidence whatsoever of any association between Goodwin and the unknown man 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.

(b) <u>There Was No Evidence of Agreement Between Goodwin and The Killers or Anyone Associated With the Killers</u>

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, supra,* 175 Cal.App.2d 8, 23 [evidence only giving rise to suspicion of conspiracy to obstruct justice and remove product of prison labor from 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.[14]

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

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[14]See Argument II.D, in Goodwin's AOB and *infra*.

did not claim Goodwin was present at the scene of the crime; rather, the prosecutor offered only the tainted 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 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 of Goodwin's AOB.) 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.[15]

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[16] – none of Goodwin's actions supply 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.

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[15]See AOB, Argument IX.

[16]See AOB, Argument IV.

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

Respondent argues Goodwin's reliance on *United States v. Todd* (8th Cir. 1981) 657 F.2d 212, is "misplaced" and attempts to distinguish it. (RB 98-99.) Respondent argues *Todd* is different from this case because Goodwin "not only voiced his hatred of Mickey Thompson . . . but also stated his intent to kill Thompson and hire killers." This Court should take careful note that respondent fails to cite to the record in support of these "factual" contentions. (See summary of the purported "threat" evidence at pages 11 through 21 of Goodwin's AOB.) Again failing to cite to the record, respondent asserts *Todd* is distinguishable because the manner of killing in this case was "not only consistent with appellant's voiced intention, but could not have occurred in the absence of prior planning." (RB 99.) Finally, respondent urges, "In *Todd*, the crimes could have been committed alone, and there was no witness as to concerted action." (RB 99.)

What respondent fails again to acknowledge is that there is no evidence of "concerted action" by Goodwin in connection with the Thompson murders, and no evidence of association and agreement between Goodwin and the killers. DDA Jackson asked the jury to convict Goodwin of two murders on the basis of inference alone, the inference being that because the Stevenses' testified they saw Goodwin

with binoculars sitting in a car in front of their home some distance from the eventual crime scene, Goodwin was "planning" the escape route and, therefore, was associated with and agreed with the killers to murder the Thompsons. (See 23RT 8754-8755, 8777, 9016-9017, 9020.)

The significance of the *Todd* case is the 8th Circuit's reversal, adhering to the same standards that govern in California, finding, "*We are unaware of any case in which a court or jury was allowed to convict on the basis of inference alone*." (*Id*. at p. 217 [Emphasis added].) What the prosecutor did here, as in *Todd*, was "merely raise suspicion of possibility of guilt." (*Ibid*.) "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). This Court must reach the same conclusion – the evidence here was insufficient to prove beyond a reasonable doubt that Goodwin was part of a conspiracy to murder the Thompsons.

As respondent has repeatedly emphasized, 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.

Respondent ignores the fact that, as to evidence of association, the prosecution case relied entirely upon suspicion, and fails to address the cases Goodwin has cited holding suspicion alone is insufficient to establish a connection between alleged co-conspirators.[17] 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.)

Respondent argues Goodwin "errs" in asserting the prosecutor improperly argued a "totality of the circumstances" burden of proof of a conspiracy as the standard for proving Goodwin murdered the Thompsons. (RB 99-100; see 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"].) Citing the "reasonable doubt" instructions given to the jury, respondent argues the prosecutor's reference to "totality of the circumstances" "was proper

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See *People v. Hardeman* (1966) 244 Cal.App.2d 1, 41; *People v. Herrera, supra*, 136 Cal.App.4th 1191, 1205, cited in the opening brief at page 113.

and consistent with the ultimate standard." (RB 99.)

The prosecutor's argument was misleading, no matter how the jurors were instructed. Respondent muddies up the issue by arguing generically about evidence that might support a jury's finding a conspiracy existed. (RB 99-100.) Respondent's argument is beside the point. "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 deceptive 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.

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

Respondent disagrees that Ron and Tonyia Stevens' eyewitness identifications are inherently unreliable and that they cannot support Goodwin's convictions. (RB 100-106.) Respondent substantially fails to address Goodwin's arguments.

First, respondent mischaracterizes Goodwin's contentions regarding the eyewitness identifications as "an improper invitation to reweigh the evidence and reevaluate witness credibility," citing *People v. Jones* (1990) 51 Cal.3d 294, 314-315, *People v. Livingston* (2012) 53

Cal.4th 1145, 1170, *People v. Thompson* (2010) 49 Cal.4th 79, 124-125, and *People v. Ennis* (2010) 190 Cal.App.4th 721, 728-729. (RB 100.) Not one of those cases addresses the issue here, which is the inherent unreliability of eyewitness identifications of a stranger that have been manipulated by law enforcement.[18] The "inherently improbable" standard does not apply to the testimony of Ron and Tonyia Stevens.

The only eyewitness identification case respondent cites for the standard of review is *In re Gustavo M.* (1989) 214 Cal.App.3d 1485. (RB 101.) The Court in that 24-year-old case did not address the identification methods, or how they might have created false memories in the witnesses. The *Gustavo M.* case was also decided decades before the scientific developments described in Goodwin's opening brief, and prior to the California Commission on the Fair Administration of Justice's 2006 Report and Recommendations Regarding Eye Witness Identification Procedures. In light of those developments, it is time for courts to consider a new approach to assessing sufficiency of evidence

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Jones is a resident child molester case, and the question was whether a child's purely "generic" testimony regarding multiple sexual molestations over a period of time was sufficiently substantial evidence to support a conviction for child molestation. *Livingston* at the place cited addressed the sufficiency of the evidence to support a gang allegation, not eyewitness identification testimony. *Thompson* addressed the testimony of an accomplice who knew the alleged perpetrator, and the issue was whether he credibly described the events he witnessed in light of other evidence presented at trial. *Ennis* addressed the testimony of the defendant's family members.

in cases involving stranger identifications and the methods used to obtain them.

Pared to its essence, the question presented to the jury here 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.)

1. Respondent Omits or Distorts Portions of The Stevenses' Testimony

(a) Respondent Entirely Omits Ron and Tonyia Stevens' Testimony at the Los Angeles County Preliminary Hearing

Without explanation, respondent omits all of Ron and Tonyia Stevens' testimony at the Los Angeles County preliminary hearing,

which Goodwin set out at pages 115 through 117 and 118 through 120 of his opening brief. All of the eyewitnesses' statements regarding their identifications of Goodwin are crucial to an understanding of the unreliability of those identifications, such as how the witnesses' memories and descriptions of the events at issue and the man they claim they saw in the station wagon were influenced over time by extraneous events, including Lillienfeld's manipulative and impermissibly suggestive lineups.

(b) Respondent Distorts Ron Stevens' Trial Testimony

Respondent renders an inaccurate picture of Ron Stevens' trial testimony by omitting the following facts. At trial Ron claimed he saw two men sitting inside a vehicle, one in the driver's seat and one in the front passenger seat. (11RT 4387.) While 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.) 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.)

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) Respondent Distorts Tonyia Stevens' Trial Testimony

By the time of trial, Tonyia was certain the incident occurred on the Monday before the Wednesday murders, although she had been less certain at the preliminary hearing. (3CT 654-655; 12RT 4595-4596.) Tonyia claimed she saw the driver's face full-on as she drove by the station wagon, and was concentrating on him because he had the

binoculars, which seemed unusual. (12RT 4566.)

Respondent omits Tonyia's testimony she followed Ron to within ten to fifteen feet of the station wagon. (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.) Respondent the fact 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. Respondent Fails to Address Goodwin's Argument That the Passage of Time, Intervening Events and Exposure to Suggestive Identification Procedures Rendered The Stevenses' Identification Testimony Unreliable as a Matter of Law

(a) The Issue Is Not Witness Credibility; The Issue is The Fundamental Lack of Reliability Of Manipulated Eyewitness Evidence

Respondent does not even attempt to address Goodwin's argument that the Stevenses' identification testimony is unreliable in light of the scientific developments described at pages 126 through 138 of Goodwin's opening brief. Instead, respondent argues against a position Goodwin has not taken. (RB 100-102; RB 104-106.)

This is not about reassessing witness credibility; this is about the fundamental lack of reliability of a type of evidence – much the same as dog-scent evidence. (See *People v. Willis* (2004) 115 Cal.App.4th 379, 385-386; see also 1 Witkin, Cal. Evidence (4th ed. 2000) Opinion Evidence, § 77; 2 Witkin, Cal. Evidence (4th ed. 2000) Demonstrative, Experimental, and Scientific Evidence, § 42 et seq.; Cal.Jur.3d, Evidence, § 446 et seq.; Annot., Criminal Law: Dog Scent Discrimination Lineups (1988) 63 A.L.R.4th 143.)

Respondent again cites the 24-year-old *Gustavo M.,* case, 214 Cal.App.3d 1485, 1497, for the proposition that the "inescapable fact of eyewitness identification . . .alone is sufficient to sustain the conviction." (RB 104.) Respondent misses the point – that position has been scientifically discredited, and it is time for a corresponding change in the law. (See AOB, pp. 114-138.) Goodwin does not have to show that the testimony was "physically impossible or inherently improbable" (RB 104-105) because the issue is not the credibility of any particular witness, but the inherent unreliability of eyewitness identifications obtained under circumstances that corrupt human memory – particularly where law enforcement has deliberately placed a suspect in a live lineup as the only individual repeated from a photographic lineup – a method deemed impermissibly suggestive more than 40 years ago because it renders "all but inevitable" the witness' identification of "[the defendant] whether or not he was in fact 'the man.'" (*Foster v. California* (1969) 394 U.S. 440, at p 443; 89 S.Ct.

1127, 1128-1129; See P. Wall, *Eye-Witness Identification in Criminal Cases,* 74—77 (1965).)

As Goodwin explained in his opening brief, the passage of 13 years between the murders and the identification procedures erased any memory the Stevenses had of the man they claimed they saw in front of their home. In addition to the undeniably unfair identification methods Lillienfeld employed, the Stevenses' memories were tainted by their interviews with Lillienfeld 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. These intervening events created "new" memories of the event in the Stevenses' minds, rendering their identifications of Goodwin as the man they saw in the station wagon in 1988 unreliable.

Citing *People v. Elliott* (2012) 53 Cal.4th 535, 585, respondent dismisses Goodwin's detailed description of how Lillienfeld created new memories in the minds of Ron and Tonyia Stevens, and cemented their certainty that they saw Goodwin in a station wagon in front of their home. (RB 105; see AOB pp. 121 through 126.) Like the earlier cases respondent has cited – the California Supreme Court dismissed the defendant's claim of insufficient evidence to support the conviction as an attack on individual witness' credibility, not as scientifically unreliable evidence. (*Ibid.*)

In addition, *Elliott* is distinguishable on its facts, because in that

case multiple witnesses identified the defendant in court as the direct perpetrator of the crimes. Here, no eyewitness ever placed Goodwin at the murder scene. Also, *Elliott* did not involve a prosecution premised on an attenuated uncharged conspiracy theory – it was a case of one perpetrator, directly responsible for murder. *Elliott* does not govern here.

(b) The Issue is Not Forfeited

Again citing *Elliott*, *supra,* at pages 585-586, respondent argues the issue is forfeited because Goodwin did not present the studies he relies upon to the trial court in a pretrial motion to prevent the Stevenses from testifying. (RB 105.)

Federal constitutional rights are not generally subject to forfeiture by silence. In *United States v. Provencio* (9th Cir. 1977) 554 F.2d 361, 363, the Ninth Circuit rejected a claim of forfeiture, holding, "Waiver of fundamental constitutional rights is not to be implied and it is not likely to be found. The record contains no express waiver of the right to confrontation. We will not imply a waiver of a fundamental right from the failure of defense counsel to object at the time of trial." (See also *Gete v. Immigration and Naturalization Service* (9th Cir. 1997) 121 F.3d 1285, 1293 ["it is a central tenet of constitutional law that courts indulge every reasonable presumption against waiver"], quoting *Aetna Ins. Co. v. Kennedy* (1937) 301 U.S. 389, 393 [57 S.Ct. 809, 81 L.Ed. 1177].) Similarly, under California law, fundamental constitutional rights are not subject to forfeiture by silence. (*People v. Vera* (1997) 15 Cal.4th 269,

176-177; *People v. Menchaca* (1983) 146 Cal.App.3d 1019, 1025.) Appellant has thus not forfeited the right to assert the issue on appeal.

Even if this court finds Goodwin's argument is forfeited for trial counsel's failure to object, this court may nevertheless address the issue, for only a party is barred from asserting an issue not objected to; an appellate court may raise the issue on its own. (*In re S.B.* (2004) 32 Cal.4th 1287 ["[A]pplication of the forfeiture rule is not automatic."]; *People v. Williams* (1998) 17 Cal.4th 148, 161, fn. 6 [even if a party cannot raise a complaint about an issue, the appellate court may address such an issue if it chooses to do so]; see also *People v. DeJesus* (1995) 38 Cal.App.4th 1, 27 [addressing defendant's claim of cruel or unusual punishment despite finding waiver to forestall a claim of ineffective assistance of counsel."].)

Based on this authority, as well as that presented in the opening brief, this court should conclude that the doctrine of forfeiture plays no role in this case, and rule upon the constitutional issue presented.

Finally, respondent fails to cite any authority for the proposition that an insufficient evidence claim can be waived for failure to raise it below.

(c) The Lack of Reliable Evidence is Not "Cured" by Pezdek's Expert Testimony

Respondent argues any error was effectively "cured" because Goodwin "presented extensive testimony by Dr. Pezdek, covering all the essential aspects of those studies." (RB 105.) Goodwin disagrees.

As respondent points out, the jurors were instructed they were not bound by the expert's opinion and could disregard it. (RB 105.) The Stevenses' testimony should never have been presented to the jury in the first place because it was unreliable and misleading, just as admitting dog scent evidence or the results of a polygraph for their truth would be misleading and confusing to a jury. (See *United States v. Miller* (9th Cir.1989) 874 F.2d 1255, 1261 [Polygraph evidence has an "overwhelming potential for prejudice" given its questionable reliability and its "misleading appearance of accuracy," thus, polygraph evidence is generally excluded because of the danger that the jury will misuse it, giving it substantially more weight than it deserves.]

D. Conclusion

Goodwin's conviction rested entirely upon evidence raising only a suspicion Goodwin somehow had arranged the Thompson murders. The prosecutor presented evidence of motive and threats Goodwin purportedly made against Thompson, but the prosecutor presented no credible, reliable evidence connecting Goodwin to the killers or to any scheme to murder the Thompsons.

The jury convicted Goodwin based on less than proof beyond a reasonable doubt by drawing the inference that, because Goodwin hated Thompson and said things suggesting he wanted Thompson dead, he *could have* hired the killers to commit the crime. In finding Goodwin *could have been* responsible, the jury reconciled the lack of

connection to the killers by applying the instruction on conspiracy, which allowed the jury to infer that connection.

Because 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

Respondent denies the 16-year delay[19] in prosecuting Goodwin violated Goodwin's state and federal constitutional due process rights. (RB 106-135.) Respondent argues:

(1) The trial court applied the correct legal standard and acted within its discretion in finding the prosecution had a legitimate reason for the delay in charging Goodwin - primarily the Stevenses' 2001

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Respondent asserts the delay in prosecution was only 13 years because there was an intervening failed prosecution by the OCDA before the LADA filed charges. (RB 106, fn. 45; 109-110.) Respondent is wrong. The delay in prosecution by the LADA was 16 years, and the LADA's delay was not interrupted in any actual or legal sense by the OCDA's action. The Thompson murders were committed on March 16, 1988. (7RT 3021; 12RT 4607.) The LADA did not bring charges against Goodwin until October 28, 2004. (3CT 851-853.) The only reason Orange County was ever involved during those 16 years was because Detective Lillienfeld could not convince the LADA to arrest and charge Goodwin for the murders, so Lillienfeld went forum-shopping to Orange County in an abortive attempt to convict him there. (See AOB pp. 374-378.)

identifications of Goodwin;

(2) Goodwin failed to demonstrate actual prejudice as a result of the 16-year delay;

(3) Even assuming the delay prejudiced Goodwin, the court correctly found the prosecution gained no tactical advantage.

Respondent is wrong. Respondent rewrites history by claiming the trial judge did not find actual prejudice to the defense, then turns the pre-charging delay analysis upside down by arguing the burden of showing prejudice for the delay shifted back to Goodwin after the trial court found the delay was justified.

The truth is that the trial court found Goodwin demonstrated actual prejudice because of the delay, then ruled the prosecution's delay was justified, and then failed of balance the actual prejudice to the defense against the prosecutor's reasons for the delay. (24RT 10518-10520.) The court did not, as respondent claims, "find" the prosecutor gained no tactical advantage; such a showing was unnecessary and irrelevant, as the court acknowledged. (24RT 10514.)

Respondent substantially fails to address appellant's argument the LADA's 16-year delay in charging Goodwin accomplished the objective of depriving Goodwin of a defense. By late 2004 witnesses had died, 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.[20] 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.

The delay requires reversal.

A. Respondent Omits and Misstates Material Facts

Respondent disregards the fact 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.

Respondent omits the fact the prosecutor never explained how or why he believed he lacked the ability to prove his case earlier.

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 did not introduce at trial because of Moreau-

[20]See Goodwin's AOB, Argument IX.

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.)

Respondent omits the court's rejection of 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 – leaving out the third step of balancing. (24RT 10515.) Respondent distorts the trial court's ruling, claiming the court "implicitly assum[ed] prejudice." (RB 115.) To the contrary, the court expressly found prejudice to the defense: "I agree there was prejudice, but there was a legitimate reason for the delay." (24RT 10519.)

Despite this express finding of actual prejudice, respondent argues "the trial court did not fail to apply the due process balancing test after initially finding actual prejudice. Rather, the court implicitly found any prejudice to the defense was speculative because appellant's affirmative showing of actual prejudice depended on an unjustified legal assumption that evidence unavailable because of delay would

have benefitted the defense. The only actual prejudice found by the court was to the prosecution." (RB 115, 117.)

Respondent misstates the record in an attempt to shift the burden back to Goodwin to show a prejudicial delay where the court had already declared Goodwin had established a prejudicial delay. (See discussion below.)

B. Respondent Misstates the Principles Governing Pre-Charging Delay and Distorts the Analysis

Having incorrectly stated the trial court found no actual prejudice to the defense at the first stage of the three-part analysis, respondent omits any discussion of the third step of a pre-charging delay analysis — balancing the harm to the defense against the prosecutor's justification. (*People v. Abraham* (1986) 185 Cal.App.3d 1221, 1226.) In performing the balancing test, the trial court must consider factors such 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* (1996) 47 Cal.App.4th at p. 911.)[21] *Archerd* has been abrogated to the extent that it required purposeful delay; negligent delay is sufficient. (*People v. Cowan* (2010) 50 Cal.4th 401, 431; *People v. Nelson* (2008) 43 Cal.4th 1242, 1255.) However, whether the delay was

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[21] Respondent fails to address *Dunn-Gonzales* in this context, and does not address *Archerd* at all.

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*.)

"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 Goodwin explained in Argument III.D. of his opening brief, once having found actual prejudice to the defense, the trial court erred in finding justification for the delay, and skipped the third step – balancing prejudice against the prosecutor's justification - altogether.

C. Having Misstated the Record and the Trial Court's Ruling Finding Actual Prejudice to the Defense at the First Stage Of the Analysis, Respondent Renders an Irrelevant Argument That the Court Properly Found No Actual Prejudice at the First Stage

Having misstated the court's first-stage ruling that Goodwin suffered actual prejudice from the delay, respondent merely catalogs the evidence Goodwin offered to show actual prejudice at the first

stage, and upon which the trial court made her finding of actual prejudice (RB 110-115; see 24RT 10518-10520), and offers an irrelevant argument that the trial court properly found no actual prejudice to the defense at the first stage. (RB 117-128.) Because respondent's argument is based on a mischaracterization of the trial court's clear ruling finding actual prejudice, Goodwin will not address it.

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. The Correct Standard of Review Is *De Novo*, Not Abuse of Discretion

Respondent incorrectly asserts the standard of review is abuse of discretion and again incorrectly asserts the trial court found Goodwin was not prejudiced by the delay in prosecution. (RB 108.) Respondent argues Goodwin's reliance on *People v. Cromer* (2001) 24 Cal.4th 889, 901, in support of a *de novo* standard of review is "mistaken," in part because the *Cromer* court applied that standard in assessing a question of due diligence the context of a defendant's right to confront witnesses. (RB 108-109.) Respondent omits this Court's obligation to 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.)

The prosecutor's lack of diligence here, where Goodwin's constitutional right to a speedy trial is implicated, is analogous to the

situation the Supreme Court addressed in *Cromer* – the prosecutor's lack of diligence in attempting to locate a witness in violation of the defendant's constitutional right of confrontation. In *Cromer* the Supreme Court unanimously called for independent review of a trial court's determination that the prosecution's failed efforts to locate an absent witness are sufficient to justify an exception to the defendant's Sixth Amendment right of confrontation. (*Id*. at p. 893.) Upon *de novo* review of the facts, the *Cromer* Court affirmed the Court of Appeal's conclusion that the prosecution had not exercised reasonable diligence to secure that witness's attendance at trial. (*Id*., at p. 903.)

As in *Cromer,* the issue of the prosecution's due diligence here directly implicates the most fundamental of Goodwin's constitutional rights, as he was not charged for the Thompson murders for 16 years while the LASD failed to follow up leads in their possession at the time of the murders. The Sixth Amendment guarantees the fundamental right of the accused to a speedy and public trial. (*Klopfer v. North Carolina* (1967) 386 U.S. 213, 222-223.) The Due Process Clause of the Fourteenth Amendment guarantees that no state shall deprive a person of life, liberty, or property without due process of law. This clause exacts a requirement of fairness in the application of the criminal law in all stages of criminal proceedings. (See, e.g., *Estes v. Texas* (1965) 381 U.S. 532, 543.) Finally, the presumption of innocence and the burden of proving the defendant guilty beyond a reasonable doubt are fundamental constitutional rights of the accused guaranteed under the

Fifth Amendment. (*In re Winship, supra,* 397 U.S. 358, 364.)

Therefore, where Goodwin's prosecution was delayed for 16 years before the LADA filed charges, the prosecution's lack of diligence within the meaning of *Cromer* made a shambles of Goodwin's constitutional rights to a speedy and public trial, to due process of law, and to his presumption of innocence.

In the final analysis, there is no reason why a *de novo* standard of review for due diligence applies when the accused's Sixth Amendment rights of confrontation are implicated, but only a lesser abuse of discretion standard of review for due diligence applies when the accused's Sixth Amendment rights to a speedy and public trial, and Fourteenth Amendment rights to due process and the presumption of innocence are implicated.

Whenever the fundamental constitutional rights of the accused are implicated, the same *de novo* standard of review enunciated in *Cromer* should apply to all trial court determinations of the prosecutor's due diligence. Respondent's argument that a *de novo* standard does not apply here must be rejected.

2. The Trial Court Erred

Contrary to respondent's argument, after incorrectly articulating a two-stage analysis (24RT 10515), 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.

(a) Respondent Fails to Rebut Goodwin's Argument Regarding The Prosecutor's Lack of Justification For the Delay

Respondent, abiding by the fiction the trial court found no "actual prejudice" at the first stage, declares "this Court need not determine whether the delay was justified, particularly since there was no evidence that the delay in prosecution was for the purpose of weakening the defense." (RB 129.) Nonetheless, respondent makes an argument the delay was justified, again ignoring *People v. Archerd, supra,* 3 Cal.3d 615. (RB 129-135.)

Respondent omits any reference to the factors the court should have examined, 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.)

Respondent selectively quibbles with Goodwin's record citations, ignoring context and Goodwin's reference to other arguments within the opening brief containing more detailed discussions of the

prosecutor's unjustified investigatory delays.[22] (See AOB 150.) Respondent complains that Goodwin fails to "explain how testimony that [Griggs] retired in January of 1992 for reasons of stress disability support a claim of negligence," (RB 130) or specify "negligent acts or omissions attributable to him." (RB 130, fn. 51.)

(b) Respondent Fails to Address The Key Prejudicial Factor in The Delay in Charging and Prosecuting Goodwin – The Resulting Tainted and Unreliable Identifications of Goodwin as the Man Who "Planned" the Thompson Murders by Allegedly "Scouting the Escape Route"

Respondent notes the court was aware that 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. (RB 116.) However, respondent urges this Court to affirm the trial court's finding there was no basis for faulting Detective Lillienfeld or anyone else with regard to the time it took to gather enough evidence to file the case because it was the culmination of an "ongoing investigation." (24RT 10520.) Respondent simply ignore the key fact that the trial court did not question Jackson's assertions or ask for details regarding the "ongoing investigation."

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Goodwin had to cross-reference his discussion of the facts to other issues in his opening brief in order to contain as much as possible the length of the document.

That omission was fatal to the court's ruling, whether assessed under a *de novo* standard or abuse of discretion standard.

Respondent offers no argument to oppose Goodwin's claim that third-stage 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; see discussion at pages 150 through 158 of Goodwin's AOB.)

While respondent attacks Goodwin's showing that the evidence was not "new" and the investigation could not reasonably be called "ongoing" (RB 129-135)[23], no matter which version this Court believes, ultimately this Court must still reverse Goodwin's convictions because the trial court did not elicit any of those facts, having failed to question the prosecutor's assertions or ask for details regarding the "ongoing investigation.

E. <u>The Pre-charging Delay Violated Federal Due Process</u>

Respondent denies the pre-charging delay violated federal due process. (RB 135.) Because respondent fails to address the particulars of Goodwin's argument, Goodwin will not address respondent's opposition on this point.

For the foregoing reasons, Goodwin's convictions must be

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[23] Goodwin has substantially addressed respondent's contentions on these points elsewhere in his briefing.

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. RESPONDENT HAS OFFERED NO OBJECTION TO THIS COURT INDEPENDENTLY REVIEWING 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 THERE WERE NO DISCOVERABLE MATERIALS

Respondent offers no objection to this Court independently reviewing the sealed records of the trial court's *in camera Pitchess* reviews of Officer Griggs' personnel file.

However, respondent argues if the trial court erred, Goodwin's conviction should be only conditionally reversed. (RB 138.) Goodwin maintains his position that, 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

Claiming Goodwin has "misread" the record, respondent

disagrees the trial court prejudicially erred by admitting Karen Kingdon's[24] 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. (RB 139-147.)

Respondent contends Goodwin has forfeited his arguments because he failed to object on the correct grounds. (RB 139-143.) Respondent further contends the court did not abuse its discretion in admitting the testimony, and that any error was not prejudicial. (RB 143-147.) Respondent misstates Goodwin's argument and the record, and is wrong.

A. Respondent Omits and/or Distorts Portions of Karen Kingdon's Testimony

Respondent omits or distorts most of the relevant details of Kingdon's testimony. Respondent claims Kingdon testified she had been an "investigative officer" for the OCDA. (RB 143.) What Kingdon actually testified was she was "a CPA and investigative *auditor* for the OCDA." (18RT 6725, 6783, 6788.)

Respondent omits the fact that 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.) Respondent

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

omits the prosecutor's theory – that 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.[25] (6RT 20; 6RT 2740-2742.)

Kingdon testified she 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.

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Respondent ignores the fact that 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.)

(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."[26] (19RT 6914-6915.) In Kingdon's 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

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Respondent omits Kingdon's testimony she 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. 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).

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.) 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.)

Respondent omits Kingdon's admission she 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.)

B. <u>The Issue is Not Forfeited</u>

Respondent misstates the issue and contends Goodwin failed to

preserve his objections to Kingdon's "expert" testimony at trial because defense counsel failed to renew the objections raised pre-trial. (RB 139-141.) That is not true.

First, an "'attorney who submits to the authority of an erroneous, adverse ruling after making appropriate objections or motions, does not waive the error in the ruling by proceeding in accordance therewith and endeavoring to make the best of a bad situation for which he was not responsible.' " (*Mary M. v. City of Los Angeles* (1991) 54 Cal.3d 202, at pp. 212-213.)

Furthermore, at trial the parties kept referring back to the objections the defense raised at the preliminary hearing in arguing over Kingdon's testimony. (See, e.g., 18RT 6740-6741 [MS. SARIS: We'll, Mr. Summers can address the direction, but I just want to say this isn't tactical decision. These questions are improper and even though they were overruled at the prelim, I believe there was a lot of leeway being taken because there was no jury."].)

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 trial court understood Goodwin was objecting to Kingdon's "expert" opinions Goodwin's wife, Diane, and Goodwin had commingled funds and Goodwin was acting "behind the scenes" in his wife's purchases. (See 18RT 6739-6740 [DDA Jackson argued, "This deals -- I mean that was one of the first questions I asked is this something that the average person could do, follow these funds,

she said no. So I'm trying to get to that point and every one of these documents was talked about and discussed at the preliminary hearing. . . ." MS. SARIS: and extensively objected to."].)

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.)

In addition, 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].)

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 it 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.)

Karen Kingdon testified the Goodwins fraudulently commingled and liquidated assets and moved money offshore. (18RT 6763-6764, 6773-6774.) From that "expert" testimony, Jackson argued Goodwin showed consciousness of guilt by liquidating "his" assets in an attempt to flee the country after the murders. (6RT 20; 6RT 2740-2742; 23RT 8782-8784.)

Therefore, contrary to respondent's assertions, Goodwin preserved his objections that 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. (18RT 6741.)

C. Respondent Fails to Acknowledge the Limits of a Court's Discretion

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.) "

D. The Trial Court Abused Her Discretion by Admitting Opinion Testimony That Could Not Assist the Jury in Understanding The Evidence and Brought Incompetent Hearsay Before The Jury

Respondent mischaracterizes Goodwin's argument and substantially fails to address it.

Respondent appears to agree that Evidence Code §801 only permits an expert to offer an opinion on "a subject that is sufficiently beyond common experience that the opinion of an expert would assist the trier of fact." (RB 140.) However, nowhere does respondent acknowledge the rule that expert opinion should be excluded when the subject of inquiry is one of such common knowledge that people of ordinary education could reach a conclusion as intelligently as the witness. (*People v. McAlpin* (1991) 53 Cal.3d 1289, 1300.) Nor does respondent recognize that courts are obligated to contain expert testimony within the area of the professed expertise, and to require adequate foundation for the opinion – which is what the trial court failed to do here. In this regard, respondent fails to address *Korsak v. Atlas Hotels, Inc., supra,* 2 Cal.App.4th 1516, 1523.

1. Kingdon Overstepped Her Expertise

Respondent misstates Goodwin's argument when stating, "Even if appellant had objected to Stephens-Kingdon's qualifications as an expert under Evidence Code section 720, appellant advances no argument as why the expert lacked "sufficient skill or experience" in accountancy such that her testimony would be unlikely "'to assist the jury in the search for the truth." (RB 143.)

The issue is not that Kingdon lacked some species of expertise; the issue is that Kingdon's testimony was not "expert" testimony in that she did not merely interpret documents and relay their meaning to the jury. In other words, Kingdon overstepped her "expertise" 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 defense counsel put it:

> She can say what she relied on. If it's pertinent, if it's relevant, she can express an opinion. She said that it required some expertise to do -- to talk about what she's talking about, but I don't think that necessarily means it required an expert.
>
> If they can prove that certain assets were moved, then they can prove that. And they could -- and then they can ask her a hypothetical about her opinion about the movement of those assets, but they can't backdoor it by just saying, well, what did all these documents say and then what's your opinion on it, because if they could prove it, then the jury could make up its own mind about what those assets transfers mean.

(18RT 6742.)

Finally, Kingdon offered her opinion, over numerous defense objections, the Goodwins had "commingled" funds so that purchases were not "for" Diane Goodwin alone, but "for" Mike Goodwin as well. (See, for example, 18RT 6733-6734, 6765 ["What I saw was that even though this boat was in Diane Goodwin's name, that it had been purchased with funds that had been commingled for so many years that this boat purchase was for both Mr. and Mrs. Goodwin."], 18RT 6766 ["Mr. and Mrs. Goodwin purchased this home together, lived in the home together, reported it on their income tax returns for the years that I saw and it appeared to be purchased with commingled assets."], 18RT 6768-6769 ["In the whitehawk investment, Diane Goodwin invested what I consider to be commingled funds of Mr. and Mrs. Goodwin into the Whitehawk investment in her own name."].)

2. Kingdon's testimony violated Evidence Code §1523(d)

Respondent disagrees that admission of Kingdon's testimony violated Evidence Code §1523, subdivision (d). (RB 145-146.)

First, respondent complains that trial counsel never raised an objection pursuant to that section. (RB 145.) While counsel did not cite the section by number, the sum and substance of it was raised in relation to the problem of Kingdon testifying from voluminous documents and improperly opining on their content. (See 18RT 6727-

6728 ["Q Were you able to uncover documents that helped support your investigation of Michael Goodwin's and Diane Goodwin's financial dealings dating all the way back to 1986? A Yes, many documents."].) Defense counsel began objecting on the basis of hearsay and foundation soon thereafter. (18RT 6735-6739.)

Eventually the court sent the jury out and Jackson said what he wanted to elicit was, "whether or not in her expert opinion as a forensic accountant, as an investigative auditor she was able to come to an opinion as to what Michael Goodwin and Diane Goodwin were doing financially from the period of 1986 to the spring of 1988." (18RT 6739-6740.) The court stated she was "troubled" by Jackson's leading questions.[27] (18T 6741.) Defense counsel then articulated the substance of the section 1523 objection:

> If she wants to say that identify records she relied on and then I believe she is allowed to say that. She can say I looked at this type of document. I looked at that type of document. She is not allowed whether expert or anyone is not allowed to say here's what this document which we've never been allowed to examine or cross-examine or know who prepared it or anything like that, here's what it says and here's all the facts that I'm relying on. That clearly --no witness can do, let alone an expert.

(18RT 6742.)

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[27] Throughout the trial, Jackson did much of the testifying on key points via his leading questions. (See AOB Argument XV.C.)

Section 1525 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."[28] An example of

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[28] 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.

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 documents. (18RT 6729, 6747-6749.)

As Goodwin explained in his opening brief, 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.

Respondent disagrees the error is analogous to that in *Kotla v. Regents of the University of California* (2004) 115 Cal.App.4th 283 (RB 145-146), asserting Kingdon did not testify to Goodwin's or his wife's mental state. (RB 146.) Goodwin disagrees. As pointed out above, Kingdon testified the Goodwins had "commingled" funds so that purchases were not "for" Diane Goodwin alone, but "for" Mike Goodwin as well – thus drawing conclusions regarding motive. (See 18RT 6733-6734, 6765.) Kingdon's testimony improperly invaded the province of the jury to draw conclusions from the evidence and it lacked any reliable foundation in her professional experience and expertise.

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." Respondent incorrectly asserts Kingdon did not draw any improper inferences (RB 146), but she did. 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.

E. <u>Kingdon's Testimony Was Irrelevant</u>

Respondent fails to address Goodwin's argument the evidence

was irrelevant. (See AOB pages 204-205.) Goodwin will not repeat that argument here.

F. Under Any Standard, Kingdon's Testimony Rendered Goodwin's Trial Fundamentally Unfair

Respondent dismisses Goodwin's prejudice arguments without addressing them. (RB 146-147.) Goodwin will not repeat them here, but refers this court to his opening brief at pages 205 through 208.

Respondent asserts that because the jury was properly instructed that it need not accept the expert opinion, there could be no due process violation. (RB 147.)

As Justice Jackson pointed out in *Krulewitch v. United States* (1949) 336 U.S. 440, 453 [69 S.Ct. 716, 93 L.Ed. 790] (conc. opn.): "The naive assumption that prejudicial effects can be overcome by instruction to the jury (citation), all practicing lawyers know to be unmitigated fiction." This assessment has received support from the most ambitious empirical study of jury behavior ever attempted. (Kalven & Zeisel, The American Jury (1966) pp. 127-130, 177-180.)

As Goodwin explained in his opening brief (AOB pages 204-205), this error prejudiced him, and his conviction must be reversed.

VI. THE TRIAL COURT ERRED BY ADMITTING WILKINSON'S IRRELEVANT AND PREJUDICIAL HEARSAY TESTIMONY THAT THOMPSON EXPRESSED FEAR OF GOODWIN

Respondent denies the trial court erred by admitting Wilkinson's irrelevant hearsay testimony that Thompson expressed fear of

Goodwin. Respondent contends her testimony was relevant and admitted for a "proper, non-hearsay purpose." (RB 148-158.)

Respondent misstates Goodwin's argument, claiming Goodwin "seeks to show the trial court erred because the challenged statement was not relevant to proving motive because it did not qualify under Evidence Code section 1250's state-of-mind-hearsay exception" (RB 151) and Goodwin "conflates the relevancy inquiry with the issue of admissibility under Evidence Code section 1250, the hearsay exception for a declarant's "state of mind." (RB 148.) Respondent is wrong; Goodwin contends the evidence is simply irrelevant.

The first step in any analysis of admissibility of evidence is whether it is relevant. Evidence Code Section 350 states that "(n)o evidence is admissible except relevant evidence." Relevant evidence is defined by Evidence Code Section 210 as "having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." (See *People v. Kelly* (1992) 1 Cal. 4th 495, 523, [only relevant evidence is admissible].)

Again, Wilkinson's testimony was simply irrelevant.

A. <u>Respondent Omits the Procedural Facts</u>

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.)

Defense counsel pointed out that 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."[29] (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.)

The court "took issue" with defense counsel's statement Goodwin did not dispute the level of hostility. (10RT 3912-3913.)

29

Respondent's claim "[t]he challenged testimony was admitted neither for its truth nor as direct evidence of the declarant's state of mind, but for the non-hearsay purpose of providing circumstantial evidence of the level of appellant's litigation-inspired hatred"(RB 148-149) is belied by the court's comments here.

Defense counsel responded the dispute was whether there was a settlement, not that there was no hostility prior to that time. (10RT 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.)

B. Thompson's State of Mind Was Irrelevant to Prove Goodwin's Motive

1. Respondent's Claim of Relevance

Respondent contends the trial court's rationale for admitting Wilkinson's testimony was reasonable and supported by the record. (RB 150.) Respondent articulates the relevance of the statement as "a statement that supported a reasonable inference that the declarant [Mickey Thompson] believed the litigation had caused appellant's hostility to reach an extraordinary level." (RB 150.) Respondent also asserts the statement is relevant because "[t]he statement was made a relatively short time before the murders, and Mickey Thompson, as a party to the litigation with appellant, would have been aware of the "goings-on" between the parties and, therefore, would have perceived that "the hatred generated by this litigation was rather intense." (RB 150.) Respondent further asserts "the fact that Thompson appreciated the level of hatred and contempt exhibited by appellant was strong evidence that appellant truly did harbor those feelings and make such representations. Moreover, such evidence was relevant to counter

appellant's attempt to show that the statements were merely examples of 'blowing off steam.'" (RB 150.)

2. A Correct Relevance Analysis Demonstrates The Trial Court Abused Her Discretion By Admitting Micky Thompson's Statement

The threshold requirement is relevance. (Evid. Code §210; *People v. Riccardi* (2012) 54 Cal.4th 758, 814.) Respondent argues Thompson's statement was non-hearsay. (RB 150-151.) Contrary to respondent's position, "[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* (2006) 37 Cal.4th 774, 821 (*Jablonski*), quoting Evid. Code §210.)

What respondent fails to recognize or address is the rule that 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* (1988) 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).

It is telling that respondent does not address *Jablonski.* In that case, 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 to show 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, as respondent argues here. 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 – which seems to be respondent's and the trial court's relevance theory here. 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).)

As Goodwin pointed out in his opening brief, the California Supreme Court in *Riccardi, supra*, 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.) Respondent fails to address this point, and

respondent's discussion of *Riccardi* and the other authorities respondent cites at RB 151-156 fails for that reason.

Respondent does not address *Ruiz*, *supra,* where 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.

Respondent also fails to address *Simpson*, where 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.)

Respondent's use of the out-of-context quote from *Riccardi* at page 154 of its brief does not salvage respondent's argument. Respondent ignores the crucial fact 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. Respondent ignores the evidence establishing 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"].)

Because the evidence was entirely irrelevant under *Riccardi*, *supra,* Goodwin need not address respondent's Evidence Code section 352 "weighing" argument. (RB 155-156.)

C. Respondent Does Not Address Goodwin's Argument The Statement Related by Wilkinson Was Hearsay and Did Not Fall Within the Spontaneous Utterance Exception of Evidence Code §1240

Respondent fails to address this argument, and Goodwin will not repeat it here. (See AOB pages 220 through 221.)

D. 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

Respondent denies the error was so prejudicial it denied Goodwin fundamental fairness under the Fourteenth Amendment to the United States Constitution, requiring reversal under the *Chapman* standard, 386 U.S. 18. (RB 157-158.)

Respondent substantially fails to address Goodwin's prejudice argument. Rather than repeat that argument here, Goodwin refers this

Court to pages 221 through 223 of his opening brief.

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

Respondent denies the trial court prejudicially erred by permitting the prosecutor to present irrelevant evidence of Goodwin's bad character in order to obtain his conviction. (RB 158-169.)

Respondent contends Goodwin's argument fails because:

(1) The trial court acted well within its discretion in finding the challenged statements were admissible as party admissions and as evidence of Goodwin's motive to commit the murders;

(2) The court made it clear that the statements were not admitted as prior acts of uncharged misconduct to prove Goodwin's criminal propensity—and the jury was never instructed that they could be considered for that purpose, nor did the prosecution make any such argument;

(3) The statements were "highly relevant" to proving Goodwin's hostility to Thompson in connection with the failed business venture and the ensuing litigation between him and Thompson; and

(4) Goodwin's due process claim necessarily fails, as does his attempt to show prejudice.

A. Respondent Omits the Procedural History

As respondent fails to set out a coherent procedural history,

Goodwin refers this Court to the procedural history set out at pages 225 through 229 of his opening brief.

B. The Trial Court Erred by Admitting Bad Character Evidence

1. The Court's Rulings

The court ruled:

(1) The testimony was not character evidence;

(2) The testimony was relevant as an admission by Goodwin;

(3) The testimony was relevant to show Goodwin's state of mind with respect to his business dealings with Thompson;

(4) The threat to Linkletter was not 1101 evidence, but relevant with respect to Goodwin's intention "to rip off Mr. Thompson;"

(5) The prejudice did not outweigh the probative value. (7RT 3009, 3011.)

2. Respondent's Argument

Respondent argues none of the challenged testimony was admitted as a prior crime or "bad act" evidence to show criminal propensity, but was properly admitted as "admissions" and to prove Goodwin's "state of mind" or motive for the murders. (RB 160-161.)

Citing *People v. Spector* (2011) 194 Cal.App.4th 1335, and *People v. Quang Minh Tran* (2011) 51 Cal.4th 1040, respondent contends hostility to third parties was relevant to prove Goodwin's motive for the Thompson murders. (RB 161-162.) In *Spector*, the Court explained the "doctrine of chances." (*Id*. at pp. 1377-1381.)

> The theory of logical relevance underlying the result in cases like *Wells* has been called the doctrine of chances. *United States v. Woods* (4th Cir.1973) 484 F.2d 127, is considered to be a classic modern example of this theory. In Woods, a seven-month-old infant died in 1969 while in the defendant's custody after several unexplained instances of cyanosis or respiratory difficulty. The prosecution put on evidence to show that beginning in 1945 the defendant had either had custody of, or access to, nine other children who suffered similar symptoms, seven of whom died. According to *Woods*: "The evidence of what happened to the other children was not, strictly speaking, evidence of other crimes.... [W]ith regard to no single child was there any legally sufficient proof that defendant had done any act which the law forbids. Only when all of the evidence concerning the nine other children and Paul [the current victim] is considered collectively is the conclusion impelled that the probability that some or all of the other deaths, cyanotic seizures, and respiratory deficiencies were accidental or attributable to natural causes was so remote, the truth must be that Paul and some or all of the other children died at the hands of the defendant." (*Id*. at p. 133, italics added.) "[W]e think that the evidence would prove that a crime had been committed because of the remoteness of the possibility that so many infants in the care and custody of defendant would suffer cyanotic episodes and respiratory difficulties if they were not induced by the defendant's wrongdoing, and at the same time, would prove the identity of defendant as the wrongdoer." (*Id*. at p. 135, italics added.)

(*Id*. at p. 1378.)

The *Spector* Court relied upon *People v. Wells* (1949) 33 Cal.2d 330, disapproved on another ground in *People v. Wetmore* (1978) 22 Cal.3d

318, 321, as an example of how the "doctrine of chances" may be employed to show motive. In *Wells* the defendant was a prison inmate accused of aggravated assault on a guard, allegedly because the guard had reported him for inmate rule infractions. The defendant, however, claimed he had hit the guard with a cuspidor by accident. In order to rebut the defendant's version of events, the trial court admitted evidence showing he had a 10–year history of run-ins with various prison guards.

The Wells Court explained why the inferences were correctly drawn in that case:

> The evidence of such other instances of misconduct was not admitted for the improper purpose of showing that defendant, because he had done many bad acts, was a bad person likely to do other bad acts, and, therefore, probably committed the crime charged. Rather, it was admitted in order that the jury, if they believed it, *might draw the following proper series of inferences: Because defendant ... expressed, by words and acts, feelings of hostility toward various custodial officers, he probably felt hostility and bore malice toward the class of custodial officers. Therefore, he probably was hostile to Brown, a member of the class against which his animosity was directed. Therefore, defendant probably injured Brown with 'malice aforethought' rather than by accident while engaged in actions prompted by honest fear for his own (defendant's) safety*.

(*People v. Wells, supra*, at pp. 341–342, 202 P.2d 53, fn. omitted [emphasis added].) Wells demonstrates why there are no such inferences to be drawn from the bad character evidence here. The people Goodwin

supposedly threatened with death or lesser violence were not part of a class against which his animosity was directed. Goodwin has never claimed the Thompson murders were an "accident," such that threats against other parties would prove the Thompsons did not die as a result of an accident. It cannot be said that because Goodwin felt hostile toward Bertinetti, he felt hostile enough toward Mickey Thompson to kill him.

These facts demonstrate the fundamental problem with the third-party threat evidence that distinguishes the *Spector* case from this one. In *Spector* there was no identity question of the type that arises when there is an undisputed *actus reus* but the perpetrator is unknown. Because Spector was with Clarkson at the time she died, the key question for the jury was whether there had been an *actus reus* at all, i.e., whether Clarkson's death had been a homicide or whether she had taken her own life, either intentionally or accidentally. If there had been an *actus reus*, then the identity of the perpetrator was not in doubt because the perpetrator had to be Spector. (*Spector, supra,* at p. 1385.) In Goodwin's case, the killers were unknown, and the question was whether Goodwin had hired the unknown shooters to kill the Thompsons. Because identity of the killers was unknown, and there was no substantial, reliable evidence to prove any connection between Goodwin and the killers, the third-party "threat" evidence simply

constituted a gratuitous attack on Goodwin's character.[30]

(a) The Threat to Charles Linkletter

Respondent argues Linkletter's testimony regarding Goodwin's "threat" to him, "Stew, if you ever say a word about this conversation to anybody, I will fucking kill you" (7RT 3028-3029), was "offered as evidence of appellant's state of mind regarding his business relationship with Mickey Thompson" and as such "the testimony tended to prove motive—to harm Mickey Thompson because of the "business dispute gone bad leading to a judgment." (RB 162, citing 7RT 3008-3009.)

Respondent argues the court's ruling was "consonant with established precedent that recognizes the admissibility of prior acts evidencing the same motive as to the charged crime." (RB 163.) While respondent cites several cases (RB 163), respondent fails to explain how threatening Linkletter would prove Goodwin's motive to harm Thompson. All of the cases respondent cites are examples of similar crimes showing related motives: prior sexual assaults showing motive for charged sexual assaults; evidence of prior assault and robbery of

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The prejudicial effect of the third-party threat evidence was particularly devastating here, because Goodwin was unable to fully present to the jury the evidence showing how shoddy and unfairly focused on Goodwin the investigation was from the start, and that there were other, much better suspects in the murder whom the investigators ignored. (See AOB Arguments II.C and C.; III; IX; X; XI and XVI.)

different victim tended to show defendant had motive to rob the victim killed in current case; in trial for murdering prostitute, evidence of prior sexual assaults tended to show defendant's "'common motive of animus against prostitutes resulting in violent batteries interrupting completion of the sex act, etc. (RB 163.) Evidence of a possibly joking threat to "kill" Linkletter did not tend to show Goodwin had a motive to hire someone to kill the Thompsons.

In arguing the Evidence Code section 352 analysis, respondent asserts Goodwin cannot show a lack of relevance and changes the theory to "Evidence that appellant intended to "rip off" Mickey Thompson and that he threatened Linkletter not to divulge that information was directly material to proving the toxic nature of the underlying business relationship whose deterioration led to the murders." (RB 163.) According to respondent's logic, Goodwin would have hired someone to kill Linkletter as well. The argument simply does not make sense, as Goodwin did not display any motive to harm Linkletter and did not harm him. "Evidence is substantially more prejudicial than probative ... [only] if, broadly stated, it poses an intolerable 'risk to the fairness of the proceedings or the reliability of the outcome' [citation]." (*People v. Waidla* (2000) 22 Cal.4th 690, 724.) Here, the third-party threat evidence only served to paint Goodwin as a bad actor, and encouraged the jury to conflate Goodwin's hostile business practices with a motive to commit murder, when unknown others committed the murders and no reliable, credible evidence

connected Goodwin with those people. The testimony should have been excluded.

Respondent concludes "as there was no attempt to prove that appellant's threat to Linkletter showed he was more likely to threaten or kill the Thompsons, there was nothing indicative of prejudice under Evidence Code section 352." (RB 163.) The argument is absurd because respondent's chain of logic started with: "the testimony tended to prove motive—to harm Mickey Thompson because of the "business dispute gone bad leading to a judgment" (RB 162) – in other words – to prove Goodwin was likely the one responsible for killing the Thompsons.

Admitting the threat against Linkletter was, therefore, error.

(b) Goodwin's Angry Outburst at Coyne 'You Better Lighten Up or Things Will Get Bad" and"If you fuck up my life, I'll fuck up yours."

Respondent contends Goodwin "is . . .mistaken in contending that his threats against Coyne lacked relevance to proving his hatred against Mickey Thompson because Coyne was a neutral party, rather than part of Thompson's legal team. (AOB 228.)" Respondent explains that, "at the time he threatened Coyne, the trustee had opposed appellant's efforts to transfer bankruptcy assets to his wife, which would have been at the expense of creditors like Thompson." Respondent argues this testimony "was offered to show that

appellant's animosity toward Mickey Thompson extended to others who opposed his efforts to avoid paying the civil judgment" as circumstantial evidence proving appellant's "motive and his hatred" — that is, his state of mind and motive. (RB 164, citing 7RT 3072-3075.)

Citing *Spector*, *supra*, 194 Cal.App.4th 1335, respondent concludes the same logic applies to the threats against Coyne as the "threat" against Linkletter and the others. According to respondent, then, Coyne and the other "threatened" third parties should have ended up dead by a "hit man" as well.[31] The argument simply makes no sense;

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Respondent also argues the third-party threat evidence was relevant to show Goodwin's "state of mind." (RB 160-161.) In *Spector* the Court found the prior bad acts evidence "was admissible because it tended to show Spector had acted with the same state of mind or 'state of emotion' in both the charged and the uncharged offenses: 'The prior assault evidence supplied the reason why appellant would have killed Clarkson, and thus had high probative value, under this second, 'similar crime' category [of motive evidence]. The record reveals defining similarities between appellant's assault on Clarkson and his prior assaults on Melvin, Jennings, Robitaille, Ogden, and Grosvenor. In each of these prior incidents, (1) appellant was alone with a woman whom he had invited to his house or hotel, (2) appellant had a romantic or sexual interest in her, (3) appellant drank alcohol, (4) appellant exhibited romantic or sexual behavior with her, (5) she attempted to leave, (6) appellant lost control, (7) appellant threatened her and pointed his accessible gun at her, and (8) appellant blocked or locked the door to force her to stay against her will." (*Id*. at p. 1383.) The evidence admitted in Goodwin's case showed nothing even remotely like the pattern of behavior as described in *Spector* that would lend relevance to it.

there is no evidence of motive to kill Coyne or any attempt to kill Coyne.

(c) Weldon's Testimony about Goodwin Wanting Him to Obtain Bartinetti's Address And Get Dirt on Him

Respondent argues that Goodwin's request to Weldon to investigate Thompson's attorney, Bartinetti, and to place illegal listening devices in Bartinetti's cars and home was relevant to prove "animosity toward those who represented Mickey Thompson's interests in the underlying lawsuit." (RB 165.) No threat was alleged in this instance, but respondent concludes the testimony was again evidence of "motive." (RB 164-165.) Respondent cites no authority other than Evidence Code section 1101. (RB 165.)

Respondent claims Goodwin does not explain how the trial court abused its discretion by admitting Weldon's testimony. (RB 165.)

Goodwin did explain. (See AOB pp. 231-232.) "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 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, as explained above, the 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 with the killers. 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 assaulted or murdered. (See *U.S. v. Woods* (4th Cir. 1973) 484 F.2d 127, 135; *People v. Spector, supra*, 194 Cal.App.4th 1335, 1391-1392.) 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). Being a loud-mouthed, confrontational jerk is not a crime, and none of the third parties whom Goodwin confronted in anger died or was otherwise injured following the unpleasant confrontations they described.

(d) <u>The Threat to Collene Campbell</u>

Respondent argues the "threat" made to Campbell eight years after the murders, "You're going to get yours, bitch," proves consciousness of guilt and a party admission. (RB 165.)

As Goodwin argued his opening brief, 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."

Respondent fails to acknowledge the fact that, like Linkletter and Coyne and Bartinetti, Campbell, – the alleged target of this threat – 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, and 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 Goodwin. (*People v. Enos* (1973) 34 Cal.App.3d 25, 34 citing *People v. Kelly, supra,* 66 Cal.2d 232, 239).

The court abused her discretion. The comment – which was not even clear in its content – did not prove any disputed 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.

Respondent fails to address the cumulative nature of all of the testimony Goodwin challenges here. 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. The impact of this extremely prejudicial testimony cannot be overstated. (See 8CT 2078-2082.)

Respondent also does not address the fact the trial 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.

C. Respondent Fails to Address Goodwin's Argument The Relevance of this Evidence Was Outweighed By Its Prejudicial Effect

Respondent fails to address this portion of Goodwin's argument. Rather than repeat it here, Goodwin refers this Court to pages 234 through 236 of his opening brief.

D. The Prejudicial Evidence Rendered Goodwin's Trial Fundamentally Unfair

Respondent denies the error in admitting this utterly irrelevant and highly damaging testimony rendered Goodwin's trial fundamentally unfair. (RB 167.)

Respondent contends there is no due process right against the admission of uncharged offenses to prove criminal propensity. (RB 168.) Respondent's argument apparently is that a criminal defendant may no longer claim a due process violation when bad character evidence is erroneously admitted at trial because criminal propensity evidence is now constitutionally permissible in *all* cases – not just in

cases of sexual crimes and domestic violence. (RB 168.) Respondent relies upon *People v. Falsetta* (1999) 21 Cal.4th 903, 913. In that case, the question was whether Evidence Code section 1108 was invalid as a violation of due process, not whether erroneous admission of *any* type of propensity evidence violates due process. Section 1108 is the provision that allows admission of a defendant's prior sex offenses in prosecutions for sex offenses. *Falsetta* did not hold that no propensity evidence offends due process. The federal cases respondent cites are likewise limited to propensity evidence in sex crimes cases. None of the authorities respondent cites support the wholesale admission of propensity evidence in murder cases, and none of them hold that erroneous admission of propensity evidence in non-sex cases will never offend due process. This Court must reject respondent's contention.

Respondent does not attempt to address Goodwin's prejudice argument set out at pages 236 through 238 of his opening brief, and refers this Court to that argument and the authorities cited therein.

The question is 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, uncharged, crimes diverted the jury's attention away from their task of deciding whether there was sufficient evidence to prove Goodwin had hired the unknown shooters to kill the Thompsons. The prosecutors had very little evidence other than Goodwin's own unpleasant personality and

his alleged motive against Mickey Thompson. The evidence of Goodwin's threats against third parties only served to convince the jury Goodwin was the kind of guy who was capable of hiring hit men to kill other people, and that he hated Mickey Thompson and his family enough to do it. The prosecutor emphasized the third party threat evidence in his argument to the jury (23RT 8764-8765), and the jury never heard the evidence that there were other, possibly more viable suspects. The prosecutor failed to prove any connection, association or agreement between Goodwin and the killers.

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 the 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.

Therefore, Goodwin's 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*.)

VIII. THE TRIAL COURT PREJUDICIALLY ERRED BY PERMITTING THE PROSECUTOR TO PRESENT IRRELEVANT EVIDENCE OF THOMPSON'S GOOD CHARACTER

Respondent denies the prosecutors attempted to prejudice the jury against Goodwin by displaying to them 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. Respondent also denies the prosecutor elicited testimony about what a great person Thompson was, how much he loved his wife, and how kind and generous he was to others. Respondent argues the evidence was relevant "for legitimate purposes other than to show the victim's character." (RB 169-174.) Respondent mischaracterizes Goodwin's arguments and is wrong.

A. Respondent Omits Some of the Relevant Facts

1. Respondent Omits Some of the Relevant Facts Rendering The Photograph Prejudicial

Respondent omits the facts regarding the details of the photograph and the manner in which it was displayed to the jury, and how it was used in conjunction with Bill Wilson's testimony. 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.)

2. Respondent Omits the Facts Rendering Greg Smith's Testimony Prejudicial

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.)

3. Respondent Omits the Facts Rendering Bertinetti's Testimony Prejudicial

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.)

B. Goodwin Did Not Forfeit the Issue Regarding the Photograph of the Thompsons

Respondent contends Goodwin did not preserve the issue regarding the family photograph because he failed to object in a timely fashion. (RB 171-172.) On October 24, 2006, Goodwin raised objections to anticipated prosecutorial misconduct prior to trial and requested that all such objections be deemed continuing objections throughout his trial. (7CT 1803-1810.)

Defense counsel objected it was misconduct for the prosecutor to continue to display a sympathetic photograph of the victims to the jury long after the purpose of the display had been satisfied. (7RT 3014-3015.) When the court said defense counsel should have brought the court's attention to the photograph earlier, defense counsel pointed out she should not have to "say in front of a jury what is ethical, understood conduct," she did not have control over the display, and had counsel approached the bench to object during the proceedings, the photograph would have been taken down in front of the jury, and "it would have been quite obvious that we objected to this nice family photo being up in front of the jury" – and thus prejudicial to the defense. (7RT 3015-3017.) The court agreed it was "bad form" for the prosecutor to display the photograph and asked defense counsel what she wanted the court to do about it. (7RT 3016.) Defense counsel requested an admonishment – it is unclear from the record whether the requested admonishment was for the jury or the prosecutors – and the

court refused. (7RT 3016.)

Respondent appears to argue the issue is not preserved because defense counsel did not object at the earliest opportunity in front of the jury. (RB 172.) It was entirely proper for defense counsel to wait until she had the opportunity to object outside the presence of the jury. Defense counsel was not required to object in front of the jury, as it would – as defense counsel pointed out – only have emphasized the prejudicial nature of the prosecutor's misconduct and placed the image more firmly in the jury's mind, no matter how the court ruled. The issue is preserved.

C. Respondent Mischaracterizes Goodwin's Argument Regarding the Family Photograph and Fails to Address The Prosecutor's Misconduct

Respondent mischaracterizes Goodwin's objection to the prolonged display of the Thompson family photograph as one of relevance. (RB 171.) It is not. Goodwin did not object to a brief display of the photograph for purposes of identification. (See 7RT 3015, lines 8-10.) The objection was that it was misconduct for Dixon and Jackson to leave the Thompson family photograph on the projector for the jury to view during the entire first day's proceedings, as at that point it was displayed only for the purpose of eliciting sympathy for the victims. (7RT 3915.) Therefore, respondent's citation to cases finding photographs of victims admissible for purposes of identification (RB 171) are unresponsive to the issue at bar, and

Goodwin will not address them. Respondent fails to address the issue Goodwin has raised.

D. Bill Wilson's Testimony Was Irrelevant and Prejudicial Good Character Evidence

Respondent omits some of the details of Wilson's testimony that Mickey Thompson appeared to care deeply for his wife. (6RT 2789.) Wilson testified 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.) Wilson spoke of how Thompson "just glowed," and was obviously tremendously in love with Trudy. (6RT 2790.)

Respondent argues the nature of the Thompsons' relationship with each other was a material issue at trial, given the acrimony between Goodwin and Mickey Thompson. (RB 170.) Respondent offers four theories of relevance:

- Mickey Thompson's loving relationship with his wife was relevant on the theory "the circumstances of the shooting supported a reasonable inference that the shooters had targeted both of them;"

- "Mickey's love for his wife logically tended to corroborate the circumstances of the shooting;"

- "Mickey's devotion to his wife" supported a reasonable inference that the shooting was planned so that Mickey would have to watch his wife die;"

- Wilson's testimony as to the necklace was "relevant because

Trudy was wearing it at the time of the murders."

(RB 170.)

Respondent offered none of these theories in support of the testimony at trial. Principles of appellate review bar respondent from advancing on appeal an argument it did not advance in the trial court. (*Perez v. Grajales* (2008) 169 Cal.App.4th 580, 591-592 [arguments raised for the first time on appeal are forfeited]); *Saville v. Sierra College* (2006) 133 Cal.App.4th 857, 872 [under the "theory of the trial doctrine," a party is "not permitted to change [its] position and adopt a new and different theory on appeal']; *Jackson v. County of Los Angeles* (1997) 60 Cal.App.4th 171, 181 ["[j]udicial estoppel prevents a party from asserting a position ... that is contrary to a position previously taken in the same or some earlier proceeding "].) These principles compel that this Court disregard respondent's new theories. (*People v. Accredited Surety and Cas. Co.* (2004) 132 Cal.App.4th 1134, 1146; *Mattco Forge, Inc. v. Arthur Young & Co.* (1997) 52 Cal.App.4th 820, 847.)

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.) Respondent fails to explain how Wilson's testimony "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." (*People v. Slocum* (1975) 52 Cal.App.3d 867, 891.) Respondent

fails to explain how "Mickey's love for his wife logically tended to corroborate the circumstances of the shooting" or "supported a reasonable inference that the shooters had targeted both of them." Points perfunctorily asserted without argument in support are not properly raised. *People* v. *Williams* (1997) 16 Cal.4th 153, 206.) This Court should reject respondent's contentions here.

Respondent also fails to explain how Wilson's testimony as to the necklace was "relevant because Trudy was wearing it at the time of the murders." (RB 170.) Again, the Court should reject this bare assertion unsupported by argument. (*Ibid*.) Wilson was not an investigator in this case and was not at the murder scene. The police witnesses testified to finding jewelry at the crime scene, and the prosecutors used that testimony to argue against the defense's robbery-gone-wrong theory for the crimes. Similarly, Wilson's testimony about Mickey Thompson "glowing" over his wife and buying the necklace for her had no bearing on the circumstances of the crime – it was offered solely to prejudice the jury against Goodwin for allegedly killing the couple.

E. <u>Greg Smith's Testimony Was Irrelevant and Prejudicial</u>

Over a defense relevance objection, Smith testified Thompson was very cooperative and was "a very easy, very honorable man to deal with." (10RT 3972.) Respondent contends the testimony was not admitted as evidence of the victim's virtuous character, but to show why Anaheim Stadium chose Thompson over Goodwin for a racing

event. (RB 172-173.) It was not relevant for that purpose. Evidence Code section 1103 provides in pertinent part:

> (a) In a criminal action, evidence of the character or a trait of character (in the form of an opinion, evidence of reputation, or evidence of specific instances of conduct) of the victim of the crime for which the defendant is being prosecuted is not made inadmissible by Section 1101 if the evidence is:
>
> (1) Offered by the defendant to prove conduct of the victim in conformity with the character or trait of character.
>
> (2) Offered by the prosecution to rebut evidence adduced by the defendant under paragraph (1)

(Evid. Code, § 1103, subd. (a).)

First, Goodwin did not offer the evidence of Thompson's trait or character – the prosecution offered it. Second, the prosecutor did not offer the evidence to rebut any evidence of Thompson's character Goodwin offered.

Respondent's claim the good character testimony was offered to prove "why" Greg Smith chose Thompson over Goodwin for a racing event lacks any merit. The prosecutor's theory of motive was that Goodwin wanted to take out his competition, or hated Thompson for taking business away from him. Under that theory, the fact Smith gave business to Thompson instead of Goodwin is relevant, but Thompson's good character is not. The court should have excluded the testimony.

F. Bertinetti's Testimony About His Relationship With Thompson Was Irrelevant and Prejudicial

When DDA Jackson asked Bertinetti, "How would you describe your relationship with Mickey Thompson?" defense counsel raised a relevance objection, which the court overruled. (8RT 3386.) Bertinetti responded, "It became a very good friendship." (*Ibid*.) Defense counsel requested a bench conference, at which she 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 advising him the Thompsons had been murdered. (8RT 3388-3389.)

Respondent asserts Goodwin "does not explain how Bartinetti's testimony amounted to evidence of the victim's good character, much less why it was prejudicial." (RB 173.) As Goodwin explained in his opening brief, the testimony was presented as evidence that Mickey Thompson was a "nice guy" who was widely liked, in contrast to Goodwin, who was portrayed as a monster who hired people to destroy Mickey Thompson's world by killing his wife in front of him as he begged for her life. (See AOB 243.) As Goodwin further explained, the question is whether Thompson's status as a popular sports figure known for his friendliness and generosity was irrelevant 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. (See AOB 243.)

As to prejudice, Goodwin explained 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 beloved individuals like Thompson and his wife. 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. (See AOB p. 243.)

It is truly disingenuous for respondent to argue "there is no good reason to find the circumstances of Bartinetti's hearing about the murders had a tendency in reason to evoke an emotional bias against

appellant, or cause the jury to prejudge appellant on the basis of extraneous factors." (RB 173.) This was an obvious, dramatic ploy to evoke the jurors' emotions by eliciting testimony about the precise moment a prosecution witness heard of the death of someone he considered a dear friend and a wonderful person, which he believed had come about by the agency of the defendant.

Respondent's claim "[t]he challenged testimony merely tended to establish the scope of Bartinetti's representation" is equally disingenuous. (RB 173.) This testimony went far beyond the scope of a lawyer's representation of a client – it was about a personal friendship, and it was completely irrelevant to the question whether Goodwin was responsible for the Thompsons' murders.

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* (2007) 156 Cal.App.4th 728, 738, *In re Anthony M.*, *supra*, 156 Cal.App.4th 1010, 1016.)

G. The Error Was Prejudicial Under both Chapman and Watson Standards

Respondent denies, without fully addressing, Goodwin's argument the error denied Goodwin Fourteenth Amendment fundamental fairness. (RB 174.) Rather than repeat his here, Goodwin refers this Court to pages 245 through 246 of his opening brief.

IX. THE TRIAL COURT DENIED GOODWIN'S FEDERAL DUE PROCESS RIGHT TO PRESENT A DEFENSE BY EXCLUDING POTENTIALLY EXCULPATORY EVIDENCE

Respondent denies the trial court violated Goodwin's federal constitutional due process right to present a defense by precluding him from presenting third-party culpability evidence. (RB 174-184.) Respondent argues (1) the trial court reasonably found the proposed evidence did not adequately link the third parties to the Thompson murders, and (2) any probative value was substantially outweighed by the risk of undue delay, prejudice or confusion. (RB 174.)

Respondent further argues the trial court's application of "well-established rules of evidence" cannot support a due process claim that Goodwin was prevented from presenting a defense. (RB 174-176.)

Respondent is wrong. The trial court denied Goodwin's federal due process right to present a defense by excluding extensive evidence, obtained via the LASD investigators' own 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. Respondent Misstates Goodwin's Argument

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.) Like the prosecutor below, respondent addresses only the third-party culpability component of Goodwin's claim. (See 7CT 1739-1792; 6RT 1-60.)

1. Respondent Distorts by Omission or Misstatement the Evidence Goodwin Offered to Show Dean Kennedy Ordered the Murders and Both Joey Hunter and John Young Had Confessed

(a) Thompson Had Underworld Connections With Motive to Kill Him

Like the prosecutor below, respondent argues Goodwin failed to show "linkage" between the likely culpable third parties and the Thompson murders. (RB 174-183.) In doing so, respondent omits or distorts material facts as set forth below. Respondent also fails to recognize the absurdity of arguing Goodwin's guilt where the evidence "connecting" Goodwin to the events leading up to the murders was non-existent and the evidence against Kennedy, Loskinski, Cowell, Hunter, Donny DiMasio and the others cried out for investigation, yet was ignored by Lillienfeld and the other detectives.

(b) Respondent Omits Most of the Facts Regarding The Scott Campbell Murder, Thereby Obscuring Thompson's Underworld Connections and Their Motives

Respondent omits most of the facts connecting Mickey

Thompson to underworld figures who had motive to kill him.[32] This Court should note in particular that respondent never once mentions drugs in this context – and the people connected to Mickey Thompson by way of his nephew, Scott Campbell, who were drug dealers with a history of organized violence, including assassinations.

Respondent does not mention that Scott Campbell – Thompson's nephew and Collene Campbell's son – was a drug dealer. (6CT 1722; 6RT 9; 7CT 1775.) Larry Cowell was a long-time friend of the Thompson and Campbell families and had a network of underworld connections. (6CT 1723; 6RT 10; 7CT 1775.)

Respondent never once mentions the Vagos Motorcyle gang and the Thompson family's connection to it. In 1976, Scott Campbell 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

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In the interest of containing the length of this brief, Goodwin refers this Court to his description of these facts and the relevant connections at pages 247 through 255 of his opening brief. Goodwin addresses respondent's contentions regarding specific evidence herein.

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.[33] (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 for Scott's murder 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.[34] (6CT 1723-1724.) Thompson was murdered before he could testify at Cowell's retrial.[35]

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Appellant has separately requested 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.) Respondent ignores this fact as well, thus obscuring another reason why the Thompson clan might have been targeted for retaliation by Vagos gang associates.

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In press accounts, Campbell scoffed at the idea mobsters might have killed the Thompsons.

(6CT 1724.) Respondent sniffs at the idea that Cowell would be motivated to kill Mickey Thompson, arguing in a footnote "[t]he fact that Cowell was convicted at the retrial without Thompson's testimony tends to refute the notion that he needed to be eliminated as a witness." (RB 178, fn. 67.) This logic fails for a couple of reasons. First, Cowell could not have known what the outcome of his trial would be at the time the Thompsons were murdered. Second, respondent's argument assumes Cowell and his associates were reasonable people who needed a rational justification for murder. As the facts respondent omits demonstrate (assassinating people because they crossed gangsters in petty ways), Cowell and his gangster associates did not need any more reason to kill than any other gangster would need. Mere perceived "disrespect" or an inordinate show of power would be sufficient for murder, according to the position the LADA takes in nearly every gang murder case. (See, e.g., *People v. Olguin* (1994) 31 Cal.App.4th 1355, 1370 [gangs generally react violently when their graffiti is crossed out, an act of disrespect].)

2. By Obscuring and Misstating Facts, Respondent Unfairly Distorts the Reasonable Inferences to Be Drawn From Those Facts

Respondent's argument that Goodwin failed "to present any credible basis for connecting Cowell and Kennedy, who were

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http://sportsillustrated.cnn.com/vault/article/magazine/MAG1127114/2/index.htm

imprisoned at different locations at the time of the Thompson murders" (RB 179) is disingenuous. Being in separate prisons has never stopped members of organized crime networks from communicating with each other and arranging murders and other crimes from behind prison walls. (See *People v. Valdez* (2013) 220 Cal.App.4th 16, 22 [Mexican Mafia orders "green lights" or "hits" from prison to kill people on the outside]; *Blumberg v. Garcia* (C.D. Cal. 2010) 687 F.Supp.2d 1074, 1134; *U.S. v. Bingham* (9th Cir. 2011) 653 F.3d 983, 9871 [gang members order gang war and murders from behind prison walls].) Goodwin presented evidence that Cowell and Kennedy had connections to the same network of thugs. The inference that the two planned the Thompson killings is far stronger than any inference Goodwin someone was connected to the unknown killers of the Thompsons, rendering laughable respondent's protestation that Goodwin "offered no evidence of any communication between Kennedy, Cowell or Losinski." (RB 179.) It is exactly that lack of connection or communication between Goodwin and the unknown killers in this case that demands reversal of Goodwin's conviction.

Respondent asserts there was no credible evidence connecting Kennedy to the Thompson murders. (RB 179.) There was. Goodwin set out a detailed analysis of the relationships between all of the parties described here, and the inference can reasonably be drawn that,

through those relationships, Kennedy became involved.[36] Goodwin does not have to show a direct connection between Kennedy and the killers in order to implicate him in the murders – respondent relies upon that very argument in order to preserve Goodwin's convictions in this case.[37] (See, e.g., RB 84-85.)

Respondent argues Goodwin "made no attempt to connect Hunter to the other members of the supposed conspiracy. Rather, he argued that Hunter served as the lookout because he matched the description of a White male "frantically hitchhiking" two miles from the murder scene. (AOB 254; 6CT 1725-1726.)" Not so. As Goodwin pointed out at the trial and in his opening brief, Hunter confessed to cousin 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, see AOB pp. 254-255 .) Goodwin also proposed to introduce evidence showing Joey Hunter was the lookout for Kennedy and his hit men. (6CT 1726, see AOB pp. 55-56.) The jury could reasonably infer from this evidence that Hunter was involved in the conspiracy to kill the

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For example, 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. (6CT 1724-1725.)

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Respondent's assertion that Paepule and Young denied involvement in the Thompson murders defeats admissibility of the evidence (RB 180, fn. 69) means little. Of course they would deny it.

Thompsons – and this was certainly more and stronger evidence than that purportedly connecting Goodwin to the murders. Respondent's argument about the weaknesses in the eyewitness identifications (RB 180) should not have defeated the admission of this evidence – weak eyewitness identifications did not stop the LADA from charging Goodwin. The same is true of any weaknesses in Hunter's confession to Bonnie Dalton. (RB 180.)

Respondent's argument that, "even accepting the disputed identification, Hunter's presence trying to hitch a ride an hour after the crime and two miles from the murder scene provides no solid connection with the crimes" is equally unavailing. (RB 180-181.) Hunter's location and behavior within an hour of the murders is certainly much stronger evidence of association and agreement than was Goodwin's purported presence and behavior in the Thompson's neighborhood two to ten days prior to the murders, and it was coupled with the other evidence of association and agreement Goodwin described above.

Finally, respondent argues Goodwin "cannot cure his evidentiary failings by attributing it to law enforcement's supposedly 'inadequate, botched investigation of the Thompson murders" (AOB 261), as his support for that allegation is mere speculation. There is no evidentiary basis to believe that additional investigation would have tied any of the proffered coconspirators to the murders." (RB 181.) First, there were no "evidentiary failings." Goodwin made a detailed

showing there were other, better, suspects and stronger evidence to link them to the Thompson murders, and the investigators simply ignored them in their zeal to arrest and prosecute him. (See AOB 247, et seq.) Respondent simply ignores most of the evidence Goodwin pointed out at trial and on appeal. (See AOB pp. 261-262.)

Respondent also obscures the facts establishing the time line of drug-dealer executions Kennedy arranged and Young and Paepule committed. Kennedy sent Young and Paepule to kill Thomas Wilson (also not mentioned by respondent), 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 (also not mentioned by respondent), knew Young and had seen him driving a maroon Volvo – the same vehicle Thompson neighbor Richard Passmore (also not mentioned by respondent) saw near Thompson's home just days before the murders. (6CT 1722; 6RT 8-9.) Respondent complains that Goodwin failed to cite to supporting evidence, but his counsel pointed out that all of this material was in discovery provided by the LADA – in other words, it is in the prosecutor's files. (See AOB p. 150.)

On December 24, 1987 – ten weeks before the Thompson murders – Young killed Wilson at home, execution-style. (6CT 1721; 6RT 8.) Young confessed to this killing, implicating Paepule. (6CT 1721; 6RT 8.)

Having omitted all of the facts establishing the environment in

which both Mickey Thompson and his nephew Scott had offended gangster drug dealers, and Thompson's sister Collene Campbell had publicly pursued the arrest and conviction of Cowell for killing her son Scott, respondent next omits the fact that 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.)

B. The Exclusion of This Exculpatory Evidence Violated Goodwin's Due Process Right to Present a Defense

Respondent denies the trial court violated Goodwin's federal constitutional due process right to present a defense by denying his motion to present third-party culpability evidence. (RB 174-178.)

Respondent fails to note there are two issues here: (1) whether the trial court improperly excluded testimony regarding the investigators' failure to pursue other leads, and (2) whether the trial court improperly excluded evidence that a third party committed the crimes. Respondent's brief addresses only the second issue.

Respondent ignores the Ninth Circuit's test for evaluating whether excluding defense evidence amounts to a due process

violation under *Chambers v. Mississippi* (1973) 410 U.S. 284,93 S.Ct. 1038, 35 L.Ed.2d 297. (*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. (*Ibid*.) Next, the court must "balance the importance of the evidence against the state interest in exclusion." (*Id*.)

The trial court here mechanistically applied evidentiary rules to exclude crucial evidence that would have supported Goodwin's claim of innocence, compelling reversal of his convictions.

1. 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

Respondent entirely fails to address this issue; however, because the issue was key to Goodwin's defense, he reiterates it here.

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. The Trial Court Violated Goodwin's Right to Due Process and a Fair Trial by Excluding The Evidence About the Other Possible Suspects

A defendant need not show "substantial proof of a probability" that the third person committed the act; he need only be capable of raising a reasonable doubt the defendant's guilt. (*People v. Hall* (1986) 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 other suspects Goodwin described at trial.

Respondent omits the *Tinsley* analysis. 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. (*Tinsley v. Borg, supra*, 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*(2006) 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* (1986) 476 U.S. 683, 690.)

Thus, as respondent points out (RB 176), 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.)

Respondent does not address Goodwin's argument that, 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[38] –

[38]See AOB, Argument XVI.

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 because they declined to investigate those leads. That failure to investigate supported the defense theory Goodwin was targeted by a biased and incomplete investigation.

As Goodwin demonstrated at trial, in his opening brief, and above, the trial court's finding that Goodwin had not demonstrated any connection between Kennedy and Cowell and Young and Paepule (6RT 39, 41-42, 44) was error. If the court based her ruling on a failure to make a connection between those individuals by direct evidence, she applied a standard that was too stringent because, under *Hall*, Goodwin was not required to produce direct evidence of those connections. (*People v. Hall, supra*, 41 Cal.3d 826, 833 [there must be direct or circumstantial evidence linking the third person to the actual perpetration of the crime.].) At the hearing on Goodwin's motion, DDA Jackson misstated the standard, arguing:

Third-party culpability evidence under *Hall* and its

> progeny must stand on its own. It must stand the test of hall. *It must stand the reasonable doubt test* and the 352 test, the two-pronged test set out by *Hall*.

(6RT 18.)

When arguing in opposition to the motion, Jackson suggested there had to be direct evidence showing the connections between the people Goodwin had named. (See, e.g., 6RT 26, lines 10-17; 30, lines 1-9, 17-23.) Jackson also deliberately misstated the standard, arguing Goodwin had to produce proof of the third party's guilt *beyond a reasonable doubt*:

> Counsel says over and over, I don't have to prove beyond a reasonable doubt that these other people did it. All I have to prove is that there is some relevant evidence. That is not true.

(6RT 37, lines 19-22.) The *Hall* standard requires "only be such direct or circumstantial evidence linking the third person to the actual perpetration of the crime *as to be capable of raising a reasonable doubt of defendant's guilt*. (*People v. Hall, supra*, 41 Cal.3d 826, 833.) The court never clarified whether it was holding Goodwin to the incorrect standard articulated by the prosecutor that Goodwin had to prove beyond a reasonable doubt that third parties committed the Thompson murders.

A trial court abuses its discretion whenever it applies the wrong legal standard to the issue at hand. (*Hinder v. Thrifty Oil Co.* (2000) 23 Cal.4th 429, 435-436 [a discretionary order based upon improper

criteria or incorrect assumptions must be reversed]; *In re Carmaleta B.* (1978) 21 Cal.3d 482, 496 ["discretion can only be truly exercised if there is no misconception by the trial court as to the legal basis for its action"].) It follows that a reviewing court must examine the trial court's stated reasons for an exercise of discretion to determine whether those reasons reflect a correct understanding of the relevant legal standards and principles. (See, e.g., *Hinder v. Thrifty Oil Co., supra*, 23 Cal.4th 429.)

Whatever standard the trial court used in making her decision, Goodwin produced sufficient direct or circumstantial evidence linking the third person to the actual perpetration of the crime as to be capable of raising a reasonable doubt of his guilt. (*People v. Hall, supra,* 41 Cal.3d 826, 833.) The evidence would not have confused the jury, nor would it have created an undue consumption of time under Evidence Code section 352 such that the court was justified in excluding it.[39] The trial court erred, and in doing so the court deprived Goodwin of his

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Again, respondent claims that, "given the tenuous nature of the proffer as to Cowell's motive, along with the speculative connection between the motiveless and incarcerated Kennedy and the supposed hit men and lookout, the probative value was minimal. On the other hand, an attempt to prove the convoluted five-person murder scheme would have entailed undue delay and a likelihood of confusion." (RB 182.) This argument is Kafkaesque, given the evidence against Goodwin was at best tenuous, and there was so much more solid, credible evidence that the Kennedy-Cowell-Hunter-Young-Paepule group killed the Thompsons.

defense.

C. 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* (1993) 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].)

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.

IX. THE TRIAL COURT ERRED BY EXCLUDING EVIDENCE THOMPSON HAD PURCHASED OR TALKED ABOUT PURCHASING A LARGE QUANTITY OF GOLD JUST PRIOR TO THE MURDERS

Respondent disagrees that the trial court erred by excluding evidence Thompson had purchased or talked about purchasing a large quantity of gold just prior to the murders. (RB 184-193.) Respondent argues:

(1) The trial court "reasonably determined that there was inadequate evidentiary foundation of an attempted robbery to support the proffered hearsay testimony under the state of mind exception or as circumstantial evidence of the presence of gold in the Thompson residence," and

(2) The court-ordered redaction "reflected the reasonable determination that a reference to gold risked misleading the jury as to the non-hearsay purpose for which the testimony was admitted." (RB 185.)

Respondent is wrong. 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* (1967) 388 U.S. 14, 18-19; *People v. Cudjo* (1993) 6 Cal.4th 585, 638 [dis. opn. of Kennard, J.].)

A. 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. Respondent Omits Part of the Law Governing Review of This Issue

Respondent omits the rule the trial court's discretion in excluding evidence 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* (1978) 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

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. Respondent asserts "[t]he trial court's ruling [excluding Thompson's statement(s) about his intention to buy $250,000 worth of gold] made good sense because appellant failed to provide any solid foundation to support the *hearsay* testimony's relevance." (RB 190 [emphasis added].) First, the statement(s) regarding gold offered by the defense were not "hearsay," as respondent mistakenly asserts, and

the prosecutor also mistakenly asserted.[40] (Evid. Code section 1250.) Second, the only foundational question the prosecutors raised was "about the safe and the pry marks," and that was the only foundational to which the trial court referred in her rulings. (7RT 7688, 7695, 7808-7809, 7813-7814.) A dispute later arose about when the pry marks on the safe were made. (7RT 7808-7811.) Defense counsel pointed out that "[a] person can attempt to get in a safe and still steal gold from someone [sic] else" and "[t]here is circumstantial evidence that Mickey Thompson bought gold, separate and apart from whether he stored it in his safe." (7RT 7807.)

Citing no authority, respondent argues Thompson's stated intention to purchase $250,000 worth of gold could not be at issue in the absence of "evidence that (1) such intent had been communicated to someone involved in the murders, (2) there was gold on the premises or (3) there had been a robbery attempt." (RB 190.) Respondent argues no such evidence was provided. (*Ibid*.)

Respondent argues there was "no solid evidence of an attempted robbery," pointing to the facts that cash was left at the scene, jewelry was left on the bodies, no signs of forced entry into the house or the victims' cars, and there no evidence the safe was tampered with. (RB 190.) Respondent overlooks the fact that people seeking to carry off

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See Dixon's comment about "hearsay" in reference to Thompson's statements about purchasing gold. (7RT 7812-7813.)

$250,000 worth of gold might not have felt it was worthwhile to take relatively small amounts of cash (possibly leaving fingerprints or DNA on wallets or other items) or unique pieces of jewelry that could be traced back to the victims.

Respondent attacks Goodwin's reliance on *People v. Alcalde* (1944) 24 Cal.2d 177. (RB 191.) First, respondent argues *Alcade*'s holding "does not mean that the trial court was obligated to admit it." (RB 191.) That statement is meaningless and does not require a response. Second, respondent asserts in *Alcalde*, "evidence independent of the proffered hearsay showed the declarant's intent was directly relevant to the issue of the defendant's guilt. (*Alcalde*, at pp. 187-188.) In contrast, there was no solid evidence of gold on the premises or Thompson's intent to buy it, except for the hearsay statement." (RB 191.) These are meaningless distinctions. Here, also, evidence independent of Thompson's statement about gold showed Thompson's intent was directly relevant to the issue of Goodwin's guilt; more than one witness saw men fleeing on bicycles with canvas bags of a kind typically used for gold deliveries (8CT 2038; 19RT 7041-7045), and a gold dealer testified to the use of those types of bags. (17RT 6436.)

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.

Respondent fails to address the relevance of the gold evidence to Goodwin's defense. 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.

Respondent contends there was "no solid evidence of an attempted robbery." (RB 190.) 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

Respondent disputes the court had no authority or reason to redact Miller's testimony so that it did not refer to "gold," claiming "redaction is a well recognized means of balancing competing claims of admissibility." (RB 191-192.) Respondent relies on cases addressing statements by co-defendants that implicate a defendant in a crime so as to protect a defendant's confrontation right. (RB 192-193.) Respondent, however, does not explain what interest was protected here by redacting the word "gold," or what interests were "competing."

Respondent cites to 21RT 7993-7994, where the court asked, "Why can't you elicit the information in a way that would meet your needs, which is: did Mr. Miller provide information to the investigators which was not followed up." (21RT 7993-7994.) After defense counsel asked for clarification, the court said, "But I'm attempting to sanitize it

so that there is no danger of this jury being misled."[41] (21RT 7994.) The defense purpose in admitting the evidence was to show the incompetent or negligent investigation. The interest was in presenting a defense to murder charges. The prosecutor's objection was a lack of connection between the statement and the killers, or that there was no foundation to show the killers had heard about the gold. (21RT 7992.) Sanitizing the word "gold" did nothing to provide foundation for the statement; all that did was confuse the jurors because they could not know what "valuable item" was being discussed, and they had to guess what potential robbers would have taken, and how they could have removed something "valuable" from the premises and taken it away on bicycles. The prosecutor later committed misconduct by exploiting the exclusion of the reference to gold on closing. (See AOB, Argument XV.D.)

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

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Respondent asserts the court redacted the word "gold" from the statement at defense counsel's suggestion. (RB 192.) Defense counsel was at that point trying to get the gold evidence admitted and was trying to avoid having the evidence of a robbery excluded entirely. She cannot be faulted for seeking guidance on what term she could use to refer to the gold, short of calling it "gold."

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.[42] Nonetheless, when Goodwin offered Thompson's 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.

B. <u>The Errors Were Prejudicial</u>

Respondent denies Goodwin was prejudiced by the error. (RB 192-193.)

First, citing no authority, respondent claims "prejudice cannot be established by pointing to excerpts from the prosecution's argument accurately referring to the lack of trial evidence as to a robbery." (RB 192.) It certainly can when the prosecutor's argument constitutes misconduct and exploits the evidence that the prosecutor had excluded. (See detailed discussion of the prosecutor's exploitation of the exclusion

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[42]See AOB, Argument VI.

of the word "gold" in Goodwin's prejudice argument at pages 278 through 282 of his opening brief; see AOB, argument X.V.2.)

Respondent ignores the facts the 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 deprived Goodwin of one of his defenses, and cannot be found harmless beyond a reasonable doubt.

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

Relying largely upon *United States v. Scheffer* (1998) 523 U.S. 303, 314-315, respondent argues the trial court properly excluded evidence that uncharged suspect Joey Hunter failed three polygraph examinations when questioned about his involvement in the Thompson murders. (RB 193-197.) Goodwin maintains that, under the circumstances of this case, the trial court violated Goodwin's federal constitutional right to a fair trial by excluding 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.

A. The Trial Court Erred by Excluding Relevant Operative Fact Evidence Joey Hunter Had Failed Three Polygraph Examinations Early in the Investigation, and Yet Investigators Failed To Pursue Him as a Suspect

Goodwin sought to present to the jury the operative facts 1) the LASD used polygraph tests to investigate the Thompson murders, and 2) LASD investigators incompetently ignored the polygraph results in their zeal to convict Goodwin. (See Sealed RT [October 16, 2006] I-97.)

Like the prosecutor, respondent argues Hunter's polygraph results were barred by Evidence Code § 351.1 unless the prosecutor stipulated to admitting them. (RB 194; see 6RT 1710-1711; ACT 117A; Sealed motion.) In accordance with the prosecutor's trial strategy of gutting Goodwin's defense by blocking all evidence demonstrating the LASD failed to investigate suspects other than Goodwin, Jackson declined to stipulate.

Goodwin does not dispute that Evidence Code § 351.1, subdivision (a) codifies the rule the California Supreme Court adopted in 1992 that polygraph test results 'do not scientifically prove the truth or falsity of the answers given during such tests.'" (See RB 194, citing *People v. Espinoza* (1992) 3 Cal.4th 806, 817.) Goodwin did not offer the results as proof of the falsity of the answers Hunter gave, but to show

the detectives gave Joey Hunter a polygraph – "a tool in their investigative arsenal in 1988. He failed that test in their opinion."

The court excluded the evidence as (1) irrelevant, and (2) "getting into the third-party culpability issue," despite Goodwin's argument the relevance of the polygraph test was the investigators' belief Hunter had failed the test. (Sealed RT [October 16, 2006] I-99; see especially I-98 ["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."]

Respondent argues there is no "basis for challenging the statute or its application under the federal Constitution" and that Goodwin "cannot be deemed to have suffered prejudice in any legal sense." (RB 194-197.) Goodwin has not challenged the statute, which is meant to exclude the use of polygraph evidence to prove the truth of test results. Goodwin's challenge is to the exclusion of operative-fact evidence that investigators either deliberately or negligently ignored the results of a test that is a key component of an investigator's tools for identifying legitimate suspects.

Respondent cites *People v. McKinnon* (2011) 52 Cal.4th 610, 663, for the proposition that the statutory ban against admission of polygraph evidence is a rational and proportional means of advancing the legitimate interest in barring unreliable evidence – meaning as proof of the truth or falsity of the answers given during such tests. (RB 194.) *McKinnon* is distinguishable because Goodwin did not seek

admission of polygraph evidence to prove the truth or falsity of the test results, and *McKinnon* cites no authority that would bar use of the polygraph evidence to prove investigators ignored a tool considered the gold standard for winnowing suspects in their zeal to prosecute and convict a particular individual. None of the cases cited in *McKinnon* address Goodwin's situation.

In *McKinnon*, on the *prosecutor*'s motion, the trial court admitted evidence that an eyewitness was told he had lied during a polygraph examination. (*Id*. at p. 662-664.) The evidence was admitted to explain why a witness, in his post-polygraph statement to police, changed his story about his involvement in the murder and implicated the defendant as the killer. The Attorney General asserted that, because such evidence was relevant to that witness's credibility, the California Supreme Court should recognize a state-of-mind exception to Evidence Code section 351.1 for that limited purpose. (*Id*. at p. 663.) The Supreme Court ruled the evidence was inadmissible for a prosecutor's use to attack a witness's credibility. (*Id*. at pp. 663-664.) Because in *McKinnon* the evidence was admitted on a prosecutor's motion to impeach a witness's credibility, *McKinnon* has no bearing on whether evidence that investigators unreasonably or incompetently ignored polygraph results that did not lead to Goodwin was admissible in this case.

Respondent deceptively cites *McKinnon* as support for its claim "the California Supreme Court has repeatedly held section 351.1 does

not violate a criminal defendant's constitutional rights." (RB 194-195.) *McKinnon* has no bearing on Goodwin's claim he was unconstitutionally denied a fair trial by exclusion of the polygraph evidence because that case does not address use of such evidence by the defense. At the place cited, the Court was discussing the *per se* exclusion of polygraph evidence because the test is unreliable in proving the truth or falsity of its results. (*Id*. at p. 663.)

Respondent also relies upon *People v. Richardson* (2004) 33 Cal.4th 959, for the proposition a rigid application of section 351.1 does not violate a criminal defendant's constitutional right to present a defense. (RB 195.) *Richardson* is also distinguishable. In that capital case the defendant filed a motion to declare Evidence Code section 351.1 unconstitutional and argued his polygraph results should be "admitted under the more permissive evidentiary standards of a penalty trial" to (*Id*. at p. 1032.) Goodwin neither challenges the statute, nor seeks to admit the result of Hunter's polygraph to prove the truth or falsity or his statements or to impeach Hunter. *People v. Wilkinson* (2004) 33 Cal.4th 821, is distinguishable for the same reasons as *McKinnon* and *Richardson* – Goodwin does not offer the evidence of Hunter's polygraph tests to attack Hunter's credibility or to bolster his own; rather, Goodwin offered it to prove investigators acted either deliberately or negligently in this case in order to prosecute him.

Respondent is incorrect in asserting polygraph evidence should never be admitted in the absence of a stipulation where a defendant's

due process right to present a defense is at stake, and offers no authority that supports its position. (RB 195-196.) The rule of exclusion is, in reality, not a *per se* rule, as a prosecutor may stipulate to admission of such evidence for use by a defendant at trial.[43] (Evid. Code § 351.1.) All of the cases respondent cites have to do with use of polygraph test results to impeach witness credibility or boost the credibility of the defendant.

This may be a case of first impression. It appears no California court has addressed the question whether the operative fact that polygraph evidence was developed and ignored by investigators may be used by a defendant to prove the investigation was canted – either deliberately or negligently – by prosecutors ignoring information leading to more likely suspects.

Respondent urges this Court to ignore the federal cases Goodwin cited in his opening brief because those cases address application of the federal rules of evidence and this court is not bound by them. (RB 195, fn. 76.) Of course, Goodwin understands that Ninth Circuit cases are not binding; however, they are often persuasive, as are the cases

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That the prosecutors refused to stipulate to admitting the evidence in this case simply lends more support to Goodwin's position that the LASD and the LADA blindly and relentlessly focused upon him for reasons other than evidence that was reliably and methodically developed against him, and blindly and unethically sought and obtained his conviction on "evidence" that was constitutionally insufficient.

Goodwin cites here. (See *People v. Bradford* (1997) 15 Cal.4th 1229, 1292 [cases from federal courts of appeals are persuasive rather than binding authority on the courts of this state]; *Adams v. Pacific Bell Directory* (2003) 111 Cal.App.4th 93, 97 [although not binding, we give great weight to federal appellate court decisions"]; *Travelers Cas. & Sur. Co. v. Superior Court* (1998) 63 Cal.App.4th 1440, 1454 [following "the well-reasoned and on-point decisions of the Ninth Circuit"].)

B. Operative Fact Evidence Should Not Be Precluded by Evidence Code § 351.1, as Demonstrated by Analogous Federal Authority

Respondent offers no California authority holding that operative fact evidence is precluded by Evidence Code § 351.1, and substantially fails to address Goodwin's argument on this point.

As Goodwin argued in his opening brief, while 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.) As Goodwin argued at pages 288 through 289 of his opening brief, the federal courts admit evidence of polygraphs 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].)

Just as California's Evidence Code § 351.1 excludes evidence of polygraph results when offered to attack or support witness credibility, Federal Rule of Evidence 702 recognizes the questionable reliability of polygraph evidence and excludes it when offered for the same reasons. The rationale is that a polygraph does not assist the trier of fact to understand the evidence or to determine a fact in issue. (*Brown v. Darcy* (9th Cir. 1996) 783 F.2d 1389, 1395.)

The federal courts hold the key inquiry is the purpose for which the polygraph is being introduced. If the polygraph evidence is offered 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. Like the California courts, federal courts exclude polygraph evidence offered to establish that one party's version of the events is the truth. (*Brown v. Darcy* (9th Cir. 1996) 783 F.2d 1389, 1397 [overruled on other grounds in *United States v. Croft* (9th Cir. 1997) 124 F.3d 1109, 1120].)

Contrary to respondent's suggestion (RB 195-196), *United States v. Scheffer*, *supra*, 523 U.S. 303, 314-315, did not overrule *Brown*, *Thorne*

or *Smiddy*, and *Scheffer* does not offer a justification for excluding the evidence in this case. *Scheffer* – like all of the other cases upon which respondent relies – is just another case holding that the *per se* exclusion of polygraph evidence to prove a witness's credibility was not a constitutional violation because of the inherent unreliability of polygraph evidence. (*Id.* at 312.)

Again, 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, 1341.)

C. Although the Standard of Review is Abuse of Discretion, the Trial Court Violated the Rule that Discretionary Exclusion of Evidence Must Yield to the Due Process Right of a Defendant to a Fair Trial

The discretionary exclusion of evidence "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.)

Respondent has cited no authority precluding a claim of a due process violation where, as here, a criminal defendant has offered polygraph evidence as an operative fact, not as proof of the truth of the results of the test. Because Goodwin did not offer "scientifically unreliable evidence," respondent's argument Goodwin was not prejudiced by the trial court's error fails.

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,[44] but even if it were a concern, defense counsel offered to make the evidence generic by not mentioning Joey Hunter's name. The operative fact police believed Joey Hunter had failed multiple polygraph examinations was relevant, admissible evidence in Goodwin's defense.

D. The Error Prejudicially Deprived Goodwin of Crucial Evidence Impeaching the Investigation Itself

As Goodwin argued in his opening brief, 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.

Respondent fails to address Goodwin's argument regarding the standard to be applied in assessing prejudice.

Because the court's ruling violated Goodwin's constitutional rights to present a defense, to confront witnesses, and to due process (*Olden v. Kentucky* (1988) 488 U.S. 227, 231 [109 S.Ct. 480, 102 L.Ed.2d

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See Argument IX in Goodwin's opening brief regarding the court's error in excluding evidence other suspects were not fully and fairly investigated.

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* (11th Cir. 1987) 831 F.2d 1547, 1554.)

Respondent has not even attempted to meet that burden, instead complaining about Goodwin's reference to Mark Matthews' declaration. (RB 197.) 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 has not shown 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.

Because respondent cannot prove beyond a reasonable doubt the error did not contribute to the verdict, Goodwin's convictions must be

reversed.

XII. DEFECTIVE CONSPIRACY INSTRUCTIONS PERMITTED CONVICTION WITHOUT PROOF OF CONNECTION AND AGREEMENT BETWEEN GOODWIN AND THE KILLERS

Respondent disagrees that the conspiracy instructions were defective in that they permitted the jury to convict Goodwin without proof of any connection or agreement between Goodwin and the killers. (RB 197-204.)

Respondent argues:

(1) the prosecutor was not required to make a *prima facie* showing of a conspiracy before instructing the jury on that theory;

(2) Goodwin has forfeited any argument that the jury instructions were incomplete because he failed to request them;

(3) CALJIC Nos. 6.22 and 17.00 are inapplicable on their face because this was not a multi-defendant trial;

(4) CALJIC No. 6.22, articulating the beyond a reasonable doubt standard, applies only when the defendant has been charged with conspiracy as a substantive offense; and

(5) CALJIC No. 6.18 was not required because CALJIC No. 6.10.5 rendered it redundant.

Respondent is wrong.

A. Goodwin's Contentions Are Not Forfeited Because the Court is Duty Bound to Give Full, Accurate Instructions And No Forfeiture Will be Found Where the Court's Instructions Were an Incorrect Statement of the Law, or The Instructional Error Affected the Defendant's Substantial Rights

Respondent contends it was Goodwin's responsibility to request modification, clarification or expansion of any jury instructions Goodwin viewed as incomplete or ambiguous, and to object to any instructions he opposed, and his failure to do so waived his claims. (RB 199-200.) More specifically, respondent points out that Goodwin did not request that the court give CALJIC Nos. 6.18, 6.22 and 17.00 or seek to modify the instructions that were given. Respondent also argues that because defense counsel did not object to CALJIC No. 6.10.5, the basic instruction on uncharged conspiracy, but instead argued CALJIC No. 6.10.5 was appropriate (22RT 8448-8451), Goodwin is barred from claiming the trial court erred by giving that instruction.

Respondent is wrong for several reasons. First, respondent misstates the record. Defense counsel did object to giving any conspiracy instructions, contrary to respondent's claim. (RB 199; see 7CT 1934.) Even the trial court expressed her doubts about giving conspiracy instructions: "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.) Defense counsel did not agree to any conspiracy instructions until it became clear her objections would not be sustained.

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).) Given the court's comments above, it is clear the court understood there was a problem with the conspiracy theory and she foresaw the jury's confusion. The court was duty-bound not to give the conspiracy instructions, given her understanding that the jury would be confused.

Furthermore, no forfeiture will be found where the court's instruction was an incorrect statement of the law, or the instructional error affected the defendant's substantial rights. (*People v. Mason* (2013) 218 Cal.App.4th 818, 823; § 1259 ["appellate court may ... review any instruction given, ... even though no objection was made thereto in the lower court, if the substantial rights of the defendant were affected thereby"].) Because the instructions given were incorrect and misleading, and because the instructions were misunderstood, the error affected Goodwin's substantial rights. Goodwin has not forfeited his right to assert this instructional error on appeal.

B. Respondent Omits The Standard of Review

"[A]ssertions of instructional error are reviewed *de novo*." (*People v. Shaw* (2002) 97 Cal.App.4th 833, 838.)

C. Respondent Does Not Address Goodwin's Argument That, Based on the Evidence Presented, No Conspiracy Instructions Should Have Been Given

Because respondent does not address the argument Goodwin set forth at pages 294 through 295 of his opening brief (RB 197), Goodwin will not repeat it here; however, Goodwin stands by that argument.

D. 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.

Respondent contends Goodwin's argument is predicated on a misunderstanding of the nature of an uncharged conspiracy. (RB 201.) It appears respondent argues that, when a prosecutor relies upon an uncharged conspiracy as a theory of derivative liability, "the People are not required to prove all of the elements of a conspiracy." (RB 201.) That is not an accurate statement of the law. (See CALJIC 6.10.5 and

comments.)

Respondent argues, "Here, the instructions as a whole made it clear that a guilty verdict could not be reached absent proof beyond a reasonable doubt as to every element of the charged offenses of *murder.* (RB 202 [emphasis added].) The argument is non-responsive to Goodwin's claim. 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 – without showing association between Goodwin and the killers. Respondent, therefore, has failed to address the issue.

Respondent appears to argue that an uncharged conspiracy need not be proved beyond a reasonable doubt. (RB 203-204.) Goodwin disagrees. A jury must find all elements of an uncharged conspiracy beyond a reasonable doubt, even if the words "reasonable doubt" do not appear in the conspiracy instruction. (*People v. Belmontes* (1988) 45 Cal.3d 744, 788.)

Respondent does not address the essential problem here, which is that the jurors did not understand that the prosecutor had to prove *association* between Goodwin and the unknown shooters, and the conspiracy instructions, as given, did not convey that concept. Furthermore, although the unknown killers were not on trial, the bulk

of the evidence as to how the murders were committed was against them, not Goodwin. Goodwin was not at the scene and did not do the killing. That is the significance of *People v. Fulton* (1984) 155 Cal.App.3d 91 in this context – the jury needed to know that Goodwin's alleged participation in any conspiracy to kill the Thompsons had to be proved separately from that of the absent, unknown killers who – as the prosecutors so vehemently pointed out at every opportunity – were working together and had a plan.

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. In other words, the trial court should have given some combination of instructions that made the concept of association, proved separately from the other alleged conspirators, clear to the jurors. (See *People v. Fulton*, *supra,* 155 Cal.App.3d 91, 101.) The court failed to do that.

E. <u>The Instructional Errors Were Prejudicial</u>

Respondent denies the errors gave rise to a mandatory presumption on an element of the offense. (RB 204.)

Respondent does not state the applicable standard here. 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 does not address the fact the prosecutor's erroneous explanation of 6.12 during his closing argument compounded this error.[45] The court had already instructed on aiding and abetting.

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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 circumstances suggest that Michael Goodwin is responsible for the

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].) 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. 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

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killings of Mickey and Trudy Thompson, then Michael Goodwin is a conspirator along with the two actual killers." (23RT 8758-8759.)

knowledge concerning the murders, which he did not personally commit. He was convicted as a co-conspirator.

Respondent also omits the fact that, 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* (238) 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

Respondent disagrees 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. (RB 205-209.) Respondent contends Goodwin's

argument fails because:

(1) Goodwin failed to preserve the instructional challenge for appellate review;

(2) This Court is bound by California Supreme Court authority holding the instruction is proper; and

(3) The challenged instruction was "non-prejudicial because it did not require the jury to credit the witnesses' level of certainty, but authorized the jurors to reject the identifications for the very same reasons offered by his expert witness, who testified about scientific literature that casts doubt on the level-of-certainty factor." Respondent is wrong.

A. Respondent Does Not Address The Facts

Respondent does not address the facts set out at pages 307 through 308 of Goodwin's opening brief, and does not appear to dispute them.

B. The Issue is Not Forfeited

Respondent argues the claim is forfeited for failure to object. (RB 206.)

There is no dispute that Goodwin's counsel did not object to the instruction or ask to modify it to remove the reference to certainty. (See AOB p. 308.) Respondent references Penal Code section 1259[46], but

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As Goodwin pointed out in his opening brief, because much of the prosecution's case centered around the Stevenses' eyewitness

argues California Supreme Court precedent bars this Court's consideration of the issue. (RB 207.) At the same time, while acknowledging again this Court may exercise discretion to excuse the lack of a trial court objection (*People v. Williams*, *supra*, 17 Cal.4th 148, 161-162, fn. 6), respondent urges the "highly fact-bound nature of" Goodwin's challenge, "requiring consideration of numerous scientific studies and application to the expert and eyewitness testimony at trial, is precisely the kind of inquiry that would benefit from lower court findings." (RB 206.) Goodwin is unsure what respondent means by this statement, because the challenge is not "highly fact-bound." The issue is a legal one, pertaining to the inherent error in instructing a jury to consider the certainty of an eyewitness where research demonstrates the certainty with which the witness makes the identification has little correlation with the accuracy of that identification.

If, as respondent urges, this court cannot consider the issue because it is bound by California Supreme Court authority (RB 206), then Goodwin raises the issue in order to preserve his due process claim for federal review.

Accordingly, forfeiture should not apply.

C. <u>Respondent Misstates Goodwin's Argument</u>

Respondent argues Goodwin incorrectly asserts that *People v.*

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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.)

Johnson, supra, 3 Cal.4th at pp.1231-1232, is not binding as to his due process claim because, according to respondent, *Johnson* "merely found CALJIC No. 2.92 proper under state law, without considering due process concerns." (RB 206-207.) The *Johnson* court could not have recognized the due process challenges Goodwin has raised here because Johnson was decided in 1992, and most of the research Goodwin relies upon was done after 1992.

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.

D. The Error Was Prejudicial and Requires Reversal

Respondent denies the instruction was prejudicial to Goodwin. (RB 208-209.) Respondent substantially fails to address Goodwin's prejudice argument. Rather than repeat it here, Goodwin refers this Court to pages 312 through 315 of his opening brief.

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

Respondent disagrees 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. (RB 209-212.) Respondent contends:

(1) The evidence supported the reasonable inference of flight as consciousness of guilt, and

(2) California law does not require the flight take place immediately after a crime is committed, or the defendant have prior knowledge criminal charges have been filed.

Respondent argues by omission and is wrong. The court erred in giving 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.

A. Respondent Distorts the Facts

Like prosecutor Jackson, respondent points to Karen Dragutin's testimony that Goodwin said during a dinner his only way out of the mess was for Thompson to die as evidence of "flight." (RB 209-210; 22RT 8438.) Respondent disputes Goodwin's claim Jackson falsely asserted Dragutin testified Goodwin said, "And they will never catch me because I'll be out of the country sailing in Bermuda." (RB 210, fn.

83; 22RT 8438.)

There was no such testimony. 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.
>
> Q The boat and going to Bermuda; is that right?
>
> A Yes. Yes."

(6RT 2840-2841.) In support of his request for the flight instruction, Jackson argued this non-existent testimony was "direct evidence" from Goodwin admitting his intention to flee the country. (22RT 8438.) Jackson was not "merely" and "accurately" "paraphrasing" Dragutin's testimony, as respondent claims. (RB 210, fn. 83.) Jackson's "paraphrase" was a false statement of "fact."

The Thompsons were murdered on March 16, 1988, approximately three months after Diane Goodwin made a deposit on

a yacht. (7RT 3021; 12RT 4607.) Citing to Karen Kingdon's testimony at 18RT 6762-6765, respondent asserts: "The purchase funds were drawn from appellant and his wife's commingled assets." (RB 210.)

Respondent muddies the time line by omission. Respondent omits the fact Diane Goodwin took possession of the yacht on April 28, 1988 – four months after Diane made the deposit. (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, and Griggs had informed Goodwin he was considered a "witness" – not a suspect. (20RT 7513-7528, 7551-7556.)

Respondent omits Jackson's argument that 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.)

Respondent claims Goodwin has misrepresented the record or failed to cite to it in stating either that "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)," or defense counsel's counter to Jackson's argument: "Goodwin did not "flee" because his attorney wrote to Griggs requesting investigators notify him if they needed Goodwin to return to LA." (20RT 7515.) Respondent describes at some length Goodwin's attempt to admit evidence of a letter from one of appellant's attorneys, Al Stokke, to Detective Griggs, written "shortly after the Thompson murders"[47] to the effect that appellant was "not hiding" from investigators and the prosecutor's threat to elicit evidence Goodwin had refused to speak to the police. (RB 211-212.) Respondent argues:

> This ruling appears to be the basis of appellant's wholly unsupported assertion that the flight instruction was erroneous "because the court excluded evidence [that appellant] had, through his counsel, offered to make himself available in Los Angeles should his presence be required by investigators" to disprove flight. (AOB 316.) This conclusory argument, lacking legal support and record citation, should be summarily rejected. (See e.g., *Stanley, supra,* 10 Cal.4th at p. 793; *In re S.C.* (2006) 138 Cal.App.4th 396, 410-412; *Valov, supra*, 132 Cal.App.4th at p. 1132.)

(RB 212, fn. 85.)

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This is another misstatement by omission by respondent. The letter the parties discussed was written in October of 1988, seven months after the Thompsons were killed. (20RT 7525.) The Goodwins went sailing approximately five months after the Thompson murders, which means the letter was written months after Goodwin had departed on his trip. (See 7RT 3057.) The record indicates the letter was an offer to Griggs to produce Goodwin in Los Angeles should Griggs wish to arrest him.

Respondent's argument should be ignored. As explained above, the court did exclude evidence that Goodwin had, through his counsel, offered to return to Los Angeles from his sailing trip should investigators so require. The fight over admission of the Stokke letter was a fight over whether the prosecutor could then reveal to the jury that Goodwin had exercised his Fifth Amendment right not to make any statement to the police. Goodwin did, in fact, make himself available should Griggs wish to arrest him. Whether Goodwin was willing to give the investigators a statement has nothing to do with "flight." Goodwin had a Fifth Amendment right not to speak to the police.

Respondent omits Griggs' testimony he never caused a case to be filed against Goodwin and never arrested Goodwin. (20RT 7551, 7556-7557.) Respondent also omits Griggs' testimony there was never a time he 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.)

Respondent omits Jackson's deceptive argument 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.[48]

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Once again, Jackson misstated the law in order to obtain an advantage 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

(22RT 8437, 8438.)

Respondent also omits defense counsel's argument 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.)

B. Standard of Review

Respondent omits the 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, supra,* 22 Cal.4th 690, 733; *People v. Alvarez* (1996) 14 Cal.14th 155, 217; *People v. Berryman* (1993) 6 Cal.4th 1048, 1089.)

C. Giving the Flight Instruction Was Prejudicial Error

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 to find him guilty.

At the beginning of its argument, respondent engages in

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showing that Fowlie knew he was wanted by the authorities and intentionally thwarted arrest by remaining abroad."].)

deception by failing to quote Penal Code § 1127c, which provides for an instruction stating:

> 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.

(Emphasis added.) Instead, respondent offers a partial quote from a California Supreme Court case that does not mention the words "immediately after the commission of a crime, or after he is accused of a crime that has been committed." (RB 213.) The court gave the instruction without the word "immediately." (7CT 1976; 23RT 8715-8716.)

Respondent concedes it is error to instruct on flight when "there is no evidence that the defendant attempted *to flee from arrest or trial*." (RB 213-214.) Reversal should be granted at the point of this concession because, as Goodwin has pointed out, there is no evidence he attempted to flee from arrest or trial. It does not matter that Goodwin refused to talk to the police, as refusing to talk to police is not an act included in the flight instruction, and refusing to talk to the police is not evidence of "consciousness of guilt" – it is a person's Fifth Amendment right. (U.S. Const. 5th Amend.) It does not matter that Goodwin had been identified as a "suspect" (RB 213-214) – being

identified as a "suspect" is not the same as an "accusation of a crime." Respondent's argument begs the question how long Goodwin was required to refrain from travel in order to avoid being accused of "flight" – a year following a crime of which he has not been accused or for which he has not been arrested? Five years? Ten years?

Respondent asserts Goodwin manifested "a purpose to avoid being observed or arrested." (RB 213-214.) In support of this assertion, respondent argues – without citing to the record – "within approximately five months of the murders, having been identified as a suspect, appellant left the country in an ocean going yacht that he had purchased in the months preceding the murders – and after he had made an admission to do just that." (RB 213.) If respondent is referring to Dragutin's tainted testimony, produced by Jackson's leading, that is hardly an "admission." The prosecutor should not be rewarded for his misconduct.

Respondent fails to acknowledge the rule that, 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* (1977) 19 Cal.3d 588, 597.)

Respondent fails to address the cases Goodwin cited in his opening brief holding that "flight" exists only 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 [citations and internal quotation marks omitted]; *People v. Mendoza* (2000) 24 Cal.4th 130, 179.) Respondent fails to address *Bradford*'s holding that "flight manifestly does require, however, *a purpose to avoid being observed or arrested*.'" (*People v. Bradford, supra*, 14 Cal.4th 1005, at p. 1055 [emphasis added], quoting *People v. Visciotti* (1992) 2 Cal.4th 1, 60.) Respondent also fails to address *People v. Carrington* (2009) 47 Cal.4th 145, 188, holding "[a]n 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."

Respondent also omits any reference to *Tot v. United States* (1943) 319 U.S. 463, 467, and *Turner v. United States* (1970) 396 U.S. 398, 404, cited by Goodwin in his opening brief. *Tot* held the due process clauses of the Fifth and Fourteenth Amendments set limits upon the power of Congress and state legislatures to make the proof of one fact or group of facts evidence of the existence of the ultimate fact on which guilt is predicated, and *Turner* held "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.'" (*Ibid*.) 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.)

1. There Was No Evidence From Which the Jury Could Reasonably Infer an "Admission by Conduct"

Respondent ignores the following facts. 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 never at the scene. Goodwin promptly met with investigators, was told he was considered a *witness* – not a suspect – and declined to be interviewed, as he had every right to do. 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 *People v. Avila* (2009) 46 Cal.4th 680, 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.)

Respondent fails to follow the required analysis. 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.)

Respondent ignores the fact that 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.)

Respondent also ignores the fact that, 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.)

Respondent does not address Goodwin's argument regarding the

way the flight instruction unfairly focuses the jury's attention on this evidence. (See AOB pp. 324-325.)

2. Respondent Fails to Address Goodwin's Argument That It Was Error to Give the Instruction Without the Word "Immediate," and in the Absence of Evidence of Immediacy

Respondent fails to address this argument. Rather than repeat it here, Goodwin refers this Court to pages 325 through 327 of his opening brief.

D. The Error Requires Reversal

Respondent dismisses most of Goodwin's prejudice argument without addressing it. (RB 215-216; see AOB pp. 327-329.)

Respondent minimizes the prejudice to Goodwin, arguing "[t]his was not a case in which flight evidence was a crucial or decisive aspect of the prosecution case." (RB 215.) But DDA 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.)

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. Also, the jury never heard Goodwin had offered to make himself available 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 omitting crucial, relevant information bearing on Goodwin's "state of mind" at the time he went sailing. The flight instruction gave the jury 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 did not contribute to the verdict. (*U.S. v. Neder* (1999) 527 U.S. 1, 7.) Goodwin's convictions must therefore be reversed.

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

Respondent denies the prosecutors violated their duty to fully and fairly present the evidence material to the charges against Goodwin. (RB 216-243.) Respondent argues:

(1) Goodwin's arguments are premised on a misreading of the record and/or a misapplication of the law;

(2) The prosecutor's statements largely tracked the trial evidence;

(3) The prosecution complied with the trial court's evidentiary directive not to refer to Goodwin's federal conviction;

(4) The trial court correctly and repeatedly found no misconduct as to the prosecution's leading questions;

(5) The prosecutor's closing argument properly referred to the defense's failure to present logical evidence, not to appellant's decision not to testify. (RB 216-217.)

Respondent is wrong on all counts.

A. DDA Jackson Committed Misconduct During His Opening Statement by Promising Evidence He Failed to Produce

Respondent denies the prosecutor promised evidence he failed to produce, claiming the record shows the "evidence tracked the opening statement reasonably well and, to the extent there were any inconsistencies, they were not only minor, but tended to favor the defense by giving trial counsel bases for criticizing the prosecution case." (RB 217-225.)

1. The Prosecutor Promised to Produce Key Witnesses Who Never Testified, and Nobody Testified to Jackson's "Dance of Death"

Respondent misstates Goodwin's first argument. (RB 219.) Respondent urges: "The prosecutor never used the phrase "dance of death" in the opening statement." Goodwin does not claim he did. Goodwin's reference to that language was a summary of the evidence

the prosecutor did not produce - a "dance of death" fantasy that was a key part of Jackson's case, intended to inflame and prejudice the jury against Goodwin. (See AOB p. 332.)

The misconduct lies in the prosecutor's promise to the jury 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."

Respondent admits that Phyllis and Anthony Triarsi did not testify at trial, but claims Allison testified to those "facts." (RB 219.) The problem is that the scenario Allison described was nothing but a fantasy, as the ballistics evidence conclusively proved the shooting could not have occurred as she described, as the same gunman shot both Mickey and Trudy Thompson. Allison did not testify that Trudy Thompson was either pulled from or fell out of the van, got down to her knees, and crawled down the driveway as the second gunman followed, "covering" her. At the place respondent cites, the testimony was: "Q: Did you see how she got to the bottom of the driveway? A:

No." (RT 4633-4634.) Jackson unfairly and falsely "corroborated" Allison's unbelievable testimony with his description of her parents' testimony, which the jury did not hear.

Respondent concedes, by failing to address, Jackson's misconduct in telling 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."

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

Respondent argues Goodwin "is mistaken in claiming the prosecutor failed to present any evidence to support his statement that Trudy Thompson died before her husband," urging "Triarsi's testimony by itself was sufficient on that point." (RB 219-220.) Triarsi's testimony was a fantasy. Respondent ignores the testimony of Griggs, the original investigator, that there was no evidence Trudy's head was held up before she was shot (20RT 7539); the coroner's testimony; and 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"

Respondent denies that 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. (RB 220.) Respondent admits there was an "inconsistency" but claims it was not "great." (RB 220.) To the contrary – Jackson told the jury twice the first gunman screwed that .9 millimeter pistol into [Thompson's] left ear and fired a shot through Mickey's brain." (6RT 2710, 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, because – as respondent admits – the coroner's report indicated 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.) Respondent omits the coroner's emphatic testimony on cross that there was evidence someone walked up to Mickey Thompson, screwed a gun into his ear and fired a bullet. (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.)

Citing no authority, respondent argues Jackson's misconduct

benefitted the defense because Goodwin was "able to capitalize on the prosecutor's overstatement." (RB 220.) 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. It was misconduct, not a gift to the defense.

4. Respondent Concedes, by Failing to Address, Goodwin's Contention Jackson Committed Misconduct by Claiming Thompson Was Shot to Incapacitate Him but Kept Alive so He Could Watch Trudy Die

Respondent concedes, by failing to address, Goodwin's contention there was no evidence Mickey Thompson was shot to incapacitate him, but kept alive so he could watch Trudy die, as Jackson claimed. (See AOB p. 334; 6RT 2710, 2731.) (See *People v. Bouzas, supra,* 53 Cal.3d 467, 480 [respondent's failure to engage arguments operates as concession].)

5. The Prosecutor Failed to Prove Goodwin Committed Bankruptcy Fraud; In Fact, Goodwin Was Acquitted of Bankruptcy Fraud in Federal Court Prior to This Trial

Respondent disagrees the prosecutor failed to prove Goodwin committed bankruptcy fraud. (RB 220-221.) Here again respondent misstates Goodwin's argument, which is that 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.) Goodwin did not contend the Jackson said he himself would prove bankruptcy fraud. (RB 220.)

Respondent ignores the facts Goodwin set out at page 335 of his opening brief establishing Jackson's misrepresentations. Respondent's rebuttal is ineffective.

6. The Prosecutor Failed to Prove Goodwin Made Threats in the Presence of Deputy John Williams

Respondent disagrees the prosecutor failed to prove Goodwin made threats in Deputy Williams' presence. (RB 221.) Citing no authority, respondent claims the fact documents and other witnesses' testimony definitively disprove Jackson's representations "does not prove that it was false, much less that the prosecutor lacked a good faith reason for adverting to it in the opening statement." (RB 221.) To the contrary, the fact that Jackson repeatedly grossly misrepresented what the evidence would show supports the inference this statement was knowingly false and made in bad faith. Jackson should have known 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.) Jackson's own witness, Cordell, directly contradicted Williams' testimony. Jackson should have known prior to making his opening statement that Cordell 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.) Jackson's deliberate misstatement was misconduct.

7. The Prosecutor Falsely Promised Witnesses Would Testify to Seeing the Gunmen "Jump on Bicycles," and That Goodwin Planned and Confessed to the Murders

Respondent denies the prosecutor falsely 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). (RB 221-222.) Respondent also denies Jackson falsely asserted the evidence would show Goodwin planned the murders (6RT 2738-2739) or "confessed" to them (6RT 2742). (RB 221-222.) Respondent dismisses any such statements as "minor discrepancies of no significant negative consequence to appellant." (RB 221-222.) To the contrary, Jackson's exaggerations constituted a pattern of false statements which, taken together, were intended to mislead the jury.

8. Jackson Promised to Produce Evidence Ron Stevens Picked Only Goodwin's Picture Out of a Photographic Lineup, When Jackson Knew That Statement Was False

Respondent denies Jackson committed misconduct when he

stated Ron Stevens "looked at the photographs and he pointed to a particular picture." (RB 222; see 6RT 2737-2738.) Again, respondent misstates the record. 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. (7CT 1859-1861; 12RT 4514-4518; Defense Exhibits Z and Z-1, AA and AA-1.) Jackson knowingly misstated what the evidence would show on a point that was crucial to the case – Ron Stevens' ability to connect Goodwin to the killers. This was misconduct.

9. 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"

Respondent denies Jackson falsely promised he would prove "[Goodwin] sold Whitehawk Investments." (RB 223; see 6RT 2740.) Respondent characterizes Goodwin's reading of the record as "tendentious," misstates Goodwin's argument, and calls any discrepancy an "inconsequential technicality." (RB 223.)

In fact, 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.

Respondent also claims Jackson did not misstate the evidence when he told the jury – without proof – Goodwin had "skimmed" or "stolen" money from Thompson. (RB 223-224; 6RT 2716-2717.) Respondent admits Jackson used the word "stolen" but excuses that characterization as "consistent with a commonsense or colloquial understanding," and that testimony showed "appellant's company refused to make its required 70 percent contribution, effectively extorting that amount from Thompson so the company would not lose its right to participate in the underlying motor sports event. (7RT3183-3185.)" (RB 223-224.)

Respondent cites no authority in support of this characterization; instead, respondent asserts, "[t]he prosecutor's comments were therefore based upon evidence to be presented at the trial and "within the 'broad scope of permissible *argument*.'" (RB 224 [emphasis added].) Respondent cites *People v. Dykes* (2009) 46 Cal.4th 731, 761, quoting *People v. Chatman* (2006) 38 Cal.4th 344, 387 [the prosecutor properly could claim the defendant lied, lacked humanity, was frightening, and was barely human].) *Dykes* was wrongly decided. The *Dykes* Court relied upon *Chatman*, which at the place cited addressed the scope of

closing argument, not opening statements. An opening statement may not be used to argue the case to the jury. (*Williams v. Goodman* (1963) 214 Cal.App.2d 856, 869.)

Respondent disputes the falsity of Jackson's assertion, "The evidence in this case will show that Michael Goodwin was never ever, ever going to pay Mickey Thompson what he owed him." (RB 224.) Respondent admits the evidence shows that in the months and weeks leading up to the murders, the parties to the bankruptcy litigation had reached a settlement that would have paid the entire judgment. (RB 224.) However, respondent disingenuously claims Goodwin's citations to the record do not show that the settlement would have fully satisfied Thompson's claims, and that Bartinetti testified that the judgment was never collected. (8RT 3420.) Respondent's assertions are beside the point – 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.)

Finally, respondent claims Jackson's statement was not false because "even if the post-murder settlement would have satisfied the debt to Thompson . . .it would hardly disprove the prosecutor's implicit representation that appellant had no intention of allowing Mickey Thompson to collect while alive." (RB 224.) That is an unreasonable

interpretation of what Jackson said. There was no such qualification on Jackson's statement; Jackson unequivocally represented that "Goodwin was never ever, ever going to pay Mickey Thompson what he owed him." (6RT 2741.) The statement was false.

The prosecutor committed misconduct.

10. The Prosecutor Failed to Prove Goodwin "Lost The Insport Agreement"

Respondent denies Jackson falsely asserted during opening statement he would prove Goodwin "lost the Insport Agreement" that made it possible for him to put on his events. (RB 224-225; see 6RT 2718-2719.) Jackson argued, "Mickey Thompson went after the Insport agreement. Mike Goodwin fought it. Mike Goodwin lost." (6RT 2719.) Respondent claims a "fair reading of the record . . .vindicates the prosecutor's characterization." (RB 225.) It does not.

Respondent misrepresents the record by taking Coyne's testimony out of context. Bartinetti explained that when Goodwin filed bankruptcy on behalf of Stadium Motor Sports, he changed the name of Stadium Motor Sports to E.S.I. (7RT 3196.) E.S.I. eventually became S.X.I., which Diane Goodwin and Chuck Clayton owned. (8RT 3305.) Coyne explained that E.S.I. originally held the Insport agreement and sold it with bankruptcy court permission to S.X.I. (10RT 4058.) It was Diane Goodwin and Chuck Clayton who defaulted on the Insport agreement – not Goodwin. (10RT 1059.) Diane Goodwin and Chuck Clayton eventually cured the default, and they never "lost" the Insport

agreement. (10RT 4061.) The "black rage" respondent refers to was not related to the Insport agreement – Goodwin was enraged because Coyne was blocking a $20,000 payment to his parents. (10RT 4069.) Respondent had flatly and deliberately misrepresented the record to this Court. It was not, therefore, "entirely reasonable to state that the evidence would show [Goodwin] lost the Insport agreement." (RB 225.)

Again, 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.)

The prosecutor, therefore, committed misconduct in falsely stating Goodwin "lost the Insport agreement" and that the loss was motive to kill Mickey Thompson.

Respondent claims Jackson's falsehoods could not have been prejudicial because the jury was instructed that the attorneys' statements were not "evidence" and "more than a month elapsed between the opening statement and deliberations." (RB 225.) It does not matter that significant time elapsed between Jackson's dishonest opening statement and deliberations. More than 80% of jury verdicts

conform to the jurors' tentative impressions after hearing opening statements, for several reasons:

> • Jurors are usually quite attentive during opening statements. They want to know what the case is all about and are therefore receptive to counsel's presentation.
>
> • The jurors are looking for someone they can trust to assist them in arriving at the correct decision. They are likely to place their trust in a trial lawyer who is straightforward and well-organized.
>
> • Opening statement was the first opportunity for persuasion.
>
> • Jackson's opening statement permitted him to draw a "roadmap" showing what evidence would come from which witnesses and how it all would fit together. Jurors may have been quicker to draw inferences from the evidence based on Jackson's opening statement, thus "filling in the gaps" from incomplete trial testimony with "facts" he never presented.

(California Practice Guide: Civil Trials and Evidence, Chapter 6:1, Opening Statement.) Therefore, Jackson's numerous falsehoods to the jury at the outset of the case were prejudicial, as they set the stage for Jackson's misconduct throughout the trial and assisted Jackson in obtaining undeserved convictions based on insufficient evidence.

Goodwin's convictions must be reversed based upon Jackson's misconduct.

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

Respondent denies the prosecutor committed misconduct by violating the trial 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. (RB 225-227.) Respondent argues the issue is forfeited for Goodwin's failure to object. (RB 226.) Respondent again misrepresents the record and misstates Goodwin's argument.

1. The Issue is Not Forfeited

Respondent misrepresents the record in claiming Goodwin did not object to admission of evidence he had committed fraud during the course of his bankruptcy proceedings prior to the direct examination of Coyle at trial. (RB 226.) The truth is that Goodwin objected to any such evidence at a pretrial hearing. (4RT V-16 – V-17.) During that pretrial hearing 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 – improperly referred to fraud. (6RT 2723; see AOB, Argument XV.A.4.)

Defense counsel again 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.) Respondent omits the particulars. 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.)

Respondent calls Goodwin's reference to his objection raised just before Kingdon testified to any reference to bankruptcy fraud as "beside the point," claiming that objection was raised after the alleged misconduct and Goodwin does not identify any misconduct as to Kingdon. (RB 227.) The prosecutor at that point again promised not ask about bankruptcy fraud. (17RT 6476-6478.)

Based on the above record, it is clear that Goodwin objected pretrial and throughout the trial to any reference to bankruptcy fraud, and respondent's claim the issue is forfeited is without substance.

2. <u>Respondent Misstates Goodwin's Argument</u>

Respondent attempt to confuse the issue by claiming it is limited to Jackson's violation of the court's order formulated just prior to Coyne's testimony. (RB 225-226.) The issue has two components: (1) Jackson's misconduct in violating the trial court's order not to refer to bankruptcy "frauds" as separate criminal conduct; and (2) and Jackson's constant misrepresentation of the facts and the law regarding the

bankruptcy and fraud charges previously litigated against Goodwin.

Because respondent has misstated Goodwin's argument, Goodwin will explain it again. 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 AOB, Argument V [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.)

Rather than address it, respondent calls Goodwin's argument the prosecutor's claim Goodwin engaged in "fraudulent" activity was contrary to the meaning of "fraud" in connection with bankruptcy as "entirely off-point." (RB 227; see AOB 340-341.) It is not, and Goodwin stands by the argument. Respondent has conceded this point by failing to address it. (See *People v. Bouzas, supra,* 53 Cal.3d 467, 480.)

The jury understood the references to fraud were references to other criminal activity and used those references as bad character evidence to convict Goodwin, therefore, Jackson's misconduct was prejudicial (8CT 2082.)

C. The Prosecutors Committed Misconduct by Constantly Leading Their Own Witnesses, Effectively Testifying Themselves

Respondent contends:

(1) Goodwin's claim that Jackson and Dixon committed misconduct by constantly leading their own witnesses fails because the trial court granted numerous "leading" objections by the defense, so that Goodwin's trial rights were protected;

(2) Goodwin has identified no instance in which the court failed to sustain an objection on the ground of leading as causing him prejudice;

(3) The trial court repeatedly found the prosecutor did not commit misconduct through his use of leading questions; and

(4) Goodwin identified no instance in which leading questions had the effect of deliberately producing inadmissible evidence or called for inadmissible and prejudicial answers. (RB 228-231.)

Respondent again misrepresents the record and Goodwin's arguments.

1. Respondent Omits Material Facts Regarding This Issue

Respondent omits the fact that 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.) Respondent also omits the fact 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.)

Respondent omits the fact 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 suggested by the improper leading question.

Respondent omits the fact the prosecutors blatantly ignored the court's repeated rulings and admonitions to stop leading witnesses. (Rather than repeat all the citations to those incidents here, Goodwin refers this Court to pages 342-343 of his opening brief.) Respondent misrepresents the record when claiming the trial court sustained numerous "leading" objections by the defense so that Goodwin's trial rights were protected. (RB 228; see AOB 342-343.)

Respondent omits the fact that 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.)

2. Respondent Misrepresents the Record in Arguing There Was No Prejudicial Misconduct

Respondent claims "a fair review of [Goodwin's] purported examples of prejudicial misconduct serves to refute his argument." (RB 229.) Respondent claims Goodwin's complaint about Jackson leading Ron Stevens to say he saw a man with a "ruddy" or "pock-marked" complexion was not misconduct because Jackson had used non-leading questions to adduce Stevens' the same testimony the day before. (RB 229, citing to 11RT 4399-4400 and 12RT 4505.) Respondent argues that in that one instance, "the witness description had already been fairly and properly presented to the jury" and there was "no significant probability of prejudice" because the improperly elicited testimony was "merely cumulative." (RB 229.) Respondent argues Goodwin's argument regarding the same method of leading Allison Triarsi demonstrates the same pattern and Goodwin suffered no prejudice. (RB 230, citing 12RT 4642.) Respondent points out that in Triarsi's case, the trial court sustained the objection and prevented Triarsi from answering the question, and then refused to admonish the prosecutor and asserted the jury instructions would prevent any prejudice. (RB 230.) The problem with the jury instruction respondent cites, however, is that it does not explain to the jury how the prosecutors' willful

pattern of feeding the witnesses the lines they were supposed to speak through leading questions essentially meant the prosecutors were testifying, not the witnesses.

Having addressed only two of the instances of the prosecutors' constantly leading questions, respondent declares there was no prejudice to Goodwin. (RB 231.) Respondent substantially fails to address Goodwin's argument.

A prosecutor is not permitted to testify through his witnesses. Jackson and Dixon effectively testified and simply asked their witnesses to affirm what they stated in an effort to follow their script and compensate for evidentiary deficiencies. (Evid. Code § 767(a)(1); see 1 McCormick 5th, §6; 3 Wigmore (Chadbourn Rev.) §769; cf. Model Code., Rule 105(g) and Comment.) As Goodwin's cites to the record establish, 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

Respondent denies the prosecutor committed misconduct on closing argument. (RB 231-243.)

1. Respondent Misstates Goodwin's Argument Regarding the Prosecutor's Repeated Misstatements of the Burden of Proof

Respondent argues "[a] fair reading" of the record refutes Goodwin's claim the prosecutor argued a "totality of the circumstances"

burden of proof in place of proof beyond a reasonable doubt. (RB 232.)

(a) Respondent Omits all of the Material Facts

Instead of addressing Jackson's language, respondent dodges the issue by asserting the trial court thought the argument was permissible. (RB 232.) In fact, 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.)

(b) The Issue Is Not the Language in the Jury Instruction on Uncharged Conspiracy; It is Jackson's Deceptive Argument

It does not matter that jury instructions on uncharged conspiracies are not required to contain the language "beyond a reasonable doubt," as respondent argues. 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.) Therefore, the prosecutor's deceptive argument that the jury could find Goodwin guilty of murder on a conspiracy theory based on the "totality of the circumstances" was misconduct.

(c) The Prejudice Was Not Cured by the Jury Instructions

Respondent claims any prejudice was cured by the jury instructions. (RB 232-233.) They did not. The misconduct that occurred here requires reversal, as Goodwin was prejudiced by the prosecutor's argument and the court did not cure the defect with any instructions to the jury. (See *U.S. v. Pungitore* (3rd Cir. 1990) 910 F.2d 1084, 1128.) By failing to cure the prejudicial prosecutorial misconduct, the trial court thereby implies to the jury an apparent approval of the prosecutor's argument. (See *State v. Jones* (1982) 615 S.W.2d 416, 420; *State v. Wilson* (1995) 118 N.C.App. 616 [when trial court overrules objection to

prosecutor's misstatement of law, trial court thereby condones the misstatement and reversible error almost inevitable].)

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

(a) The Argument is Not Forfeited

Respondent contends Goodwin forfeited this argument by failing to make a timely and specific objection. (RB 233.) 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.)

If this Court finds trial counsel failed to adequately preserve this issue through objections, then this court may nevertheless address the issue. (*In re S.B., supra*, 32 Cal.4th 1287; *People v. Williams, supra*, 17 Cal.4th 148, 161, fn. 6; *People v. DeJesus, supra*, 38 Cal.App.4th 1, 27, and *People v. Rodrigues, supra*, 8 Cal.4th 1060, 1125 [a court may reach the merits in response to defendant's assertion that the failure to assign misconduct constituted ineffective assistance of counsel].)

(b) Respondent Omits the Material Facts

Respondent omits the facts showing 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 record citations and argument set out at pages 348 through 349 of Goodwin's AOB.) Respondent claims the prosecutors "properly relied on evidence *admitted* at trial" to argue that appellant failed to support the defense theory with evidence. (RB 233-234 [emphasis in original].) This is a blatant misrepresentation of the record. (See, e.g., the prosecutor's arguments capitalizing on the exclusion of the evidence gold was taken].) Clearly the prosecutors were exploiting evidence that was excluded by them. Because Jackson and Dixon had obtained exclusion of such evidence[49], this was devastating prosecutorial misconduct.

Next, respondent deceptively argues a prosecutor cannot commit misconduct "by arguing in accordance with the trial court's rulings," citing *People v. Visciotti* (1992) 2 Cal.4th 1, 82, and *People v. Haskett* (1990) 52 Cal.3d 210, 247(RB 235.) Neither of those cases addresses the issue of a prosecutor exploiting defense evidence the prosecutor was able to exclude.

Respondent contends Goodwin's reliance on *People v. Daggett* (1990) 225 Cal.App.3d 751; *People v. Castain* (1981) 122 Cal.App.3d 138, 146; and *People v. Varona* (1983) 143 Cal.App.3d 566, 570, is "misplaced." (RB 235-237.) Respondent correctly identifies why Goodwin relies on these authorities (RB 235-236), but nonsensically argues these cases "have no application where, as here, the potential contrary evidence

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[49]See full discussion of these issues in AOB Arguments X, XI and XII.

was not only properly excluded after a hearing, but even if it had been admitted, would not have precluded the prosecution's arguments." (RB 236.)

Respondent tries to distinguish *Daggett*, pointing out how the prosecutor argued to the jury the victim must have learned about sex when the defendant molested him after the court excluded evidence the victim had been sexually abused by others prior to the acts allegedly committed by the defendant. As Goodwin pointed out, 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. Respondent claims this case is different because "the court not only conducted hearings prior to making its rulings, but those rulings were based on its fully supported findings that the proffered evidence was inherently speculative and unreliable." (RB 236.) This is not a valid distinction. The *Daggett* Court's ruling did not depend on whether or not the court's order excluding the evidence was correct; the ruling was simply that a prosecutor may not mislead the jury by asking the jurors to draw an inference that they might not have drawn if they had heard the evidence the judge excluded. (*People v. Daggett, supra*, 225 Cal.App.3d 751, 757-758.) That is exactly what Jackson and Dixon did here. Respondent also attempts to distinguish *Castain* and *Varona* on the same basis and fails for the same reason.

It was nothing short of outrageous for Jackson and Dixon 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; see Goodwin's discussion of prejudice at AOB pp. 351-352.)

Goodwin's conviction must be reversed.

3. Jackson Argued Facts Not in Evidence

Respondent denies Jackson committed misconduct when he repeatedly argued facts not in evidence. (RB 237-238.)

(a) The Issue is Not Forfeited

Respondent claims the issue is forfeited for trial counsel's failure to object. (RB 237-238.) For the same reasons stated above, this Court may decline to find forfeiture and address the issue if trial counsel failed to preserve the issue for appeal.

(b) The Prosecutor Argued Facts Not in Evidence

Respondent substantially fails to address this argument, instead referring this Court to respondent's arguments in response to Goodwin's claim Jackson committed misconduct during his opening statement. (RB 238.) For the same reasons Goodwin argued in that

part of his brief, and for the reasons stated at pages 352-353 of his opening brief, Goodwin submits the prosecutor committed prejudicial misconduct by arguing facts not in evidence.

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

Respondent denies the prosecutor misrepresented the law of bankruptcy and that Goodwin forfeited the claim by failing to object to the argument. (RB 238.)

Respondent substantially fails to address this argument, instead referring this Court to respondent's arguments in section XV.C. of its brief. (RB 238.) For the same reasons Goodwin argued in that part of his brief, and for the reasons stated at pages 354 through 355 of his opening brief, Goodwin submits the prosecutor committed prejudicial misconduct by misstating the law of bankruptcy on closing argument.

5. Dixon Vouched For His Witnesses

Respondent denies the prosecutor vouched for witness John Williams. (RB 238-240.)

(a) The Claim is Not Forfeited

If this Court finds trial counsel failed to adequately preserve this issue through objections, then this court may nevertheless address the issue. (*In re S.B.*, *supra*, 32 Cal.4th 1287; *People v. Williams, supra*, 17 Cal.4th 148, 161, fn. 6; *People v. DeJesus, supra*, 38 Cal.App.4th 1, 27, and

People v. Rodrigues, supra, 8 Cal.4th 1060, 1125 [a court may reach the merits in response to defendant's assertion that the failure to assign misconduct constituted ineffective assistance of counsel].)

(b) <u>The Prosecutor Vouched</u>

Respondent contends the prosecutor's comments about John Williams were permissible because they "were in direct response to defense counsel's closing argument which criticized Williams as "just simply delusional." (23RT 8853, 9004).

Respondent relies upon *People v. Bryden* (1998) 63 Cal.App.4th 159, 184, for the proposition a prosecutor may respond to defense counsel's arguments in rebuttal. (RB 239.) *Bryden* does not address the issue of vouching, and *Bryden* does not stand for the proposition that a prosecutor can say anything he wants to rebut a defendant's argument a prosecution witness is "delusional," including refer to a witness' status as a law enforcement officer in order to bolster his credibility. (See *U.S. v. Weatherspoon* (9th Cir. 2005) 410 F.3d 1142, 1146.) "Vouching consists of placing the prestige of the government behind a witness through personal assurances of the witness's veracity, or suggesting that information not presented to the jury supports the witness's testimony" (*United States v. Necoechea* (9th Cir.1993) 986 F.2d 1273, 1276.)

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.)

Respondent argues the prosecutor "did not argue that the jury should believe the witness because he was a public official. Rather, to the extent the prosecutor did anything more than accurately restate the testimony (10RT 3990-3992), he merely argued that the witness's public positions tended to refute defense counsel's assertion that he was delusional. (23RT 9005.) That's vouching. (*United States v. Necoechea, supra,* 986 F.2d 1273, 1276.)

Respondent claims the vouching was not prejudicial "because there was no reasonable likelihood the jury would have interpreted the prosecutor's comments as "vouching for the credibility of witnesses or otherwise bolstering the veracity of their testimony by referring to evidence outside the record." (RB 240.) That is not so. Williams was a terrible witness because all of the documentation regarding the repossession of Goodwin's Mercedes, and all of the testimony of the other witnesses – including Jackie Southern, the woman who actually

seized the vehicle and stored it, and attorney Bartinetti – indicated it was impossible that Williams witnessed what he claimed to have witnessed when he claimed to have witnessed it. (7RT 3200; 8RT 3464-3465; 10RT 4015-4017; 21RT 7822-7831.)

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

Respondent denies Jackson committed *Griffin* error. (RB 240-243.) Respondent contends the claim fails because (1) the prosecutor was not commenting on appellant's constitutional right not to testify, but rather on his failure to present logical witnesses; and (2) that "reasonable understanding" of the challenged comments was reinforced by the jury instructions which emphasized Goodwin's constitutional right not to testify. (RB 240.)

(a) Respondent Fails to Address the Facts

Respondent omits the facts about Goodwin's attack on the Stevenses' identifications of Goodwin. (See AOB 356.)

Respondent also omits what Jackson said:

> . . . 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?

(23RT 8755.)

Goodwin did not testify in his defense. (23RT 8754-8756.) Defense counsel objected that Jackson had commented on Goodwin's failure to testify. (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.)

(b) The Prosecutor's Comments Violated Goodwin's Federal Constitutional Right Not to Testify at Trial

Respondent claims these were comments "referring to the failure of the defense to challenge the Stevenses' eyewitness identifications with evidence of an alibi" and that Jackson further commented he "would call every single person in this courtroom and subpoena them to court to say" that he was in court at the time. (23RT 8756.)" Respondent characterizes Jackson's statements as legitimate comment on Goodwin's failure to call logical witnesses. (RB 241.) Respondent substantially fails to address Goodwin's argument.

Respondent fails to address *People v. Murtishaw* (1981) 29 Cal.3d 733, which held that, in determining whether *Griffin* error has occurred, 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. (*Id*. at p. 757.)

Respondent ignores the fact that 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. As Goodwin pointed out in his opening brief, 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.)

Respondent fails to address any of the cases Goodwin cited that have addressed this same issue. (See *People v. Vargas* (1973) 9 Cal.3d 470, 475; *In re Rodriguez* (1981) 119 Cal.App.3d 457, 468; *People v. Rodgers* (1979) 90 Cal.App.3d 368, 371; and *People v. Crawford* (1967) 253 Cal.App.2d 524, 535.)

Respondent relies on *People v. Bradley* (2012) 208 Cal.App.4th 64, 85, as authority demonstrating there was no *Griffin* error in this case. (RB 242.) *Bradley* is distinguishable. In that case the prosecution stated "[t]here was no valid explanation given by the city manager as to why

the public could not see the actual credit card statements." (*Ibid.)* When the prosecutor returned to his argument after defense counsel objected, he told the jury that Johnson "has a constitutional right not to testify" and commented on how the defendants had time to produce witnesses to explain where the money went. (*Id.* at pp. 85-86.)

The *Bradley* court agreed with the trial court that there was no *Griffin* violation because the prosecutor could properly argue that the defense had presented no reasonable evidence explaining why public records were redacted. (*Id*. at p. 86.) The court pointed out that witnesses other than the defendant could, and did, testify regarding the reason for the redactions, and the prosecutor could properly comment upon the reasonableness of their evidence. (*Ibid*.)

That was not the case 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.

Jackson's comment shifted 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.)

The standard instructions the court gave did not cure the prejudice from Jackson's remarks, as respondent claims. (RB 242-243.) "If you throw a skunk into the jury box, you can't instruct the jury not to smell it." (*Dunn v. United States* (5th Cir.1962) 307 F.2d 883, 886.)

E. **The Errors Were Prejudicial**

Respondent does not attempt to address Goodwin's prejudice argument at pages 360 through 362 of his opening brief. Goodwin asks this Court to consider that argument and reverse his conviction.

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

Respondent disagrees the government engaged in misconduct during the investigation of the Thompson murders. (RB 243-256.) Respondent contends:

(1) The claim is forfeited because Goodwin failed to raise the issues at trial;

(2) Goodwin's claims cannot be substantiated;

(3) The trial court heard and rejected the claims;

(4) Goodwin's claims that Collene Campbell exerted improper influence during the investigation and that Lillienfeld and the prosecutors acted in bad faith are "specious;" and

(5) Even if Goodwin's claims are true, they did not result in any prejudice to him.

Respondent misstates and substantially fails to address Goodwin's arguments, and is again wrong.

A. <u>Goodwin Did Not Forfeit His Claims</u>

Generally appellate courts will not reverse a judgment on grounds that the opposing party did not have an opportunity to argue and the trial court did not have an opportunity to consider. (*JRS Products, Inc. v. Matsushita Elec. Corp. of America* (2004) 115 Cal.App.4th 168, 178.) However, even when a party has forfeited his right to contest an issue on appeal by failing to raise that issue in the trial court, the appellate court may, in its discretion, consider the issue, particularly when both parties have briefed that issue. (*In re C.T.* (2002) 100 Cal. App. 4th 101, 110, fn. 7.)

Respondent argues Goodwin did not raise the claims asserted in his opening brief, at the same time acknowledging that "full hearings" were conducted on the very same issues. (RB 245-246.) There can be no forfeiture because Goodwin raised the issues before the trial court and they were rejected. Furthermore, Goodwin has not forfeited the misconduct issues for appeal because he has raised the issues in the context of substantial evidence. (*Tahoe National Bank v. Phillips* (1971) 4

Cal.3d 11, 23, fn. 17 [substantial evidence issues are an exception to the forfeiture rule].) Goodwin has already explained at pages 364 through 366 of his opening brief why this Court should reject any claim of forfeiture, and will not repeat that explanation here.

Finally, respondent contends the authorities upon which Goodwin relies for his arguments regarding the futility of raising objections to some of the misconduct only apply to "extreme cases." (RB 245.) Goodwin submits this is an "extreme case." Prosecutors in both Orange County and Los Angeles targeted Goodwin for prosecution in the absence of evidence to establish his guilt, and then unfairly ignored, manufactured and manipulated evidence to obtain a conviction, in spite of the elevated standard of conduct to which they are supposed to be held. (*People v. Hill* (1998) 17 Cal.4th 800, 819.) The prosecutors ignored their duty to fully and fairly present to the court the evidence material to the charge upon which Goodwin stood trial. (*In re Ferguson* (1971) 5 Cal.3d 525, 531.) The prosecutors ignored the goals of ascertainment of truth and seeking justice. (*Ibid*.) The prosecutors relied heavily upon false evidence created by LASD's investigators in order to arrest and convict Goodwin. No forfeiture should be found. (See also Goodwin's argument at pages 364 through 366 of his opening brief.)

B. Goodwin's Misconduct Claims Are Substantiated

Respondent contends Goodwin's "assertions of misconduct are long on invective and innuendo, but woefully short on evidentiary and

legal support." (RB 247.) Respondent's position is a classic case of projection.

1. Respondent Effectively Concedes by Failing to Address Goodwin's Arguments

As a preliminary matter, respondent substantially fails to address Goodwin's claims. "The reviewing court is not required to make an independent, unassisted study of the record in search of . . . grounds to support the judgment. It is entitled to the assistance of counsel. The appellate court may reject an issue, even if it is raised, if a party failed to support it with adequate argument." (*People v. Hardy* (1992) 2 Cal.4th 86, 150.) Every brief should contain legal argument with citation of authorities of points made, and if none is furnished on a particular point, the court may treat it as waived. (9 Witkin, California Procedure [Appeals] (3d Ed.) § 497 at p. 469; see *Sprague v. Equifax* (1985) 166 Cal.App.3d 1012, 1050.) Respondent has not specifically addressed appellant's arguments on this point, and thus has effectively conceded the validity of appellant's position. (See *Westside Center Associates v. Safeway Stores 23, Inc.* (1996) 42 Cal.App.4th 507, 529; see also *People* v. *Williams*, *supra*, 16 Cal.4th 153, 206 [Points perfunctorily asserted without argument in support are not properly raised]; and *California School Employees Assn. v. Santee School Dist*. (1982) 129 Cal.App.3d 785, 787 ["[T]he district apparently concedes by its failure to address this issue in its appellate brief . . ."].) If a party "does not expand on the issue with . . . citation to relevant authority" the court may "decline to

address the issue. [Citations.]" (*People v. Hardy* (1992) 2 Cal.4th 86, 150; in accord, *People v. Solorzano* (2005) Cal.App.4th fn. 4 [rejecting Attorney General's argument].) The lack of a response to appellant's argument effectively concedes the issue. (See *People v. Bouzas* (1991) 53 Cal.3d 467, 480 [respondent's failure to engage arguments operates as concession].)

2. All of Goodwin's Claims Are Substantiated

(a) Respondent Has Effectively Conceded Goodwin's Arguments Regarding Collene Campbell's Improper Influence by Substantially Failing to Address Them and Picking at Goodwins Record Citations Instead

First, respondent dismisses in a conclusory fashion Goodwin's claim Collene Campbell interfered with the investigation of the Thompson murders. (RB 247-248.) Respondent offers no argument or discussion of this issue, other than to declare it "baseless" because the citations in Goodwins opening brief are not to "testimony." (RB 247.) Without citing to the record, respondent complains Goodwin "points mainly to unsubstantiated representations of trial counsel, along with memoranda and reports written by Detective Griggs that were not admitted into evidence at trial." (RB 247.) While Goodwin can only guess at what respondent is referring to, respondent's complaint about not referencing "trial" evidence is irrelevant. In support of all of his contentions, Goodwin cites to pretrial motions and hearings, all material in the record.

Respondent chooses snippets of Goodwin's many citations to the record and attacks them. Respondent asserts Goodwin's "statement that '[f]rom the start of the investigation, Campbell insisted Goodwin had the Thompsons killed' finds no apparent support in the record citation. (AOB 367, citing 5CT 1198-1199.)" (RB 247.) That citation appears to be a typographical error, which is not surprising given the BATES-stamping in that volume is extremely difficult to read. The cite should be to 5CT 1188-1189, where Griggs wrote: "From the start of the case Ms. Campbell has maintained that Michael Goodwin had her brother killed."

Next respondent points out Goodwin's assertion that "'Campbell lobbied her personal friend and attorney. . .Tony Rackauckas to help pursue Goodwin.' (AOB 367, citing 6CT 1503-1505.)" Here respondent misquotes Goodwin's brief by lopping off part of the sentence without employing ellipses to show only part of the sentence was quoted. The full sentence is: "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 [emphasis on the omitted part of the sentence].) The italicized portion of that sentence that respondent omitted is what is supported by the record citation. Goodwin describes Campbell's relationship at page 389 of his

opening brief.[50]

Next respondent attacks Goodwin's assertion that "Detective Griggs 'secreted his memoranda in the evidence locker, apparently concerned the material would disappear if it went through normal Sheriff's Department channels" is based on trial counsel's assertion. (AOB 367-368, citing 4RT R-13.) It was never substantiated, despite the fact that the detective testified at trial." (RB 247.) The time for the People to object to trial counsel's representation was during the *Pitchess* hearing, during which trial counsel made that assertion. DDA Jackson raised no objection at the time that trial counsel's representation was inaccurate. (4RT R-13.) Respondent has forfeited this point on appeal.

Respondent complains that the Griggs memos do not establish that Campbell "caused the investigators to do anything inappropriate" and that Goodwin "fails to show any connection between Campbell and the supposed 'manufactured evidence' or suppressed exculpatory evidence." (RB 247-248.) Here respondent ignores the nature of Goodwin's argument concerning Campbell, which is that 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. (See AOB, pages 388-392.) Goodwin's ability to be

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This foundational information may have inadvertently ended up being presented later in the brief due to the extensive revisions Goodwin had to do in order to shorten the opening brief per this Court's order. Goodwin apologizes for any confusion this created.

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 facts show that Griggs was attempting to conduct a reasonably fair investigation, Campbell pestered him relentlessly to conduct the investigation her way – with a focus on Goodwin – and essentially drove Griggs off of the case. Lillienfeld came on board and behaved less scrupulously than Griggs.[51] (See AOB pp. 372-380.) Respondent makes no attempt to address the particulars of any of Goodwin's arguments, and therefore has effectively conceded this cluster of issues. (See authorities in section XVI.B.1., *supra*.)

(b) Respondent Has Effectively Conceded Goodwin's Arguments Regarding Detective Lillienfeld's Misconduct by Substantially Failing to Address Them and Picking at Goodwins Record Citations Instead

Respondent substantially fails to address Goodwin's arguments regarding Lillienfeld's misconduct, choosing again to quibble over

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Goodwin has separately responded to respondent's objections to his request that this Court take judicial notice of the Orange County Preliminary hearing transcript. (RB 248.) As soon as this reply brief is filed, Goodwin will provide the transcript of which he has asked this Court to take judicial notice.

Goodwin's citations to the record. (RB 248-251; see AOB pp. 366-374, 379-388.)

First, respondent complains "the record citations do not support the assertion that in his participation with an episode of America's Most Wanted, Detective Lillienfeld "'fictionalize[ed] the 'facts' to which witnesses later testified.'" (AOB 372.) As respondent did with the Campbell record cites, respondent deceptively misquotes Goodwin's opening brief to twist its meaning. What Goodwin's opening brief really says is: "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.)" In other words, Goodwin's meaning was that Lillienfeld participated in a television show that fictionalized – through a crime-scene "reconstruction" – the "facts" to which witnesses later testified. At the place Goodwin cites, the record establishes Lillienfeld's participation in that show. Goodwin discussed elsewhere in his opening brief how witnesses's memories may have been, or actually were, influenced by fictionalized television depictions of the crime in a manner that violated Goodwin's due process rights and denied him a fair trial. (See, e.g. AOB pp. 2, 19, 26, 120-121, 125-126, 132, 136, 138, 140-141, 170, 314, 356.)

Respondent next attacks Goodwin's assertion Lillienfeld "'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' and 'manufactured evidence (AOB 372) fails to acknowledge that the trial court found otherwise." (RB 248-250.)

Here respondent contradicts its position that the issue of Lillienfeld's duplicity was "forfeited" for failure to raise it below. (RB 245-246.) Respondent also appears to take the insupportable position (citing no authority) that, because the trial court ruled adversely to Goodwin on some of the facts about Lillienfeld lying, the inquiry ends there.

Respondent attacks Goodwin's reliance on *People v. Headlee* (1941) 18 Cal.2d 266, 267. (RB 249-250; AOB 383-384.) As respondent does throughout its briefing, respondent misstates Goodwin's argument and takes small pieces of it out of context, substantially failing to address it. First, respondent fails to note the first part of Goodwin's argument, which starts at page 379 of the opening brief. Goodwin's argument is that 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. (AOB 379-388.) While Goodwin's opening brief addresses *all* of the known demonstrably false statements and testimony Lillienfeld presented to various courts from the beginning of his investigation (AOB 379-388), respondent addresses only the 402 hearing Judge Schwartz conducted at Goodwin's Los Angeles trial regarding Lillienfeld's misrepresentations about Goodwin having a gun or guns consistent

with the murder weapon. (RB 248.)

Respondent fails to address any of Goodwin's argument at pages 379 through 388 of his opening brief except for application of the *Headlee* standard and the misrepresentations Lillienfeld made about Gail Moreau-Hunter. (See RB 248-252.)

Respondent argues the *Headlee* standard has no application in the context of Goodwin's claim the OCDA used false evidence in order to arrest and charge Goodwin in Orange County. (RB 249-250.) Respondent again muddies up the issues. The question here is not whether Judge Schwartz found Lillienfeld credible; the question is whether the OCDA used false evidence developed by Lillienfeld in an attempt to prosecute Goodwin in Orange County, and then Jackson and Dixon carried on with a prosecution in Los Angeles based on false evidence after the Court of Appeal in Orange County dismissed the case. (See AOB pp. 379-388.) Goodwin cites *Headlee* in the context of defining what false evidence is.

As for Gail Moreau-Hunter, respondent denies "the detective and prosecutor knowingly proffered such false testimony and attempted to prevent the defense from finding out the truth." (RB 250-251.) Respondent claims the argument is "devoid of evidentiary support." (RB 251.) Respondent asserts that, "based on unsubstantiated assertions that the witness's statements were the product of delusions, appellant leaps to the speculative inference that the prosecution knew her statements were false at the preliminary

hearing." (RB 251.) Respondent urges that, "[f]rom the record, it appears that neither party had obtained Moreau-Hunter's medical records prior to the Los Angeles trial." (RB 251.) To the contrary, Lillienfeld falsely 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.)

Respondent stubbornly insists that, because some of the false evidence that propelled Lillienfeld's "investigation" and instigation of the Orange County prosecution – namely Goodwin's possession of a potential murder weapon and Moreau-Hunter's statement – was not used against Goodwin in the Los Angeles prosecution, the misconduct originating in Orange County could not have contributed to the ultimate guilty verdict. (RB 254-255.) Respondent also dismisses, without discussing in any depth, the evidence that Campbell's influence on the OCDA was so great as to violate the requirement that the prosecution of criminal offenses on behalf of the People is the sole responsibility of the public prosecutor. (RB 255.) Although, as respondent remarks, the underlying prosecution was not filed by Campbell or any other private citizen, Goodwin has established Campbell's undue influence on the process leading up to Goodwin being charged. (See AOB pp. 366-373, 388-392.)

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.[52] 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.)

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.)

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[52] See Argument III, *supra*.

Outrageous government misconduct pervaded this case.

3. 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

Respondent characterizes Goodwin's claim that Lillienfeld engaged in forum-shopping and usurped power as "incoherent and baseless." (RB 252-256.)

Respondent denies 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.) Respondent denies Goodwin's contention that a sheriff's deputy lacks authority to investigate crimes in other California counties. (RB 252.)

(a) Detective Lillienfeld Usurped Power

Respondent ignores the provisions of the California Constitution identifying California sheriffs as county officials. (See *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.]; Cal. Const. Article XI, § 1(b).)

Respondent does not deny that the sheriff acts for the county when conducting investigations and that the county is liable for any misconduct by the sheriff. (See authorities cited in Goodwin's AOB at

pages 374-375.) Respondent appears to agree with Goodwin's assertion that 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 under Penal Code § 830.1. (RB 252.)

Respondent, however, disagrees with Goodwin's reliance on *People v. Pina* (1977) 72 Cal.App.3d Supp. 35, 39-40, for the proposition that a sheriff's powers, with a few statutory exceptions, are limited to actions within the deputy's county of employment. (RB 252-253.) Respondent does not explain how Lillienfeld's knowledge that a double murder that had been committed in Los Angeles would affect his authority to cross the border into Orange County to investigate without "the prior consent of the chief of police, or person authorized by him to give such consent." (*Id*. at p. 38.) Respondent complains Goodwin has not "develop[ed] the necessary factual support" to "rule out the possibility that Detective Lillienfeld had received consent to investigate in Orange County" and concludes "neither *Pina* nor any of [Goodwin's] authorities support his allegation that Detective Lillienfeld acted outside his jurisdiction." (RB 253.)

To the contrary, Lillienfeld left a paper trail indicating his lack of authority to cross the border into Orange County in various Orange County proceedings. Lillienfeld admitted that, because in 1998 the LADA declined to prosecute Goodwin due to insufficient evidence, he 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.)

Respondent complains that Goodwin "presents no authority for the far-fetched notion that a peace officer can engage in judge- or forum-shopping." (RB 253.) That is precisely the point; Lillienfeld was not authorized to engage in judge- or forum-shopping, and yet he did just that and bragged about doing it in grand jury and preliminary hearing proceedings in Orange County. (OCPHRT 29; OCGJ Lillienfeld RT, 885-886.)

Finally, respondent asserts that "any impropriety in the filing of charges in Orange County was remedied with the appellate court's dismissal of the matter on venue grounds." (RB 253-254.) It is not the "impropriety in filing . . . charges in Orange County" that prejudiced Goodwin; it was Lillienfeld's unauthorized expansion of his investigation into Orange County after the LADA initially rejected this case that garnered Lillienfeld the resources to obtain search and arrest warrants and other assistance he would not otherwise have had in pursuing Goodwin. 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, once the prosecution in Orange County ended.

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

Other than dismissing Goodwin's claim of forum-shopping in two sentences, respondent does not address the issue. (RB 253.) Goodwin stands by the arguments and authorities presented at pages 376 through 378 of his opening brief.

4. 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

Respondent denies the OCDA used false evidence in order to arrest and charge Goodwin in Orange County. (RB 254-256.)

(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, supra,* 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* (2000) 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.

C. **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.[53] (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.[54]

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[53] http://articles.latimes.com/2001/aug/30/local/me-40177

[54] http://members.calbar.ca.gov/fal/Member/Detail/51374

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. (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* (1994) 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* (1935) 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* (1983) 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.[55]

D. 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. 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

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[55] See discussion in section XVII. F, *infra*.

be taken into account as part of the quantum of evidence supporting a dismissal in this case.[56]

XVII. REVERSAL IS REQUIRED BASED ON THE CUMULATIVE EFFECT OF THE ERRORS

Respondent declines to respond to Goodwin's cumulative error argument. (RB 256.) Rather than repeat it here, Goodwin refers the Court to pages 394-399 of his opening brief.

CONCLUSION

Goodwin had demonstrated his 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: December 31, 2013

Respectfully submitted,

GAIL HARPER
Attorney for Appellant
MICHAEL GOODWIN

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56 Goodwin anticipates he will be able, if necessary, to develop facts supporting this issue and others in habeas corpus proceedings.

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 60,502 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 December 31, 2013.

_____

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CERTIFICATE OF MAILING

I hereby certify that I mailed a true copy of the foregoing to the following persons at the following addresses on the 31st day of December, 2013:

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_____

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