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No. _____

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

IN RE THE ACCUSATION OF
LARA BAZELON,

AGAINST LINDA JOANNE ALLEN.

State Bar Case No. 19-O-15691

PDF 1 OF 7

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ACCUSATION AGAINST AN ATTORNEY WITH EXHIBITS A-D AND 1-3

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TO THE HONORABLE CHIEF JUSTICE OF CALIFORNIA AND ASSOCIATE JUSTICES OF THE SUPREME COURT:

This is an Accusation under California Rules of Court, rule 9.13(d), requesting review of a decision by the State Bar of California to close Petitioner Lara Bazelon's complaint against Linda Allen, a former Assistant District Attorney in San Francisco. Petitioner has filed this verified Accusation within 60 days after fully exhausting the review process before the State Bar. The State Bar's Complaint Review Unit mailed its final decision denying Petitioner's complaint on April 28, 2021. (Cal. Rules of Court, rule 9.13(d), (e)(1); Ex. A [Complaint Review Unit Denial of Appeal].)[1] The Supreme Court should review this Accusation because (1) it is necessary to settle important questions of law related to two exceptions to the five year statute of limitations for filing a State Bar complaint—the independent source doctrine and the tolling of the limitations period based on pending proceedings related to the same acts and circumstances; (2) Petitioner, a law professor with no connection to the litigation in the underlying matters where Allen committed prosecutorial misconduct, did not receive a fair hearing before the State Bar; and (3) the State Bar's refusal to recommend any discipline for Allen is not appropriate given that both the California Court of Appeal and the San Francisco District Attorney's Office concluded that Allen's conduct in two homicide trials constituted brazen prosecutorial misconduct. Prosecutors seeking a 50 year sentence cannot make up evidence "out of whole cloth"—as the Court of Appeal concluded that Allen did here—and yet be found not to have

[1] The letter itself is dated April 27, 2021, but it was mailed on April 28. Ex. 17 [Postmarked envelope from State Bar].

violated the State Bar code of conduct by clear and convincing evidence. (Cal. Rules of Court, rule 9.16.)

INTRODUCTION

Jamal Trulove spent six years in prison after being wrongfully convicted due to highly prejudicial prosecutorial misconduct where Allen presented false evidence during closing argument. The Court of Appeal reversed Trulove's conviction, finding that Allen had simply made up the false evidence "out of whole cloth." During his wrongful incarceration at San Quentin, a prisoner stabbed Trulove thereby demonstrating why Trulove had to fear for his life on a daily basis for six years. Allen's misconduct contributed directly to Trulove's wrongful conviction; when she retried Trulove and was not permitted to commit the same misconduct, Trulove was acquitted. No innocent citizen should ever be exposed to such deliberate and egregious mistreatment at the hands of a prosecutor.

Nothing threatens the integrity of our justice system more than an unethical prosecutor who cheats to convict an innocent citizen in a murder trial. When this happens, the State Bar must act decisively to sanction the prosecutor to deter other prosecutors from subverting the integrity of our justice system. Here, however, the State Bar chose to do nothing. It refused to investigate Allen by hiding behind a tortured interpretation of the statute of limitations that is flatly contradicted by controlling legal precedent. The State Bar's refusal to do its job is particularly concerning given that (a) a unanimous Court of Appeal condemned Allen's unethical behavior in the strongest possible terms, (b) Allen's office promoted her into a managerial position and permitted her to retry Trulove, and (c) Petitioner will prove that Allen must be sanctioned by relying on the same legal arguments that the State Bar has previously advanced to this Court and the State Bar Court in similar cases of prosecutorial misconduct, but inexplicably ignores here.

Petitioner respectfully requests that this Court conduct an independent review of this Accusation against Allen pursuant to its power to entertain disciplinary proceedings. (See Bus. & Prof. Code §§ 6100-6117; *In re Attorney Discipline System* (1998) 19 Cal.4th 582, 611 [citing *In re Accusation by Walker* (1948) 32 Cal.2d 488, 490 (describing the bar complaint procedure and noting the California Supreme Court's ultimate power to "independently [] entertain disciplinary proceedings" once "the accuser has followed the normal procedure by first invoking the disciplinary powers of The State Bar"].) Petitioner contends that the minimum sanction for Allen should be the discipline the State Bar recently obtained against another prosecutor who committed similar misconduct in a homicide trial— *In the Matter of Andrew M. Ganz* (Final Order of Discipline, Supreme Ct., June 3, 2018, No. S254852). In *Ganz*, the State Bar Court determined that a prosecutor who withheld exculpatory evidence from defense counsel in a murder trial should receive a 90 day suspension from practicing law and a two year probation. (Amended Dec. at p. 2, *In the Matter of Andrew M. Ganz*, Hearing Dept., Jan. 11, 2019, No. 14-O-02363.)

Independent review by this Court is warranted based on the following ***undisputed*** facts:

- The State Bar has repeatedly asserted that prosecutors must be held to a higher ethical standard because prosecutors represent the sovereign and are obligated to pursue justice, not win cases;
- Since prosecutors enjoy absolute immunity from civil liability regarding any prosecutorial misconduct they commit, the State Bar and this Court must play a critical role in protecting the public from prosecutors who abuse their power;

- The State Bar has repeatedly asserted that the State Bar Court must take action against prosecutors who deprive defendants of their right to a fair trial due to prosecutorial misconduct;
- The State Bar has repeatedly asserted that deceitful statements made by a prosecutor who is attempting to secure a murder conviction are especially reprehensible;
- The State Bar has repeatedly asserted that a Court's finding of prosecutorial misconduct must be given "great weight" in related disciplinary proceedings;
- Here, the California Court of Appeal ruled that Allen committed "egregious" and "highly prejudicial" prosecutorial misconduct in the *Trulove* murder trial because Allen presented a closing argument that was a "yarn [] made out of whole cloth";
- After falsely convicting Trulove due to her prosecutorial misconduct, Allen sought and obtained a 50 year sentence against Trulove;
- Trulove served six years in prison before winning his release on appeal—and was violently stabbed by another prisoner during his unjustified incarceration at San Quentin;
- After the Court of Appeal reversed Trulove's conviction due to Allen's "highly prejudicial misconduct," Allen was permitted to, and did, retry Trulove;
- At the retrial, when Allen was not permitted to commit the "highly prejudicial" misconduct that dominated her closing argument in the first trial, the jury acquitted Trulove—thereby confirming the severity of Allen's prosecutorial misconduct in Trulove's first trial;
- In the *Barnes* murder prosecution, Allen's colleague in the San Francisco District Attorney's Office confirmed to the Trial Court

that Allen committed prosecutorial misconduct by intentionally withholding critical *Brady* evidence from defense counsel—a tape recorded exculpatory witness statement where an eyewitness to the shooting identified someone other than the defendants as the sole shooter; *Brady v. Maryland* (1963) 373 U.S. 83, 87;

- The State Bar is responsible for protecting the public from the exact sort of abuse of prosecutorial power committed by Allen in the *Trulove* and *Barnes* prosecutions;
- Petitioner is an independent law professor who had ***no*** role in either the *Trulove* or *Barnes* matters;
- The State Bar has repeatedly emphasized that the tolling provision should be applied broadly, with all benefits of the doubt applied to prevent the claim from being dismissed.
- The State Bar has previously advanced the same position that Petitioner advances here regarding the independent source exception to the statute of limitations; namely that an individual like Professor Bazelon who did not represent the parties in the underlying litigation qualifies as an independent source thereby eliminating any statute of limitations issues; *In the Matter of Phillips* (Review Dept., Mar. 4, 2011, No. 05-O-03782 (06-O-13490)) 2011 WL 9375622, at p. 4;
- On December 5, 2014, Trulove filed an in limine motion in his retrial to preclude Allen from committing the same misconduct in her remarks to the second jury;
- Trulove's in limine motion, which litigated issues related to the same underlying prosecutorial misconduct by Allen, was filed inside the five year limitations period given that Professor Bazelon sent her initial letter to the State Bar on May 10, 2019; and

- On January 5, 2016, Trulove filed a federal civil rights lawsuit against the City of San Francisco in which Allen was subpoenaed, deposed, and wrote a sworn declaration on behalf of the defendants. Her misconduct was argued to the jury during Trulove's civil trial—again demonstrating that the facts underlying Allen's misconduct continued to be litigated well inside the five year limitations period.

In short, the State Bar inexplicably reneged on its obligation to protect the public from Allen's misconduct on a disturbing set of facts that cry out for investigation and discipline. The State Bar's purported reasoning, that the complaint is time-barred, ignores controlling precedent that makes clear that a complaint that originated from an individual who was not harmed by the attorney's misconduct "is not a time-barred complainant." *In the Matter of Phillips, supra,* 2011 WL 9375622, at *4. As in *Phillips*, the complainant in this case had no relation to the litigation, and was not personally harmed by the attorney's misconduct. Instead, "she merely provided the State Bar with a narrative referencing court files which documented [respondent's] misconduct." *Ibid*. Thus, the statute of limitations in Allen's case "does not apply as a matter of law," because the State Bar obtained its information from the third party complainant's narrative and a "review of the court files." *Ibid*. This is not a case, as the State Bar claimed, "based solely on a complaint." *Ibid*.

Even assuming that the statute of limitations did apply, the State Bar erred in not applying the proper tolling procedure where the depth and breadth of the misconduct became clear only after the retrial in 2015—making it clear that Allen's misconduct was worse than the appellate court ever knew.

As a result of the State Bar's numerous errors and failure to act, this Court must take action against Allen. Failure to act against Allen would embolden other prosecutors to commit similar acts of prosecutorial

misconduct and thereby expose innocent citizens in our communities, like Mr. Trulove, to being wrongfully convicted and sentenced to lengthy sentences or even life in our prisons. Our system of justice cannot tolerate such an unconscionable result.

STATEMENT OF FACTS

I. ALLEN COMMITS "HIGHLY PREJUDICIAL" PROSECUTORIAL MISCONDUCT IN *PEOPLE V. TRULOVE*

A. Allen Presents False Evidence in Her Closing Argument to Secure Trulove's Conviction

In June 2009, the San Francisco District Attorney's Office charged Jamal Trulove with the first-degree murder of a man named Seu Kuka. Trial began in 2010. Allen presented only one witness—Priscilla Lualemaga—to identify Trulove as Kuka's killer. As Allen acknowledged repeatedly in her closing argument, the whole case boiled down to whether the jury believed Lualemaga. "You don't have to have corroboration. It can be through the testimony of one witness."[2]

Allen repeatedly suggested that Trulove or someone close to Trulove threatened Lualemaga and that she testified despite that danger. Allen also told the jury that the District Attorney's Office had no choice but to put Lualemaga in the witness protection program because of the danger she faced: "Remember we have to put her in witness protection before she testified at the prelim."[3] Allen went further, telling the jury that Lualemaga was forced to live "in some crummy hotel room," and all the while "[s]he's afraid for herself, afraid for her life; her husband's life, her children's life."[4] In fact, Lualemaga and her family were never in any danger. The District

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[2] Ex. 8 [Closing Argument of Linda Allen, *People v. Trulove* (Super. Ct. San Francisco County, Feb. 1-2, 2010, No. 2391686)], at pp. 2425:28–2426:2.
[3] Ex. 8, at p. 2357.
[4] Ex. 8, at pp. 2350, 2353.

Attorney's Office moved them to permanent housing that was not "some crummy hotel room." There was no justification for putting Lualemaga and her family in the witness protection program: not in a "crummy hotel room" and not later in permanent housing.[5]

Allen used the nonexistent "threat" to Lualemaga to improperly establish Trulove's consciousness of guilt and vouch for her sole eyewitness. In the first trial, Allen presented ***no*** evidence to demonstrate that Trulove or anyone else had ever threatened Lualemaga. This is because, as it turned out, there was none. Lualemaga admitted in sworn testimony at Trulove's retrial that neither Trulove nor anyone associated with him had ever threatened her—no one had.[6] In addition, Lualemaga testified at her deposition that she spoke with Allen "probably more than 10" times before the first trial.[7] Thus, Allen had to know her statements in closing argument about Lualemaga's concerns about "revenge and retaliation" from Trulove were not true—any diligent prosecutor who met with a witness "probably more than 10 times" would know the answer to such a fundamental and important question. Nor was this an inadvertent mistake or a stray remark by an inexperienced prosecutor. Allen had been a prosecutor for 19 years at the time of the Trulove's initial trial.[8] She repeated this false argument to the jury over and over during both her initial

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[5] Ex. 9 [Deputy Chief Larry J. Wallace, mem. to Linda Allen re: "Witness Priscilla Maliolagi Lualemaga," Jan. 12, 2010; Lualemaga Payment Receipts], at p. 1.

[6] Ex. 7 [Retrial Testimony of Priscilla Lualemaga (*People v. Trulove*, *supra*, Feb. 18, 2015, No. 2391686)], at pp. 622:11–623:1.

[7] Ex. 10 [Deposition of Priscilla Lualemaga, *Trulove v. City and County of San Francisco* (N.D. Cal., Feb. 13, 2017, No. 18-cv-00050)], at p. 114:20-22.

[8] Allen was a prosecutor in New York originally; she joined the California State Bar in 1991 and began prosecuting cases at the San Francisco District Attorney's Office. Ex. 6 [Deposition of Linda Allen (*Trulove v. San Francisco*, N.D. Cal., Apr. 6, 2017, No. 16-cv-00050)], at p. 8:14–10.

and rebuttal closing arguments—it was her theme and her theory for why Lualemaga was credible. This was no accident—this was intentional and knowing prosecutorial misconduct.

To undergird this argument, Allen made much of the fact that the District Attorney's office had placed Lualemaga into witness protection. Documentation in Allen's file shows that by the time of trial, in 2010, Lualemaga had received $19,234.74 in benefits from the district attorney's office and was living in permanent housing that cost $1,350.00 per month to rent.[9] Nor was Lualemaga the only one who benefitted from the District Attorney's witness protection program. Shortly before the trial, at Lualemaga's request, the prosecution team placed her sister and her sister's family in the witness protection program even though they had not received any threats and her sister was not a witness.[10] In total, Lualemaga's sister and her sister's family received $10,200 in benefits from the state.[11]

During this time, Lualemaga was unemployed and her husband was only doing side jobs and they relied on money provided by the witness protection program to support themselves and their kids.[12] Lualemaga and her family remained in the witness protection program for more than a year after Trulove was convicted. The record shows that from June 1, 2009 through April 30, 2011, Lualemaga received nearly $63,000 in benefits from the state through the witness protection program, which was authorized by the San Francisco District Attorney's Office.[13]

Again and again in her closing argument, Allen commanded the jury to credit her witness' testimony—saying at one point: "***you have to believe***

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[9] Ex. 9, at p. 1.
[10] Ex. 7, at p. 661:17-27.
[11] *Id*. at p. 684:5-9.
[12] *Id*. at p. 684:14-25.
[13] Ex. 9, at p. 2.

her."[14] Allen told the jury that they had to believe Lualemaga because Lualemaga was "brave, courageous"[15] because she stepped forward even though she was "afraid for her life; she's afraid for her family's life; afraid for her sister's life."[16] She emphasized Lualemaga's fear, repeatedly stating that her witness was "terrified."[17] Allen spoke of "the sacrifices that she's had to make" stating, "[s]he will never get her life back."[18]

Allen went on, "[Lualemaga] didn't want to be sitting there where everybody could see her, where there's an open courtroom that could be full of the defendant's friends and family all going to know she's the one. She's the only one standing between him [Trulove] and justice, because she's the only witness."[19] Allen claimed that Lualemaga's "life will never be the same. I don't think she's ever going to have a day when she's not looking over her shoulder."[20] She concluded, "So you have to believe her."[21] Allen's implication was clear: Trulove or his family and friends had threatened Lualemaga's life because she was the only eyewitness to his alleged crime.

Allen also said that Lualemaga had to be telling the truth because of what she had sacrificed and that she was still "paying the price for it." Only someone telling the truth would take such risks and make such sacrifices, Allen said—"give up your life; be scared forever; worry about

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[14] Ex. 8, at p. 2350:21 (bold and italics added).
[15] *Id.* at p. 2316:21.
[16] *Id.* at p. 2316:26-27.
[17] Allen said Lualemaga was "terrified" 11 times in her arguments. Ex. 8, pp. 2313:20-21, 25; 2316:22-25; 2353:2-3, 9-10; 2362:3-4, 15-16; 2363:2-4.
[18] *Id.* at p. 2316:24, 27-28.
[19] *Id.* at p. 2353:11-16.
[20] *Id.* at p. 2350:11-13.
[21] *Id.* at p. 2350:21.

you, your family, your husband, your sister."[22] She repeated these words nearly verbatim just a few transcript pages later, saying "how sure would you have to be [to] put your life in peril?" and "how sure would you have to be before you would to risk your life on it?"[23]

Allen went on, "All of this danger, all of her fears. Everything she has suffered for, because she was a witness. She didn't miss that point. She's smart enough to know she doesn't have to do this. And the only reason she's doing this is because it's the truth. And it's the right thing to do."[24] Allen finished the opening portion of her closing by saying that Lualemaga "was the only witness willing to come forward; the only witness willing to walk in here, risk her life, and tell you what she saw. She has done her part; now I'm asking you to do yours."[25]

In her rebuttal closing, Allen returned to the same false trope of bravery in the face of present imminent danger. Allen said, "And Priscilla, Priscilla's life is priceless to her. Priceless. What is your life worth to you? What would you risk your life for?"[26] Allen continued, "You can't underestimate the sacrifice that Priscilla has made, just to do the right thing. The more scared she gets, the more certain she has to be."[27] Allen ended this way, "People don't come forward. But Priscilla did. Now I am asking you to have the same courage that she did and convict the defendant of murder."[28]

The "right thing to do here" was for Allen to present an honest case. Trulove did not threaten Lualemaga. No one had, and, as it turned out from

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[22] *Id.* at p. 2356:4-6, 19.
[23] *Id.* at pp. 2361:24-25, 2362:1-2.
[24] *Id.* at p. 2363:21-26.
[25] *Id.* at p. 2389:19-21.
[26] *Id.* at p. 2444:25-27.
[27] *Id.* at p. 2445:10-12.
[28] *Id.* at p. 2446:11-13.

Lualemaga's retrial testimony, Allen must have known it. Allen presented no evidence that either Trulove or his family and friends ever threatened Lualemaga because there was none. Moreover, Lualemaga ultimately admitted in subsequent sworn testimony that no one had threatened her.[29] Not Trulove. Not Trulove's family. Not Trulove's friends. No one. Allen made it all up to win a conviction. Based on Allen's false statements in closing argument, the jury convicted Trulove of first-degree murder. The Trial Court sentenced Trulove to 50 years to life in prison.[30]

B. The California Court of Appeal Reverses Trulove's Murder Convictions Due to Allen's "Highly Prejudicial" Misconduct

In 2014, a unanimous panel of justices on the California Court of Appeal reversed Trulove's convictions due to his trial counsel's failure to object to Allen's repeated and egregious prosecutorial misconduct. The Court found that Allen "***repeatedly engaged in prejudicial misconduct*** when she urged the jury to believe Lualemaga because Lualemaga testified in the face of real danger of retaliation from defendant's friends and family, and endured hardships in a witness protection program that this danger compelled her and others to enter, ***when there was no evidence of such danger***."[31]

The Court of Appeal summarized Allen's numerous acts of prosecutorial misconduct: (1) Allen referred to facts not in evidence, (2) improperly vouched for the credibility of her sole eyewitness, and (3) offered assurances that Lualemaga had told the truth based on non-existent facts.[32] The Court found that state and federal law prohibited Allen's

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[29] Ex. 7, at pp. 622:11–623:1.
[30] Ex. 1 [Unpub. Dec. at p. 1, *People v. Trulove* (Cal. Ct.App., Jan. 6, 2014, No. A130481) 2014 WL 36469].
[31] *Id.* at p. 10 (bold and italics added).
[32] *Id.* at pp. 10–13.

"***highly prejudicial misconduct.***"[33] The Court further explained, "such prohibitions are particularly important regarding prosecution references to threats to a witness because of the highly prejudicial subject matter; evidence that a defendant is threatening witnesses implies a consciousness of guilt and is thus highly prejudicial and admissible only if adequately substantiated."[34]

The Court condemned Allen for making up a false argument to bolster Lualemaga's credibility to secure Trulove's conviction:

> ***The People did not present a scintilla of evidence at trial that defendant's friends and family would try to kill Lualemaga if she testified against him***, nor that Lualemaga was placed in the witness protection program for any reason other than Lualemaga's subjective concerns about her safety. Rather than concede Lualemaga's fears were just that, however, the People trumpeted her courageous willingness to testify in the face of assassins lurking on defendant's behalf. ***This yarn was made out of whole cloth***. Because the heavy emphasis the prosecutor repeatedly placed on the asserted dangers Lualemaga faced by testifying against defendant must have influenced the jury, and such dangers were not based on any evidence, the prosecutor's argument to the jury was prejudicial prosecutorial misconduct under both the federal and state standard. . . .
>
> When prosecutorial misconduct occurs, an appellate court must determine whether there was sufficient prejudice to require reversal under the federal standard articulated in *Chapman v. California* (1967) 386 U.S. 18, 24 and/or the state standard articulated in *People v. Watson* (1956) 46 Cal.2d 818, 836. (*People v. Adanandus* (2007) 157 Cal.App.4th 496, 514.) We conclude there was sufficient prejudice. This misconduct was not harmless beyond a reasonable doubt.[35]

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[33] *Id.* at p. 7.
[34] *Id.* at p. 10.
[35] *Id.* at p. 13 (bold and italics added).

Because Allen's misconduct was so prejudicial and the case against Trulove was supported only by Lualemaga's "sparse testimony," the Court of Appeal found the prosecutorial misconduct constituted prejudicial error and overturned Trulove's conviction.[36]

C. Trulove Wins an Acquittal in His Retrial

In 2015, Allen re-prosecuted Trulove on the same charges. The retrial is significant for three reasons. First, on December 5, 2014, Trulove's trial counsel filed a motion in limine to exclude Allen's false argument regarding the alleged threats against Lualemaga.[37] Thus, the issue of Allen's prosecutorial misconduct continued to be litigated during Trulove's retrial in 2015. That fact demonstrates that the statute of limitations argument the State Bar advances here—that Allen's misconduct was not litigated after the Court of Appeal ruling—is wrong because the "pending proceedings" tolling exception now applies.

Second, Lualemaga admitted on cross-examination that neither Trulove nor his family or friends had ever threatened her. This new evidence establishes that Allen must have acted knowingly and intentionally when she made her false argument to the jury in the first trial. Specifically, Lualemaga testified in the retrial that: (1) Trulove had never threatened her; (2) nobody associated with Trulove had ever threatened her; and (3) nobody ever threatened her in connection with being a witness in this case.[38] Lualemaga's testimony established facts about the scope of

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[36] *Id.* at pp. 15, 16.

[37] Ex. 16 [Defendant Trulove's Motions in Limine (*People v. Trulove* (Super. Ct. San Francisco County, Dec. 5, 2014, No. SCN 208898/MCN 2391686)), at pp. 1–2 ("The prosecution be ordered not to make any arguments that violate the holding of the Court of Appeal in *People v. Trulove* (2014 Cal.App.Unpub.LEXIS 26)").

[38] The following excerpt from Lualemaga's cross examination on February 18, 2015 makes this clear:

Allen's misconduct well beyond those presented to the Court of Appeal. The Court of Appeal knew only that there was no evidence in the record to support Allen's closing argument; the Court did not know that Allen knew that Trulove had not threatened Lualemaga. That knowledge takes Allen's misconduct out of the realm of reckless and makes clear that Allen must

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Counsel:	So I want to be clear about one thing right from the start. Jamal Trulove has never threatened you; is that correct?
Lualemaga:	Yes.
Counsel:	And no one associated with Jamal Trulove has ever threatened you?
Lualemaga:	Right.
Counsel:	And nobody, in fact, has ever threatened you in connection with you being a witness in this case, correct?
Lualemaga:	Right.
Counsel:	The fear that you feel as sort of a generalized fear, that comes from having watched television, what you've seen on t.v.?
Lualemaga:	Just documentaries, news, and stuff like that.
Counsel:	On t.v.?
Lualemaga:	Yes.
Counsel:	And you've been fearful all of a sudden because you expected something might happen, but nothing has actually happened, correct?
Lualemaga:	Correct.

Ex. 7, at pp. 622:11–623:1.

have acted intentionally—after all, she met with Lualemaga at least ten times before she testified. There was no evidence either inside or outside the record at trial that Trulove threatened Lualemaga.

Third, on March 11, 2015, a jury that considered the evidence without being polluted by Allen's false statements acquitted Trulove. Thus, the jury's acquittal in Trulove's retrial demonstrated that Allen's intentional and knowing misconduct had caused Trulove's conviction in the first trial.

D. In 2016, Trulove Continues to Litigate Allen's Misconduct in His Lawsuit Against the City of San Francisco

Though innocent and finally vindicated, Trulove did not exit the criminal justice system unscathed. While wrongfully incarcerated for over six years—from the time he was arrested on October 27, 2008, to the time of his acquittal in the second murder trial on March 11, 2015[39]—Trulove suffered a number of physical and emotional injuries. For example, during his incarceration at San Quentin, an inmate stabbed Trulove in the stomach causing Trulove to constantly fear being murdered in prison.[40] In addition to the severe physical trauma, Trulove also lost the opportunity to parent his four children, who were all under the age of five when he was arrested. They barely remembered him when he was released from custody.[41]

In 2016, Trulove sued the City of San Francisco and others in federal court for framing him by fabricating evidence and withholding exculpatory evidence.[42] Even though Trulove could not sue Allen because Allen enjoys absolute immunity as a prosecutor, Trulove still litigated Allen's

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[39] Ex. 12 [Complaint, *Trulove v. City & County of San Francisco* (N.D. Cal, Jan. 5, 2016, No. 4:16-cv-00050)], at p. 33 ¶ 203.
[40] Ex. 12, at pp. 30 ¶¶ 174–175, 34 ¶ 206.
[41] *Id.* at p. 34 ¶ 207.
[42] Ex. 12. For the factual background of the lawsuit, see Ex. 2 [*Trulove v. D'Amico* (N.D. Cal., Feb. 27, 2018, No. 16-cv-050) 2018 WL 1070899 (unpublished order granting in part, and denying in part, motion for summary judgment).].

misconduct throughout his civil case. For example, Trulove's complaint directly referenced Allen's misconduct and the Court of Appeal's ruling that concluded that Allen "'did not present a scintilla of evidence' of any threats" against Lualemaga and that "this yarn was made of whole cloth."[43] Allen was also deposed as part of the civil proceedings in April 2017. In her deposition, she continued to insist that Trulove was guilty and called his acquittal "a defeat for justice."[44]

A unanimous civil jury agreed that Trulove had been falsely convicted and awarded Trulove $10 million in April of 2018. In March of 2019, the city paid Trulove a $13.1 million settlement. Trulove is now one of more than 2,400 wrongfully convicted people listed on the National Registry of Exonerations.[45]

II. ALLEN WITHHOLDS EXCULPATORY EVIDENCE IN THE *PEOPLE V. BARNES ET AL.* MURDER PROSECUTION.

On February 23, 2009, several fights broke out in the Tenderloin in San Francisco. Someone fired into the crowd of people killing one person and injuring others. The police did not recover the murder weapon.[46] The San Francisco District Attorney's Office ultimately charged Barbara Barnes, Javon fee, and Rorico Reyna with premeditated murder, assault with a firearm, and conspiracy to sell cocaine.[47]

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[43] Ex. 12, at p. 26 ¶ 153.
[44] Ex. 6, at pp. 22:18–23:12.
[45] The full procedural history of the case is documented in the National Registry of Exonerations report on Jamal Trulove. (Ex. 3 [Jamal Trulove, National Registry of Exonerations, at https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=4658 (as of June 24, 2021)]). See also Ex. 1 (procedural history of case through 2014 is documented in the Court of Appeal decision).
[46] Ex. 4 [Motion to Dismiss, *People v. Barnes* (Super. Ct. San Francisco County, Apr. 23, 2014, No. SCN 211977/2410155)], at p. 3.
[47] *Ibid*.

Two days after the shooting, police ***recorded*** an interview with an eyewitness named Cedric Brown.[48] Brown told police inspectors that a man who went by the street names "Rufus" and "Stoney" was the person who "did the shooting."[49] Brown said that Roofus [sic]/Stoney's face was "very clear" to him and that Brown had "just bought drugs from him" on the day of the interview.[50] Neither of these street names matched any of the defendants. Brown also said that Roofus [sic]/Stoney was a man with a large scar on his face—neither of the male defendants had a facial scar. Brown said he could identify a picture of Rufus/Stoney but the government never presented Brown with a photo array or a live line up.[51] Brown also warned the government that he was seriously ill because he suffered from both cancer and HIV.[52]

The detective typed up a three-page single spaced report summarizing Brown's exculpatory statement.[53] The detective also put the audio recording of the interview on a CD that he labeled "CD 55." Allen was the prosecutor assigned to the case in 2009.[54] Despite the defense attorneys' many oral and written requests for exculpatory discovery, Allen withheld the report and recording of Brown's exculpatory interview.[55]

According to the certified court minutes, Allen handled the preliminary hearing on March 1, 2010.[56] Allen remained the prosecutor of

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[48] *Id.* at pp. 4, 18.
[49] *Id.*, Ex. C [Motion to Dismiss, Transcript of Cedric Brown Interview], at pp. 16.
[50] *Id.*, Ex. C, at p. 10.
[51] *Id.* at pp. 4–5, Ex. C, at p. 41.
[52] *Id.* at pp. 4–5, Ex. C, at p. 3.
[53] *Id.,* Ex. B [Motion to Dismiss, Summary of Cedric Brown Interview, bates-stamped 005149-005151].
[54] Ex. 5 [Transcript of *Barnes* discovery hearing, June 25, 2013], at pp. 2:24-7:21.
[55] *Id.*, at pp. 2-7.
[56] Ex. 11 [*Barnes* Certified Court Minutes], at pp. 16, 31, 46.

record on May 6, 2010, when the case was set for arraignment following the preliminary hearing.[57] It is undisputed that Allen had a constitutional obligation to disclose material exculpatory evidence prior to the preliminary hearing—which would include disclosing the exculpatory tape recorded statement that Brown had provided to the prosecution team.[58] However, Allen knowingly and intentionally failed to comply with her constitutionally mandated discovery obligation—her own colleague, ADA Scot Clark, acknowledged as much to the Trial Court on June 25, 2013.[59]

The case was set for trial on June 18, 2010.[60] Under Penal Code section 1054.7, Allen's statutory discovery obligations were triggered 30 days before that date, on or before May 18, 2010. ADA Clark disclosed the Brown interview to defense counsel on March 18, 2013. At that point, more than four years had passed since the detectives conducted and memorialized the interview with Brown. By that time, the ailing Brown had passed away—he had died on November, 20, 2012, four months earlier.[61] ***That means Brown was alive, but unknown to the defense, during the preliminary hearing and five previously scheduled trial dates***. Because Allen failed to disclose the exculpatory evidence from Brown in her possession, defense counsel did not know that Brown was a witness with exculpatory information suffering from a terminal illness so defense counsel did not interview Brown and preserve his testimony via a video-

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[57] *Id.* at pp. 15, 30, 45.
[58] *People v. Gutierrez* (2013) 214 Cal.App.4th 343, 349; see also *Merrill v. Super. Ct.* (1994) 27 Cal.App.4th 1586, 1594; and *Stanton v. Super. Ct.* (1987) 193 Cal.App.3d 265, 272.
[59] Ex. 5, at pp. 2:16–3:1.
[60] Ex. 11, at pp. 15, 30, 45.
[61] Ex. 4, at pp. 4:14–18, 5:8–13.

recorded conditional examination, as provided by Penal Code section 1335 et seq.[62]

At a discovery hearing, ADA Clark conceded that Brown's interview "had actually reached the DA's office in 2009 and my predecessor on the case [Allen] had excluded it, had marked it as something that should be excluded, apparently believing at the time that it was confidential for some reason."[63] ADA Clark's "predecessor" was Allen. Defense counsel noted, "***So you know, there is a deliberateness to this [failure to disclose], and I appreciate that Mr. Clark has indicated that for Ms. Allen.***"[64] Defense counsel explained that Allen had years earlier disclosed a different CD, CD 56, an audio recording of an interview with a different witness that occurred at the same time as Brown's interview.[65] The prosecution team conducted the witness interviews at roughly the same time, but the witness on CD 56 inculpated, rather than exculpated, the defendants.[66] In other words, Allen readily provided defense counsel with

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[62] Penal Code section 1336(a) allows the defense to record a witnesses' testimony under these exact circumstances: "When a material witness for the defendant, or for the people, is . . . so sick or infirm as to afford reasonable grounds for apprehension that he or she will be unable to attend the trial, or is a person 65 years of age or older, or a dependent adult, the defendant or the people may apply for an order that the witness be examined conditionally."

[63] Ex. 5, at pp. 2:24–3:1. There was no reason to exclude Brown's testimony as being "confidential." Brown was a percipient witness who identified the shooter as someone other than Javon Lee and did not implicate the other co-defendants. His understanding of what happened flatly contradicted the People's case, which meant that he not only had nothing to fear from the defendants, his statements had to be disclosed to them under federal and state constitutional law because they tended to show that someone else was responsible.

[64] *Id.* at p. 7:22-23 (bold and italics added).

[65] *Id.* at p. 7:18-21.

[66] Ex. 4, at p. 5:8-13.

discovery that fit her view of the case while knowingly withholding exculpatory evidence that did not. That is inexcusable.

Notably, Allen's own office acknowledged the severity of her misconduct in the *Barnes* prosecution. ADA Clark admitted to the Trial Court that "***I think there's a lot of stuff I have that they [defense counsel] don't have. And I think the logical place to start, there may be motions on that. There may be sanctions that flow from that.***"[67] Clark continued, "I'm kind of a proud guy inasmuch as -- and of course, this is going to have a Brady issue, but in the cases that I handle from cradle to grave, there aren't issues like this . . . ***I think there's volumes of other stuff out there that may give rise to a deeper inquiry***."[68]

After the defense team filed motions to dismiss due to Allen's misconduct, the District Attorney's Office resolved the cases against Barnes, Lee, and Reyna through plea agreements where the defendants received far less custodial time than the mandatory minimum 25 year to life sentence that would have accompanied a first degree murder conviction.[69]

PROCEDURAL HISTORY

I. PROFESSOR BAZELON SENDS INITIAL LETTER TO STATE BAR DATED MAY 10, 2019

On May 10, 2019, Lara Bazelon, a professor at University of San Francisco School of Law, sent a letter to the State Bar of California with 11

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[67] *Id.* at p. 3:3-6.
[68] *Id.* at pp. 3:18-20, 4:1-3.
[69] In 2015, Barnes pleaded guilty to manslaughter and assault with a firearm; she received eight years in prison. In 2015, Reyna pleaded guilty to manslaughter and assault with a firearm; he received eight years in prison. In 2015, Lee pleaded guilty to manslaughter, a firearms enhancement, and assault with a deadly weapon and received 23 years in prison. Barnes and Reyna—who were charged with the most serious crime it is possible to commit—have served their sentences and are no longer in state prison. None of the three received the mandatory life sentence that a murder conviction entails. See Ex. 11.

exhibits totaling hundreds of pages that detailed Allen's prosecutorial misconduct in both the *Trulove* and *Barnes* cases.[70] The exhibits included the Court of Appeal decision in Trulove, transcripts from the retrial and the civil case, transcripts from a number of pretrial hearings in the Barnes case and other official records. Professor Bazelon did not serve as counsel of record, a witness, a juror, or in any other capacity in either the *Trulove* or *Barnes* cases—she was completely independent of both prosecutions. Professor Bazelon specializes in ethics, wrongful convictions, and issues of racial justice in the criminal justice system. Her scholarship has focused on the intersection of ethics and advocacy, and she has written extensively about the root causes and ramifications of prosecutorial misconduct. After Professor Bazelon learned about the severity of Allen's misconduct in both *Trulove* and *Barnes*, she felt compelled to notify the State Bar about Allen's unethical behavior. Professor Bazelon does not claim to have personal knowledge of Allen's conduct—she is an independent source who reported publicly available information to the State Bar.

In her May 10, 2019 letter to the State Bar, Professor Bazelon provided evidence that demonstrated that Allen had committed multiple ethical violations. For example, Professor Bazelon demonstrated that Allen's confirmed prosecutorial misconduct in her closing argument in *Trulove* violated Business and Professions Code sections 6068(a) and 6106, which prohibit attorneys from violating the law and committing acts of moral turpitude, respectively. Professor Bazelon also demonstrated that Allen's failure to provide the exculpatory witness interview in the prosecution of *Barnes et al*. violated Business and Professions Code sections 6068(a) and 6106, and State Bar Rules of Professional Conduct, rule 3.4.

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[70] Ex. D [Linda Allen Bar Complaint].

Professor Bazelon also addressed the issue of the statute of limitations. Rule 5.21(A) of the California State Bar Rules of Procedure states: "If a disciplinary proceeding is based ***solely*** on a complainant's allegations of a violation of the State Bar Act or Rules of Professional Conduct, the proceeding must begin within five years from the date of the violation" (bold and italics added). Professor Bazelon noted that the five-year period is tolled in a number of circumstances, including while "civil, criminal, or administrative investigations or proceedings based on the same acts and circumstances as the violation are pending with any governmental agency, court, or tribunal."[71] She also noted that the Rule also has an independent source exception: specifically, Rule 5.21(G) provides that the five-year statute of limitations period does not apply to "disciplinary proceedings that were investigated and initiated by the State Bar based on information received from an independent source other than a complainant."

With respect to the Barnes complaint, there is no dispute that it was timely filed. As the State Bar concedes, the case was not resolved until January 7, 2015,[72] meaning that the five year statute of limitations did not expire until January 7, 2020; Professor Bazelon sent her initial letter to the State Bar eight months earlier, on May 10, 2019.

With respect to the *Trulove* complaint, Professor Bazelon argued that the time limit set forth in Rule 5.21 would not apply to the misconduct in *Trulove* because any disciplinary action against Allen would not be based ***solely*** on allegations from a complainant—for example, a disgruntled client or the defendant in a criminal case. Instead, the complaints fell under Rule 5.21(G) because the allegations were based on the court files

[71] State Bar Rules of Proc., rule 5.21(C)(3).
[72] Ex. 11, at pp. 3, 13, 33.

documenting Allen's misconduct, which are independent sources.[73] Professor Bazelon is also an independent source herself—a fact that the State Bar itself has advocated in other similar factual scenarios. (*In the Matter of Phillips*, *supra,* 2011 WL 9375622, at *4.) Professor Bazelon also argued that even assuming that the five year limitations did apply, it must be tolled under rule 5.21(C)(3) in both the *Trulove* and *Barnes* cases because proceedings "based on the same acts or circumstances as the violation" were pending inside the five-year limitations period—such as Trulove's retrial in 2015 and subsequent litigation against the City of San Francisco in 2016.

II. STATE BAR INVESTIGATOR SARA MASTER REJECTS PETITIONER'S COMPLAINT ON OCTOBER 27, 2020

Months went by after Professor Bazelon sent her initial letter to the State Bar. Finally, on October 27, 2020, nearly a year and half after Professor Bazelon sent her initial letter, the State Bar sent Professor Bazelon a short letter stating that it was closing the file simply due to the age of Allen's prosecutorial misconduct.[74] The State Bar failed to address the substantive merits of the prosecutorial misconduct summarized by the Court of Appeal in the *Trulove* matter as well as the other independent public records detailing the rest of Allen's prosecutorial misconduct.

Without a coherent explanation or citation to any legal authority, the State Bar stated that the five-year time limit from rule 5.21(A) applied, that Professor Bazelon was not entitled to tolling, and that there was no independent source exception.[75] With respect to the misconduct in

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[73] State Bar Rules of Procedure, rule 5.21(G) provides, "The five year limit does not apply to disciplinary proceedings that were investigated and initiated by the State Bar based on information received from an independent source other than a complainant."
[74]Ex. C [Closing Letter from State Bar], at p. 1.
[75] *Ibid.*

Trulove, the State Bar stated that the statute of limitations began to run after the Court of Appeal made its finding of "prejudicial prosecutorial misconduct" against Allen on January 6, 2014.[76] The State Bar stated, "This is the first, and only, time that the court made a finding that Ms. Allen engaged in prosecutorial misconduct throughout the Trulove matters. As such, the five year Rule of Limitations commenced January 6, 2014, and lapsed on January 6, 2019."[77] The State Bar went on, "There are no court findings to support that Ms. Allen's misconduct was litigated in the retrial."[78]

Notably, the State Bar refused to cite any authority for the proposition that there must be a "court finding" for the tolling exception to apply. None exists. In fact, the State Bar has a long history of advocating just the opposite. The State Bar has long taken the position that the tolling provision must be applied broadly, with the benefits of the doubt applying against enforcing the rule of limitations. (See, e.g., State Bar Opening Brief at p. 6, *In re Saxon* (Review Dept., Nov. 12, 2019, No. 17-O-01259) (hereafter "Saxon brief") [citing Bus. & Prof. Code § 6001.1 ["public protection is the highest priority of the State Bar in exercising its licensing, regulatory and disciplinary functions"]].) The State Bar simply did not address the fact that the issue of Allen's misconduct was litigated in Trulove's retrial, which is unquestionably a "criminal . . . proceeding[s] based on the same acts and circumstances as the violation."[79] But for Ms. Allen's misconduct and trial counsel's ineffectiveness in failing to object to it, there would not have been a retrial. Moreover, counsel at the retrial litigated Ms. Allen's misconduct in the first trial by seeking a ruling from

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[76] *Id.* at p. 2.
[77] *Ibid.*
[78] *Ibid.*
[79] State Bar Rules of Proc., rule 5.21(C)(3).

the court to prevent it from happening again.[80] Trulove was acquitted on March 11, 2015, thereby extending the five year limit to March 11, 2020. The retrial itself exposed more information about Allen's conduct, because new testimony from Lualemaga established that she was never threatened or in danger from Trulove or anyone else, facts that were not elicited at the first trial and that the Court of Appeal therefore could not consider in its 2014 opinion.

The State Bar also stated that Trulove's federal civil rights lawsuit in connection with the wrongful conviction procured by Allen, which resolved in a favorable jury verdict in 2018, did not toll the statute because "the issues raised were unrelated to Ms. Allen's misconduct."[81] The pleadings and trial transcript illustrate that the State Bar's position is inaccurate. Allen was deposed by Trulove's counsel prior to the trial. Trulove's civil complaint expressly raises Allen's misconduct during closing argument and the resulting Court of Appeal's finding against Allen.[82] The parties also stipulated that the Court of Appeal's finding of misconduct by Allen would be directly read to the jury at the civil trial.[83] Trulove's attorney also reiterated the importance of Allen's misconduct to the jury in her opening statement.[84]

The State Bar also based its decision on the fact that Trulove did not name Allen as a defendant in his civil complaint. That fact is immaterial and irrelevant to the limitations analysis. The State Bar expressly ignores that (a) Allen enjoys absolute immunity under the law from civil claims

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[80] Ex. 16.
[81] Ex. C, at p. 2.
[82] Ex. 12, at p. 26 ¶¶ 152–153.
[83] Ex. 14 [Additional Trial Stipulations re Adverse or Hostile Witnesses], at p. 2.
[84] Ex. 15 [Opening Statements by Plaintiff (*Trulove v. D'Amico* (N.D. Cal., Mar. 12, 2018, No. CV 16-0050)], at p. 30:15-24.

regarding her prosecutorial misconduct, and (b) Trulove is not legally obligated to name Allen as a defendant in the civil case to toll the limitations period. That is not the test—the relevant inquiry is simply whether the issues raised in Trulove's civil case related to Allen's prior prosecutorial misconduct. They did. That tolls the limitations period.

Regarding tolling in *Barnes*, the State Bar claimed that with the statute running on January 7, 2020—five years after the *Barnes* case ended in plea agreements—Professor Bazelon's initial letter gave them "insufficient timing for the State Bar to file charges in the matter."[85] Professor Bazelon's letter dated May 10, 2019 was filed a full ***eight months*** before the statute of limitations would run under the State Bar's reading of the limitations period. The State Bar appeared to be arguing that it could reject a timely filed complaint by claiming "insufficient tim[e]" to investigate, even though "insufficient tim[e]" to investigate is not a valid reason to refuse to look into colorable claims of prosecutorial misconduct. Again, the State Bar cited no legal authority to support its position because none exists.

Turning to the independent source exception, the State Bar stated that the exception was inapplicable:

> There are various sources from which the State Bar receives complaints such as clients, family and friends of clients, courts, opposing counsel, members of the public or other third parties, and anonymous submissions. Here, you indicated that the defense motion to dismiss, certified court minutes, and a hearing transcript satisfy the rule because they originated from independent sources. However, the rule requires the State Bar receive the information from an independent source, and in this case, the information was received exclusively from you and there was no additional independent source.[86]

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[85] Ex. C, at p. 3.
[86] *Ibid.*

In other words, the State Bar closed its investigation of Allen's "highly prejudicial" prosecutorial misconduct simply because Professor Bazelon attached court files to support her letter rather than offering up "clients, family and friends of clients, courts, opposing counsel, members of the public or other third parties." Under the State Bar's flawed interpretation, if the court files and exhibits to the complaint documenting Allen's misconduct had been delivered by anyone other than Professor Bazelon—Trulove, his friends or family, or any other human being acting as a separate messenger to Professor Bazelon's allegations, that would be sufficient to trigger the protection of the independent source doctrine. In the eyes of the State Bar, the fact that Professor Bazelon had the professionalism and work ethic to include the court files in her letter to help the State Bar conduct an accurate review of Allen's conduct somehow meant that the limitation period could not be tolled. This blinkered interpretation of the independent source doctrine is nonsensical and puts good faith citizens like Professor Bazelon in the ridiculous position of soliciting sympathetic minded individuals to become "independent" messengers of documents already in her possession or simply hoping that a like-minded person will, on their own, decide to forward on to the State Bar an appellate decision that is readily available to the Bar itself. (Indeed, how such an appellate decision could exist and the State Bar decline to take the initiative to act on it is a matter of concern in and of itself). In short, the State Bar took Professor Bazelon's diligence and used it as a reason to close her complaint without investigating it. And did so in a case where the Court of Appeal determined that Allen had committed highly prejudicial prosecutorial misconduct—misconduct that led Trulove to be wrongfully incarcerated for six years and suffer a stabbing while imprisoned at San Quentin.

III. PROFESSOR BAZELON APPEALS TO THE COMPLAINT REVIEW UNIT DATED JANUARY 25, 2021

On January 25, 2021, Professor Bazelon timely appealed to the Complaint Review Unit of the State Bar.[87] In her letter, Professor Bazelon highlighted the absurdity of the decision to close the investigation into Allen's confirmed prosecutorial misconduct, which hinged on erroneous interpretations of the statute of limitations and the applicable exceptions. Professor Bazelon's arguments are more fully developed below in part III of the Argument section.

IV. THE COMPLAINT REVIEW UNIT REJECTS THE APPEAL ON APRIL 28, 2021

On April 28, 2021, the Complaint Review Unit of the State Bar rejected Professor Bazelon's appeal and again refused to proceed against Allen in either the *Trulove* or *Barnes* matters.[88] The State Bar doubled down on its flawed interpretation of the statute of limitations. First, the Review Unit stated that the time limit in rule 5.21 applied because, "any disciplinary proceeding flowing from [Professor Bazelon's] complaint would be based solely on [Professor Bazelon's] allegations" against Allen.[89] Next, the Review Unit found that the independent source exception did not apply because "the only information received by the State Bar regarding [Allen's] alleged misconduct was received by [Professor Bazelon], the complainant."[90]

Then the Review Unit found that the "pending proceedings" tolling exception did not apply in either the *Trulove* or *Barnes* cases.[91] For *Trulove*, the Review Unit asserted that the exception did not apply because,

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[87] Ex. B [Appeal to Complaint Review Unit].
[88] Ex. A.
[89] *Id.* at p. 2.
[90] *Ibid.*
[91] *Ibid*.

after the Court of Appeal decision, "[t]here are no subsequent court decisions" to show that Allen's misconduct "was litigated at any point during the retrial." Just like the State Bar's prior letter, the Review Unit cited no authority for the proposition that there must be a "court decision" for the pending proceedings tolling exception to apply. The Review Unit reiterated, without citing any controlling authority, that Trulove's civil action did not toll the statute because Allen was not a defendant in that case, and "the claims raised therein were not based on [Allen's] alleged misconduct."[92]

For *Barnes*, the Review Unit found that the statute began to run on March 18, 2013, when the exculpatory witness interview was finally handed over to the defense.[93] The Review Unit explained that the tolling exception "is inapplicable as there are no pending proceedings in this matter—the matter resolved by plea agreements on January 7, 2015."[94] Apparently, the Review Unit believed that a criminal case that ends in a plea agreement is not a "proceeding" for purposes of the tolling exception—a proposition for which, once again, the State Bar provided no authority. None exists.

Lastly, while the State Bar's initial response did not address the merits of Professor Bazelon's complaint, the Complaint Review Unit briefly touched on the merits in two short paragraphs to make the additional findings that the allegations against Allen did not amount to clear and convincing evidence of misconduct.

The Complaint Review Unit rested its merits finding on: (1) inconsistencies in an earlier opinion by the Court of Appeal in *Trulove* that found Allen's closing argument to be appropriate—an opinion that was

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[92] *Ibid*.
[93] *Id.* at pp. 2–3.
[94] *Id.* at p. 3.

reversed by a unanimous panel of the Court of Appeal on rehearing in an opinion written by the same justice; (2) lack of a court ruling in *Barnes* making a specific finding on the *Brady* issue—even though Allen's own office admitted that her actions constituted prosecutorial misconduct to the Trial Court; and (3) lack of "specific facts that [Allen] acted with the requisite intent or recklessness" to meet the clear and convincing evidence standard needed to prove ethical violations in State Bar Court—even though neither intent nor recklessness are required to prove the primary statutes Professor Bazelon alleges that Allen violated, and the facts demonstrate that Allen's misconduct in both cases was knowing and intentional given that the witness admitted under oath that Trulove never threatened her and Allen took affirmative steps to withhold the exculpatory evidence in *Barnes* by marking it to not be produced to defense counsel.

STANDARD OF REVIEW

The Supreme Court exercises original jurisdiction over disciplinary proceedings. (*In re Rose* (2000) 22 Cal.4th 430, 442.) "The ultimate decision regarding attorney discipline rests with the Supreme Court, which has not hesitated to impose a harsher sanction than recommended by the Review Department, and when the facts have warranted doing so, the Court has even rejected a recommendation of suspension and disbarred the attorney." (*In re Silverton* (2005) 36 Cal.4th 81, 89–90.)

This Court will exercise its power to independently entertain disciplinary proceedings against members of the bar where "(1) [] the accuser has set forth specific charges which, if proved, would constitute grounds for disciplinary action; (2) [] the same specific charges have been previously presented in written form to The State Bar for the purpose of invoking its disciplinary powers; and (3) [] following such presentation to The State Bar, it has arbitrarily failed or refused to grant a hearing on such

specific charges or has arbitrarily failed or refused, after a hearing, to take appropriate action." (*In re Accusation by Walker*, 32 Cal.2d at 490.)

As explained above in the Procedural History section, Professor Bazelon satisfied the first and second prongs of *Walker* when she sent a detailed letter to the State Bar on May 10, 2019, presenting the same specific charges against Allen as are set forth below. Moreover, in addition to the information provided above in the Statement of Facts and Procedural History sections, the following argument sets forth specific charges which would constitute proper grounds for disciplinary action, and illustrates that the State Bar arbitrarily refused to grant a hearing here. Thus, pursuant to *Walker*, Professor Bazelon respectfully asks that this Court grant review of this case and independently entertain disciplinary proceedings against Allen due to her prosecutorial misconduct in the *Trulove* and *Barnes* prosecutions.

ARGUMENT

I. THIS COURT'S REVIEW OF ALLEN'S CONFIRMED MISCONDUCT IS CRITICAL DUE TO THE UNIQUE ROLE OF THE PROSECUTOR IN OUR JUSTICE SYSTEM

This Court stated in *Jackson v. State Bar* (1979) 23 Cal.3d 509, 514: "Our principal concern is always the protection of the public, the preservation of confidence in the legal profession, and the maintenance of the highest possible professional standard for attorneys." Whatever the "highest possible professional standard" may be for attorneys generally, it is undisputed that the State Bar and this Court demand an even higher standard for prosecutors.

The unique role of the prosecutor in our system of justice has repeatedly been recognized by this Court and the United States Supreme Court. According to this Court, "A prosecutor is held to a standard higher than that imposed on other attorneys because of the unique function he or she performs in representing the interests, and in exercising the sovereign

power, of the state." (*People v. Hill* (1998) 17 Cal. 4th 800, 820.) Moreover, in *Berger v. United States* (1935) 295 U.S. 78, 88, Justice Sutherland explained that the prosecutors must focus on pursuing justice, not simply winning cases:

> [The prosecutor] is the representative not of an ordinary party to a controversy, but of a sovereignty . . . whose interest, . . . in a criminal prosecution is not that it shall win a case, but that justice shall be done. . . . It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.

Beyond the unique role of the prosecutor in our justice system, disciplinary proceedings involving prosecutors require special attention from the State Bar because it is the only means of holding prosecutors accountable for their misconduct because they enjoy absolute civil immunity. This point is undisputed. The State Bar itself asserted this fact in its trial brief to the State Bar Court in *In the Matter of Andrew M. Ganz*. The State Bar argued that since "prosecutors are immune from lawsuits, [the State Bar] Court and others like it play a critical role in protecting the public from prosecutorial power[.]" (State Bar's Trial Brief at p. 27 (State Bar Ct., Aug. 16, 2018, No. 14-O-02363) (hereafter Ganz Brief).)

The State Bar's point in *Ganz* bears repeating here. If the State Bar refuses to investigate, much less sanction unethical prosecutors who obtain wrongful convictions via prosecutorial misconduct, our justice system will lack any mechanism to deter this misbehavior.

II. ALLEN'S CONFIRMED PROSECUTORIAL MISCONDUCT IN TWO MURDER PROSECUTIONS CONSTITUTES GROUNDS FOR DISCIPLINARY ACTION

The fact that Trulove was wrongfully convicted makes Allen's "highly prejudicial" misconduct particularly egregious, but a wrongful conviction is not required to trigger an investigation—the guilty pleas of

Barnes and the other co-defendants in that case do not relieve the State Bar of its responsibility. "Regardless of whether a wrongful conviction ultimately occurs, [the State Bar] Court must take action when prosecutors try to deprive defendants of their right to a fair trial." (*Ganz* Brief, at pp. 27–28.) Allen was a veteran prosecutor who committed multiple acts of misconduct in homicide cases. Allen's confirmed misconduct in *Trulove* and *Barnes* constitute grounds for disciplinary action based on this Court's precedent and briefs the State Bar has filed in other similar matters involving prosecutorial misconduct. This Court's review is crucial to ensuring that this unethical prosecutor is held accountable.

A. Allen's Highly Prejudicial Closing Argument in *Trulove* Constitutes Grounds for Disciplinary Action

1. The Court of Appeal's Finding of Prosecutorial Misconduct Is Entitled to Great Weight

According to the State Bar, "Deceitful statements, when made by a prosecutor who is attempting to secure a murder conviction, are especially reprehensible." (*Ganz* Brief, at p. 33–34; citing *Pickering v. State Bar* (1944) 24 Cal.2d 141, 145 ["It is the endeavor to secure an advantage by means of falsity which is denounced"].) It is undisputed that Allen made multiple deceitful statements in her closing argument in *Trulove*. A unanimous panel of justices for the California Court of Appeal found that Allen "repeatedly engaged in prejudicial misconduct when she urged the jury to believe Lualemaga because Lualemaga testified in the face of real danger of retaliation from defendant's friends and family, and endured hardships in a witness protection program that this danger compelled her and others to enter, when there was ***no evidence of such danger.***"[95]

The Court then enumerated Allen's numerous acts of misconduct: (1) Allen referred to facts not in evidence, (2) improperly vouched for the

[95] Ex. 1, at p. 10 (bold and italics added).

credibility of her key witness, and (3) offered assurances that Lualemaga was a truth teller based on non-existent facts.[96] Allen's statements in her closing argument, the Court found, were prohibited by state and federal law and constituted "***highly prejudicial misconduct***."[97]

The Court of Appeal found that the "impropriety of these contentions was ***particularly egregious*** because they implied a consciousness of guilt on defendant's part; and they likely persuaded jurors because they were made by a prosecutor whose office, the jury knew, had arranged for Lualemaga and her family members to enter the witness protection program."[98]

The Court further explained that "such prohibitions are particularly important regarding prosecution references to threats to a witness because of the highly prejudicial subject matter; 'evidence that a defendant is threatening a witness implies consciousness of guilt and is thus *highly prejudicial* and admissible only if adequately substantiated.'"[99] (*Id.* at p. 10.) In this case, the court found, there was no such evidence: "the only pertinent evidence was that Lualemaga had voluntarily entered the [witness protection] program solely because of her own general fears."[100]

The Court of Appeal's condemnation of Allen's conduct was stark:

> ***The People did not present a scintilla of evidence at trial that defendant's friends and family would try to kill Lualemaga if she testified against him***, nor that Lualemaga was placed in the witness protection program for any reason other than Lualemaga's subjective concerns about her safety. Rather than concede Lualemaga's fears were just that, however, the People trumpeted her courageous willingness to testify in the face of assassins lurking on defendant's behalf.

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[96] *Id.* at pp. 10–13.
[97] *Id.* at pp. 7, 13 (bold and italics added).
[98] *Id.* at p. 2 (bold and italics added).
[99] *Id.* at p. 10, quoting *People v. Warren* (1988) 45 Cal.3d 471, 481.
[100] *Id.* at p. 12.

> ***This yarn was made out of whole cloth***. Because the heavy emphasis the prosecutor repeatedly placed on the asserted dangers Lualemaga faced by testifying against defendant must have influenced the jury, and such dangers were not based on any evidence, the prosecutor's argument to the jury was prejudicial prosecutorial misconduct under both the federal and state standard.[101]

Consistent with the position the State Bar advanced in *Ganz,* the Court of Appeal's findings against Allen should be entitled to "great weight" in this proceeding—particularly because the State Bar has historically viewed this type of prosecutorial misconduct as "especially reprehensible." (See *Ganz* Brief, at pp. 23, 34.) This point is undisputed. The findings which the State Bar asserted were entitled to "great weight" in *Ganz* were findings of prosecutorial misconduct made by the trial judge on a motion to dismiss by the defendant in a related criminal case. (*Id.* at p. 16.). The Court of Appeal's finding in the *Trulove* case was made in the context of an appellate decision overturning Trulove's murder conviction in the ***same*** criminal case. As such, the Court's findings regarding Allen's prosecutorial misconduct should be given great weight in this case.

2. Allen's "Highly Prejudicial" Closing Argument Constitutes an Act of Moral Turpitude in Violation of Business and Professions Code, Section 6106

Business and Professions Code section 6106 provides that, "The commission of any act involving moral turpitude, dishonesty or corruption. . . . constitutes a cause for disbarment or suspension." An improper closing argument by a prosecutor can be grounds for a violation of section 6106. (*In re Field* (2010) 5 Cal. State Bar Ct. Rptr. 171, 184.) In *Field*, the Review Court found Field culpable for violating section 6106 for an improper closing argument, because the timing of the argument—saving the improper argument for rebuttal—showed his deceptiveness. (*Ibid.*)

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[101] *Id.* at p. 13 (bold and italics added).

Allen's misconduct in the Trulove case was far more pervasive and damaging.

Moreover, according to the State Bar's brief in *Ganz*, a prosecutor violates section 6106 when the prosecutor fails to correct the record when a witness testifies falsely. (*Ganz* Brief, at p. 28.) Certainly then, when a prosecutor like Allen makes deceitful statements herself in court (an act of commission, as opposed to the act of omission in *Ganz*), her conduct violates section 6106. (See also *Price v. State Bar* (1982) 30 Cal.3d 537, 542, 548 [prosecutor violated section 6106 when he altered evidence in a criminal trial].)

In this case, the Complaint Review Unit stated that one of the reasons it would not reopen the complaint against Allen was that Professor Bazelon's "case file does not include specific facts that Respondent acted with the requisite *intent* or *recklessness*" needed to prove a violation of "the Rules of Professional Conduct or the State Bar Act."[102] The State Bar's position, however, misstates the relevant standard. Intent or recklessness does not need to be shown to prove a violation of section 6106—gross negligence is enough. (See, e.g., *In the Matter of Wyrick* (1992) 2 Cal. State Bar Ct. Rptr. 83, 91 [attorney violated section 6106 because he "was grossly negligent in preparing the [job] application letter and thereby improperly held himself out as entitled to practice law"].)

In addition, Allen's closing argument was both reckless and intentionally deceitful. It is undisputed that (a) Lualemaga ultimately admitted under oath at Trulove's retrial that neither Trulove nor his friends had ever threatened her[103] and (b) Allen spoke with Lualemaga on more than 10 occasions before her trial testimony.[104] How can the State Bar

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[102] Ex. A, at p. 3 (italics added).

[103] Ex. 7, at pp. 622:11–623:1.

[104] Ex. 10, at p. 114:11-22.

claim that Allen's false statements during closing argument were not reckless when the Court of Appeal held that Allen made up the story about Lualemaga being threatened by Trulove "out of whole cloth?" If making false statements in closing argument to convict innocent defendants in murder trials is not reckless, what is? The State Bar has said that deceitful statements made by a prosecutor who is attempting to secure a murder conviction are especially reprehensible. (*Ganz* Brief, at p. 34). So how does the State Bar claim that Allen's deceitful statements are not reckless? Prosecutors cannot simply make up stories in closing arguments to juries to wrongfully convict defendants in murder trials. Clear and convincing evidence supports a finding that Allen's highly prejudicial closing argument violated section 6106.

3. Allen's "Highly Prejudicial" Closing Argument Constitutes a Violation Business and Professions Code, Section 6068(a)

Business and Professions Code section 6068(a) provides that, "It is the duty of an attorney . . . to support the Constitution and laws of the United States and of this state." A prosecutor's improper closing argument may violate section 6068(a). (*In re Field*, *supra*, 5 Cal. State Bar Ct. Rptr. at p. 184.) In Field, the State Bar Court's Review Department disciplined a prosecutor who had argued facts in closing argument that were not in evidence, citing section 6068(a). (*Ibid*.) In addition, under state and federal law, a prosecutor's reference to facts not in evidence is "'clearly misconduct' [citation], because such statements 'tend[ ] to make the prosecutor his own witness—offering unsworn testimony not subject to cross-examination.'" (*People v. Hill*, *supra*, 17 Cal.4th at 828.) "Statements of supposed facts not in evidence . . . are a highly prejudicial form of misconduct, and a frequent basis for reversal." (*Ibid*., citing 5 Witkin & Epstein, Cal. Crim. Law (2d ed. 1989) § 2901, p. 3550.) "A prosecutor's 'vigorous' presentation of facts favorable to his or her side

'does not excuse either deliberate or mistaken misstatements of fact.'" (*Id*. at p. 823, quoting *People v. Purvis* (1963) 60 Cal.2d 323, 343).) "[T]he prosecutor has a special obligation to avoid 'improper suggestions, insinuations, and especially assertions of personal knowledge.'" (*United States v. Roberts* (9th Cir. 1980) 618 F.2d 530, 533, [quoting *Berger v. United States, supra*, 295 U.S. at 88].)

The decision in *Field* controls here. The State Bar cannot distinguish it. Here, as in *Field*, Allen argued facts not in evidence in violation of state and federal law. The Court of Appeal found that there was no evidence in the first trial to support Allen's argument that Trulove or his family and friends had threatened Allen's sole eyewitness. As it turned out, and was revealed at the retrial when the witness admitted that Trulove never threatened her, the opposite was true. The Court found that Allen "repeatedly engaged in prejudicial misconduct when she urged the jury to believe Lualemaga because Lualemaga testified in the face of real danger of retaliation from defendant's friends and family, and endured hardships in a witness protection program that this danger compelled her and others to enter, ***when there was no evidence of such danger***."[105] Therefore, Allen's improper closing argument also violated section 6068(a).

B. Allen's Confirmed Violation of Her Pretrial *Brady* Obligations in *Barnes* Constitutes Grounds for Discipline

In *Ganz,* the State Bar correctly asserted that prosecutors are required to comply with their ethical "*Brady* duties." (*Ganz* Brief, at p. 24 [citing *Strickler v. Greene* (1999) 527 U.S. 263, 281–282].) Emphasizing the uniquely damaging nature of *Brady* violations, the United States Supreme Court has also admonished that "the deliberate withholding of exculpatory information . . . is reprehensible, ***warranting criminal***

[105] Ex. 1, at p. 10 (bold and italics added).

prosecution as well as disbarment. (*Imbler v. Pachtman* (1976) 424 U.S. 409, 431 fn. 34 (bold and italics added)).

In *Ganz*, the State Bar filed disciplinary charges against Andrew Ganz, a county prosecutor, for withholding exculpatory evidence from the defense in a murder case. The State Bar argued, and the State Bar Court agreed, that "[a] prosecutor's violation of pretrial *Brady* duties is cause for discipline even if no prejudice results." Specifically, the State Bar found that Ganz's misconduct violated sections 6068(a) and 6106 of the Business and Professions Code. Thus, in this case, by the State Bar's own standard, Allen's refusal to turn over the report and recording of Cedric Brown's exculpatory witness interview in the *Barnes* case is "cause for discipline," even though the interview was eventually turned over to the defense by the prosecutor who replaced Allen and the case ultimately resolved via plea agreements.

1. Allen's Willful Withholding of Exculpatory Evidence Violates Business and Professions Code, Section 6068(a)

This Court has explained that "willful" ethical violations are subject to state bar discipline. A willful act "implies simply a purpose or willingness to commit the act, or make the omission referred to. It does not require any intent to violate law, or to injure another, or to acquire any advantage. [Citation.] Thus, ***bad faith is not a prerequisite*** to a finding of a willful failure to comply with [an ethical rule]. Only a general purpose or willingness to commit the act or permit the omission is necessary." (*Durbin v. State Bar* (1979) 23 Cal.3d 461, 467 (bold and italics added).)

Here, Allen was the prosecutor of record on the date of the preliminary hearing and the arraignment.[106] She intentionally withheld the evidence and proceeded to preliminary hearing with the defense unaware of Brown's exculpatory video recorded statement. This violated her

[106] Ex. 11, at pp. 15–16, 30–31, 45–46.

constitutional obligation to provide material, exculpatory evidence to defense counsel, as articulated in *People v. Gutierrez,* 214 Cal.App.4th at 349, *Merrill v. Super. Ct.,* 27 Cal.App.4th at 1594, and *Stanton v. Super. Ct.,* 193 Cal.App.3d at 272. The case was set for trial while Allen was still the prosecutor. On May 6, 2010, the case was set for trial on June 18, 2010.[107] At that point, Allen should have immediately disclosed the exculpatory evidence. She refused to do so. It was years later that her colleague, Scot Clark, finally made that evidence available and he made no excuses for her conduct, instead telling the court that "There may be sanctions that flow from that."[108]

Nor was this an inadvertent mistake. Allen willfully withheld exculpatory evidence in the *Barnes* case. At a discovery hearing, ADA Clark admitted to the Court that Brown's interview "had actually reached the DA's office in 2009 and ***my predecessor on the case [Allen] had excluded it, had marked it as something that should be excluded***, apparently believing at the time that it was confidential for some reason."[109] Thus, Allen took affirmative intentional actions, such as marking the exculpatory tape recording as evidence that should ***not*** be disclosed to defense counsel. As a result, Allen willfully prevented the defense attorneys from learning about a tape recorded exculpatory interview of an eyewitness who claimed that the defendants had not committed the

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[107] *Id.* at pp. 15, 30, 45.
[108] Ex. 5 at p. 3:5-6.
[109] *Id.* at pp. 2:24-3:1. There was no reason to exclude Brown's testimony as being "confidential." Brown was a percipient witness who identified the shooter as someone other than Javon Lee and did not implicate the other co-defendants. His understanding of what happened flatly contradicted the People's case, which meant that he not only had nothing to fear from the defendants, his statements had to be disclosed to them under federal and state constitutional law because they tended to show that someone else was responsible.

shooting. In so doing, Allen violated her constitutional and statutory discovery obligations as a prosecutor. Allen violated Business and Professions Code section 6068(a), which declares that, "It is the duty of an attorney . . . [t]o support the Constitution and laws of the United States and of this state."

2. Allen's Violation of Her Pretrial *Brady* Obligations Constitutes an Act of Moral Turpitude in Violation of Business and Professions Code, Section 6106

Business and Professions Code section 6106 provides that "[t]he commission of any act involving moral turpitude, dishonesty or corruption, . . . constitutes a cause for disbarment or suspension." Such acts may be either intentional or involve gross negligence.[110] The rule still applies where the attorney's gross negligence affected the public in general and not a specific client.[111]

The State Bar has historically disciplined prosecutors for violations of Business and Professions Code section 6106 for both intentionally withholding exculpatory evidence, such as *In the Matter of Barone* (Stip. & Order at p. 10, State Bar Ct., Aug. 30, 2005, No. 04-O-14030), as well as purposefully making oneself ignorant of the details with a "see no evil or hear no evil" approach,[112] such as *In the Matter of Halsey* (Dec. at p. 16, Hearing Dept., 2006, Case No. 02-O-10195). (See also *In re Field, supra*,

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[110] See, e.g., *In the Matter of Wyrick*, *supra,* 2 Cal. State Bar Ct. Rptr. at 91 (gross negligence may violate § 6106); *In re Wells* (Review Dept., Mar. 7, 2006, No. 01-O-00379) 2011 WL 3293313, at p. 12 (moral turpitude includes "creating false impression by concealment as well as by affirmative misrepresentations").

[111] Opn. & Order at pp. 4–7, *In the Matter of Anna Christina Yee* (State Bar Review Dept., May 21, 2014, No. 12-O-13204) (attorney's gross negligence in inaccurately reporting MCLE compliance deemed an act of moral turpitude even though it was not an intentional misrepresentation).

[112] "[A] prosecutor cannot adopt a practice of 'see no evil or hear no evil.'" *People v. Kasim* (1997) 56 Cal. App. 4th 1360, 1386.

5 Cal State Bar Ct. Rptr. at p. 184 [prosecutor violated § 6106 by suppressing witness statement even though it was ultimately disclosed before trial].)

Moreover, as stated above, the State Bar in *Ganz* took the exact position that Petitioner takes here—a prosecutor who fails to disclose exculpatory evidence violates section 6106. (*Ganz* Brief, at p. 28.). There is no daylight between Ganz and Allen. Allen engaged in an act reflecting dishonesty and moral turpitude by intentionally suppressing exculpatory evidence in the *Barnes* matter, in violation of section 6106.

3. Allen Also Violated Rule of Professional Conduct 3.4 Regarding Improper Suppression of Evidence

Rule 3.4(b) declares that "[a] lawyer shall not . . . suppress any evidence that the lawyer . . . has a legal obligation to reveal or to produce."

Allen had a legal obligation to produce Brown's audio taped statement and the summary of the statement and intentionally failed to do so, thus violating RPC 3.4(b). Because Brown died before defense counsel knew of his existence, the defense could not interview him, follow up on any leads he might have had, or recorded his testimony at a conditional examination so it could be used at trial.

III. THE STATE BAR ARBITRARILY DENIED REVIEW BASED ON ERRONEOUS INTERPRETATIONS OF THE STATUTE OF LIMITATIONS.

A. The Independent Source Doctrine Applies

The five-year time limit in Rule 5.21(A) of the Rules of Procedure of the State Bar of California does ***not*** apply when a neutral third-party, like Professor Bazelon, reports the misconduct of an attorney to the State Bar. (*In the Matter of Phillips*, *supra*, 2011 WL 9375622, at p. 4.) In *Phillips*, a U.S. Trustee wrote a letter to the State Bar reporting Phillips' misconduct in multiple bankruptcy cases. (*Id.* at pp. 1, 4.) After receiving the Trustee's letter, the State Bar investigated Phillips misconduct. (*Id*. at p. 4.) Based

on that investigation, the State Bar filed a Notice of Disciplinary Charges (NDC) against Phillips. (*Ibid*.) Phillips argued that some of the State Bar's charges were time-barred because the State Bar initiated the proceedings more than five years after the alleged misconduct. (*Id.* at p. 1.)

Interpreting an earlier version of the statute with identical language, the Review Department of the State Bar Court disagreed with *Phillips* and held that the statute of limitations "d[id] ***not*** apply as a matter of law since the State Bar based the NDC on information gained from its review of the court files and not *solely* on a complaint made by a third party." (*In the Matter of Phillips, supra*, 2011 WL 9375622, at p. 4.) The Review Department reasoned that, "In this proceeding, ***the Trustee is not a complainant*** under [the statute of limitations] because she merely provided the State Bar with a narrative overview referencing court files which documented Phillips's misconduct. ***No individual bankruptcy clients filed any complaints with the State Bar.***" (*Ibid*, bold and italics added). In reaching its decision, the Review Department also cited the independent source exception to the statute of limitations, explaining that the statute "does not limit the authority of the State Bar to file charges based on information 'from a source independent of a time-barred complainant.'" (*Ibid* [citing the previous version of Rule 5.21(A) with identical language]; see also *In the Matter of Luti* (State Bar Ct. Review Dept., Aug. 6, 2018, No. 15-O-11994) 2018 WL 3968218, at p. 5 [five-year limitation did not apply because it was not based solely on a complainant's allegations when the State Bar discovered the attorney's bank records, that showed he paid personal expenses out of his client trust account, while investigating his client's complaint about misappropriation].)

Here, just like the Trustee in *Phillips*, Professor Bazelon, a neutral third party, sent a letter to the State Bar in which she provided "a narrative

overview referencing court files" which documented Allen's misconduct.[113] Like the Trustee's claims in *Phillips,* no defendant in the *Trulove* or *Barnes* matters filed any complaint with the State Bar. Like *Phillips,* Professor Bazelon's initial letter did not ***solely***, or even primarily, consist of her own allegations of Allen's misconduct. To the contrary, Professor Bazelon's letter pointed the State Bar to the written opinion from the Court of Appeal ruling that Allen committed misconduct in *People v. Trulove* (along with other case documents, such as transcripts) and the transcripts and filings from *People v. Barnes*. Professor Bazelon was neither a litigant nor an attorney in either case and does not have personal knowledge of Allen's conduct. Professor Bazelon simply did her civic duty as an independent citizen and directed the State Bar to the undisputed evidence of Allen's violation of our ethics rules.

The Court in *Phillips* noted in dicta that the Trustee referred the Phillips matter to the State Bar "in her official capacity," and "as a discharge of her statutory duties" as a Trustee. (*In the Matter of Phillips, supra*, 2011 WL 9375622, at p. 4.) The Court explained that this fact was worth mentioning because: "The Trustee referred this matter in her official capacity, ***not because she suffered harm as an individual***." (*Ibid*., bold and italics added). In other words, the limitations period is only meant to apply to cases in which an aggrieved client files a complaint against her attorney or an aggrieved defendant files a complaint against a prosecutor; not in matters initiated by a neutral third party who did not suffer any individual harm from the attorney's misconduct. Like the Trustee in *Phillips,* Professor Bazelon suffered no individual harm from Allen's prosecutorial misconduct. Thus, as the *Phillips* case illustrates, the five-year limitations period does not apply here.

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[113] See Ex. D.

Nevertheless, the State Bar contends that the independent source exception does not apply to this case because "the rule requires the State Bar receive the information from an independent source, and in this case, the information was received exclusively from you [Professor Bazelon] and there was no additional independent source."[114] The State Bar's interpretation would mean that when a lawyer was publicly reprimanded for misconduct by a court, individual citizens must find and report the Court opinion within five years—or not at all. Under the State Bar's flawed interpretation, the State Bar, on its own, could find such an opinion 30 years later and still discipline the same attorney. Why is the State Bar powerless to act when a thoughtful law professor came across the same evidence of misconduct, fills out a complaint, and sends the Court of Appeals opinion their way? The State Bar's reasoning seems to imply that the complaint would have been deemed timely if Professor Bazelon had sent in her letter and then had a third party forward on the Court of Appeal opinion to the State Bar. Drawing that distinction makes no sense. How does it help the accuracy of our attorney disciplinary process to encourage citizens to not send the State Bar the actual underlying proof of an attorney's misconduct?

Finally, there is one key difference between the *Phillips* case and this case: in *Phillips*, the State Bar actually fulfilled its duty and took action against Phillips' confirmed misconduct. The State Bar in *Phillips* did not think the statute of limitations prevented them from pursuing discipline against the offending attorney. But, here, the State Bar hides behind its tortured interpretation of the independent source doctrine to avoid pursuing discipline against a prosecutor who made a closing argument so riven with material falsities that it resulted in the conviction of

[114] Ex. C, at p. 3.

an innocent man who was then sentenced to serve 50 years in state prison. Before he was finally exonerated, he missed the chance to parent his children and was violently stabbed, among many other injuries.

B. The Limitations Period Was Tolled During Related "Pending Proceedings"

Under Rule 5.21(C)(3) of the Rules of Procedure of the State Bar of California, the five year limitations period is tolled "while civil, criminal, or administrative investigations or ***proceedings based on the same acts or circumstances*** as the violation are pending with any governmental agency, court, or tribunal." (Bold and italics added.) In other matters, the State Bar correctly asserts that California Supreme Court precedent requires that the tolling provision "***be interpreted broadly*** to further the State Bar's mission of public protection." (State Bar Opening Brief at p. 6, *In re Saxon* (Review Dept., Nov. 12, 2019, No. 17-O-01259) (hereafter "Saxon brief"), bold and italics added.) In *Yokozeki v. State Bar* (1974) 11 Cal.3d 436, 449, this Court stated that "it is not unreasonable for a disgruntled client to attempt to resolve his differences with an attorney through civil action before filing a complaint with the State Bar." (*Saxon* brief, pp. 6–7.) The State Bar in *Saxon* explained that "*Yokozeki* was decided at a time when there was no limitations period for the filing of disciplinary charges. [Citation.] The Rules of Procedure now contain a limitations period, but the principal in *Yokozeki* is now effectively recognized by [the] tolling provision." (*Id.* at p. 7.) The State Bar went on: "Thus, in light of *Yokozeki*, and to best effectuate the State Bar's mission of public protection, this tolling provision should be applied broadly, with benefits of the doubt against applying the rule of limitations, particularly at the pleadings stage of a proceeding." (*Ibid*, citing Bus. & Prof. Code § 6001.1 ["public protection is the highest priority of the State Bar in exercising its licensing, regulatory and disciplinary functions"].)

Rather than apply the tolling provision broadly, the State Bar has applied it as narrowly as possible—in contravention of the words of the rule and the spirit in which it should be applied. In so doing, the State Bar again ignores the controlling case law it has relied on to pursue discipline in other matters.

In *Trulove*, proceedings "based on the same acts and circumstances" related to the ethical violation at issue—Allen's improper closing argument—continued until well inside the five year limitations period. Professor Bazelon sent her initial letter to the State Bar on May 10, 2019—meaning that it is timely filed if any misconduct issues "based on the same facts and circumstances" were litigated on or after May 10, 2014. Here, there are two. First, the issue of Allen's misconduct ***was*** re-litigated in Trulove's retrial in 2015. On December 5, 2014, Trulove filed a motion in limine entitled "THE PROSECUTION BE ORDERED NOT TO MAKE ANY ARGUMENTS THAT VIOLATE THE HOLDING OF THE COURT OF APPEAL IN *PEOPLE V. TRULOVE* (2014 Cal.App.Unpub.LEXIS 26.)."[115] Trulove cited and attached the *People v. Trulove* appellate decision, moving to preclude Allen from committing the same misconduct in the second trial.[116] Trulove's motion in limine constitutes litigation of the same acts or circumstances of Allen's ethical violation of a matter pending in a court—and it occurred within five years of Professor Bazelon's May 10, 2019 letter.

In addition, the full scope and severity of Allen's misconduct in the first trial did not become clear until the retrial in 2015, when Lualemaga testified on cross examination that Trulove and his family had never threatened her.[117] That testimony demonstrated that Allen did not simply

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[115] Ex. 16, at pp. 1–3.
[116] *Ibid*.
[117] Ex. 7, at pp. 622:11–623:1.

refer to facts not in evidence during her closing argument. Even worse, Allen affirmatively made statements in her closing argument that were false because Trulove never threatened Lualemaga.

Finally, the limitations period should continue to toll through April 2019—the end of Trulove's civil lawsuit against the City and County of San Francisco. The State Bar argues that Trulove's civil action did not toll the limitations period because (a) Allen was not named as a defendant, and (b) the claims were not based on Allen's alleged misconduct.[118] Once again the State Bar cites no authority for the proposition that an action can only be "based on the same acts or circumstances as the violation" if the attorney is named as a defendant in the case. The State Bar's flawed interpretation would essentially mean that the tolling provision would never apply to a prosecutor whose misconduct is litigated in a federal civil rights case because Supreme Court case law prevents the moving party from naming the prosecutor as a defendant. That weaponization of a prosecutor's immunity from civil liability defeats the purpose of the State Bar, which is to serve as an alternative—and only—means of holding the prosecutor accountable for unethical behavior.

Moreover, the civil lawsuit also involved litigation related to Allen's misconduct. The allegations supporting the claims in Trulove's civil complaint explicitly referenced the appellate Court's finding of Allen's misconduct:

> "On January 6, 2014, the First District Court of Appeal filed its opinion reversing Jamal Trulove's conviction and sentence. The appellate court held that the prosecution had committed misconduct by arguing that Ms. Lualemaga had faced threats which caused her to fear for her life. . . .
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> The appeals court, in a unanimous opinion written by Presiding Justice Anthony Kline, said the prosecution 'did not

[118] Ex. A, at p. 2.

> present a scintilla of evidence' of any threats. 'This yarn was made of whole cloth.' The court held that the prosecution's argument was improper and likely prejudiced the jury.[119]

In addition, Allen wrote and filed a declaration in support of the City and County's motion for summary judgment and was even deposed for the civil lawsuit.[120] The parties even stipulated that the Court of Appeal opinion reversing Trulove's conviction and finding misconduct by Allen would be directly read to the jury at the civil trial.[121] Trulove's attorney went on to tell the jury in opening statement, "the lead prosecutor in this case engaged in prosecutorial misconduct at the first trial."[122] Allen's misconduct was front and center during all three phases of the civil litigation: the pleading, discovery, and trial. That level of focus on Allen's misconduct easily meets the statutory definition to trigger the tolling provision of Rule 5.21(C)(3) of the Rules of Procedure of the State Bar of California.

In *Barnes,* the State Bar contends that the statute of limitations began running on March 18, 2013, when ADA Scot Brown provided the interview of Cedric Brown to defense attorneys in the case, or on April 23, 2014, when the defense attorneys filed a Motion to Dismiss (which was never ruled upon).

But under Rule 5.21(C)(3), the five-year limit is tolled while "while civil, criminal, or administrative investigations or proceedings based on the same acts or circumstances as the violation are pending with any governmental agency, court, or tribunal." As the *Barnes* case was still continuing, with trial and the motion to dismiss still pending, the limitations period had not begun to run. The earliest the time could have begun to run

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[119]Ex. 12, at p. 26 ¶¶ 152–153.
[120] Ex. 6; Ex. 13 [Linda Allen Declaration].
[121] Ex. 14, at p. 2.
[122] Ex. 15, at p. 30:16-18.

is January 7, 2015, when the criminal case concluded.[123] As noted above, Professor Bazelon filed the complaint eight months prior to January 7, 2020, when time would have run.

Strangely, after stating that the *Barnes* complaint is untimely under its incorrect interpretation of when the statute of limitation began to run, the State Bar appears to concede that it was timely for this very reason—the case concluded on January 7, 2015, which would make the last date to timely file January 7, 2020. The State Bar then makes the baseless claim that eight months is not enough time to investigate the timely filed allegations in *Barnes*. (Ex. C [Closing Letter from State Bar], p. 3 ["The interval between when you placed your complaint and January 7, 2020 was insufficient timing for the State Bar to file charges in the matter."].) This Court cannot reward such a lethargic and indifferent approach to the State Bar's obligation to protect the public from obvious abuses of prosecutorial power. Notably, California Business and Professions Code section 6094.5(a) states that, "It shall be the goal and policy of the disciplinary agency to dismiss a complaint, admonish the attorney, or forward a completed investigation to the Office of Trial Counsel within ***six months*** after receipt of a written complaint." (Bold and italics added.) The fact that the State Bar fell short of its own standards yet again on this matter cannot be a proper basis to close a credible complaint of prosecutorial misconduct particularly in a situation where, as here, the prosecutor has

[123] Ex. 11, at pp. 3–4, 18–19, 33–34. It would be unreasonable for the time limit to begin to run against a defendant in the middle of the same case in which prosecutorial misconduct was committed against him. This interpretation could require a defendant to get a complaint on file at the State Bar while he is busy defending himself against criminal charges. Such an interpretation is directly contrary to the State Bar's mission of public protection (See Bus. & Prof. Code § 6001.1 [public protection is the highest priority of the State Bar in exercising its disciplinary functions].)

committed egregious misconduct more than once, sent an innocent man to prison, and tried to convict and incarcerate him all over again. As a matter of public policy, our State Bar must assign a much higher priority to deterring prosecutors from committing the type of misconduct the Court of Appeals summarized in its rebuke of Allen's conduct in the *Trulove* trial.

This is not an academic exercise. Jamal Trulove suffered for over six years in prison because of Allen's "highly prejudicial" prosecutorial misconduct. An inmate stabbed Trulove. Trulove had to live in constant fear—real fear—that he might be killed. High-level security prisons are no place for innocent citizens. But we risk many more examples of Trulove's odyssey in our criminal justice system if this Court will not take action against Allen for her undisputed ethical and legal violations.

Moreover, as a matter of public policy, statutes of limitations for ethical violations are increasingly disfavored nationwide. The American Bar Association's Model Rule 32 for Lawyer Disciplinary Enforcement makes lawyer discipline "exempt from all statutes of limitations." In the commentary to Rule 32, the ABA explains, "Statutes of limitation are wholly inappropriate in lawyer disciplinary proceedings. Conduct of a lawyer, no matter when it has occurred, is always relevant to the question of fitness to practice."[124] These findings are consistent with a highly respected report on prosecutorial oversight published by the Innocence Project in 2016. The report recommended that state bar disciplinary

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[124] *Model Rules for Lawyers Disciplinary Enforcement,* American Bar Association (July 16, 2020), at https://www.americanbar.org/groups/professional_responsibility/resources/lawyer_ethics_regulation/model_rules_for_lawyer_disciplinary_enforcement/ [as of June 23, 2021].

committees lengthen statutes of limitations and add additional tolling provisions.[125]

CONCLUSION

Petitioner respects that this Court maintains a very busy docket. But this Accusation had to be filed because the State Bar refused to fulfill its role in the disciplinary process here. Failure to act would send the wrong message to prosecutors because it would signal that they will suffer no personal consequences for taking unethical actions that deprive defendants their constitutional right to due process.

The undisputed record demonstrates that Allen must be sanctioned for her prosecutorial misconduct. Petitioner relies on basic principles and doctrines that the State Bar and this Court have endorsed and advocated for generations—but the State Bar inexplicably chose to ignore here:

- Prosecutors occupy a unique role in our justice system and must be held to a higher ethical standard;
- Prosecutors cannot make up evidence in closing argument "out of whole cloth" and cannot refuse to disclose exculpatory witness statements to defense counsel;
- A judicial finding of highly prejudicial prosecutorial misconduct must be given great weight in disciplinary proceedings;
- State Bar discipline is critical to deterring prosecutorial misconduct because prosecutors enjoy absolute immunity from civil suits;
- The independent source doctrine eliminates any limitations issue where the party who raised the unethical behavior to the

[125] *Prosecutorial Oversight: A National Dialogue in the Wake of Connick v. Thompson,* Innocence Project (March 2016), Bar Oversight Entities, p. 19, at https://www.innocenceproject.org/wp-content/uploads/2016/04/IP-Prosecutorial-Oversight-Report_09.pdf [as of June 23, 2021].

State Bar had no role in the underlying litigation and suffered no harm due to the attorney's unethical conduct; and

- The tolling provision of the statute of limitation must be applied broadly, with the benefit of the doubt applied to keep the claim alive.

As a result, Petitioner respectfully requests that this Court take action to remedy the State Bar's inexplicable refusal to discipline Ms. Allen. Petitioner requests that this Court conduct an independent review of this Accusation and impose discipline that, at a minimum, equates to the 90 day suspension and two year probationary term that was issued in *In the Matter of Andrew M. Ganz* (Amended Dec., State Bar Ct., Jan 11, 2019, No. 14-O-02363).

NAI-1519023685v7

VERIFICATION — ACCUSATION

I, Neal J. Stephens, am the person who is filing the **ACCUSATION**. I certify and declare that I have read the foregoing, that I know its contents, and that I am informed and believe the matters stated within are true.

I declare, under penalty of perjury and the laws of the State of California, that the foregoing is true and correct.

Executed this 25th day of June, 2021, at Palo Alto, California.

June 25, 2021

NEAL J. STEPHENS

Counsel for LARA BAZELON

DECLARATION PURSUANT TO CRC 9.13(E)(2)(C)

In accordance with California Rule of Court 9.13(e)(2)(c), I certify that there were no proceedings in the State Bar Court leading to the State Bar's decision to close its investigation of Linda Allen. Accordingly, no transcript of proceedings is available.

June 25, 2021

/s/ Neal J. Stephens
NEAL J. STEPHENS

Counsel for LARA BAZELON

PROOF OF SERVICE — ACCUSATION

STATE OF CALIFORNIA, COUNTY OF SANTA CLARA

I hereby declare that I am a citizen of the United States, that I am over 18 years of age, and that I am not a party to the within action. I am employed in the County of Santa Clara, and my business address is 1755 Embarcadero Road, Palo Alto, California, 94303.

On June 25, 2021, I served true and correct copies of the foregoing Accusation on the below parties in a sealed envelope addressed as follows:

One copy to:	**Three copies to:**
Office of the State Bar 845 South Figueroa Street Los Angeles, CA 90017	**State Bar of California** 180 Howard Street San Francisco, CA 94105

BY MAIL: I enclosed the document(s) in sealed boxes addressed to the entities at the addresses listed above, and I caused such boxes with fully-prepaid postage thereon to be placed it in the United States Mail at San Francisco, California.

I declare under penalty of perjury, under the laws of the State of California, that the foregoing is true and correct.

Executed on June 25, 2021, at Palo Alto, California.

/s/ Kyle A. Moreno
KYLE A. MORENO

IN RE THE ACCUSATION OF LARA BAZELON,
AGAINST LINDA JOANNE ALLEN

INDEX TO EXHIBITS

EXH. NO.	DATE	DESCRIPTION	PAGE NOS.
5	06/25/2013	Reporter's Transcript of Proceedings from Preliminary Hearing in *People v. Barnes* (Super. Ct. San Francisco County, Nos. 2410155, 2410212, and 2410235)	372-393
6	04/06/2017	Deposition of Linda Allen taken in *Trulove v. San Francisco* (N.D. Cal., No. 16-cv-00050)	394-460
7	02/18/2015	Transcript of Retrial Testimony of Priscilla Lualemaga from *People v. Trulove* (Super. Ct. San Francisco County, No. 2391686)	462-618
8	02/01/2010–02/02/2010	Closing Argument of Linda Allen from trial of *People v. Trulove* (Super. Ct. San Francisco County, No. 2391686)	620-786
9	01/12/2010	Memorandum from Deputy Chief Larry J. Wallace to Linda Allen re: "Witness Priscilla Maliolagi Lualemaga" with Lualemaga Payment Receipts	788-791
10	02/13/2017	Transcript of Deposition of Priscilla Lualemaga taken in *Trulove v. City and County of San Francisco* (N.D. Cal., No. 18-cv-00050)	792-965
11	03/01/2010 – 01/07/2015	Certified Court Minutes from *People v. Barnes* (Super. Ct. San Francisco County Nos. 211977)	967-1012
12	01/05/2016	Complaint And Demand For Jury Trial, *Trulove v. City & County of San Francisco* (N.D. Cal, No. 4:16-cv-00050)	1013-1061

EXH. NO.	DATE	DESCRIPTION	PAGE NOS.
13	Undated	Declaration of Linda Allen in Support of Defendants' Motion for Summary Judgment, filed in *Trulove v. City & County of San Francisco* (N.D. Cal. No. 16-cv-00050)	1062-1066
14	02/23/2018	Additional Trial Stipulations re Adverse or Hostile Witnesses, Statement of the Case, and Explanation of Court of Appeal Ruling, filed in *Trulove v. City & County of San Francisco* (N.D. Cal. No. 16-cv-00050)	1067-1070
15	03/12/2018	Opening Statements by Plaintiff in trial of *Trulove v. D'Amico* (N.D. Cal., No. CV 16-0050)	1071-1107
16	12/05/2014	Defendant Trulove's Motions in Limine filed in *People v. Trulove* (Super. Ct. San Francisco County, SCN 208898/MCN 2391686)	1108-1116
17	04/28/2021	Postmarked envelope from State Bar with letter dated 04/17/2021	1117-1118

EXHIBIT A

The State Bar
of California

OFFICE OF GENERAL COUNSEL

180 Howard Street, San Francisco, CA 94105 415-538-2575

Personal and Confidential **Complaint Review Unit**

April 27, 2021

Lara Abigail Bazelon
2130 Fulton St
Kendrick Hall, Ste 211
San Francisco CA 94117

RE: Case No.: 19-O-15691
Respondent(s): Linda Joanne Allen

Dear Ms. Bazelon:

The Complaint Review Unit received your correspondence on January 25, 2021, requesting reconsideration of the decision to close your complaint. An attorney reviewed all the information provided and has determined that there is not a sufficient basis to recommend reopening your complaint.

The Complaint Review Unit will recommend reopening a complaint when there is significant new evidence or when we determine there is good cause to recommend that the matter be reopened. The State Bar Court is authorized to impose or recommend disciplinary sanctions only if there is clear and convincing evidence to establish that the attorney has committed a violation of the Rules of Professional Conduct or the State Bar Act. Therefore, the Complaint Review Unit will not recommend that a matter be reopened unless there is a reasonable possibility that a disciplinary violation can be proven by clear and convincing evidence.

In your complaint, you allege attorney Linda Allen (Respondent), former San Francisco County Assistant District Attorney, engaged in prosecutorial misconduct in two separate criminal matters: *People v. Jamal R. Trulove* and *People v. Barbara Barnes et al.*

Your complaint was closed by the Office of Chief Trial Counsel on October 27, 2020, on the ground that the misconduct complained of took place outside the allowable statute of limitations. In your request for reconsideration of the decision to close your complaint, you state that you disagree with the Office of Chief Trial Counsel's conclusion that the statute of limitations applies and, alternatively, that your complaint fails to meet an exception to the statute of limitations.

Your request for review does not establish good cause to recommend that this matter be reopened. Specifically, the Complaint Review Unit will only recommend reopening a complaint when a request for review provides significant new evidence or otherwise demonstrates good cause. Your request for review does not submit any significant new evidence or information that was not already considered by the Office of Chief Trial Counsel when it decided to close your complaint.

Moreover, your request for review does not otherwise demonstrate good cause to reopen your complaint for further investigation. Rule 5.21 (of the State Bar Rules of Procedure) provides, "If a disciplinary proceeding is based solely on a complainant's allegations of a violation of the State Bar Act or Rules of Professional Conduct, the proceeding must begin within five years from the date of the violation." We agree with the Office of Chief Trial Counsel that the conduct complained of took place outside the allowable five-year statute of limitations. We further agree that the tolling exceptions set forth in the rule do not apply.

As a preliminary matter, we disagree with your assertion that the statute of limitations does not apply in these circumstances. Indeed, any disciplinary proceeding flowing from your complaint would be based solely on your allegations that Respondent's conduct as it relates to the two criminal matters at issue constitutes attorney misconduct. That Respondent was not your attorney is irrelevant to the question of whether your allegations are the sole basis of the complaint.

Further, we agree with the Office of Chief Trial Counsel that neither the "independent source" nor the "pending proceedings" tolling exceptions apply here. As you acknowledge in your complaint, Respondent's alleged misconduct occurred in 2010 (*Trulove*) and 2009-2010 (*Barnes*). The "independent source" tolling exception does not apply because this is not a proceeding that was "investigated and initiated by the State Bar based on information received from an independent source other than a complainant." The only information received by the State Bar regarding Respondent's alleged misconduct was received from you, the complainant.

The "pending proceedings" tolling exception also does not apply. With respect to the *Trulove* matter, the first any only time any court made a finding that Respondent engaged in prosecutorial misconduct was on January 6, 2014. There are no subsequent court decisions to support your contention that Respondent's alleged misconduct was litigated at any point during the retrial. Therefore, the statute of limitations was not tolled by the retrial. Further, the 2018 wrongful conviction matter was not filed against Respondent, it was filed against the San Francisco Police Department, and the claims raised therein were not based on Respondent's alleged misconduct. Based on the foregoing, it is our conclusion that the statute of limitations lapsed on January 6, 2019, five years after the court's finding that Respondent engaged in prosecutorial misconduct.

With respect to the *Barnes* matter, on April 24, 2014, defense counsel filed a Motion to Dismiss alleging that the prosecution, including Respondent, intentionally withheld exculpatory *Brady* materials from Barnes and the other defendants for four years. The District Attorney provided

the *Brady* materials to defense counsel on March 18, 2013, at which time defense counsel knew or should have known about the possible *Brady* violation. The statute of limitations therefore lapsed on March 18, 2018. The "pending proceedings" tolling exception is inapplicable as there are no pending proceedings in this matter—the matter resolved by plea agreements on January 7, 2015.

Even if your complaint were not time-barred, there are issues that would prevent the Office of Chief Trial Counsel from being able to establish by clear and convincing evidence that Respondent has committed a violation of the Rules of Professional Conduct or the State Bar Act. First, with respect to *Trulove*, Respondent has stated that there are inconsistencies in the court's opinion finding prosecutorial misconduct and a prior opinion in which they examined the same closing argument and found it to be appropriate based on the evidence. With respect to *Barnes*, the trial court did not make a ruling on the *Brady* issue and the matter resolved via plea agreements. Absent a court order, it would be very difficult for the Office of Chief Trial Counsel to establish a *Brady* violation.

The imposition of discipline against an attorney requires that the Office of Chief Trial Counsel be able to prove by clear and convincing evidence that the attorney violated the Rules of Professional Conduct or the State Bar Act. As relevant to your complaint, these laws prohibit an attorney from knowingly making a false statement of fact or law to a tribunal; and from engaging in acts involving moral turpitude, dishonesty, corruption, or those that are prejudicial to the administration of justice. Setting aside the statute of limitations issue, your case file does not include specific facts that Respondent acted with the requisite intent or recklessness to meet this high standard.

If there is a subsequent finding by a tribunal that Respondent engaged in prosecutorial misconduct that falls within the allowable statute of limitations, you can file a new complaint and the State Bar may consider proceeding with further investigation. However, for the reasons set forth above, your request for review does not provide the Complaint Review Unit with any basis upon which to recommend reopening your complaint at this time.

If you disagree with this decision, you may file an accusation against the attorney with the California Supreme Court. A copy of the applicable rule is enclosed. (See Rule 9.13, subsections (d) through (f), California Rules of Court.) If you choose to file an accusation, you must do so **within 60 days of the date of the mailing of this letter**. Together with your accusation, you should provide the Supreme Court (1) a copy of this letter and (2) a copy of the original closing letter from the Office of Chief Trial Counsel.

The State Bar cannot give you legal advice or representation. If you have not already done so, you may wish to consult with an attorney for advice regarding any other remedies which may be available to you. Attorneys can be located by contacting a lawyer referral service certified by the State Bar in your area. You may obtain a list of State Bar certified lawyer referral services by calling the State Bar at 866-442-2529 or by visiting the State Bar website at:

http://www.calbar.ca.gov/Public/Need-Legal-Help/Lawyer-Referral-Service

Sincerely,
Complaint Review Unit
Enclosure

Rule 9.13. Review of State Bar Court decisions

(a) Review of recommendation of disbarment or suspension

A petition to the Supreme Court by a member to review a decision of the State Bar Court recommending his or her disbarment or suspension from practice must be filed within 60 days after a certified copy of the decision complained of is filed with the Clerk of the Supreme Court. The State Bar may serve and file an answer to the petition within 15 days of service of the petition. Within 5 days after service of the answer, the petitioner may serve and file a reply. If review is ordered by the Supreme Court, the State Bar must serve and file a supplemental brief within 45 days after the order is filed. Within 15 days of service of the supplemental brief, the petitioner may serve and file a reply brief.

(Subd (a) amended effective January 1, 2007; previously relettered and amended effective October 1, 1973; previously amended effective July 1, 1968, and December 1, *1990.)*

(b) Review of State Bar recommendation to set aside stay of suspension or modify probation

A petition to the Supreme Court by a member to review a recommendation of the State Bar Court that a stay of an order of suspension be set aside or that the duration or conditions of probation be modified on account of a violation of probation must be filed within 15 days after a certified copy of the recommendation complained of is filed with the Clerk of the Supreme Court. Within 15 days after service of the petition, the State Bar may serve and file an answer. Within 5 days after service of the answer, the petitioner may serve and file a reply.

(Subd (b) amended effective January 1, 2007; adopted effective October 1, 1973; previously amended effective December 1, 1990.)

(c) Review of interim decisions

A petition to the Supreme Court by a member to review a decision of' the State Bar Court regarding interim suspension, the exercise of powers delegated by rule 9.10(b)-(e), or another interlocutory matter must be filed within 15 days after written notice of the adverse decision of the State Bar Court is mailed by the State Bar to the petitioner and to his or her counsel of record, if any, at their respective addresses under section 6002.1. Within 15 days after service of the petition, the State Bar may serve and file an answer. Within 5 days after service of the answer, the petitioner may serve and file a reply.

(Subd (c) amended effective .January 1, 2007; adopted effective December 1, 1990.)

(d) Review of other decisions

A petition to the Supreme Court to review any other decision of the State Bar Court or action of the Board of Governors of the State Bar, or of any board or committee appointed by it and authorized to make a determination under the provisions of the State Bar Act, or of the chief executive officer of the State Bar or the designee of the chief executive officer authorized to make a determination under article 10 of the State Bar Act or these rules of court, must be filed within 60 days after written notice of the action complained of is mailed to the petitioner and to his or her counsel of record, if any, at their respective addresses under section 6002.1. Within 15 days after service of the petition, the State Bar may serve and file an answer and brief. Within 5 days after service of the answer and brief, the petitioner may serve and file a reply. If review is ordered by the Supreme Court, the State Bar, within 45 days after filing of the order, may serve and file a supplemental brief. Within 15 days after service of the supplemental brief, the petitioner may file a reply brief,

(Subd (d) amended effective January 1, 2007, previously amended effective July 1, 1968, May 1, 1986, and April 2, 1987; previously *relettered and amended effective October 1, 1973, and December 1, 1990.)*

EXHIBIT B

January 25, 2021

The State Bar of California
Complaint Review Unit
Office of General Counsel
180 Howard Street
San Francisco, CA 94015

Re: Case Number: 19-O-15691
Respondent: Linda Allen

Dear Members of the Complaint Review Unit:

I am writing to the Complaint Review Unit to appeal the decision by Investigator Sara Master to close the State Bar's investigation of documented misconduct by attorney Linda Allen.[1]

After taking 17 months to process my complaint, the State Bar claims that the age of Allen's misconduct in the *Trulove* and *Barnes* cases precludes the possibility of any discipline in either case.

I submitted a complaint on May 10, 2019 regarding the actions of Linda Allen in two cases – her closing argument misconduct in the prosecution of Jamal Trulove and her failure to provide an exculpatory witness interview in the prosecution of Barbara Barnes (and other co-defendants). Months went by. On November 1, 2019, I received a letter from Supervising Attorney Susan Kagan, advising me that the complaint had been "reviewed and forwarded to the enforcement unit…" In January 2020, I emailed the assigned investigator Sara Master, the same person who has now closed the complaint as time-barred. She informed me that the investigations "can take anywhere from 6-12 months." I sent another letter on June 8, 2020, six months later, to the Office of Trial Counsel, requesting an update. Finally, in October 2020, nearly a year and half after I filed my complaint, investigator Masters sent me a letter that the file would be closed due to the age of the misconduct. Ms. Masters never addressed the complaint on the merits.

The decision by the State Bar is wrong as a matter of law and should be reversed.

1. Rule 5.21(A): the five-year limit does not apply because a disciplinary action would not be based "solely" on a complainant's allegations.

The time limitations of Rule 5.21 simply do not apply. Rule 5.21(A) states: "If a disciplinary proceeding is based *solely* on a complainant's allegations of a violation of the State Bar Act or Rules of Professional Conduct, the proceeding must begin within five years from the date of the violation" (emphasis added).

[1] See Masters' letter, attached.

Understandably, many State Bar complaints are based solely on an individual's allegations against her attorney. But that is not the case here. The Allen complaint is not based *solely*, or even *primarily*, on my allegations; to the contrary, the *Trulove* part of the complaint is based almost entirely on a written opinion from the Court of Appeal ruling that Allen committed misconduct in *People v. Trulove*, along other case documents, such as transcripts and filings from the civil case. The *Barnes* part of my complaint is based on the transcripts and filings from *People v. Barnes et. al*. I was not a litigant or party in either case and do not claim to have personal knowledge of Allen's conduct.

Moreover, time limits in this situation would serve no purpose. The time limits of Rule 5.21 protect an attorney against the unfair situation where a complainant raises allegations against which the attorney cannot defend herself because the allegations are too old to be disproved. But my complaint does not raise factual allegations that Ms. Allen must investigate to defend himself; rather, the complaint is based on court opinions and filings of which she has undoubtedly known for many years, as she surely read them at the time. Moreover, the misconduct mentioned in the *People v. Trulove* court opinion is entirely limited to the public record of Ms. Allen's closing arguments to the jury, so there is no issue of a person's memory, credibility, or other factual nuance at play.

Thus, the time limits of 5.21 do not apply and the State Bar is not time-barred from prosecuting Allen for her conduct in the *Trulove* and *Barnes* cases.

2. Rule 5.21(g): the five-year limit does not apply due to the independent source doctrine.

Rule 5.21(g) provides, "The five-year limit does not apply to disciplinary proceedings that were investigated and initiated by the State Bar based on information received from an independent source other than a complainant." As noted above, my complaint is based entirely on the court decision and other public documents in *People v. Trulove* and the filings and transcripts in *People v. Barnes et al* – I am alleging no personal knowledge of facts related to Ms. Allen's conduct.

In her letter closing the Allen complaint, Ms. Masters finds that the independent source provision does not apply because the State Bar did not discover the documents prior to my complaint. I based my complaint on public records of which I had no personal knowledge. The State Bar's failure to take note of a 2014 judicial opinion by a unanimous Court of Appeal and timely act on it should not bar a private citizen from bringing it to the Bar's attention. Nor should it strip the State Bar of all disciplinary authority. Under Ms. Masters' interpretation, if the State Bar had simply kept abreast of court decisions involving misconduct, that would have sufficed as an independent source—so, too, would a random citizen acting on her own to send the state bar a copy of the court's decision within five years of its issuance. Under that interpretation, if a private citizen finds the opinion six years after the misconduct, the State Bar has lost its power entirely to

discipline the attorney.[2] That interpretation is nonsensical and plainly not what the drafters of Rule 5.21(g) intended.

3. Assuming *arguendo* that a time limit applies, the *Trulove* time limit has not run due to tolling. In *Barnes*, to the extent that time limits apply, the time may have run because the State Bar failed to timely investigate my complaint for eight months.

Under Rule 5.21(c), the five-year limit is tolled while "while civil, criminal, or administrative investigations or proceedings based on the same acts or circumstances as the violation are pending with any governmental agency, court, or tribunal."

Tolling in Trulove

The misconduct at issue here occurred in the first trial of Mr. Trulove by Ms. Allen, where she committed misconduct in the way she argued to the jury about the credibility of the main prosecution eyewitness. Following the conviction and reversal, Ms. Allen re-tried the same case against Mr. Trulove, accusing him of the same homicide. Even the docket number was apparently the same. After Mr. Trulove's acquittal in the second trial, he filed a civil lawsuit against the City and County of San Francisco for malicious prosecution and related claims.

The State Bar contends that the retrial of the *same criminal charges* by Allen and the civil lawsuit *based on the exact same arrest and prosecution* were not, for the purposes of 5.21(c), "based on same acts or circumstances as the violation." In fact, Allen's misconduct was based on the "acts and circumstances" of Trulove being accused of killing a man named Kuka. The same "acts and circumstances" – indeed, the same factual allegations and the same charge – were the basis for the retrial and the civil lawsuit.

The State Bar contends that the very narrow issue of Allen's misconduct was not "litigated" at the retrial or the civil case. This is incorrect, as I will show below. But this is also not a reasonable interpretation of the "acts or circumstances" clause of 5.21(c). The State Bar tolling rule is broad, encompassing civil, criminal and administrative "investigations or proceedings" pending with "any government agency, court of tribunal." To interpret the "acts or circumstances" of legal proceeding as requiring that the subsequent litigation—here, the appeal and retrial—involve the narrow and specific issue of the ethical violation later alleged in a State Bar complaint would violate the spirit and the common sense interpretation of the language. By Masters' interpretation, if an attorney committed ethical violations in a 2020 trial and the case remained on appeal until 2025, no tolling period would occur and all State Bar remedies would be time-barred unless the defendant's appellate attorney chose to brief the narrow issue of the attorney's ethical violations and the court considered that narrow issue in its appellate decision. That makes no sense.

[2] Under this interpretation, if the State Bar, on its own, finds the opinion 25 years after the misconduct, it still has the power to discipline the attorney.

In any event, the State Bar's finding is wrong as a matter of fact – Allen's misconduct *was* litigated in the retrial. When Allen prosecuted Trulove again in 2014-2015, the defense filed an *in limine* motion that "THE PROSECUTION BE ORDERED NOT TO MAKE ANY ARGUMENTS THAT VIOLATE THE HOLDING OF THE COURT OF APPEAL IN *PEOPLE V. TRULOVE* (2014 Cal.App.Unpub.LEXIS 26.)."[3] Trulove cited and attached the *People v. Trulove* appellate decision, moving to preclude Allen from committing the same misconduct in the second trial.

The civil lawsuit – based on the damage caused to Trulove from the same case – also involved litigation about Allen's misconduct. As Investigator Masters points out, Allen was not a defendant in the civil lawsuit – presumably due to the doctrine of absolute immunity. But Allen's specific misconduct was explicitly referenced, discussed, and argued at many points during the civil lawsuit.

The 2016 Complaint which initiated the civil case explicitly referenced the appellate court's finding of Allen's misconduct:

> "On January 6, 2014, the First District Court of Appeal filed its opinion reversing Jamal Trulove's conviction and sentence. The appellate court held that the prosecution had committed misconduct by arguing that Ms. Lualemaga had faced threats which caused her to fear for her life… The appeals court, in a unanimous opinion written by Presiding Justice Anthony Kline, said the prosecution 'did not present a scintilla of evidence' of any threats. 'This yarn was made of whole cloth.' The court held that the prosecution's argument was improper and likely prejudiced the jury."[4]

During the pretrial litigation of the lawsuit, Allen wrote a declaration in support of the City and County's motion for summary judgment.[5] Eventually, Allen was even deposed for the civil lawsuit (transcript attached as Exhibit 6 to my original complaint).

In preparation for trial, *the parties stipulated that the Court of Appeal opinion reversing Trulove's conviction and finding misconduct by Allen would be directly read to the jury at the trial*.[6] During the trial, Trulove's attorney told the jury in opening statement, "the lead prosecutor in this case engaged in prosecutorial misconduct at the first trial and… Jamal Trulove's prior criminal defense lawyer failed to properly object to it."[7]

Finally, as mentioned in my initial complaint, the severity of Allen's misconduct did not become clear before the testimony of Lualemaga obtained in connection with the civil

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[3] "Defendant Trulove's Motions in Limine." SCN 208898 / MCN 2391686, pp.1-2.
[4] Exhibit 12, Civil Complaint, p.26.
[5] Exhibit 13, Declaration of Linda Allen.
[6] Exhibit 14, "Additional Trial Stipulations re Adverse or Hostile Witnesses," p.2. I do not know, but certainly the State Bar could investigate, whether the opinion was actually read to the jury.
[7] Exhibit 15, Opening Statement, p.30.

lawsuit.[8] I attached that transcript as Exhibit 7 to my original complaint. The facts proving the ethical violation are intimately involved with the civil lawsuit, showing why tolling of the statute of limitations during the civil case is the only logical conclusion here.

For all the above reasons, the acts and circumstances – in other words, the general background – were the same for the first trial (where Allen's misconduct occurred), the retrial, and the civil lawsuit. The statute of limitations, if applicable, was tolled, and did not begin running until 2018, when the civil trial resulted in a verdict for Jamal Trulove.

Tolling in Barnes et al.

As noted in sections 1 and 2, the five-year time limit should not apply to the State Bar's investigation of Allen's conduct in *People v. Barnes et al*.

Nonetheless, Investigator Master claims three reasons why the State Bar is time-barred from proceeding against Allen for her conduct in this case, addressed below.

A. Masters posits that the statute of limitations ran on January 7, 2020, five years from the date the *Barnes* case concluded; I filed my complaint in May 2019, well within the statute of limitations, but Masters contends that eight months was "insufficient timing for the State Bar to file charges in the matter."

The State Bar's inability to adhere to its own six-month deadline in completing its review of a timely-filed bar complaint is not a basis to close a case. California Business and Professions Code 6094.5(a) states that "[i]t shall be the goal and policy of the disciplinary agency to dismiss a complaint, admonish the attorney, or forward a completed investigation to the Office of Trial Counsel *within six months after receipt of a written complaint*."

According to the State Bar's 2020 Adopted Final Budget, the Office of Chief Trial Counsel carries a budget of $63.3 million for 276 full-time employees, including nearly 100 attorneys and over 60 investigators. The fact that the State Bar fell short of its own standards is not a basis to close my complaint.

Indeed, as Ms. Masters concedes in her letter closing the investigation, I raised the statute of limitations issue explicitly in my initial complaint. I advised the State Bar that under one interpretation, the statute of limitations would run in January 2020. I assume that most complainants to the State Bar are unaware of the minutia of the State Bar's procedural rules, so the State Bar is accustomed to making such calculations promptly, but in this case the issue was flagged for them.

Six months after I filed my complaint, on November 1, 2019, I received a letter from attorney Susan Kagan advising me that the complaint was forwarded to the enforcement unit. I had to prod the State Bar for responsive information about its investigation again in June 2020 and did not hear of any result for 17 months after filing my complaint.

[8] See my complaint, pp.15-17.

As the statute of limitations had not run when I made the complaint, the Review Unit should re-open the matter.

B. Masters contends, in the alternative, that the statute of limitations ran on March 18, 2013 or April 23, 2014.

Masters contends that in alternative, the statute of limitations clock started ticking while the criminal case was still ongoing, that is, it began running on March 18, 2013, when the subsequent prosecutor provided the interview of Cedric Brown to defense attorneys in the case, or on April 23, 2014, when the defense attorneys filed a Motion to Dismiss (which was never ruled upon).

But under Rule 5.21(c), discussed above, the five-year limit is tolled while "while civil, criminal, or administrative investigations or proceedings based on the same acts or circumstances as the violation are pending with any governmental agency, court, or tribunal." As the case was still continuing, with charges, trial and motion to dismiss still pending, the time had not begun to run. The earliest the time could have begun to run is January 7, 2015, when the criminal case concluded. As I noted above, I filed the complaint eight months prior to January 7, 2020, when time would have run.

Conclusion

Statutes of limitations for ethical violations are increasingly disfavored nationwide. The American Bar Association's Model Rule 32 for Lawyer Disciplinary Enforcement makes lawyer discipline "exempt from all statutes of limitations." In the commentary to Rule 32, the ABA explains, "Statutes of limitation are wholly inappropriate in lawyer disciplinary proceedings. Conduct of a lawyer, no matter when it has occurred, is always relevant to the question of fitness to practice."[9] California's five-year statute of limitations is shorter than many states; a cursory review reveals that most states have no statute of limitations for ethics violations whatsoever.

Such limitations are particularly troubling with prosecutorial misconduct, where they represent barriers to justice. In its 2016 report on prosecutorial oversight, the Innocence Project made proposals to increase accountability for the largely unregulated misconduct by prosecutors. The report recommended that state bar disciplinary committees lengthen statutes of limitations and add additional tolling provisions.[10]

The State Bar should be far more concerned about Allen's misconduct than it appears to be. Allen's misconduct in the Trulove case resulted in a life sentence for an innocent

[9] *Model Rules for Lawyers Disciplinary Enforcement*. American Bar Association, June 28, 2017. https://www.americanbar.org/groups/professional_responsibility/resources/lawyer_ethics_regulation/model_rules_for_lawyer_disciplinary_enforcement/

[10] *Prosecutorial Oversight: A National Dialogue in the Wake of* Connick v. Thompson. Innocence Project, March 2016. https://www.innocenceproject.org/wp-content/uploads/2016/04/IP-Prosecutorial-Oversight-Report_09.pdf

man – and her relentless effort to convict him speaks volumes. After the jury convicted Trulove in the first trial, witness Oscar Barcena's exculpatory statement came to light. Allen still successfully opposed Trulove's motion for a new trial and he was sentenced to life in prison with the possibility of the parole. Nearly four years later, on January 6, 2014, the Court of Appeal issued its opinion reversing Trulove's conviction. Linda Allen described these events under oath: "After the Court reversed Trulove's conviction, I personally made the decision to retry plaintiff, even knowing of Barcenas' statement. I did not receive any pressure from any officer to retry Trulove."[11]

On April 30, 2014, when the remittitur from the Court of Appeal was placed on the record, reflecting the appellate court's decision to reverse the conviction, bail was set at $10,000,000. Due to Ms. Allen's personal decision to retry the case, Mr. Trulove remained incarcerated until his acquittal on March 11, 2015.

Allen's withholding of evidence in the *Barnes* case also troubling and ripe for a State Bar investigation. Her own office conceded that she had done so intentionally, in the form of the prosecutor who took over the case telling the court that his predecessor "had excluded it, had marked it as something that should be excluded, apparently believing at the time that it was confidential for some reason."[12]

The State Bar says now that if it had begun its investigation in both cases earlier, the statute of limitations would not have run. But Allen's misconduct was not "under the radar," it was widely-reported in the media at the time of the reversal of Mr. Trulove's acquittal. In 2018, the Office of Chief Trial Counsel presumably would have researched Allen's background when disgraced prosecutor Andrew Ganz (whose license was ultimately suspended by the State Bar) listed Ms. Allen as a potential character witness for Ganz's State Bar trial for withholding exculpatory evidence in a murder case.

Allen's termination at the beginning of the new District Attorney's administration in San Francisco was also reported in the news media. Then Allen was briefly employed in Santa Clara County, but her hiring was reported in the media to be controversial among community organizations and she no longer works there.

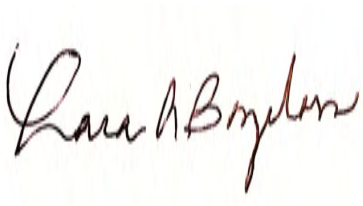
It is troubling that the State Bar apparently did not initiate disciplinary proceedings or even an investigation during any of the above time period, when Allen's conduct was reported in the media. But it is far worse that, when the misconduct is brought directly to the State Bar's attention, the State Bar may choose to reject any possibility of investigation and accountability by relying on a statute of limitations argument that is farcical on its face.

For all the above reasons, I ask the Complaint Review Unit to reopen the investigation into Linda Allen's conduct in *People v. Trulove and People v. Barnes et al.*

Sincerely,

[11] Exhibit 13, Declaration of Linda Allen.

[12] Exhibit 5 to my original complaint, Transcript of *Barnes* discovery hearing, June 25, 2013, pp. 2-3.



Lara Bazelon
Barnett Chair in Trial Advocacy and Professor
University of San Francisco School of Law

EXHIBIT C

The State Bar
of California

OFFICE OF CHIEF TRIAL COUNSEL

180 Howard Street, San Francisco, CA 94105 415-538-2023 sara.master@calbar.ca.gov

October 27, 2020

Lara Bazelon
2130 Fulton St. Kendrick Hall Suite 211
San Francisco, CA 94117

RE: Case No.: 19-O-15691
Respondent: Linda Allen

Dear Ms. Bazelon:

The State Bar has decided to close your complaint against Linda Allen.

Please understand that the State Bar cannot proceed with disciplinary charges unless we can present evidence and testimony in court, sufficient to prove by clear and convincing evidence that the attorney has committed a violation of the State Bar Act or the Rules of Professional Conduct. The violation must be serious enough to support both a finding of culpability and the imposition of professional discipline. In some cases, there may be evidence of attorney malfeasance or negligence, but this evidence may be insufficient to justify the commencement of a disciplinary proceeding, or to be successful at a disciplinary trial.

After carefully reviewing the information you provided, as well as information from other sources including Ms. Allen, this office has concluded that we would not be able to prevail in a disciplinary proceeding. We have concluded that because the conduct complained of is beyond the time limit allowed, we are unable to proceed with your complaint. After reviewing whether any of the possible exceptions available under Rules of Procedure of the State Bar Court (Hereinafter all references to "rules" are to the Rules of Procedure), rule 5.21 would apply to permit your complaint to proceed, we conclude that your complaint fails to meet an exception to the five year limitations rule. However, if you have additional information showing that an exception applies, you may request in writing that your complaint be reopened. In explaining why an exception may apply, please give specific dates of possible violations so that we may properly evaluate your additional information.

Rule 5.21, Rules of Procedure of the State Bar of California, prohibits the State Bar from initiating disciplinary proceedings against an attorney for alleged misconduct occurring more than five years from the date of the violation(s). The rule recognizes various exceptions to extend the five-year period, including for example, when the attorney continues to represent the complainant; when the complainant is a minor; when there are pending civil, criminal, or administrative investigations or proceedings based on the same acts against the attorney; or when the attorney conceals facts about the misconduct.

On January 6, 2014, in *People v. Jamal Trulove*, Court of Appeal First Appellate District case number A130481, the appellate court made a finding that Ms. Allen engaged in prosecutorial misconduct during the first trial. This is the first, and only, time that the court made a finding that Ms. Allen engaged in prosecutorial misconduct throughout the *Trulove* matters. As such, the five year Rule of Limitations commenced January 6, 2014, and lapsed on January 6, 2019. There are no court findings to support that Ms. Allen's misconduct was litigated in the retrial. Therefore, the Rule of Limitations is not tolled by the 2015 retrial. In addition, the 2018 wrongful conviction matter was not filed against the San Francisco Police Department, not Ms. Allen, and accordingly, the issues raised were unrelated to Ms. Allen's misconduct. Therefore, the Rule of Limitations is not tolled by the 2018 civil matter.

You indicated that the State Bar can also apply rule 5.21(G) based upon independent sources that demonstrate Ms. Allen's misconduct such as the 2014 Court of Appeal decision, the 2015 transcript of testimony from the retrial, and the 2017 deposition of R. The independent source rule indicates that the five-year limit does not apply to disciplinary proceedings that were investigated and initiated by the State Bar based on information received from an independent source other than a complainant. There are various sources from which the State Bar receives complaints such as clients, family and friends of clients, courts, opposing counsel, members of the public or other third parties, and anonymous submissions. Here, you indicated that the 2014 Court of Appeal decision, the 2015 transcript of testimony from the retrial, and the 2017 deposition of R, satisfy the rule because they originated from independent sources. However, the rule requires the State Bar receive the information from an independent source, and in this case, the information was received exclusively from you and there was no additional independent source.

On March 18, 2013, in *People v. Barbara Barnes, Javon Fee, and Rorico Reyna*, San Francisco County Superior Court case number 211977, the prosecution inadvertently disclosed the witness interview of Cedric Brown to defense counsel. On April 24, 2019, defense counsel filed

a Motion to Dismiss on behalf of Ms. Barnes. On January 7, 2015, (before a ruling on the Motion to Dismiss) the cases were resolved through plea agreements. You indicated that the Rule of Limitations, by which the State Bar must file a complaint, began to run on January 7, 2015 and ended on January 7, 2020. The interval between when you placed your complaint and January 7, 2020 was insufficient timing for the State Bar to file charges in the matter. Furthermore, there court did not make a ruling on the *Brady* issue because the matter was resolved before a ruling on the Motion to Dismiss.

On February 24, 2009, Mr. Cedric Brown was interviewed by the police. On March 18, 2013, the District Attorney provided the interview to defense counsel. This is the first discovery of a possible violation of *Brady*. As such, the five year Rule of Limitations was tolled from March 18, 2013 and expired on March 18, 2018. Alternatively, according to rule 5.21(C)(4), if the Motion to Dismiss were to toll the Rule of Limitations then the five year Rule of Limitations would have started on April 23, 2014 and lapsed on April 23, 2019. Based upon your complaint that was placed on May 10, 2019, the Rule of Limitation lapsed under both circumstances.

You indicated that the State Bar can also apply rule 5.21(G) based upon independent sources that demonstrate Ms. Allen's misconduct such as the defense motion to dismiss, certified court minutes, and the transcript of a hearing where the subsequent prosecutor conceded that the exculpatory interview was withheld. The independent source rule indicates that the five-year limit does not apply to disciplinary proceedings that were investigated and initiated by the State Bar based on information received from an independent source other than a complainant. There are various sources from which the State Bar receives complaints such as clients, family and friends of clients, courts, opposing counsel, members of the public or other third parties, and anonymous submissions. Here, you indicated that the defense motion to dismiss, certified court minutes, and a hearing transcript satisfy the rule because they originated from independent sources. However, the rule requires the State Bar receive the information from an independent source, and in this case, the information was received exclusively from you and there was no additional independent source.

If you would like to further discuss this matter or provide additional information or documentation, we request but do not require that you call us or send us the information within ten days of the date of this letter. You may leave a voice mail message for Deputy Trial Counsel Whitney Geitz 415-538-2377. In your message, be sure to clearly identify the lawyer complained against, the case number assigned to your complaint, and your name and return telephone number, including area code and the attorney will return your call as soon as possible.

If you have presented all of the information that you wish to have considered, and you disagree with the decision to close your complaint, you may request that the State Bar's Complaint Review Unit review your complaint. The Complaint Review Unit will recommend that your complaint be reopened if it determines that further investigation is warranted. To request review by the Complaint Review Unit, you must submit your request in writing, **post-marked within 90 days of the date of this letter**, to:

The State Bar of California
Complaint Review Unit
Office of General Counsel
180 Howard Street
San Francisco, CA 94105-1617

If you decide to send new information or documents to this office, the 90-day period will continue to run during the time that this office considers the new material. You may wish to consult with legal counsel for advice regarding any other available remedies. You may contact your local or county bar association to obtain the names of attorneys to assist you in this matter.

We would appreciate if you would complete a short, anonymous survey about your experience with filing your complaint. While your responses to the survey will not change the outcome of the complaint you filed against the attorney, the State Bar will use your answers to help improve the services we provide to the public. The survey can be found at http://bit.ly/StateBarSurvey2.

Sincerely,

Sara Master

Sara Master
Investigator

EXHIBIT D

May 10, 2019

Office of Chief Trial Counsel
Intake Department
State Bar of California
845 South Figueroa Street
Los Angeles, California 90017-2515

Complaint re: Linda Allen, Cal. State Bar No. 153718

Dear Chief Trial Counsel,

I write to complain about the conduct of Linda Allen, who is an Assistant District Attorney in the San Francisco District Attorney's Office.

Judicial Finding of Misconduct in the Prosecution of Jamal Trulove

From 2009-2010, and again from 2014-2015, Allen prosecuted Jamal Trulove for first degree murder and related crimes in connection with the shooting death of Seu Kuka in the California Superior Court in San Francisco County, California.[1] Following his first-degree murder conviction and related convictions after the first trial in 2010, Trulove was sentenced to 50 years to life in prison. He appealed.

In 2014, the Court of Appeal held that Allen committed pervasive, "highly prejudicial prosecutorial misconduct" during her closing argument at trial and reversed Trulove's convictions.[2] The Court of Appeal detailed Allen's repeated misconduct, finding Trulove's trial counsel ineffective for failing to object.[3] The appellate court's finding that Allen committed misconduct is "entitled to a strong presumption of validity and prima facie weight" in State Bar proceedings.[4]

Allen re-filed the same charges against Trulove later that year and prosecuted Trulove for a second time. As will be explained below, the scope of Allen's misconduct in the first

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[1] *See People v. Jamal R. Trulove*, SCN 208898 and SCN 2391686.
[2] Exh. 1, *People v. Trulove*, 2014 WL 36469 (Cal. Ct. of Appeal, Jan. 6, 2014) (unpublished decision).
[3] *Id*. at 1. (unpublished decision) ("[W]e reverse, based on one of defendant's several appellate claims, that being that he received ineffective assistance of counsel because his trial counsel did not take any action in the face of highly prejudicial prosecutorial misconduct."). Jamal Trulove was represented at the first trial by Christopher Shea.
[4] *In the Matter of Robert Alan Murray* (2016) 14-O-00412, at *6. Public Matter – Designated for Publication, citing *Maltaman v. State Bar* (1987) 43 Cal.3d 924, 947; *In the Matter of Lais* (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 112, 117-118.

trial—that is, the inaccurate, misleading, and prejudicial statements Allen repeatedly made to the first jury—was only fully exposed at the retrial. At that point, it became clear that what Allen had argued to the jury was not only "facts not in evidence" (as the Court of Appeal found) but facts that were false.

Trulove, represented by new counsel, was acquitted in 2015 of all charges. In 2016, Trulove sued the City and County of San Francisco in federal court alleging that San Francisco Police Department detectives framed him by fabricating evidence and withholding exculpatory evidence.[5] A unanimous civil jury agreed and awarded Trulove $10 million in April of 2018. In March of 2019, the city paid out a settlement to Trulove of $13.1 million. Trulove is now one of more than 2,400 wrongfully convicted people listed on the National Registry of Exonerations.[6]

Misconduct in the Prosecution of Barbara Barnes et. al.

The Trulove case does not appear to be the only time that Allen has committed misconduct. On April 24, 2014, defense attorney Cheryl Wallace filed a motion to dismiss the charges against her client, Barbara Barnes, based in part on allegations of misconduct by Linda Allen. Wallace alleged in her motion that Allen, and other prosecutors, intentionally withheld exculpatory *Brady*[7] material from Barnes and the other defendants, all charged with premeditated murder, for four years.[8]

The *Brady* material in the *Barnes* case consisted of an exculpatory police report and an audio-taped interview of a witness named Cedric Brown, who identified the killers as individuals other than defendants Barnes, Fee, and Reyna.[9] According to the subsequent prosecutor and the defense motion to dismiss, Allen "was in actual possession" of that

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[5] For the factual background of the lawsuit, see Exh. 2, *Trulove v. D'Amico*, 2018 WL 1070899 (United States District Court, Northern District, February 27, 2018) (unpublished order granting in part, and denying in part, motion for summary judgment).
[6] Exh. 3, "Jamal Trulove," National Registry of Exonerations. https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=4658. The full procedural history of the case is documented in the National Registry of Exonerations report on Jamal Trulove. *See also* Exh. 1, *People v. Trulove*, 2014 WL 36469 (Cal. Ct. of Appeal, Jan. 6, 2014) (unpublished decision). The procedural history of the case through 2014 is documented in the Court of Appeal decision.
[7] *Brady v. Maryland* (1963) 373 U.S. 83.
[8] Exh. 4, Motion to Dismiss, *People v. Barnes*, pp.4-7. The motion listed the prosecutors who are alleged to have withheld Brady material in this order: Linda Allen, Heather Trevisan, George Butterworth, Scot Clark, and George Barnes. *See id*. at 4.
[9] Exh. 4, Motion to Dismiss, *People v. Barnes*, pp. 4-5.

evidence in 2009, and suppressed it intentionally.[10] Brown also told the police in the audio-recorded interview that he was ill with cancer and HIV. Brown died in 2012; his statement was disclosed months later, "inadvertently," in 2013.[11]

This complaint asks the State Bar of California to investigate, and if appropriate, charge Allen with, the ethical breaches detailed below. Specifically, I am asking that the bar investigate whether Allen committed ethical violations in the first prosecution of Trulove because of prosecutorial misconduct and whether she committed ethical violations in the prosecution of *Barnes et. al*. by withholding exculpatory discovery.

State Bar intervention is necessary here.

First, Allen is not a new lawyer. These were not the mistakes of a novice. Allen is a veteran prosecutor, having been a member of the California State Bar for 28 years. At the time of her misconduct in 2010, Allen had been a prosecutor in San Francisco for 19 years.[12]

Second, despite the Court of Appeal's finding in the *Trulove* case that Allen committed pervasive misconduct, the San Francisco District Attorney's Office subsequently placed in her a position of power and influence over newer attorneys. In a deposition taken in April of 2017, Allen testified that she currently has a managerial position in the San Francisco District Attorney's Office as the supervisor of a team of lawyers working in the general felonies unit.[13] In that role, Allen supervised attorneys including "assist[ing]" these Assistant District Attorneys in trial and "assist[ing] them with making offers."[14] That degree of power and responsibility is concerning, especially because there is no evidence that Allen has shown any insight into her misconduct or been held accountable for it.

Third, because Allen has absolute immunity as a prosecutor, no civil remedy applies.[15] Despite the injustice he suffered, which included more than six years of wrongful

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[10] Exh. 4, Motion to Dismiss, *People v. Barnes*, p. 6; Exh. 5, Transcript of *Barnes* discovery hearing, June 25, 2013, pp. 2-7.
[11] Exh. 4, Motion to Dismiss, *People v. Barnes*, pp. 4-5, 15.
[12] Allen was a prosecutor in New York originally; she joined the California State Bar in 1991 and began prosecuting cases at the San Francisco District Attorney's Office. Exh. 6, Deposition Testimony of Linda Allen, pp. 8-10.
[13] Exh. 6, Deposition Testimony of Linda Allen, p. 5.
[14] Exh. 6, Deposition Testimony of Linda Allen, p. 5.
[15] *Imbler v. Pachtman* (1976) 424 U.S. 409; *see*, *e.g. Fields v. Wharrie* (7th Cir. 2012) 672 F.3d 505, 515 (prosecutor who solicited false testimony in attempt to convict an innocent man and obtain a death sentence is absolutely immune from civil lawsuit).

imprisonment, Jamal Trulove could not include Allen in his federal civil complaint.[16] That makes it all the more important that the State Bar investigate her conduct.

I. Introduction

A. Prosecutors are held to the highest ethical standards of all attorneys

Prosecutors, like all attorneys, are bound by state rules of ethics. But of all lawyers, prosecutors are held to the *highest standard of conduct*.[17] "As an officer of the court and representative of the People, [a prosecutor] is subject to the highest standards of honesty, fidelity, and rectitude. Prosecutors must meet standards of candor and impartiality not demanded of other attorneys."[18]

As described by California Supreme Court, "A prosecutor is held to a standard higher than that imposed on other attorneys because of the unique function he or she performs in representing the interests, and in exercising the sovereign power, of the state."[19]

The State Bar has a particularly important role in regulating misconduct by prosecutors. While other attorneys and law enforcement officers are liable to civil lawsuits when they neglect their duties, prosecutors enjoy absolute immunity.[20] In justifying prosecutorial immunity, the U.S. Supreme Court noted that the public is not powerless to deter prosecutorial misconduct because the prosecutor is subject to discipline by state bar organizations.[21]

B. The State Bar Has Jurisdiction over Allen

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[16] Exh. 6, Deposition Testimony of Linda Allen, pp. 12-14.
[17] *People v. Hill* (1998) 17 Cal. 4th 800, 819–20; *In the Matter of Robert Alan Murray* (2016) 14-O-00412. Public Matter – Designated for Publication.
[18] *Murray, supra* (internal citation omitted).
[19] *People v. Hill* (1998) 17 Cal. 4th 800, 952 P.2d 673.
[20] *Imbler v. Pachtman* (1976) 424 U.S. 409; *see*, *e.g. Fields v. Wharrie* (7th Cir. 2012) 672 F.3d 505, 515 (prosecutor who solicited false testimony in attempt to convict an innocent man and obtain a death sentence is absolutely immune from civil lawsuit).
[21] *Imbler,* supra, 424 U.S. at 429; *Bach v. Cty. of Butte* (1983) 147 Cal. App. 3d 554, 565 ("Redress for the willful deprivation of constitutional rights by a prosecutor… could be achieved by prosecution of the offender or by discipline imposed by official state bar organizations.")

Allen is an active member of the California State Bar who currently works as a San Francisco Assistant District Attorney. The California State Bar has jurisdiction to discipline all members of the California State Bar.[22]

The State Bar uses a general statute of limitations of five years from the misconduct to the filing of a complaint, as set out in Rule 5.21 of the Rules of Procedure of the State Bar of California. Though Allen's misconduct in 2010 (in *Trulove*) and 2009-2010 (in *Barnes et al*), the State Bar retains jurisdiction due to the tolling provision (Rule 5.21(C)(3)) and the independent source provision (5.21(G)).

First, the five-year period is tolled in a number of circumstances, including while "civil, criminal, or administrative proceedings based on the same acts and circumstances as the violation are pending with any governmental agency, court, or tribunal."[23]

In the *Trulove* case, proceedings "based on the same acts and circumstances" continued until the 2015 acquittal, tolling the statute from the date of Allen's closing argument on February 2, 2010, until the date of the acquittal, March 11, 2015.[24] There can be no doubt that the same "acts and circumstances" were at issue. Allen prosecuted Trulove in the second trial based on the same evidence and brought the same charges. Crucially, the scope and severity of Allen's misconduct in the first trial did not become clear until the retrial, when Lualemaga testified on cross examination that Trulove and his family had never threatened her and that her fears came from watching movies and documentaries on television.[25] Assuming that the statute of limitations under which to file a bar complaint began to run on March 11, 2015, the last date to file a complaint would be March 11, 2020.[26]

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[22] *In re Gadda*, No. 97-O-15010, 2002 WL 31012596, at 4 (Cal. Bar Ct. Aug. 26, 2002)
[23] Rule 5.21(C).
[24] Further, there is a basis to believe that the tolling continued through the civil litigation. Trulove filed a civil case in 2016, which was resolved only in April of 2019, thus tolling the statute of limitations an additional three years. While it was true that Allen was not a named defendant in the civil case, she was deposed, and the civil case involved relitigating the underlying criminal charges. Rule 5.21(c).
[25] Exh. 7, Retrial Testimony of Lualemaga, pp. 622-23.
[26] *Yokozeki v. State Bar of California* (Cal. 1974) 11 Cal.3d 436, 449 (holding that a seven year delay was not prejudicial and in violation of due process where the harmed party tried "to resolve his differences with an attorney through a civil action before filing a complaint with the State Bar"); *Caldwell v. State Bar of California* (Cal. 1975) 13 Cal.3d 488, 495 (holding that a seven year delay in bringing charges against the lawyer was not an undue delay where bar suspended disciplinary proceedings while the harmed parties pursued action against the lawyer in a civil lawsuit).

In the *Barnes et al* case, the misconduct is alleged to have occurred from 2009-2010. But the cases themselves did not resolve until January 7, 2015. The same reasoning with respect to the tolling provision applies here, that is, the statute of limitations would be tolled until January 7, 2015 and any complaint filed before January 7, 2020 would be timely.

Secondly, the Rules of Procedure do not set any limitations period for proceedings initiated by the State Bar, based on information from independent sources.[27] Rule 5.21(G) provides that the five-year period does not apply to "disciplinary proceedings that were investigated and initiated by the State Bar based on information received from an independent source other than a complainant."[28] For example, *In the Matter of Luti*, the State Bar Court found the 5-year limit inapplicable to commingling charges that the State Bar discovered when investigating a complainant's misappropriation allegations:

> As to count four (commingling), we find that the five-year limitation does not apply because it was not based solely on a complainant's allegations. The State Bar discovered Luti's bank records that show he paid personal expenses out of his CTA while it was investigating Weremblewski's complaint about the misappropriation.[29]

In the *Trulove* case, there are numerous independent sources for Allen's discipline: the California Court of Appeal's 2014 decision, the 2015 transcript of Lualemaga's retrial testimony, and Allen's 2017 deposition.

In the Barnes case, there is an independent record as well, including a properly filed defense motion to dismiss, certified court minutes, and the transcript of a hearing where the subsequence prosecutor concedes that Allen intentionally withheld the exculpatory interview.

As in *Luti*, then, this complaint is "not based solely on a complainant's allegations." Rather, as the voluminous exhibits demonstrate, the complaint is based upon primary documents

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[27] Rule 5.21(G); *In the Matter of Carmen Anthony Trutanich* (2018) 16-0-12803-YDR. Public Matter – Designated for Publication (finding that the state bar's three-decade delay in bringing charges based on a 2016 judicial opinion did not violate the statute of limitations period under Rule 5.21 but dismissing the complaint because a three-decade delay substantially prejudiced the attorney's ability to defend himself). See also *In the Matter of Luti*, No. 15-O-11994, 2018 WL 3968218, at *5 (Cal. Bar Ct. Aug. 6, 2018).
[28] Rule 5.21(G).
[29] *Matter of Luti*, No. 15-O-11994, 2018 WL 3968218, at *5 (Cal. Bar Ct. Aug. 6, 2018).

including court decisions, trial transcripts, and deposition testimony.[30] Thus, under either rationale above, the State Bar retains jurisdiction to discipline Allen.

II. Jamal Trulove's Wrongful Conviction and Allen's Misconduct.

A. A homicide occurs; the eyewitness does not initially recognize Jamal Trulove's photograph, but through a series of suggestive police procedures, the eyewitness eventually says the shooter was Trulove.

Late in the evening on July 23, 2007, a man named Seu Kuka was shot to death in the Sunnydale housing project in San Francisco.[31]

Priscilla Lualemaga told police she had witnessed the shooting from the bedroom window of her grandmother's apartment in Sunnydale housing project. The police took Lualemaga to the Ingleside police station later than evening and was left alone in a room for two hours. The police instructed Lualemaga "to look over a bulletin board of photos of dozens of mugshots and identify anyone she recognized."[32]

One of the photographs on the bulletin board that Lualemaga looked at was Jamal Trulove's. But despite spending two hours alone in the room with his picture, Lualemaga neither recognized him nor identified him to the police that night as the shooter, despite later claiming to have seen Trulove 30 times in the past.[33] Lualemaga "was able to identify one person's picture from the bulletin board as Joshua Bradley, the person Kuka was chasing when he was shot."[34] But "it is undisputed that she did not identify Jamal Trulove's photo, which was directly adjacent to Joshua Bradley's."[35]

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[30] *In the Matter of Carmen Anthony Trutanich* (2018) 16-0-12803-YDR. Public Matter – Designated for Publication (finding that the state bar's three-decade delay in bringing charges based on a 2016 judicial opinion did not violate the statute of limitations period under Rule 5.21 but dismissing the complaint because a three decade delay substantially prejudiced the attorney's ability to defend himself).

[31] Exh. 1, *People v. Jamal R. Trulove* 2014 WL 36469 (Cal. Court of Appeal Jan. 6, 2014) (unpublished decision).

[32] *Id*.

[33] Exh. 1, *People v. Jamal R. Trulove* 2014 WL 36469 (Cal. Court of Appeal Jan. 6, 2014), at *2 (unpublished decision);

[34] Exh. 2, *Trulove v. D'Amico*, 2018 WL 1070899, (N.D. Cal. February 27, 2018) at *1 (unpublished order).

[35] Exh. 1, *People v. Jamal R. Trulove* 2014 WL 36469 (Cal. Court of Appeal Jan. 6, 2014), at *2; (unpublished decision); Exh. 2, *Trulove v. D'Amico*, 2018 WL 1070899, (N.D. Cal. February 27, 2018) at *1 (unpublished order).

After looking at the pictures on the wall and identifying many people she recognized, including photographs above and next to Jamal Trulove's, Lualemaga was interviewed by San Francisco homicide detectives. Lualemaga told the detectives "that she really did not get a good look at the shooter," "was 'not sure' if the shooter hung around with Bradley," and never mentioned Trulove as a possible suspect.[36] She agreed with the detective's statement that she "didn't get a good look at the shooter."[37]

Detectives visited her at work the following day, July 25, 2007. They came with a six pack of photographs seeking an identification. Jamal Trulove's photograph, his brother Joshua Bradley's photograph, his other brother David Trulove's photograph,[38] and "maybe a couple of other people from the neighborhood"[39] were all included in the highly suggestive six pack. The photograph of Trulove was the *same photograph* that had appeared on the bulletin board at the Ingleside police station, where Lualemaga had failed to recognize it.[40] Jamal Trulove was the only person wearing an orange sweatshirt that Lualemaga associated with jail clothing; the other five individuals were in street clothes.[41] In describing this photo spread in closing argument, Allen asked the jury, "Is it really so bad that the photo spread was conducted in this way?"[42]

This time, Lualemaga told police that the shooter "could be" Trulove.[43] But at trial, Lualemaga testified that she was "100 percent sure" that the shooter was Trulove.[44] In between the time that Lualemaga stated that she was uncertain and the time she stated she was positive, Lualemaga received nearly $20,000 worth of benefits from the District Attorney's Office, as described below.[45]

B. The District Attorney's Office arranges for $63,000 in benefits to be paid to the Lualemaga and her family, justified by on the ground that Lualemaga was "in imminent danger if she continued to reside in the City and County of San Francisco." But no evidence suggested Lualemaga was in any danger and she was not living in the "City and County of San Francisco" at the time she entered the witness protection program.

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[36] *Id*.
[37] Exh. 7, Retrial Testimony of Priscilla Lualemaga (aka "Priscilla Faleafaga"), p.653.
[38] *Id*. at 654-5.
[39] Exh. 8, Closing Argument of Linda Allen, p.2347:15-16.
[40] Exh. 7, Retrial Testimony of Priscilla Lualemaga, p.655.
[41] Exh. 7, Retrial Testimony of Priscilla Lualemaga, p.656.
[42] Exh. 8, Closing Argument of Linda Allen, p.2347:15-17.
[43] Exh. 7, Retrial Testimony of Priscilla Lualemaga, p.657.
[44] Exh. 8, Closing Argument of Linda Allen, p. 2360.
[45] Exh. 9, Memorandum to Linda Allen, "Witness Priscilla Maliolagi Lualemaga," dated January 12, 2010; Lualemaga Payment Receipts.

Beginning on June 1, 2009 and continuing through April 30, 2011, the District Attorney's Office paid $62,999.10 to subsidize Lualemaga and her family by moving them into a witness protection program in connection with her testimony against Trulove.[46] According to the *Trulove* Court of Appeal opinion, it was then-prosecutor Eric Fleming who initially told Lualemaga about the witness protection program in 2009.

In a 2010 memo addressed to Allen authorizing the move and the expenses, Larry Wallace, who was then Deputy Chief of Investigations in the San Francisco District Attorney's Office stated that Lualemaga had been in "imminent danger" because of her testimony.[47] Specifically, Wallace wrote, "Members of the San Francisco Police Department and I believed that Priscilla Maliolago Lualemaga was in imminent danger if she continued to reside in the City and County of San Francisco. Therefore, our office provided them with relocation assistance via the California Department of Justice."[48]

The statements in the memorandum were false. Lualemaga was never threatened by Trulove, his family, his friends, or anyone else.[49] There is no evidence, nor any reason to believe, that Lualemaga ever told anyone in the District Attorney's Office—Fleming, Wallace, or Allen—she had received any threats, much less that she was in "imminent danger." To the contrary, Lualemaga testified at the retrial that she had received no threats. She stated that her fear was based shows that she had watched on television.[50]

Moreover, Lualemaga was not living in the "City and County of San Francisco" at the time she entered the witness protection program, as the memo stated. She and her family lived in an apartment in South San Francisco on Carter Drive and had a lease under Lualemaga's name.[51] South San Francisco is a city in San Mateo County that, despite the shared name, does not even share a border with San Francisco.[52] When Lualemaga entered the witness protection program on June 1, 2009, she moved directly from her South San Francisco apartment in San Mateo County.[53] The District Attorney's Office

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[46] Exh. 9, Memorandum to Linda Allen, "Witness Priscilla Maliolagi Lualemaga," dated January 12, 2010; Lualemaga Payment Receipts.
[47] Exh. 9, Memorandum to Linda Allen, "Witness Priscilla Maliolagi Lualemaga," dated January 12, 2010; Lualemaga Payment Receipts.
[48] Exh. 9, Memorandum to Linda Allen, "Witness Priscilla Maliolagi Lualemaga," dated January 12, 2010; Lualemaga Payment Receipts.
[49] Exh. 7, Retrial Testimony of Priscilla Lualemaga, pp.622-23.
[50] Exh. 7, Retrial Testimony of Lualemaga, pp. 622-23.
[51] Exh. 10, Deposition of Priscilla Lualemaga, pp. 177-79.
[52] Exh. 10, Deposition of Priscilla Lualemaga, pp. 182:23-25; 256: 4-8.
[53] Exh. 10, Deposition of Priscilla Lualemaga, pp.179:24-25; 180:1-5.

presumably knew as much, since it paid the moving company to go to the Lualemaga's apartment "to pack, move, and store" their personal belongings.[54]

By the time of trial, in 2010, Lualemaga had received $19,234.74 in benefits from the district attorney's office and was living in permanent housing that cost $1,350.00 per month to rent.[55] Nor was Lualemaga the only one who benefitted from the district attorney's witness protection program. Shortly before the trial, at Lualemaga's request, her sister and her sister's family were also placed in the witness protection program even though they had not received any threats and her sister was not a witness.[56] In total, Lualemaga's sister and her family received $10,200 in benefits from the state.[57]

Lualemaga and her husband were unemployed during this time and relied on money provided by the witness protection program to support themselves and their kids.[58] Lualemaga and her family remained in the witness protection program for more than a year after Trulove was convicted. The record shows that from June 1, 2009-April 1, 2011, Lualemaga received nearly $63,000 in benefits from the state through the witness protection program, which was authorized by the San Francisco District Attorney's Office.[59]

C. First Trial in *People v. Jamal Trulove*: Guilty verdict follows Allen's misconduct.

In June of 2009, the San Francisco District Attorney's Office charged Trulove with the first-degree murder of Keka in violation of California Penal Code section 187(a); with a gun enhancement allegation within the meaning of section 12022.53(d); and with being a felon in possession of a firearm, in violation of California a Penal Code section 12021. The trial commenced in 2010.

Lualemaga was the sole trial witness who claimed Trulove was at the scene and identified him as Kuka's killer. As Allen acknowledged repeatedly in her closing argument, this was a one witness case. "You don't have to have corroboration. It can be

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[54] Exh. 9, Memorandum to Linda Allen, "Witness Priscilla Maliolagi Lualemaga," dated January 12, 2010; Lualemaga Payment Receipts. At the civil deposition, Lualemaga said that she moved to South San Francisco shortly after the homicide, "sometime around July or August of 2008." (Exh. 10, Deposition of Priscilla Lualemaga, pp. 177-79.)
[55] Exh. 9, Memorandum to Linda Allen, "Witness Priscilla Maliolagi Lualemaga," dated January 12, 2010; Lualemaga Payment Receipts.
[56] Exh. 7, Retrial Testimony of Priscilla Lualemaga, p.661.
[57] Exh. 7, Retrial Testimony of Priscilla Lualemaga, p.683-84.
[58] Exh. 7, Retrial Testimony of Priscilla Lualemaga p.684.
[59] Exh. 9, Memorandum to Linda Allen, "Witness Priscilla Maliolagi Lualemaga," dated January 12, 2010; Lualemaga Payment Receipts.

through the testimony of one witness."[60] She reminded the jury early on in her closing argument:

> I asked all of you, "Could you follow the law?" Some people couldn't. They just couldn't. Some people thought, "I can't do that. I can't convict somebody, just on the testimony of one witness." But I asked each and every one of you, and you all assured me that you would follow the law and that, if I proved my case beyond a reasonable doubt with one witness, that you wouldn't hesitate to convict the defendant of murder.[61]

As the federal judge stated in a ruling on summary judgment in the civil trial: "At Trulove's preliminary hearing and trial, the prosecution based its entire case on Lualemaga's identification of [Trulove] as the shooter[.]"

Again and again in her closing argument, Allen urged the jury to credit Lualemaga's testimony—indeed, she didn't so much urge the jury was command them, saying at one point: "*you have to believe her*."[62] Allen told the jury to believe Lualemaga because she was "brave,"[63] "bold, courageous"[64] because she stepped forward even though she was "afraid for her life; she's afraid for her family's life; afraid for her sister's life."[65] She emphasized Lualemaga's fear, repeatedly stating that she was "terrified."[66] Allen spoke of "the sacrifices she's had to make" stating, "she will never get her life back,"[67] and "I don't think she's ever going to have a day when she's not looking over her shoulder."[68] Allen told the jury that they, by contrast, need not be nearly so brave because unlike Lualemaga "there's twelve of you" so "you don't have to be afraid to convict a man, just on the testimony of one witness."[69]

Allen also used Lualemaga's fear to explain the inconsistencies in her testimony, implying that her initial uncertainty was the result of fear and that Lualemaga had everything to lose by becoming more certain, not less certain. "She's afraid for herself, afraid for her life; her husband's life; children's life… The more sure she gets, the worse her life gets," Allen told the jury.[70] Allen claimed that Lualemaga's "life will never be the

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[60] Exh. 8, Closing Argument of Linda Allen, p. 2425-26.
[61] Exh. 8, Closing Argument of Linda Allen, pp. 2313-14.
[62] Exh. 8, Closing Argument of Linda Allen, p. 2350 (emphasis added).
[63] *Id*. at p.2340
[64] *Id*. at 2316.
[65] *Id*.
[66] Allen said Lualemaga was "terrified" 11 times in her arguments.
[67] *Id*. at p.2316.
[68] *Id*. at p.2350.
[69] *Id*. at p.2317.
[70] *Id*. at p.2350.

same. I don't think she's ever going to have a day when she's not looking over her shoulder."[71] She said, "So you have to believe her."[72]

Allen went on, "[Lualemaga] didn't want to be here sitting where everybody could see her, where there's an open courtroom that could be full of the defendant's friends and family all going to know she's the one. She's the only one standing between him and justice because she's the only witness. So we move her to a hotel."[73] Allen's implication was clear: Trulove was a threat to Lualemaga because her identification was correct, and he was guilty of murder.

Allen described the witness protection program as a hardship where Lualemaga was forced to live "in some crummy hotel room."[74] Lualemaga's move to a hotel, followed by two additional moves, were, according to Allen, "the only way she can feel safe, she can feel safe from revenge and retaliation."[75] She said, "*Remember, we have to put her in witness protection* before she testified at the prelim."[76] She told the jury that even on the night of the homicide, "[t]he police officer obviously recognized the danger she was in."[77]

The District Attorney's Office did not "have to" put Lualemaga in witness protection; there was no threat. Lualemaga testified at her deposition that she spoke with Allen "probably more than 10" times before the first trial,[78] so Allen knew or reasonably should have known that her statements were not true.

Lualemaga was not moved several times because of danger; there was none. Moreover, the District Attorney's memo suggests that the final move was made to secure "permanent housing,"[79] not to protect Lualemaga from an ongoing danger. The permanent housing – which cost $1,350.00 per month – was significantly cheaper for the District Attorney's Office to pay than what it had been paying previously ($89 per night for a hotel room for a total of approximately $2,670 per month).[80] Allen, to whom the memo was addressed, knew or reasonably should have known that her statements were not true.

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[71] *Id*. at p.2350.
[72] *Id*. at p.2350.
[73] Exh. 8, Closing Argument of Linda Allen, p.2353.
[74] *Id*. at p. 2353.
[75] *Id*. at p. 2354.
[76] *Id*. at p. 2357.
[77] *Id*. at p. 2340.
[78] Exh. 10, Deposition of Priscilla Lualemaga, p. 114.

[79] Exh. 8, Closing Argument of Linda Allen, p.2340.
[80] *Id*.

Allen also said that Lualemaga had to be telling the truth because of what she had sacrificed and that she was still "paying the price for it." Only someone telling the truth would take such risks and make such sacrifices, Allen said—"give up your life, be scared forever, worry about you, worry about your family, your husband, your sister."[81] She repeated these words nearly verbatim just a few transcript pages later, saying "How sure would you have to be to put your life in peril?" and "how sure would you have to be to risk your life on it?"[82] But Lualemaga was not risking her life. There was no threat. It is unreasonable to believe that Allen did not know that basic truth.

Allen went on, "All of this danger, all of her fears. Everything she has suffered for, because she is a witness. She didn't miss the point. She's smart enough to know she doesn't have to do this. And the only reason she's doing it is because it's the truth. And it's the right thing to do."[83] She finished the opening portion of her closing by saying that Lualemaga "was the only witness willing to come forward; the only witness willing to come in here, risk her life, and tell you what she saw. She has done her part; now I'm asking you to do yours."[84]

This false trope of bravery in the face of present imminent danger was a theme Allen returned to repeatedly, and it was false. In her rebuttal closing, Allen continued to hammer away at it. "*We had to relocate her*. . . ."[85] Allen's statement, "We had to relocate her" was simply not true. Using Lualemaga's first name, Allen said, "And Priscilla, Priscilla's life is priceless to her. Priceless. What is your life worth to you? What would you risk your life for?"[86] Allen continued, "You can't underestimate the sacrifice that Priscilla has made, just to do the right thing. The more scared she gets, the more certain she has to be."[87] Allen ended this way, "People don't come forward. But Priscilla did. Now I am asking you to have the same courage that she did and convict the defendant of murder."[88]

The jury convicted Trulove of first-degree murder with the weapons enhancement and of being a felon in possession of a firearm. He was sentenced to 50 years to life in prison.[89]

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[81] *Id*. at p. 2354.
[82] Exh. 8, Closing Argument of Linda Allen, p. 2362.
[83] *Id*. at p. 2363.
[84] *Id*. at p. 2389.
[85] *Id*. at p. 2433 (emphasis added).
[86] *Id*. at p. 2445.
[87] *Id*. at p. 2445.
[88] *Id*. at p. 2446.
[89] Exh. 1, *People v. Jamal R. Trulove* 2014 WL 36469 (Cal. Court of Appeal Jan. 6, 2014), at *1; (unpublished decision).

D. The Appeal: Court of Appeal Identifies Allen's Prosecutorial Misconduct.

In 2014, a unanimous panel of justices on the California Court of Appeal reversed Trulove's convictions because of trial counsel's failure to object to Allen's prosecutorial misconduct. Specifically, the Court found that "the prosecutor repeatedly engaged in prejudicial misconduct when she urged the jury to believe Lualemaga because Lualemaga testified in the face of real danger of retaliation from defendant's friends and family, and endured hardships in a witness protection program that this danger compelled her and others to enter, *when there was no evidence of such danger*."[90]

The Court of Appeal enumerated Allen's numerous acts of misconduct: Allen referred to facts not in evidence and vouched for the credibility of her key witness, offering assurances that Lualemaga was a truthteller based on non-existent facts. These arguments, the court found, were prohibited by state and federal law and constituted "highly prejudicial misconduct."

The court further explained, "such prohibitions are particularly important regarding prosecution references to threats to a witness because of the highly prejudicial subject matter; evidence that a defendant is threatening a witness implies consciousness of guilt and is thus *highly prejudicial* and admissible only if adequately substantiated."[91] In this case, the court found, there was no such evidence: "the only pertinent evidence was that Lualemaga had voluntarily entered the witness protection program solely because of her own general fears."

The court condemned Allen's factually unsupported argument that Lualemaga was credible because she was in danger:

> The People did not present a scintilla of evidence at trial that defendant's friends and family would try to kill Lualemaga if she testified against him, nor that Lualemaga was placed in the witness protection program for any reason other than Lualemaga's subjective concerns about her safety. Rather than concede Lualemaga's fears were just that, however, the People trumpeted her courageous willingness to testify in the face of assassins lurking on defendant's behalf. This yarn was made out of whole cloth. Because the heavy emphasis the prosecutor repeatedly placed on the asserted dangers Lualemaga faced by testifying against defendant must have influenced the jury, and such dangers were not based on any evidence, the prosecutor's argument to the jury was prejudicial prosecutorial misconduct under both the federal and state standard…

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[90] Exh. 1, *People v. Jamal R. Trulove* 2014 WL 36469 (Cal. Court of Appeal Jan. 6, 2014), at *10; (unpublished decision) (emphasis added).
[91] Exh. 1, *People v. Jamal R. Trulove* 2014 WL 36469 (Cal. Court of Appeal Jan. 6, 2014), at *10; (unpublished decision) (emphasis in original).

> When prosecutorial misconduct occurs, an appellate court must determine whether there was sufficient prejudice to require reversal under the federal standard articulated in *Chapman v. California* (1967) 386 U.S. 18, 24 and/or the state standard articulated in *People v. Watson* (1956) 46 Cal.2d 818, 836. (*People v. Adanandus* (2007) 157 Cal.App.4th 496, 514.) We conclude there was sufficient prejudice. This misconduct was not harmless beyond a reasonable doubt.[92]

Because Allen's misconduct was so prejudicial and the case against Trulove was supported only by Lualemaga's "sparse testimony," the Court of Appeal found the prosecutorial misconduct was prejudicial error and overturned the convictions.

E. Retrial: Lualemaga Concedes She Was Never Threatened by Anyone.

The full scope of Allen's Constitutional and ethical violations in her 2010 closing argument was not fully evident until the retrial in 2015. It was only during the retrial, under cross examination, that Priscilla Lualemaga conceded that she had *never* been threatened by Trulove or any member of his family. In fact, *no one* had ever made a threat to Lualemaga.

The Court of Appeal found Allen to have argued "facts outside the record"; but what Allen actually did was argue "facts" that were not true.

The following excerpt from Lualemaga's cross examination on February 18, 2015 makes this clear:

Counsel:	So I want to be clear about one thing right from the start. Jamal Trulove never threatened you, is that correct?
Lualemaga:	Yes.
Counsel:	And no one associated with Jamal Trulove ever threatened you?
Lualemaga:	Right.
Counsel:	And nobody, in fact, has ever threatened you in connection with you being a witness in this case, correct?
Lualemaga:	Right.

[92] Exh. 1, *People v. Jamal R. Trulove* 2014 WL 36469 (Cal. Court of Appeal Jan. 6, 2014), at *13; (unpublished decision).

Counsel: The fear that you feel as sort of a generalized fear, that comes from having watched television, what you've seen on t.v.?

Lualemaga: Just documentaries, news, and stuff like that.

Counsel: On t.v.?

Lualemaga: Yes.

Counsel: And you've been fearful all of a sudden because you expected something might happen, but nothing has actually happened, correct?

Lualemaga: Correct.[93]

The State Bar should investigate whether Allen made her closing argument knowing that her assertions and implications about Lualemaga being in danger were not only factually unsupported, but false.

It is hard to imagine that Allen was unaware that Lualemaga had not received any threats. Any competent prosecutor would ask a witness in witness protection if she had received any actual threats, and witnesses asking for witness protection benefits typically volunteer such information.

And Lualemaga wasn't just any witness: she was the key witness. Lualemaga testified at her deposition that she spoke with Allen "probably more than 10" times before the first trial.[94] Given the importance of Lualemaga's testimony and the weight Allen put on her "bravery" in the face of retaliation, it is implausible to believe that Allen never asked Lualemaga if she had actually been threatened by Trulove and his family members. And if such threats had emerged after Lualemaga entered the witness protection program, that information would presumably have been reported to Allen so that the District Attorney's office could take appropriate steps to protect Lualemaga.

Allen told the jury that Lualemaga was moved three times while she was in the witness protection program, implying it was because of threats to her safety – but the only "threats" Lualemaga faced existed only in her imagination. Yet Allen insinuated, over and over, that the non-existent threats were real, to bolster Lualemaga's credibility and to falsely imply that Trulove had shown consciousness of guilt. Allen told the jury "*Remember, we have to put her in witness protection before she testified at the prelim*,"

[93] Exh. 7, Retrial Testimony of Priscilla Lualemaga, pp. 622-23.
[94] Exh. 10, Deposition of Priscilla Lualemaga, p. 114.

and *"we had to relocate her."*[95] Allen spoke repeatedly of Lualemaga's "sacrifice," and how the jurors "have to believe her," [96] because "her life will never be the same. I don't think she's ever going to have a day when she's not looking over her shoulder."[97]

None of these assertions were true, and it is hard to imagine they were made in good faith. The impact of the false insinuations be overstated – this was a one-witness case with no corroborating evidence. The theme of Allen's closing argument was that Lualemaga was believable because of her courage in the face of threats to her life. A unanimous panel of the Court of Appeal ruled that the arguments made by Allen constituted "highly prejudicial prosecutorial misconduct" that violated Trulove's right to a fair trial. A civil jury later found that Trulove was framed and he was exonerated. Allen's misconduct contributed to the conviction of an innocent man.

F. Prosecutorial Misconduct as a Violation of the Ethical Rules

Ethical violations are subject to state bar discipline when "willful," which "implies simply a purpose or willingness to commit the act, or make the omission referred to. It does not require any intent to violate law, or to injure another, or to acquire any advantage… Thus, *bad faith is not a prerequisite* to a finding of a willful failure to comply with [an ethical rule]. Only a general purpose or willingness to commit the act or permit the omission is necessary."[98]

Prosecutorial misconduct in closing argument is widespread. As one treatise notes, "The problem is not new... [M]isconduct by prosecutors in oral argument has indeed become staple in American trials. Even worse, such misconduct shows no sign of abating or being checked by institutional or other sanctions… Virtually every federal and state appellate court at one time or another has bemoaned the 'disturbing frequency' and 'unheeded condemnations' of flagrant and unethical prosecutorial behavior."[99]

As far back as 1889, the California Supreme Court noted, "*We have been called upon many times to caution, sometimes to rebuke, prosecuting officers for the overzealous performance of their duties* [in argument]. They seem to forget that it is their sworn duty to see that the defendant has a fair and impartial trial, and that he be not convicted except by competent and legitimate evidence. Equally with the court the district attorney, as the representative of law and justice, should be fair and impartial. He should remember that it

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[95] Exh. 8, Closing Argument of Linda Allen, pp. 2433, 2357 (emphases added).
[96] *Id*. at p. 2350.
[97] *Id*. at p. 2350.
[98] *Durbin v. State Bar* (1979) 23 Cal. 3d 461, 467 (internal citations omitted, emphasis added).
[99] Gershman, Bennett L. *Prosecutorial Misconduct*. §11:1. Introduction (2d ed.) (August 2018 update) (internal citations omitted.)

is not his sole duty to convict, and that to use his official position to obtain a verdict by illegitimate and unfair means is to bring his office and the courts into distrust."[100]

Sadly, the commonness of prosecutorial misconduct in closing argument is related to the utter lack of consequences for such behavior. In its seminal 2010 study, the Northern California Innocence Project identified 707 appellate decisions where courts identified prosecutorial misconduct.[101] Of those, the majority (62 percent) involved prosecutorial misconduct in closing argument. Of the total 707 decisions, the State Bar issued public discipline for just 6 prosecutors for on-the-job misconduct.

Business and Professions Code § 6068(a). This rule declares that "[i]t is the duty of an attorney . . . to support the Constitution and laws of the United States and of this state."

A prosecutor's improper closing argument violates BPC § 6068(a).[102] In the *Field* case, the State Bar Court's Review Department disciplined a prosecutor who had argued in facts in closing argument that were not in evidence.[103] The Court held that the prosecutor's argument constituted a violation of BPC § 6068(a) because Field violated case law defining proper argument. [104]

Here, as in *Field*, Allen violated the law in her improper closing arguments, thereby violating BPC § 6068(a).

Business and Professions Code § 6106. This rule declares that "[t]he commission of any act involving moral turpitude, dishonesty or corruption . . . constitutes a cause for disbarment or suspension." Such acts may be either intentional or involving gross

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[100] *People v. Lee Chuck* (1889) 78 Cal. 317, 328–29 (emphasis added).
[101] Ridolfi, Kathleen M.; Possley, Maurice; and Northern California Innocence Project, "Preventable Error: A Report on Prosecutorial Misconduct in California 1997–2009" (2010). *Northern California Innocence Project Publications*.
[102] *In the Matter of Benjamin Thomas Field* (2010) 05-O-00815; 06-O-12344.
[103] In a Sexually Violent Predator ("SVP") trial, the prosecutor, Benjamin Field, implied in his closing argument that if the defendant was found ineligible, he would be returned to a state mental hospital.
[104] *In the Matter of Benjamin Thomas Field* (2010) 05-O-00815; 06-O-12344.

negligence.[105] The rule still applies where the attorney's gross negligence affected the public in general and not a client.[106]

Allen's conduct appears either intentionally dishonest or at least grossly negligent – either of which constitutes a violation of § 6106.

Allen told the jury that Lualemaga had risked her life by testifying when that was not true. Lualemaga had been threatened by no one and had been living with her family, since late November of 2009, in permanent housing that cost $1,350. By the time of trial, she had been paid nearly $20,000 based on the assertions that she was in "imminent danger" and needed to leave the City and County of San Francisco. Neither fact was true – Lualemaga faced no threats and was living in San Mateo County. Allen knew or reasonably should have known as much. These improprieties in Allen's closing argument can form the basis for a charge of BPC §6106 (moral turpitude).[107]

Allen's closing argument went beyond vouching, it was deceptive. Allen didn't simply argue facts outside the record, she argued facts that did not exist, and which she either knew or had reason to know did not exist. Her false argument – which the Court of Appeal called "highly prejudicial" – was the heart of her case. It was her basis for arguing that Trulove showed consciousness of guilt and for vouching for Lualemaga's credibility even though her account was inconsistent and uncorroborated.

In the 2010 *Field* case, the Review Court found Field culpable for a violation of BPC § 6106 (moral turpitude) for an improper argument, because the timing of the argument – saving the improper argument for rebuttal – showed his deceptiveness.[108] Viewed in this context, Allen's improper closing argument reflected moral turpitude, dishonesty and corruption, in violation of BPC § 6106.

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[105] *See, e.g*; *In the Matter of Wyrick* (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 83, 91 (gross negligence may violate § 6106); *In the Matter of Wells* (Review Dept. 2006) 4 Cal. State Bar Ct. Rptr. 896, 910 (moral turpitude includes creating false impression by concealment as well as by affirmative misrepresentations); *In the Matter of Guzman* (Review Dept. 2014) Case No. 11-O-17734 (attorney's carelessness in giving staff access to Client Trust Account without supervision constituted gross negligence amounting to moral turpitude when CTA funds were misappropriated).

[106] *In the Matter of Anna Christina Lee* (Review Dept. 2014) 12-O-13204. (attorney's gross negligence in inaccurately reporting MCLE compliance deemed an act of moral turpitude even though it was not an intentional misrepresentation).

[107] *In the Matter of Benjamin Thomas Field* (2010) 05-O-00815; 06-O-12344.

[108] *Id.*

Business and Professions Code §6068(o)(7) – Failure to Report. This section requires an attorney to report to the State Bar within 30 days a reversal of judgment based in whole or in part upon misconduct or willful misrepresentation by an attorney.

The Court of Appeal's reversal of Trulove's conviction was based in part on Allen's misconduct and willful misrepresentation. This writer is unaware whether Allen complied with her obligation to self-report the case to the State Bar.

California Rule of Professional Conduct 3.3. This rule requires candor toward the tribunal and prohibits a lawyer from "knowingly making a false statement of fact" in a courtroom. The State Bar should investigate whether Allen knowingly made false statements implying that Lualemaga faced threats from Trulove or his family members when she knew that Lualemaga faced no such threats.

At the time of Allen's conduct, California attorney were governed by Rule of Professional Conduct 5-200. This rule ordered that attorneys "shall employ… such means only as are consistent with truth" and "shall not seek to mislead the judge, judicial officer, or jury by an artifice or false statement of fact or law."[109] The State Bar should investigate whether Allen's conduct violated these canons of candor.

III. *People v. Barbara Barnes, Javon Fee, and Rorico Reyna*, SCN 211977

I am also asking that the state bar investigate Allen for possible misconduct in connection with *People v. Barnes, Fee, and Reyna* (Superior Court Number 211977, Municipal Court Number 2410155).

On February 23, 2009, several fights broke out in the Tenderloin. Someone fired into the crowd of people killing one person and injuring others. The murder weapon was not recovered.[110] Based on eyewitness accounts, the San Francisco District Attorney's Office charged Barbara Barnes, Javon Lee, and Rorico Reyna with premeditated murder, assault with a firearm, and conspiring to sell cocaine.[111]

Two days after the crime, police conducted and *recorded* an interview with Cedric Brown.[112] Brown told police inspectors that a man who went by the street names

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[109] California Rule of Professional Conduct 5-200. Effective from September 14, 1992 to October 31, 2018. Available at http://www.calbar.ca.gov/Portals/0/documents/rules/California-Rules-of-Professional-Conduct-from-1992-2018.pdf.
[110] Exh. 4, Motion to Dismiss, *People v. Barnes*, p. 3.
[111] Exh. 4, Motion to Dismiss, *People v. Barnes*, p. 3.
[112] Exh. 4, Motion to Dismiss, *People v. Barnes*, p. 4.

"Roofus" and "Stoney" was the person who "went nuts and did that shit."[113] Brown later clarified that Roofus/Stoney was "the dude that did the shooting."[114] Brown said that Roofus/Stoney's face was "very clear" and that Brown had "just bought drugs from him" on the day of the interview.[115] Neither of these street names matched any of the defendants. Brown said that Roofus/Stoney was a man with a large scar on his face—neither of the male defendants had a facial scar. He said he could identify a picture of Roofus/Stoney but was never shown a photo array or a live line up.[116] Brown also told the Inspectors that he suffered from cancer and HIV.[117]

The police inspector typed up a two-page single spaced report summarizing Brown's statement, titled "Confidential Information Do Not Release Without Specific Authorization or Order" at the top.[118] The audio recording of the interview was put on a CD and labeled "CD 55."

Linda Allen was the prosecutor assigned to the case in 2009.[119] Despite the defense attorneys' many oral and written requests for discovery, Allen never provided the Brown interview.[120]

According to the certified court minutes, Linda Allen was the Assistant District Attorney of record on March 1, 2010, when the preliminary hearing started.[121] She as the ADA of record on May 6, 2010, when the case was set for arraignment following the preliminary hearing.[122] Allen had a Constitutional obligation to disclose material exculpatory evidence prior to the preliminary hearing.[123] There appears to be no dispute

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[113] Exh. 4, Motion to Dismiss, *People v. Barnes*, p. 4 (citing to Exhibit C of the Motion to Dismiss, transcript of Brown interview, pp. 8-10).
[114] Exh. 4, Motion to Dismiss, *People v. Barnes*, p. 4 (citing to Exhibit C of the Motion to Dismiss, transcript of Brown interview, p. 16).
[115] Exh. 4, Motion to Dismiss, *People v. Barnes*, p. 4 (citing to Exhibit C of the Motion to Dismiss, transcript of Brown interview, pp. 10-11).
[116] Exh. 4, Motion to Dismiss, *People v. Barnes*, p. 4 (citing to Exhibit C of the Motion to Dismiss, transcript of Brown interview, p. 41).
[117] Exh. 4, Motion to Dismiss, *People v. Barnes*, pp. 4-5 (citing to Exhibit C of the Motion to Dismiss, transcript of Brown interview).
[118] Exh. 4, Motion to Dismiss, *People v. Barnes*, p.4 (citing to Exhibit B of the Motion to Dismiss, summary of Brown interview, bates-stamped 005149-005151).
[119] Exh. 4, Motion to Dismiss, *People v. Barnes*; Exh. 5, Transcript of *Barnes* discovery hearing, June 25, 2013, pp. 2-7.
[120] Exh. 5, Transcript of *Barnes* discovery hearing, June 25, 2013, pp. 2-7.
[121] Exh. 11, *Barnes* Certified Court Minutes.
[122] Exh. 11, *Barnes* Certified Court Minutes.
[123] *People v. Gutierrez* (2013) 214 Cal.App.4th 343; see also *Merrill v. Superior Court* (1994) 27 Cal.App. 4th 1586 and *Stanton v. Superior Court* (1987) 193 Cal.App. 3d 265.

that she intentionally failed to comply with this Constitutionally-mandated discovery obligations – her own colleague, Scot Clark, stated as much on June 25, 2013.[124]

The case was set for trial on June 18, 2010.[125] Under California Penal Code section 1054, Allen's *statutory* discovery obligations were triggered 30 days before that date, on or before May 18, 2010. While it is not clear if Allen was still the prosecutor of record on May 18, 2010 (another prosecutor, Scot Clark, is listed as the prosecutor of records on June 18, 2010), it is within the power of the state bar to investigate and determine whether she was.

Ultimately, Assistant District Attorney Scot Clark provided the Brown interview on March 18, 2013, more than four years after the interview was conducted. By that time, Brown was dead –he had died on November, 20, 2012, four months earlier. *Brown was alive – but unknown to the defense – during the Preliminary Hearing and five Trial dates*. Because defense counsel did not know that Brown was a witness with exculpatory information, they did not interview him and preserve his testimony via a video-recorded conditional examination, as provided by Penal Code §1335 et seq.[126]

At a discovery hearing, Clark conceded that Brown's interview "had actually reached the DA's office in 2009 and my predecessor had excluded it, had marked it as something that should be excluded, apparently believing at the time that it was confidential for some reason."[127]

His "predecessor" was Linda Allen. Defense counsel noted, "*So you know, there is a deliberateness to this [failure to disclose], and I appreciate that Mr. Clark has indicated that for Ms. Allen*."[128] Defense counsel explained that Allen had years earlier disclosed

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[124] Exh. 5, Transcript of *Barnes* discovery hearing, June 25, 2013, pp. 2-3.
[125] Exh. 11, Barnes Certified Court Minutes.
[126] Pen. C., §1336 allows the defense to record a witnesses' testimony under these exact circumstances: "(a) When a material witness for the defendant, or for the people, is… so sick or infirm as to afford reasonable grounds for apprehension that he or she will be unable to attend the trial, or is a person 65 years of age or older, or a dependent adult, the defendant or the people may apply for an order that the witness be examined conditionally."
[127] Exh. 5, Transcript of *Barnes* discovery hearing, June 25, 2013, pp. 2-3. There was no reason to exclude Brown's testimony as being "confidential." Brown was a percipient witness who identified the shooter as someone other than Javon Lee and did not implicate the other co-defendants. His understanding of what happened flatly contradicted the People's case, which meant that he not only had nothing to fear from the defendants, his statements had to be disclosed to them under federal and state constitutional law because they tended to show that someone else was responsible.
[128] Exh. 5, Transcript of *Barnes* discovery hearing, June 25, 2013, p. 7 (emphasis added).

CD 56, an audio recording of a witness interview which *post-dated* Brown's interview. The interviews were conducted at roughly the same time, but the witness on CD 56 inculpated, rather than exculpated, the defendants.

Clark's assessment of Allen's discovery failures was stark. "I think there's a lot of stuff I have that they don't have. And I think the logical place to start, there may be motions on that. There may be sanctions that flow from that."[129] Clark continued, "I'm kind of a proud guy inasmuch as—and of course this is going to have a *Brady* issue, but in cases that I handle from cradle to grave, there aren't issues like this… I think there's volumes of other stuff out there that may give rise to a deeper inquiry."[130]

Following the filing of the motion to dismiss, the District Attorney's Office resolved the cases against Barnes, Lee, and Reyna through plea agreements and were ultimately resolved on January 7, 2015.[131] In 2015, Barnes pleaded guilty to manslaughter and assault with a firearm; she received eight years in prison. In 2015, Reyna pleaded guilty to manslaughter and assault with a firearm; he received eight years in prison. In 2015, Lee pleaded guilty to manslaughter, a firearms enhancement, and assault with a deadly weapon and received 23 years in prison. Barnes and Reyna—who were charged with the most serious crime it is possible to commit—have served their sentences and are no longer in state prison. None of the three received the mandatory life sentence that a murder conviction entails.

A. Business and Professions Code § 6068(a).

Ethical violations are subject to state bar discipline when "willful," which "implies simply a purpose or willingness to commit the act, or make the omission referred to. It does not require any intent to violate law, or to injure another, or to acquire any advantage… Thus, *bad faith is not a prerequisite* to a finding of a willful failure to comply with [an ethical rule]. Only a general purpose or willingness to commit the act or permit the omission is necessary."[132]

Business and Professions Code § 6068(a). This rule declares that "[i]t is the duty of an attorney . . . to support the Constitution and laws of the United States and of this state."

Allen's Constitutional Discovery Obligations

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[129] Exh. 5, Transcript of *Barnes* discovery hearing, June 25, 2013, p.3.
[130] Exh. 5, Transcript of *Barnes* discovery hearing, June 25, 2013, pp. 3-4.
[131] Exh. 11, Barnes Certified Court Minute Orders.
[132] *Durbin v. State Bar* (1979) 23 Cal. 3d 461, 467 (internal citations omitted, emphasis added).

The prosecutor has constitutional obligations with respect to exculpatory evidence. The prosecutor must disclose material exculpatory evidence prior to the preliminary hearing[133] and trial[134] without a request.[135] "[T]he prosecution's duty imposed by *Brady* is 'self-executing.' As the California Supreme Court put it, "[T]he prosecution must disclose material exculpatory evidence whether the defendant makes a specific request, a general request, or none at all."[136]

Exculpatory evidence includes all evidence that is favorable to the defendant, including evidence that could undermine a prosecution witness's credibility,[137] evidence leading to the constitutional suppression of inculpatory evidence,[138] and acts of moral turpitude committed by a significant witness that the prosecution chooses not to call to testify.[139]

Emphasizing the uniquely damaging nature of *Brady* violations, the United States Supreme Court has admonished that "the deliberate withholding of exculpatory information . . . is reprehensible, *warranting criminal prosecution as well as disbarment*.[140]

Allen's Statutory Discovery Obligations

Under California law, prosecutors must provide the defense "any exculpatory evidence."[141] In California, the duty is particularly broad, having no limitation of materiality; the prosecutor must disclose *all exculpatory evidence*.[142] As the California Supreme Court explained in the 2015 *Cordova* case, "[The Penal Code] requires the

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[133] *People v. Gutierrez* (2013) 214 Cal.App.4th 343; see also *Merrill v. Superior Court* (1994) 27 Cal.App. 4th 1586 and *Stanton v. Superior Court* (1987) 193 Cal.App. 3d 265.
[134] *Brady v. Maryland* (1963) 373 U.S. 83, 87; see also *U.S. v. Bagley* (1985) 473 U.S. 667; *Giglio v. U.S.* (1972) 405 U.S. 150, 154.
[135] *Id*.
[136] *In re Brown* (1998) 17 Cal. 4th 873, 879 (internal citations omitted).
[137] *J.E. v. Superior Court* (2014) 223 Cal. App. 4th 1329, 1335.
[138] *People v. Harrison* (2017) 16 Cal. App. 5th 704 (a recording of inculpatory statements of the defendant was exculpatory because it demonstrated a *Miranda* violation ultimately leading to the suppression of the statements).
[139] *People v. Lewis* (2015) 240 Cal.App.4th 257 (a nontestifying police officer's criminal behavior was exculpatory but not material in a case where disclosure would not have altered the jury's verdict).
[140] *Imbler v. Pachtman* (1976) 424 U.S. 409, 431 n.34 (emphasis added).
[141] Pen. C., §1054.1(e). This is broader than the standard articulated in *Brady v. Maryland*, as there is no requirement of materiality.
[142] Pen. C., §1054.1.

prosecution to provide all exculpatory evidence, not just evidence that is material under *Brady* and its progeny."[143]

Moreover, California discovery statutes require that prosecutors provide witness names, addresses, written and oral[144] statements – by 30 days before trial.[145]

Violation of §6068

The State Bar should investigate whether Allen violated § 6068 by failing to fulfill her discovery obligations under the federal Constitution and California Penal Code. Brown's statement that the shooter was someone other than Lee or Reyna was clearly exculpatory and material.

Allen was the prosecutor of record on the date of the preliminary hearing and the arraignment.[146] She intentionally withheld the evidence and proceeded to preliminary hearing with the defense unaware of Brown's statement. This was a violation of her Constitutional obligation to provide material, exculpatory evidence, as articulated in *People v. Gutierrez* (2013) 214 Cal.App.4th 343, *Merrill v. Superior Court* (1994) 27 Cal.App. 4th 1586, and *Stanton v. Superior Court* (1987) 193 Cal.App. 3d 265.

Moreover, the case was set for trial while Allen was still the prosecutor. On May 6, 2010, the case was set for trial on June 18, 2010. At that point, Allen should have immediately disclosed the exculpatory Brown interview. Instead, she apparently left her colleague, Scot Clark, holding the bag.

Ultimately, there was an entire preliminary hearing and seven trial dates prior to the provision of the exculpatory evidence. The prosecution failed to provide the exculpatory evidence when Brown was alive, when the defense could have called him to testify at the preliminary hearing, recorded his testimony at a conditional examination,[147] and/or insisted on a speedy trial.

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[143] *People v. Cordova* (2015) 62 Cal. 4th 104, 124, citing *Barnett v. Superior Court* (2010) 50 Cal. 4th 890, 901 ("Penal Code section 1054.1, subdivision (e) requires the prosecution to disclose '[a]ny exculpatory evidence,' not just material exculpatory evidence… [T]he statute illustrates the difference between being entitled to relief for a *Brady* violation and being entitled merely to receive the evidence.")
[144] *Roland v. Superior Court* (2004) 124 Cal.App.4th 154, 155; *People v. Poletti* (2015) 240 Cal.App.4th 1191, 1210, fn. 7.
[145] Pen. C., §§1054.1; 1054.7. "The disclosures required under this chapter shall be made at least 30 days prior to the trial." There is an exception, "good cause," not claimed or relevant here.
[146] Exh. 11, Barnes Certified Court Minutes.
[147] Pen. Code §1335 et seq.

Clark's statements at the 2013 hearings indicate that Allen knew of the interview and made an intentional decision not to disclose it to the defense. If Allen had truly believed that the production of that interview would somehow create a danger, she had the obligation to seek a hearing with the court under Penal Code § 1054.7 to delay disclosure. There is no evidence that happened. A prosecutor has no right to simply fail to provide crucial exculpatory evidence and unilaterally deem it "confidential."

B. Business and Professions Code §6106.

Business and Professions Code §6106. This rule declares that "[t]he commission of any act involving moral turpitude, dishonesty or corruption . . . constitutes a cause for disbarment or suspension." Such acts may be either intentional or involving gross negligence.[148] The rule still applies where the attorney's gross negligence affected the public in general and not a client.[149]

The State Bar has historically disciplined prosecutors for violations of Business and Professions Code §6106 for both intentionally withholding exculpatory evidence, such as *In the Matter of Barone* (Stipulation 2005) 04-O-14030, as well as purposefully making oneself ignorant of the details with a "see no evil or hear no evil" approach,[150] such as *In the Matter of Halsey* (Hearing Dept. 2006) Case No. 02-O-10195-PEM.

If Allen acted as alleged, she engaged in an act reflecting dishonesty and moral turpitude in intentionally suppressing exculpatory evidence, in violation of section 6106.

C. Rule of Professional Conduct 3.4 (formerly 5-220 – Suppression of Evidence).

This Rule declares that "[a] member shall not suppress evidence that the member . . . has a legal obligation to reveal or produce."

Allen had a legal obligation to produce Brown's audio taped statement and the summary of the statement and intentionally failed to do so, thus violating RPC 3.4. Because Brown died before they knew of his existence, the defense could not interview

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[148] *See, e.g*; *In the Matter of Wyrick* (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 83, 91 (gross negligence may violate § 6106); *In the Matter of Wells* (Review Dept. 2006) 4 Cal. State Bar Ct. Rptr. 896, 910 (moral turpitude includes creating false impression by concealment as well as by affirmative misrepresentations).)

[149] *In the Matter of Anna Christina Lee* (Review Dept. 2014) 12-O-13204. (attorney's gross negligence in inaccurately reporting MCLE compliance deemed an act of moral turpitude even though it was not an intentional misrepresentation).

[150] "[A] prosecutor cannot adopt a practice of 'see no evil or hear no evil.'" *People v. Kasim* (1997) 56 Cal. App. 4th 1360, 1386.

him, follow up on any leads he might have had, or recorded his testimony at a conditional examination so it could be used at trial.

Conclusion

Despite her flagrant misconduct, Allen remains a high-ranking San Francisco prosecutor, in charge of training and managing newer prosecutors on how to perform their duties ethically. Allen has never acknowledged any wrongdoing. In her April 2017 deposition, she continued to insist that Trulove was guilty and called his acquittal "a defeat for justice."[151] The true perpetrator has never been arrested.

The State Bar has an obligation to intervene here, to protect the public and ensure that the next generation of prosecutors do not follow in the same unethical footsteps of some of their predecessors. We cannot accept a criminal justice system that allows prosecutors to violate the state and federal Constitution to wrongfully convict people and send them off to die in prison. Jamal Trulove would have died in prison for a crime he did not commit had the Court of Appeal not intervened and had new counsel not been appointed and represented him competently at the retrial. It should not take that kind of intervention to right a wrong that never should have occurred in the first place. But most importantly, it cannot happen again.

Thank you for your attention to this matter. If I can provide any further information to assist you in your investigation, please do not hesitate to contact me.

Very truly yours,

Lara Bazelon
Associate Professor of Law
University of San Francisco, School of Law

[151] Exh. 6, Deposition Testimony of Linda Allen, pp. 22-23.

EXHIBIT 1

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Court of Appeal, First District, Division 2, California.

The PEOPLE, Plaintiff and Respondent,
v.
Jamal R. TRULOVE, Defendant and Appellant.

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Filed January 6, 2014

(San Francisco City and County Super. Ct. No. SCN208898)

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Opinion

Kline, P.J.

***1** Defendant Jamal R. Trulove appeals from his conviction of first degree murder, accompanied by a sentence enhancement, and possession of a firearm by a felon, for which defendant was sentenced to 50 years to life imprisonment. In a previous unpublished opinion, we affirmed the judgment, except that we reduced the conviction to second degree murder. We then granted defendant's petition for rehearing and received additional briefing from the parties. On rehearing and reexamination of all of the issues, we reverse, based on one of defendant's several appellate claims, that being that he received ineffective assistance of counsel because his trial counsel did not take any action in the face of highly prejudicial prosecutorial misconduct.

Evidence presented at trial indicated the victim was an adult male whose body was found by police late at night lying in the street of San Francisco's Sunnydale housing project in July 2007, shot multiple times. Although about two dozen people were in the area, only one person, Priscilla Lualemaga, came forward and indicated she had seen the shooting, from a bedroom window. Her trial testimony was the only evidence, direct or circumstantial, that placed defendant at the scene.

Between her initial statements to police and her testimony at trial, Lualemaga changed her account in some significant respects, including stating with increased certainty that defendant was the shooter and admitting that, contrary to her preliminary hearing testimony, she had called her cousin on the night of the shooting to ask her defendant's name before identifying him as the shooter to the police. She largely attributed these changes to her fears of retaliation against her and her family from defendant's friends and family. She indicated her fears were alleviated by her voluntary entry, and the entry of other family members, into a witness protection program, as arranged by the district attorney's office; she also indicated that the relocation and isolation of her and her family in the program caused considerable hardships. There was no evidence of any threats or other actual danger presented by defendant, his friends, or his family to Lualemaga or her family, or of any reason for Lualemaga's entry into the witness protection program other than because of her own fears.

Lualemaga's uncorroborated testimony that she saw defendant shoot the victim was essential to the People's case. Therefore, the trial's outcome turned on the jury's view of the credibility of her testimony. In closing argument, the prosecutor pointed out that Lualemaga feared retaliation from defendant's friends and family, then repeatedly argued that Lualemaga should be believed because only someone certain defendant was the shooter would risk her life and others, and endure hardships in a witness protection program she was forced to enter, in order to testify against him. The prosecutor wove these points into the very fabric of her closing argument, going so far as to urge the jury to have the same “courage” as Lualemaga and find defendant guilty.

***2** The prosecutor's arguments improperly relied on facts not in evidence; namely, that Lualemaga and her family members were in real danger of retaliation from defendant's friends and family, and compelled by that danger to enter the witness protection program. The impropriety of these contentions was particularly egregious because they implied a consciousness of guilt on defendant's part; and they likely persuaded jurors because they were made by a prosecutor whose office, the jury knew, had arranged for Lualemaga and her family members to enter the witness protection program. Therefore, we conclude the prosecutor's reliance on the dangers Lualemaga allegedly confronted constituted prejudicial misconduct, whether evaluated under the federal or state standard.

Defendant's trial counsel did not object to this misconduct, address it in his closing argument, nor request that the trial court give any related admonitions or limiting instructions to the jury. Therefore, although defendant has forfeited his appellate claim of prosecutorial misconduct by this inaction, he also received ineffective assistance of counsel. We reverse on this basis.

BACKGROUND

In June 2009, the San Francisco County District Attorney filed a two-count information against defendant charging him with the willful, deliberate, and premeditated murder of Seu V. Kuka in violation of section 187, subdivision (a), [1] accompanied by an enhancement allegation that he personally and intentionally discharged a firearm causing great bodily injury and death within the meaning of section 12022.53, subdivision (d), and with possession of a firearm by a felon in violation of section 12021, subdivision (a)(1). A jury trial commenced in January 2010. We summarize the evidence and proceedings relevant to our resolution of this appeal.

The Prosecution's Case

Police Discover the Body of Seu V. Kuka

On July 23, 2007, approximately 10:49 p.m., San Francisco police officers heard gunshots from the area of the Sunnydale housing project (Sunnydale). They received a dispatch that shots had been fired on Blythedale Avenue in Sunnydale and arrived at the scene at 10:51 p.m. They were waved down by people in the area and found the body of a man lying on the ground. The pulseless body, dressed in jeans, shirtless, with a jacket lying across the waist, appeared to one officer to have been moved; there were gunshot holes in the chest and face, and blood beside the head. Everyone in the crowd around the officers denied seeing anything that occurred. There were no weapons around the body, and no murder weapon was ever found.

The Testimony of Priscilla Lualemaga

Priscilla Lualemaga was the sole testifying eyewitness to the shooting, and the prosecution's key witness. She said that at the time of the shooting, she stayed at her grandmother's apartment on Blythedale Avenue (Blythedale apartment) during the week because it was closer to her work. She did not know or socialize with people in the neighborhood.

About two months before the shooting, Kuka moved in next door to Lualemaga, at which time Lualemaga learned he was her distant relative. Lualemaga's father had a half sister, Lualemaga's aunt, who told Lualemaga the aunt was a half sister of Kuka, although the aunt had never met him.

Lualemaga noticed that Kuka spent time with defendant, who she saw approximately 30 times before the shooting. She also noticed that they spent time with a man whose name she did not know, identified at trial as Joshua Bradley, defendant's brother. At the time of the shooting, Lualemaga said she did not know that defendant and Bradley were related.

According to Lualemaga, she returned home on the day of the shooting around 3:00 p.m. and saw Kuka, defendant, and Bradley drinking in front of the building. About 11:00 p.m. that evening, as she prepared for bed, she heard yelling, a slapping or hitting sound, and a man yell something like, “I'm going to get you.” She pushed aside the shade of a bedroom window and looked out over a board that covered part of the window. She saw a shirtless Kuka looking “very angry” and chasing Bradley, with dozens of people watching. Both men ran very fast; Bradley ran to Lualemaga's car, which was parked by a light pole, and ran around the car. She could see their faces clearly at that time, even though it was nighttime.

***3** Lualemaga testified that Kuka, as he ran around Lualemaga's car chasing Bradley, bumped into defendant, who “was kind of in his way.” Kuka elbowed defendant “really hard” with his right arm, causing defendant to fall down, and ran down a hill after Bradley. Lualemaga could see defendant's face clearly. She was sure it was defendant.

Lualemaga said defendant got up "fast" and ran after Kuka. When he was right behind Kuka, defendant, whose face Lualemaga saw clearly, shot Kuka "two times, maybe" in the back before Kuka fell to his knees, and then kept shooting Kuka in the back maybe four or five more times. She was unsure how many shots were fired because it "happened so fast." She did not see a gun, but saw defendant holding his hand out like he was holding one, saw flashes, and heard gunshots. Defendant ran around a building as Kuka remained on the ground, face down. Lualemaga did not see that Kuka had any weapons. Bradley was not with Kuka when he was shot, and Lualemaga could not see him. About 25 people were outside and they tried to back away when the shooting occurred.

According to Lualemaga, defendant was wearing black jeans, a black, hooded pullover sweater, and a white T-shirt. At trial, she said the hood was down. However, she acknowledged that she had said at the preliminary hearing that she could not remember whether it was up or down that night.

Lualemaga further testified that she went outside when the police arrived and indicated to them that she had seen what had happened. They took her to the Ingleside police station and put her in a room that had "mug shots of individuals hanging on a wall." A police officer told Lualemaga to look through the mug shots; Lualemaga "kind of scanned through" them and identified one as the person Kuka was chasing, Bradley.

Lualemaga further testified that she did not recall defendant's name as of the night of the shooting, although she knew him by face. After she returned home that night, she called a cousin and asked her the name of the "guy" they had talked to a couple of weeks before, and her cousin said it was "Jamal."

Lualemaga said police came to her work place the next day and showed her a lineup card with six photographs. She identified one as the man Kuka was chasing and another as defendant, who, she told police, "could have shot" Kuka, and was named "Jamal." She was scared when she made this statement that she might be required to testify, so she did not tell police she was "one hundred percent" sure of her two identifications, although she was that sure at the time. She did not mean for her identification to "come out" so uncertain, but was scared that if she identified defendant, she would "be sitting here," and "would have to face him and say, 'I seen you. This is the person I seen shot [Kuka].' " Asked what she feared was going to happen if she testified, she said, "Just people who are probably related to [defendant], or friends with him, you know. They're—they want to support him. And I'm just—I was scared. I don't know. Maybe revenge on me, or my family."

Some months later, Lualemaga said, she happened to see defendant in an episode of a television show called "I Love New York." The parties stipulated that defendant was in such an episode, which aired in October 2007.

Defendant was not arrested until October 2008. Before the May 2009 preliminary hearing, Lualemaga testified, prosecutor Eric Fleming showed her a photograph, apparently of the mug shots that were on the wall of the room police took her to on the night of the shooting. She noticed a shot of defendant was directly above Bradley's, and one of another brother, David Trulove was also visible. She had not noticed them or identified them to police the night of the shooting, although she spent about two hours in the room. She had not looked at every mug shot on the wall that night. When asked why she did not notice defendant's photograph that night, she said, "I don't know. I just—that night only [Bradley's] stuck out to me." She said defendant looked different in the photograph than he did the night of the incident. She said, "He looks younger; the hair is different. He just—this looks like an old photo. [¶] You would really have to look at it, to know it was him. When I walked up, I kind of briefly scanned through the pictures. I don't know. For some reason, [Bradley's] picture stood out."

***4** Lualemaga testified that the photograph of defendant that police showed her at her work place the next day was the same one that was on the wall of the room. The parties stipulated that it was taken in 2003, and that defendant was arrested and convicted of felony receipt of stolen property that year.

Lualemaga also testified that she had lied at the preliminary hearing when she said she did not talk to anyone about the shooting between July 23 and July 25, 2007, because she did not want to point out any family members who were in the courtroom. In fact, she had spoken to her cousin, who was present at the hearing.

Lualemaga also testified further about her fears and entry into the witness protection program. She testified that she moved out of her grandmother's Blythedale apartment in August 2008, but that members of her family continued to live there when she learned she had to testify at the May 2009 preliminary hearing. She testified, without objection by

defense counsel, that she was "terrified" that she would have to do so. She was scared to sit in court and say, " 'I saw you shoot [Kuka].' " She was afraid that "[s]omething bad might happen, because I'm sitting here scared for my life, for my family's life."

Lualemaga said she discussed her fears with a prosecutor, Fleming, before the preliminary hearing. He told her about the witness protection program, [2] which she decided to enter. She discussed the hardships she endured in the program, including that she, her husband, and their one year old child moved into one hotel, then another, and then into another location; she gave birth to a new baby; and they were not permitted to see other family members. The record indicates she became emotional in discussing these hardships. They remained in the program at the time of trial; Lualemaga's sister and her family had also been relocated in the program at Lualemaga's request. Lualemaga received $875 per month for meals, and between $1,350 and $2,500 per month for lodging and storage fees. She said she was testifying at the trial in order to do what was right.

The Testimony of Assistant Medical Examiner Ellen Moffatt

Assistant San Francisco Medical Examiner Ellen Moffatt, who performed an autopsy of Kuka's body, testified that the cause of death was multiple gunshot wounds. Kuka's body had 16 gunshot wounds, including entrance and exit wounds, from nine bullets. Five bullets entered the back of the head. One entered the right side of the head and exited the neck, and others entered the right back and lower right back. Two entrance wounds had stippling around them, which indicated they were inflicted at close range. Moffatt opined that the wounds in the back were probably inflicted before the wounds to the head because the latter would be more quickly fatal.

The Testimony of Officer Jim Trail

Officer Jim Trail of the San Francisco Police Department testified, among other things, that as a result of his work at Sunnydale, he had known defendant for years. He saw him with Kuka a couple of times a week around Blythedale Avenue. Trail also saw defendant's brother, Bradley, there.

Other Evidence

***5** An investigating police inspector testified that, according to his measurements, the distances from the window where Lualemaga saw the shooting to the sidewalk below, the base of the light pole, and the knee of Kuka's body as found were 23 feet, 28 feet, 7 inches, and 37 feet, 2 inches respectively.

The inspector also testified that the lighting at the scene was good, photos taken with a flash made the area look darker than it really was, and faces could be recognized in the available lighting. Called by the defense to authenticate a DVD video of the crime scene, he said the video did not accurately portray the lighting conditions, the area was "very well lit," and he repeatedly recognized the faces of the many officers at the scene.

Moffatt, who had first observed the body at the scene of the shooting, testified that it was "fairly dark" there and it would not have been easy to see faces clearly beyond 10 or 15 feet. The next day, she testified that she had visited the scene the night before and saw a light post there, but could not recall if it was there on the night of the shooting, when she was focused on Kuka's body.

The investigating inspector testified that he found eight spent cartridge casings and a live round at the scene, as well as a deformed bullet. A police department criminalist testified that seven of the spent cartridge casings (the eighth was missing) were fired from the same firearm, a semiautomatic pistol. He could not determine if the unfired cartridge was ejected from the same pistol, but all were nine-millimeter Luger ammunition. The deformed bullet was of a .380 automatic or nine-millimeter caliber.

The criminalist also testified that the operator of a typical semiautomatic pistol loads a live cartridge into the pistol's single chamber by pulling a slide back and letting it drop forward, known as "charging" the weapon. Each time the trigger is pulled, a bullet is fired, the spent cartridge casing is ejected from the pistol, and another cartridge is loaded into the chamber. If the operator charges a pistol with a live cartridge already in the chamber, that cartridge is ejected from the firearm. Thus, if the police found an unspent cartridge on the ground of a crime scene, one explanation would be that the operator charged the weapon while the cartridge was in the chamber.

Defendant's Case

The Testimony of Dr. Geoffrey Loftus

Defendant presented the testimony of Dr. Geoffrey Loftus, an expert in memory and perception. Loftus testified that a witness to an event takes in jumbled bits of information and that memory can change over time as "post-event" information is received from other sources or because a witness infers things in an effort to make sense of the event.

According to Loftus, memory can become inaccurate for multiple reasons. There can be problems witnessing the event, such as a lack of enough light or time to observe the event, diverted attention, or being too far away. Witnesses tend to fill in missing details in events with low lighting, can usually observe only one thing at a time, and their recall ability can be affected by stress and fear. The length of the retention interval and the possibility of receiving "post-event" information can affect accuracy, as can the process of retrieving information from memory, such as to respond to leading or biased questions.

***6** Loftus further testified that the circumstances in which photo lineups are shown can affect a witness's memory of an event. An investigator can consciously or unconsciously influence a witness when a photo lineup is not "double-blind" so that neither knows who is suspected. A photo lineup should not include more than one suspect because this increases the chances that a person will choose a suspect. Also, confirming to witnesses that the right choice has been made, even when it has not, can cause them to believe they made the right choice and that conditions of observation were better than they were.

Defense counsel gave Loftus a hypothetical based upon the facts of Lualemaga's observations. Loftus observed that, based on the distances traveled by the participants in the hypothetical incident, it lasted between 1.3 and 5 seconds, a very short time to observe an event. The collision between the victim and the shooter would have drawn the witness's attention, a shift of attention that would take one and a half seconds. Also, the problems caused by the darkness could not be compensated by additional time. Loftus concluded, "All in all, this is a set of circumstances that will be very poor for the witness's ability to accurately perceive and memorize what the shooter looked like." He also opined that while a 23–foot distance would not inhibit perception in daylight viewing, under nighttime viewing, it would have "in and of itself, a significant effect on a witness's ability to make out fine detail corresponding to facial appearance."

Loftus acknowledged it was easier to recognize the face of someone that you know. However, he said, that part of the brain that recognizes faces requires the witness to observe the entire face, and does not work well if part of the face is hidden or the lighting is not good. In poor viewing conditions, it would not really matter if the witness knew the person. Accurately recognizing the person would be difficult or impossible.

The Testimony of Defense Investigator Kenneth Heriot

Defense Investigator Kenneth Heriot testified that he looked out Lualemaga's bedroom window, both in the day and at night, and observed that she would have to move over to the left side of the window to look up the avenue. Also, at the time of the shooting, the entire bottom panel of the window was covered with a board. When he looked out of the window at night, "it was dark," but he acknowledged a streetlight in the area cast light down on the sidewalk beneath it.

Closing Argument

We further discuss the prosecutor's closing argument in addressing defendant's claims of prosecutorial misconduct. Therefore, we only briefly summarize it here. She began by urging the jury to rely on the testimony of a single witness as the law allows, giving examples of crimes that might go unpunished if juries did not do so. She repeatedly emphasized the courage of Lualemaga for coming forward despite her considerable fears, the danger she faced by doing so, and the hardships she endured in the witness protection program. The prosecutor argued that for her to do so, Lualemaga must be sure of her testimony and should be considered credible. The prosecutor also reviewed the other evidence of the shooting and urged the jury to review the evidence carefully as well. She argued there was sufficient evidence to find defendant guilty of first degree murder.

Defense counsel argued the incident happened very quickly and that Lualemaga's account did not make sense. He noted that she did not point out defendant from the photos on the wall of the police station on the night of the shooting, although she sat there for two to three hours, gave an uncertain identification of defendant the following day, and did not positively identify defendant until the preliminary hearing in May 2009. He argued that she received "post-event" information about defendant being charged that made her identification more certain.

***7** Defense counsel argued Lualemaga was not credible. She had viewed the incident, which had occurred very quickly, on a dark night, and had given only a vague and conclusory description of defendant. Counsel questioned if Lualemaga could have seen the shooter's face under the circumstances. She lied in the preliminary hearing about talking to her cousin, and gave different accounts about whether she recalled if defendant's hooded sweater was up or down. She was extremely emotional, had a relationship with the government, came from a close family that grieved the loss of Kuka, and could have erred in making a cross-racial identification, a subject testified to by Loftus. While she may have felt like she was doing the "right thing," he said, that did not mean she was telling the truth, was accurate, or "got it right."

Defense counsel also discussed the physical evidence. He emphasized that the live cartridge was found in the middle of the street, away from where Lualemaga said she saw defendant, indicating someone else charged the weapon there, then caught up to Kuka, and shot him. He suggested the person who was knocked down moved closer to a building and out of Lualemaga's sight.

The Verdict, Motion for New Trial, Sentence, and Appeal

The jury deliberated for four days. It requested read-backs of Lualemaga's testimony. It also requested further instruction on whether first degree murder required that the act be willful, deliberate, and premeditated before the first shot was fired, or whether it could become willful, deliberate, and premeditated with any subsequent shot, which the trial court provided. An hour later, the jury reached a verdict. It found defendant guilty of first degree murder, found true the allegation that he had personally and intentionally discharged a firearm in its commission, and found him guilty of being a felon in possession of a firearm.

Defendant moved for a new trial based on purported trial errors, prosecutorial misconduct, and newly discovered exculpatory evidence, that being the recollections of two newly discovered witnesses. The trial court rejected the claims of trial errors and prosecutorial misconduct. It heard the testimony of the two witnesses, found the testimony was not credible, and denied the motion.

The trial court sentenced defendant to a total of 50 years to life imprisonment, with possibility of parole, including 25 years to life for his conviction on count one for first degree murder, a two-year term to run concurrent for his conviction on count two for being a felon in possession of a firearm, and an additional 25 years to life to run consecutively for the enhancement allegation that he had personally and intentionally discharged a firearm in the commission of the murder.

This timely appeal followed. After oral argument, defendant filed a petition for writ of habeas corpus on August 2, 2013, in case No. A139377. He has asked that we consider this petition with his appeal. We decline to do so.

As we have indicated, after we issued our previous unpublished opinion, we granted defendant's petition for rehearing and received additional briefing from the parties. We have also considered an amicus curiae brief filed by the Northern California Innocence Project on defendant's behalf.

DISCUSSION

We conclude the prosecutor committed highly prejudicial misconduct. The People's case turned on whether the jury believed Lualemaga's testimony that defendant was the shooter, despite her changing account. To persuade the jury, the prosecutor argued not only that Lualemaga had courageously testified despite not only her fears, which was a fair comment on admissible evidence, but also despite the danger of retaliation from defendant's friends and family, which caused her and family members to enter an onerous witness protection program. Reading her statements as a whole, the prosecutor argued that only a witness sure of what she saw would risk her life and others, and endure such hardships, to testify against a defendant whose friends and family could kill her for doing so; the prosecutor urged the jury to follow Lualemaga's brave example and find defendant guilty. These arguments, which were unsupported by any evidence, were highly prejudicial because they indicated defendant had a consciousness of guilt. Also, when combined with Lualemaga's testimony that the district attorney's office arranged for her and family members to enter the witness protection program, they suggested the prosecutor knew more than the information disclosed at trial. Therefore, they infected the trial with a fundamental unfairness. Although defendant has forfeited this claim because of his trial counsel's inaction, we conclude he received ineffective assistance of counsel, requiring reversal.

***8** We reject defendant's argument that the information should be dismissed because he was denied his right to a fair preliminary hearing. We do not determine defendant's other claims of prosecutorial misconduct or of other error. [3]

We note the disappointing failure of the People to address a number of defendant's arguments, even after being given the opportunity to provide supplemental briefing. Defendant argues we should take this silence as a concession that these arguments cannot be rebutted, pursuant to *Gonzalez–Servin v. Ford Motor Co.* (7th Cir.2011) 662 F.3d 931, 933–934. We decline to do so because "on appeal a judgment is presumed correct, and a party attacking the judgment, or any part of it, must affirmatively demonstrate prejudicial error." (*People v. Garza* (2005) 35 Cal.4th 866, 881.) Therefore, we have examined the persuasiveness of defendant's appellate arguments throughout.

I. *Prosecutorial Misconduct*

A. *Forfeiture*

The People argue defendant has forfeited his prosecutorial misconduct claims by his trial counsel's failure to take action below. Defendant disagrees, arguing that his trial counsel raised sufficient objections to preserve them. We agree with the People.

1. *Relevant Proceedings Below*

Prior to trial, defense counsel objected for lack of relevance to the introduction of evidence about Lualemaga being relocated and receiving assistance, such as rent, from the district attorney's "Victim Witness Assistance Program." He conceded that Lualemaga could testify that she had previously denied speaking to others about the crime for fear those people might become involved in the process, but objected on foundation and hearsay grounds to the admission of evidence that other people were in fear of coming forward.

The prosecutor argued that Lualemaga's fear about, and attitude towards, testifying was clearly relevant to her credibility, as was her relocation and the effect this had on her and her attitude about testifying.

The court ruled that Lualemaga could talk about her own attitude towards testifying and relocation, but not about anyone else's fear. Also, defense counsel could cross-examine on the financial assistance provided to Lualemaga.

As we have discussed, Lualemaga testified about her fears and her experiences in the witness protection program. The prosecutor also asked her who had recently lived in her former bedroom. Over two defense objections based on relevance and a third that was unspecified, Lualemaga was permitted to testify that her sister had lived there, that Lualemaga had feared for her safety if Lualemaga were to testify at trial, and that the prosecutor, at Lualemaga's request, had arranged to relocate the sister and her family to a safe place.

***9** Later in the trial, the prosecution objected to providing the defense with additional documentation about the benefits Lualemaga had received in the witness protection program. After conducting an in camera review, the court ruled that the prosecution was not required to provide the documentation because the revelation of details would create a potential risk to Lualemaga and was not necessary for impeachment purposes. The court allowed a defense inquiry that was limited "to the amounts and the specific purposes [for] those amounts and time frames for the amounts."

As we will further discuss, in closing argument, the prosecutor made a number of improper statements in urging the jury to rely on Lualemaga's identification of defendant as the shooter. Defense counsel did not object to any of the prosecutor's statements, with one exception late in rebuttal that is not relevant to our analysis here, [4] nor did he ask for any related admonitions or limiting instructions to the jury.

2. *Analysis*

As the People point out, our Supreme Court has held that, when a defendant does not object to remarks in closing argument claimed to be prosecutorial misconduct, "defendant is deemed to have waived the objection and the point cannot be raised on appeal. [Citations.] The reason for this rule, of course, is that 'the trial court should be given an opportunity to correct the abuse and thus, if possible, prevent by suitable instructions the harmful effect upon the minds of the jury.' " (*People v. Green* (1980) 27 Cal.3d 1, 27 (*Green*), overruled on other grounds in *People v. Martinez* (1999) 20 Cal.4th 225, 233–237 and *People v. Hall* (1986) 41 Cal.3d 826, 834, fn. 3.) Thus, "a claim of prosecutorial misconduct is not preserved for appeal if defendant fails to object and seek an admonition if an objection and jury admonition would have cured the injury." (*People v. Crew* (2003) 31 Cal.4th 822, 839.)

Defendant argues that he preserved his claims via his motion in limine to bar evidence of Lualemaga's participation in the witness protection program, his objection at trial to evidence about Lualemaga's sister's participation in the witness protection program, and his objection to the prosecutor withholding documents regarding the details of program payments to Lualemaga. He cites to *People v. Hill* (1998) 17 Cal.4th 800 (*Hill*), which provides that "[a] defendant will be excused from the necessity of either a timely objection and/or a request for admonition if either would be futile," that a failure to require the jury be admonished does not forfeit the issue on appeal "if ' "an admonition would not have cured the harm caused by the misconduct," ' " and that "the absence of a request for a curative admonition does not forfeit the issue for appeal if 'the court immediately overrules an objection to alleged prosecutorial misconduct [and as a consequence] the defendant has no opportunity to make such a request.' " (*Id.* at pp. 820–821, quoting *Green, supra,* 27 Cal.3d at p. 35, fn. 19.)

Defendant's preservation argument is unpersuasive. His claims that the prosecutor engaged in misconduct in closing argument were not a subject of defendant's motion in limine or the other objections cited. Also, timely objections and requests for admonitions, and/or limiting instructions, could have cured the harm done by the prosecutor's improper arguments. Therefore, defendant has forfeited his appellate claims of prosecutorial misconduct. [5]

B. ***The Prosecutor's Prejudicial Misconduct By Referring to Facts Not in Evidence***

***10** We agree with defendant that the prosecutor repeatedly engaged in prejudicial misconduct when she urged the jury to believe Lualemaga because Lualemaga testified in the face of real danger of retaliation from defendant's friends and family, and endured hardships in a witness protection program that this danger compelled her and others to enter, when there was no evidence of such danger.

" 'A prosecutor's conduct violates the Fourteenth Amendment to the federal Constitution when it infects the trial with such unfairness as to make the conviction a denial of due process. Conduct by a prosecutor that does not render a criminal trial fundamentally unfair is prosecutorial misconduct under state law only if it involves the use of deceptive or reprehensible methods to attempt to persuade either the trial court or the jury.' " (*People v. Gonzales and Soliz* (2011) 52 Cal.4th 254, 305.) Also, " ' "when the claim focuses upon comments made by the prosecutor before the jury, the question is whether there is a reasonable likelihood that the jury construed or applied any of the complained-of remarks in an objectionable fashion." ' " (*People v. Ayala* (2000) 23 Cal.4th 225, 283–284.)

Generally, " ' " 'a prosecutor is given wide latitude during argument. The argument may be vigorous as long as it amounts to fair comment on the evidence, which can include reasonable inferences, or deductions to be drawn therefrom.' " ' " (*Hill, supra,* 17 Cal.4th at p. 819.) Also, although a defendant may "single[ ] out words and phrases, or at most a few sentences, to demonstrate misconduct, we must view the statements in the context of the argument as a whole." (*People v. Dennis* (1998) 17 Cal.4th 468, 522.)

However, a prosecutor's reference to facts not in evidence is " 'clearly misconduct' [citation], because such statements 'tend[ ] to make the prosecutor his own witness—offering unsworn testimony not subject to cross-examination.... [Citations.]' [Citations]. 'Statements of supposed facts not in evidence ... are a highly prejudicial form of misconduct, and a frequent basis for reversal.' " (*Hill, supra,* 17 Cal.4th at p. 828.) "A prosecutor's 'vigorous' presentation of facts favorable to his or her side 'does not excuse either deliberate or mistaken misstatements of fact.' " (*Id.* at p. 823.) "[T]he prosecutor has a special obligation to avoid 'improper suggestions, insinuations, and especially assertions of personal knowledge.' " (*United States v. Roberts* (9th Cir.1980) 618 F.2d 530, 533, quoting *Berger v. United States* (1935) 295 U.S. 78, 88.)

A prosecutor is specifically " 'prohibited from vouching for the credibility of witnesses or otherwise bolstering the veracity of their testimony by referring to evidence outside the record.' " (*People v. Turner* (2004) 34 Cal.4th 406, 432–433 (*Turner*).) "It is improper for a prosecutor to offer assurances that a witness is credible or to suggest that evidence available to the government but not before the jury corroborates the testimony of a witness. [Citations.] In either case, prosecutorial comments may be understood by jurors to permit them to avoid independently assessing witness credibility and to rely on the government's view of

the evidence." (*People v. Cook* (2006) 39 Cal.4th 566, 593.) Such prohibitions are particularly important regarding prosecution references to threats to a witness because of the highly prejudicial subject matter; "evidence that a defendant is threatening witnesses implies a consciousness of guilt and thus is *highly prejudicial* and admissible only if adequately substantiated." (*People v. Warren* (1988) 45 Cal.3d 471, 481, italics added.)

***11** Defendant contends the prosecutor made a number of statements to the jury that indicated the danger to Lualemaga was real, a fact not in evidence. For example, he cites the prosecutor's remark that "[Lualemaga] was the only witness willing to ... walk in here, *risk her life,* and tell you what she saw" (italics added), and other similar remarks.

The People argue the prosecutor made the remarks in dispute to explain "why Lualemaga was not one hundred percent sure of her identification of [defendant] as the shooter when she talked to the police, but was one hundred percent sure at trial," as well as to explain Lualemaga's attitude towards testifying, particularly her fears about her own life and those of her family, her sister, and her sister's family. Thus, when the prosecutor said Lualemaga had risked her life and the lives of the others by coming forward as a witness, she "was telling the jury that there was no good reason for the witness to come forward unless she was telling the truth. Experiencing the fear of risking lives was not a good reason to be a witness. Whether expressed as fear or risk, the concept was clearly what the evidence showed." Therefore, there was no misconduct.

The prosecutor did urge the jury to believe Lualemaga because she testified despite her fears. For example, she stated early in her closing argument, "[Lualemaga] was terrified to do what she did, but she did it anyway.... She told you how terrified she was. [¶] She's afraid for her life, she's afraid for her family's life, afraid for her sister's life. She will never get her life back. [¶] In one day of testimony, she has shown more courage and more character than most people can ever expect to do in a lifetime." Later, talking about placing Lualemaga and her family in the witness protection program, the prosecutor said, "You have to put them where nobody can find them. That's the only way that she can feel safe, she can feel safe from revenge and retaliation. That's what she feared most."

Evidence of such fears, including of retaliation, is admissible to evaluate that witness's credibility pursuant to Evidence Code section 780. " 'Testimony a witness is fearful of retaliation similarly relates to that witness's credibility and is also admissible. [Citation.] It is not necessary to show threats against the witness were made by the defendant personally, or the witness's fear of retaliation is directly linked to the defendant for the evidence to be admissible.' " (*People v. Olguin* (1994) 31 Cal.App.4th 1355, 1368.) The prosecutor's statements were a fair comment on this evidence. [6]

However, the prosecutor did not stop there. Although she did not declare outright that Lualemaga was in actual danger of retaliation from defendant, his family, or his friends, she made numerous statements indicating that was the case.

***12** First, the prosecutor reminded the jury that Lualemaga was terrified about testifying specifically because of her fear of retaliation from defendant's friends and family. She stated that Lualemaga did not "want to be sitting there where everybody could see her, where there's an open courtroom that could be full of the defendant's friends and family all going to know she's the one."

The prosecutor followed this with statements that indicated Lualemaga was in real danger. The prosecutor said: "She's the only one standing between him and justice, because she's the only witness. So we move her into a hotel. *And we put her in a safe place,* so she didn't feel vulnerable." (Italics added.) She also said, after describing some of the hardships Lualemaga experienced in the witness protection program: "How sure would you have to be of what you saw if that was *the price* of being a witness?" (Italics added.) Similarly, in explaining Lualemaga's concealment of her conversation with her cousin, the prosecutor noted several hardships Lualemaga experienced in the witness protection program and said, "She doesn't want her cousin to *have* to go through that.... She lied *to protect* her cousin, so her cousin wouldn't *have* to suffer what she was going through." (Italics added.) These statements indicated Lualemaga was moved from an unsafe place to a safe place in a program she was required to enter in the face of real danger of retaliation. However, the only pertinent evidence was that Lualemaga had voluntarily entered the program solely because of her own general fears.

The prosecutor then proceeded to argue again and again that Lualemaga should be believed because she had knowingly risked her life and faced the danger of retaliation in order to testify against defendant. She said to the jury at various points: "How sure would someone have to be to risk her life?" "How sure would you have to be to put your life in peril?"

"How sure would you have to be to know that, because of what you're doing, because you're standing up and doing the only thing that's right; that is, pointing out the defendant as a murderer, how sure would you have to be before you would risk your life on it?" "How sure would you have to be to risk your sister's life?" "Is it so unreasonable that somebody who is now afraid she's going to have to testify and expose herself to retaliation, maybe get killed over being a witness because she saw someone else kill someone, is it so unreasonable to think that she's going to hesitate?" As part of her final summation, the prosecutor referred to Lualemaga coming forward and said, "What would people give up? What would people risk their life for? ... If someone's life depended on the decision, how sure would that person have to be? [¶] You can't underestimate the sacrifice that [Lualemaga] has made, just to do the right thing." A short time later, she said, "Nobody knowing what [Lualemaga] has sacrificed just to come in here and tell you what she saw would think she was mistaken."

At times, the prosecutor made these statements alongside references to Lualemaga's fears. For example, along with referring to Lualemaga's sacrifices in the quote directly above, the prosecutor stated, "The more scared she gets, the more certain she has to be." These additional references, however, did not cure the damage done by the prosecutor's numerous indications that Lualemaga actually faced a real danger of retaliation, and that the danger was so substantial that she was required to enter the witness protection program. The prosecutor made no effort to qualify her many references as being only to those risks and dangers the fearful Lualemaga believed to exist. Instead, the prosecutor argued repeatedly that Lualemaga should be believed for two reasons: because she testified despite her fears, and, *furthermore,* because she risked her life and others, and endured hardships, to testify in the face of danger of retaliation from defendant's friends and family. As the prosecutor summed up Lualemaga's circumstances: "All of this danger, all of her fears." (Italics added.) The prosecutor repeatedly crossed over the boundary of proper argument.

***13** To make matters worse, the prosecutor used Lualemaga's willingness to testify in the face of this purportedly real danger for an additional purpose. After praising Lualemaga's courage in coming forward despite the sacrifices, risks, and fears referred to, the prosecutor ended her rebuttal argument by stating, "Now I'm asking you to have the same courage that [Lualemaga] did and convict the defendant of murder." In other words, the prosecutor relied on facts not in evidence to directly implore the jury to find defendant guilty.

The People did not present a scintilla of evidence at trial that defendant's friends and family would try to kill Lualemaga if she testified against him, nor that Lualemaga was placed in the witness protection program for any reason other than Lualemaga's subjective concerns about her safety.[7] Rather than concede Lualemaga's fears were just that, however, the People trumpeted her courageous willingness to testify in the face of assassins lurking on defendant's behalf. This yarn was made out of whole cloth. Because the heavy emphasis the prosecutor repeatedly placed on the asserted dangers Lualemaga faced by testifying against defendant must have influenced the jury, and such dangers were not based on any evidence, the prosecutor's argument to the jury was prejudicial prosecutorial misconduct under both the federal and state standard. (See *Hill, supra,* 17 Cal.4th at pp. 828, 845 [referring to an "onslaught" of misconduct that made it difficult for the jury to remain impartial]; *United States v. Roberts, supra,* 618 F.2d at pp. 533–535 [finding misconduct when the prosecutor vouched for the key witness's credibility by referring to facts outside the record].)

When prosecutorial misconduct occurs, an appellate court must determine whether there was sufficient prejudice to require reversal under the federal standard articulated in *Chapman v. California* (1967) 386 U.S. 18, 24 and/or the state standard articulated in *People v. Watson* (1956) 46 Cal.2d 818, 836. (*People v. Adanandus* (2007) 157 Cal.App.4th 496, 514.) We conclude there was sufficient prejudice. This misconduct was not harmless beyond a reasonable doubt. To the contrary, as we discuss in our ineffective assistance of counsel analysis directly below, it is reasonably probable that, but for this misconduct and defense counsel's inaction, the result would have been more favorable to defendant.

C. *Ineffective Assistance of Counsel*

We agree with defendant that he received ineffective assistance of counsel because his trial counsel did not object to any of the statements we have discussed, nor ask the court to give any related admonitions or limiting instructions to the jury.

To establish such a claim by direct appeal, a "defendant bears the burden of demonstrating, first, that counsel's performance was deficient because it 'fell below an objective standard of reasonableness [¶] ... under prevailing professional norms.' [Citations.] Unless a defendant establishes the contrary, we shall presume that 'counsel's performance fell within the wide range of professional competence and that counsel's actions and inactions can be explained as a matter of sound trial strategy.' [Citation.] If the record 'sheds no light on why counsel acted or failed to act in the manner challenged,' an appellate claim of ineffective assistance of counsel must be rejected 'unless counsel was asked for an explanation and failed to provide one, or unless there simply could be no satisfactory explanation.' [Citations.] If a defendant meets the burden of establishing that counsel's performance was deficient, he or she also must show that counsel's deficiencies resulted in prejudice, that is, a 'reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.' " (*People v. Ledesma* (2006) 39 Cal.4th 641, 745–746.)

***14** As we have discussed, the prosecutor's prejudicial misconduct was integral to the prosecutor's closing argument and about the jury's evaluation of the credibility of Lualemaga's testimony, upon which the case turned. Under these circumstances, defendant's trial counsel's performance was deficient, and there simply can be no satisfactory explanation for his failure to object or otherwise act to alleviate the prejudice caused by the prosecutor's improper arguments. Therefore, defendant received ineffective assistance of counsel. (See *People v. Anzalone* (2006) 141 Cal.App.4th 380, 395–396 [finding ineffective assistance of counsel for trial counsel's failure to object to the prosecutor's misstatements of the law as to three attempted murder counts].)

The People do not address this ineffective assistance of counsel argument, part of their disappointing failure to address a number of defendant's arguments. They do argue that, assuming prosecutorial misconduct occurred, it was not prejudicial because the jury was properly instructed that closing argument is not evidence and is presumed to have followed this instruction. (*People v. Holt* (1997) 15 Cal.4th 619, 662.). We disagree. The prosecutor, unchecked by any defense objection or other action, encouraged the jury again and again to believe that Lualemaga faced a real, life-threatening danger of retaliation from defendant's friends and family, highly prejudicial subject matter. (*Hill, supra,* 17 Cal.4th at p. 828 [referring to facts not in evidence " 'a highly prejudicial form of misconduct' "]; *People v. Warren, supra,* 45 Cal.3d at p. 481 [evidence that a defendant is threatening a witness is "highly prejudicial"].) She indicated Lualemaga was placed in a witness protection program by her own office because of this supposed danger, circumstances suggesting she had special knowledge that added weight to her assertions. Her improper arguments may well have influenced the jury to think defendant was an especially dangerous person who deserved the maximum conviction allowed by law, even if the jury was instructed that these arguments were not evidence.

The People also argue a lack of prejudice because the evidence of defendant's guilt was overwhelming. The only evidence they cite is Lualemaga's testimony, which, the People note, the trial court said was "very compelling and very credible" in rejecting defendant's new trial motion. Given that Lualemaga's uncorroborated account changed over time and was the subject of prosecutor's improper arguments, her testimony was not so overwhelming as to render harmless the prejudice caused by the prosecutor's misconduct. The court's posttrial evaluation of Lualemaga's credibility is not particularly relevant to whether the jury was prejudicially influenced. We conclude this was the case. The most obvious indication of it is the jury's return of a verdict of murder in the first degree, after four days of deliberation and shortly after it asked the court about the legal standards for first degree murder, when there was no substantial evidence to support conviction of that offense.

A first degree murder conviction such as defendant's must be based on more than evidence of the willful intent to kill; there must also be evidence beyond a reasonable doubt that defendant acted with premeditation and deliberation. (§ 189; see *People v. Bolin* (1998) 18 Cal.4th 297, 331.) Typically, the manner of killing does not alone establish first degree murder. "It is well established that the brutality of a killing cannot in itself support a finding that the killer acted with premeditation and deliberation. 'If the evidence showed no more than the infliction of multiple acts of violence on the victim, it would not be sufficient to show that the killing was the result of careful thought and weighing of considerations.' " (*People v. Anderson* (1968) 70 Cal.2d 15, 24–25.)

***15** Lualemaga's sparse testimony was the only account presented at trial about defendant's conduct prior to and during the shooting. She said defendant was friends with

Kuka, and present outside her building drinking with him and Bradley around 3:00 p.m. on the day of shooting. When Lualemaga looked out her bedroom window around 11:00 p.m. that night, she first saw defendant by her parked car when Kuka bumped into him as defendant "was kind of in his way." Kuka elbowed defendant "really hard" with his right arm, causing defendant to fall down, and then ran down a hill after Bradley. Lualemaga did not indicate defendant was holding a pistol when he first appeared, or took any aggressive action towards Kuka before being knocked down. While one could speculate about defendant's appearance, no juror could reasonably conclude beyond a reasonable doubt that defendant's appearance on the scene indicated any planning or motive to kill Kuka.

Indeed, the People do not point to any specific, substantial evidence of planning. One could point to the evidence that defendant arrived at the scene with a loaded pistol. However, without any evidence explaining why he did so, no juror could reasonably conclude beyond a reasonable doubt that he planned to kill Kuka when he arrived. This would be mere speculation.

As for motive, a juror could reasonably infer that defendant, after appearing by Lualemaga's car, reacted to Kuka's chasing defendant's brother and elbowing defendant hard to the ground. However, one cannot reasonably conclude this showed premeditation or planning, given the rest of Lualemaga's testimony. Lualemaga said defendant got up "fast" and ran after Kuka, shooting him multiple times in rapid succession when he caught up to him.

In addition, defense expert Loftus, testifying about a hypothetical based on the incident, estimated a shooter running fast, as Lualemaga testified defendant had done, caught up to the victim in about 1.3 seconds (and about 5 seconds if walking), based on the approximately 29 feet between the point of the initial collision and the location of the victim's body. The prosecution did not attempt to rebut this estimate.

Given the undisputed evidence of the events before and during the shooting, a juror could not reasonably conclude that defendant premeditated or deliberated about killing Kuka between the time he encountered Kuka and shot him. Although case law cautions that one can reach a premeditated and deliberate decision to kill quickly (*People v. Bolin, supra,* 18 Cal.4th at p. 332), the particular circumstances before us indicate that a few seconds, at most, elapsed between the time defendant was elbowed to the ground and began shooting Kuka. Also, they indicate defendant was elbowed hard, knocked down, got up, chased after Kuka, and prepared to shoot him in these few seconds, significant indications defendant did not engage in any reflection or careful consideration of his actions during this short period of time. And even if the jury relied on defendant's decision to repeatedly shoot Kuka in the head after his initial shots knocked Kuka to the ground, there is no evidence defendant paused in any meaningful way between his first and last shot; to the contrary, Lualemaga's testimony indicates he did not pause at all.

We are left, then, with the evidence that defendant shot Kuka nine times in rapid succession, including six shots in the head that, according to Moffatt, probably came after he shot Kuka three shots in the back and neck. Certainly, the nature of this shooting indicates defendant intended to kill Kuka. However, we fail to see how a juror could reasonably conclude beyond a reasonable doubt that these multiple shots, including those aimed precisely at the head, alone prove premeditation and deliberation, since neither "the brutality of a killing" and " 'the infliction of multiple acts of violence' " on a victim are sufficient to show that the killing was the result of careful thought and weighing of considerations. (*People v. Anderson, supra,* 70 Cal.2d at pp. 24–25.)

***16** We conclude that the jury reached this erroneous verdict at least in significant part because of the prosecutor's highly prejudicial misconduct in closing argument and defendant's trial counsel's failure to take any action regarding it.[8] Therefore, there was a reasonable probability that, but for the ineffective assistance of counsel, the trial result would have been more favorable to defendant.

II. *The Court's Denial of Motion to Dismiss for Untimely Discovery*

Defendant also argues the trial court erred in denying his pretrial motion to dismiss the case based on the purported violation of his right to a fair preliminary hearing. Defendant argues this requires that we order dismissal of the information, regardless of whether or not we reverse the judgment. We disagree.

A. *The Relevant Proceedings Below*

Before trial, defendant moved for dismissal of the information. He argued that, despite defense requests, the prosecution did not turn over evidence of Kuka's violent criminal history and an unredacted version of a purportedly exculpatory document until after his preliminary hearing, thereby violating his federal and state constitutional rights to due process and confrontation of witnesses, and Penal Code section 1054, et seq. Relying heavily on *Stanton v. Superior Court* (1987) 193 Cal.App.3d 265 (*Stanton*), he argued that he was precluded from fully investigating claims of self defense, defense of others, and third party culpability, requiring dismissal.

The People opposed the motion, arguing among other things, that defendant was not entitled to the requested discovery prior to the preliminary hearing because it was not material to Lualemaga's cross-examination (identified in the hearing transcript as "Priscilla Maliolagi"), exculpatory, or otherwise relevant, and that there had been no prejudice to the defense.

After hearing, the trial court ruled that the discovery sought was relevant (apparently referring to trial), but that the failure of the prosecution to timely produce it, while negligent delay, did not violate defendant's due process rights so as to warrant dismissal under the federal Constitution. It denied the motion to dismiss, but continued the trial two weeks, and indicated that defense counsel could move to continue the trial further if he was not ready at that time. At trial, the defense did not present any evidence based on the discovery that was the subject of its pretrial motion.

B. *Analysis*

A defendant has the right to cross-examine witnesses and produce witnesses to be sworn and examined at a preliminary hearing. (*Jennings v. Superior Court* (1967) 66 Cal.2d 867, 875.) The People have a "fundamental 'duty ..., even in the absence of a request therefor, to disclose all substantial material evidence *favorable to an accused,* whether such evidence relates directly to the question of guilt, to matters relevant to punishment, or to the credibility of a material witness.' " (*Stanton, supra,* 193 Cal.App.3d at p. 269.) " '[T]he suppression of substantial material evidence bearing on the credibility of a key prosecution witness is a denial of due process within the meaning of the Fourteenth Amendment.' " (*Id.* at p. 269.) The *Stanton* court determined that the procedural vehicle for setting aside an information because of a prosecution's failure prior to a preliminary hearing to disclose material evidence favorable to the accused, where the deprivation of the substantial right is not shown in the transcript of the preliminary hearing, is a pretrial nonstatutory motion to dismiss. (*Id.* at pp. 270–271.)

***17** Normally, we review a trial court's denial of a motion to dismiss such as defendant's for abuse of discretion. (*Merrill v. Superior Court* (1994) 27 Cal.App.4th 1586, 1597.) However, defendant contends the trial court did not exercise its discretion and that we should conduct a de novo review pursuant to *Green, supra,* 27 Cal.3d at pages 24–26.

We do not necessarily agree that the trial court failed to exercise its discretion. Regardless, defendant's argument is unpersuasive under a de novo standard of review. The People presented Lualemaga as its only witness at the preliminary hearing, and she testified that she saw defendant shoot Kuka, similar to her description at trial. This was sufficient to support the information. The evidence claimed by the defendant to be material and exculpatory was neither, and it was not relevant to Lualemaga's cross-examination at the preliminary hearing. The only possible reading of the redacted portion of the notes referred to by defendant is that it is *inculpatory,* as it refers to Kuka crawling along the ground as defendant runs up and makes a negative statement about him. Defendant's contention that Kuka's criminal history was material for purposes of the preliminary hearing because it could have led to his being held on a lesser charge based upon heat of passion or self-defense is speculative and unpersuasive.

We also agree with the People that any error was not prejudicial, including under the federal standard articulated in *Chapman v. California, supra,* 386 U.S. at page 24, in light of the fact that the defense did not present any of the withheld discovery at trial, a telling indication that it was not exculpatory and did not lead to other exculpatory evidence.

DISPOSITION

The judgment is reversed.

We concur:

Haerle, J.

Richman, J.

All Citations

Not Reported in Cal.Rptr., 2014 WL 36469

Footnotes

1 All statutory references herein are to the Penal Code unless otherwise stated.

2 The program was referred to at trial as the "witness relocation program" and the "witness protection program." We refer to it as the latter for consistency's sake.

3 Specifically, we do not address defendant's claims that the trial court improperly denied his motion for a new trial based on newly discovered evidence, failed in its duty to give certain jury instructions sua sponte, and erroneously admitted evidence of Lualemaga's fears and the witness protection program. We also do not address his claim that the evidence was insufficient to support defendant's first degree murder conviction, other than in our analysis of the prejudice caused by the prosecutorial misconduct.

4 Defense counsel objected when the prosecutor, after stating that Lualemaga's life was priceless to her, asked the jury, "What is your life worth to you? What would you risk your life for?" Defense counsel stated that the argument appealed to jurors personally, and the trial court sustained the objection on that ground.

5 Defendant also argues that the trial court had a duty to rein in continued misconduct even absent adequate objection based on a citation to *People v. Vance* (2010) 188 Cal.App.4th 1182, 1201–1202, a decision issued by this court. This argument is unpersuasive because, as the discussion in *Vance* indicates, we found the trial court failed in its duty to admonish the jury in the face of repeated objections by the defense, which the court sustained. (*Ibid.*)

6 For these reasons, we reject defendant's additional argument that the prosecutor's misconduct exacerbated the trial court's erroneous, unconstitutional admission of evidence of Lualemaga's fears and the witness protection program. Assuming for argument's sake that defendant did not forfeit this claim as the People contend, it is unpersuasive because of the highly probative nature of this evidence. Lualemaga's account was the sole evidence placing defendant at the scene, and changed over time. Her testimony about her fears and the witness protection program was critical to the jury's evaluation of her credibility and, therefore, to the outcome of the case.

7 At best, it can be reasonably inferred from the fact that no one other than Lualemaga came forward before trial that there might have been some danger involved in doing so; testimony by her and investigating police suggest a couple of dozen others were in the area at the time of the shooting. However, it *cannot* be reasonably inferred that any such danger came from defendant. There are a multitude of reasons why someone might be afraid to come forward, including that they saw someone else shoot Kuka and feared retaliation from that person, feared becoming involved at all, and/or did not trust the authorities.

8 In our previous opinion, we reduced defendant's murder conviction from first degree to second degree pursuant to sections 1181, subdivision (6) and 1260, and otherwise affirmed the judgment. We do not reduce the verdict here in light of our determination that prejudicial prosecutorial misconduct occurred, requiring reversal.

EXHIBIT 2

2018 WL 1070899
Only the Westlaw citation is currently available.
United States District Court, N.D. California.

Jamal Rashid TRULOVE, Plaintiff,
v.
Maureen D'AMICO, Michael Johnson, Robert McMillan, John Evans, and Carla Lee, et al., Defendants.

Case No. 16-cv-050 YGR
|
Signed 02/27/2018

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Margaret W. Baumgartner, Kelly Marie Collins, Renee Rosenblit, Office of the City Attorney, San Francisco, CA, for Defendants.

ORDER GRANTING IN PART AND DENYING IN PART DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Dkt. No. 233, 256

Yvonne Gonzalez Rogers, United States District Court Judge

***1** Plaintiff Jamal Trulove ("Trulove") brings this action against defendants Maureen D'Amico, Michael E. Johnson, Carla Lee, Robert T. McMillan, and John Evans (collectively, "defendants") for denial of his constitutional rights under 42 U.S.C. section 1983, alleging fabrication of evidence; failure to disclose exculpatory evidence resulting in his prosecution, conviction, and prolonged detention; malicious prosecution; and conspiracy. Defendants move for summary judgment on all claims on the grounds that Trulove lacks evidence to support one or more elements of each claim, that defendants are entitled to qualified immunity on each claims, and that the claim for malicious prosecution is barred by the applicable statute of limitations.

The Court has considered the papers and pleadings submitted in support of and in opposition to the motion, the admissible evidence, [1] and the arguments of the parties at the hearing on February 16, 2018. Based thereon, defendants' motion for summary judgment is **GRANTED IN PART** in favor of defendant Carla Lee, and **DENIED IN PART** as to all other defendants, for the reasons stated herein.

I. BACKGROUND [2]

Shortly before 11:00 p.m. on July 23, 2007, Seu Kuka was shot from behind and killed on a sidewalk in front of 140 Blythedale Avenue in San Francisco's Sunnydale housing projects. Although there were as many as 25 people present at the scene of the crime, only one witness came forward at the time: Priscilla Lualemaga. Lualemaga gave defendant Carla Lee a description of the suspect as a black male in his thirties, wearing a black hooded sweat shirt and black jeans. Just after the shooting, Lualemaga was transported to Ingleside Police Station by officers Lee and Phillips. Lee placed Lualemaga in a room for two hours, and directed her to look over a bulletin board of photos of dozens of mugshots and identify anyone she recognized. While there was a photo of plaintiff Trulove on the wall, she did not identify him. She was able to identify one person as Joshua Bradley, the person Kuka was chasing when he was shot. There is conflicting evidence as to whether Lualemaga identified additional people, including plaintiff's brother David Trulove, from the photographs on the wall. It is undisputed that she did not identify Jamal Trulove's photo, which was directly adjacent to Joshua Bradley's.

Sometime around 1:00 a.m. on the night of the shooting, defendants Inspectors Johnson and D'Amico, took an audio-recorded statement from Lualemaga in which she told the inspectors about seeing Bradley's photo on the wall, and seeing the shooter in the neighborhood. She stated that she did not really get a look at the shooter, was "not sure" if the shooter hung around with Bradley, and she "[didn't] know [Bradley] at all ... [didn't] even know his name." She described the shooter "lanky, skinny," "a little bit darker than Joshua," about the same age as Joshua, and having a "fade" haircut." Defendant D'Amico asked then Lualemaga "if we were able to identify the shooter, and ... put his picture in a line up for you do you think you'd be able to pick him out?," to which Lualemaga replied, "I think so." She did not mention the name Trulove at that time.

***2** The following afternoon of July 24, 2007, D'Amico went door-to-door in the Sunnydale neighborhood. She came to Lualemaga's door. The evidence is conflicting as to what D'Amico showed Lualemaga. Lualemaga recalls D'Amico showing her a single photo of someone she did not recognize. D'Amico testified that she does not recall the photograph, but believes it would have been a photo of the victim, not a suspect.

On July 25, 2007, D'Amico and Johnson met Lualemaga and presented her with a six-person photo array. To create that photo array, Johnson had used a computer program to generate random arrays based on photos for Jamal Trulove, Joshua Bradley, David Trulove, and Israel Benson, and then selected photos from those to create his own array. The six photos in the array shown to Lualemaga included Joshua Bradley (who she had already identified from the photo wall), David Trulove, Jamal Trulove, and two others from the Sunnydale neighborhood. Johnson and D'Amico recorded some, but not all, of their conversation with Lualemaga. Lualemaga identified Joshua Bradley's photo as the person chased by Kuka, and then picked out Jamal Trulove's photo, stating that "he looks like the person that could have shot Seu [Kuka]" and "the shooter, I want to say it's him."

Trulove offers evidence, denied by defendants, that on the night of the murder a third party, Oliver Barcenas, witnessed an interaction in Ingleside Police Station in which an unidentified plainclothes police officer questioned a Samoan woman about the murder in his presence, while he was handcuffed to a bench in the police station. According Barcenas, with a second uniformed, female police officer standing by, the plainclothes officer pointed to a clipboard and asked the Samoan woman, "Are you sure it wasn't J___ Trulove?" Barcenas wasn't sure about the first name, but knew it started with a J. The Samoan woman responded, "No, I don't know," and plainclothes officer appeared frustrated.

On the night of the murder, defendant Evans, of the Crime Scene Investigations Unit, took photographs of the location of the shell casings at the scene. Evans created a report thereafter including a diagram of the casings relative to Kuka's body. The diagram showed the shell casings in a relatively straight line to the east and downhill of where Kuka's body was found.

Nearly ten months later, in June 2008, two officers, including defendant McMillan conducted a traffic stop. Latisha Meadows was a passenger in the car, and her husband was the driver. Also in the car were Meadows' father and her seven-year-old son. The officers found that Meadows had a stolen 9mm handgun in her pants, along with cocaine and heroin in the car. Meadows' husband was on probation and had an active gun possession case. Meadows and her husband were handcuffed and taken to Bayview Police Station. Meadows stated that she witnessed a murder in the Sunnydale projects and that she could give a statement to the homicide detectives. While still in custody, several hours later, she gave a statement to defendants Johnson and McMillan. Some of the details of the statement matched those provided by Lualemaga, including that that Kuka knocked into the shooter just before the shooting happened, that Kuka was shot in the back, and the location of the shooter. However, the statement contradicted facts known to the officers about the shooting, including the time of day and how light it was outside. Meadows chose the same photo of Jamal Trulove out of the same six-photo array that Lualemaga had been shown. She was released from custody thereafter and not charged for any crimes in connection with the detention. Her husband was not prosecuted.

***3** After this second identification, in August 2008, Johnson prepared an affidavit for an arrest warrant for Jamal Trulove. Trulove was arrested on October 27, 2008, and the prosecution then proceeded against him. At Trulove's preliminary hearing and trial, the prosecution based its entire case on Lualemaga's identification of him as the shooter and never called Meadows to testify at any proceeding against Trulove.

In 2010, a San Francisco Superior Court jury convicted Trulove of the murder of Seu Kuka. He was sentenced to a term of 50 years to life in prison. Trulove's conviction was reversed on appeal. The San Francisco District Attorney elected to retry the case in 2015. That second jury acquitted Trulove. Trulove spent six years in prison prior to his acquittal.

II. APPLICABLE LEGAL STANDARDS

A. Standards Applicable to Summary Judgment

Summary judgment is appropriate when "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). "A party asserting that a fact cannot be or is genuinely disputed must support that assertion by ... citing to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits, or declarations,

stipulations ... admissions, interrogatory answers, or other materials," or by "showing that materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact." *Id.* 56(c)(1)(A), (B). Thus, summary judgment is mandated "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). A moving party defendant bears the burden of specifying the basis for the motion and the elements of the causes of action upon which the plaintiff will be unable to establish a genuine issue of material fact. *Id.* at 323. The burden then shifts to the plaintiff to establish the existence of material fact. *Id.* A material fact is any factual issue that may affect the outcome of the case under the governing substantive law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

In the summary judgment context, the court construes all disputed facts in the light most favorable to the non-moving party. *Ellison v. Robertson*, 357 F.3d 1072, 1075 (9th Cir. 2004). If the plaintiff "produces direct evidence of a material fact, the court may not assess the credibility of this evidence nor weigh against it any conflicting evidence presented by" defendants. *Mayes v. WinCo Holdings, Inc.*, 846 F.3d 1274, 1277 (9th Cir. 2017). "[C]redibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from facts are jury functions, not those of a judge." *George v. Edholm*, 752 F.3d 1206, 1214 (9th Cir. 2014) (alteration in original) (quotation omitted). Thus "where evidence is genuinely disputed on a particular issue—such as by conflicting testimony—that issue is inappropriate for resolution on summary judgment." *Zetwick v. Cty. of Yolo*, 850 F.3d 436, 441 (9th Cir. 2017) (internal quotation mark omitted); *Santos v. Gates*, 287 F.3d 846, 852 (9th Cir. 2002) (same).

B. Qualified Immunity Standard

Qualified immunity shields government officials from civil liability under section 1983. United States Supreme Court authority has established a two-part test to determine if a defendant is entitled to qualified immunity. *Saucier v. Katz*, 533 U.S. 194, 201-02 (2001), *overruled on other grounds by Pearson v. Callahan*, 555 U.S. 223 (2009). First, the court must determine "whether the facts, '[t]aken in the light most favorable to the party asserting the injury,' show that the officers violated a constitutional right." *George*, 752 F.3d at 1214 (quoting *Saucier,* 533 U.S. at 201). Second, the court must determine "whether federal rights asserted by [the] plaintiff were clearly established at the time of the alleged violation." *Id.* (internal quotation marks omitted). A right is clearly established when "[t]he contours of the right [are] sufficiently clear that a reasonable official would understand that what he is doing violates that right" at the time of the events. *Sialoi v. City of San Diego*, 823 F.3d 1223, 1231 (9th Cir. 2016) (quoting *Anderson v. Creighton*, 483 U.S. 635, 640 (1987)). The qualified immunity inquiry "must be undertaken in [the] light of the specific context of the case, not as a broad general proposition." *Saucier,* 533 U.S. at 201. Thus, a violation of clearly established law occurs when "it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Torres v. City of Los Angeles*, 548 F.3d 1197, 1211 (9th Cir. 2008). The Supreme Court has cautioned courts "not to define clearly established law at a high level of generality." *Ashcroft v. al–Kidd,* 563 U.S. 731, 742 (2011). At the same time, "[f]or a legal principle to be clearly established, it is not necessary that 'the very action in question has previously been held unlawful,' " but rather that " 'in the light of pre-existing law the unlawfulness [is] apparent.' " *Fogel v. Collins,* 531 F.3d 824, 833 (9th Cir. 2008) (quoting *Anderson,* 483 U.S. at 640). Instead, at the time of the conduct, the "contours" of the constitutional right must be "sufficiently clear' that every 'reasonable official would have understood that what he is doing violates that right.' " *al–Kidd,* 653 U.S. at 741 (quoting *Anderson,* 483 U.S. at 640); *see also Carrillo v. Cty. of Los Angeles*, 798 F.3d 1210, 1223–24 (9th Cir. 2015) (same).

***4** On summary judgment as to qualified immunity, as in other contexts, the evidence is viewed in the light most favorable to the non-moving party. *See KRL v. Estate of Moore*, 512 F.3d 1184, 1189 (9th Cir. 2008) ("[w]here disputed facts exist, we assume that the version of the material facts asserted by Plaintiffs, as the non-moving party, is correct.") (citing *Jeffers v. Gomez,* 267 F.3d 895, 903 (9th Cir. 2001)). "If a genuine issue of material fact

exists that prevents a determination of qualified immunity at summary judgment, the case must proceed to trial." *Serrano v. Francis,* 345 F.3d 1071, 1077 (9th Cir. 2003); *see also* *Torres*, 548 F.3d at 1210. Where "unresolved issues of fact are also material to a proper determination of the reasonableness of the officers' belief in the legality of their actions," summary judgment should be denied. *Espinosa v. City & Cty. of San Francisco*, 598 F.3d 528, 532 (9th Cir. 2010).

III. DISCUSSION

A. Defendant Carla Lee

Having previously dismissed other claims, plaintiff now asserts a single claim for conspiracy against Lee. Based upon the evidence submitted by plaintiff, a reasonable jury could find that Lee: spoke to eyewitness Priscilla Lualemaga on the night of the murder; relayed a description of the shooter that Lualemaga provided; brought Lualemaga to the station to sit in the report writing room; asked Lualemaga if she could identify anyone, including the shooter, from the wall of photos of purported gang members in the room; did not document this interaction with Lualemaga; and was with defendant Johnson in the police station when he pointed to a photograph and asked Lualemaga "are you sure it wasn't Jamal Trulove?" Even assuming a jury were to find all these matters to be true, they are not sufficient to give rise to a plausible inference of Lee's knowledge and participation in an agreement to coerce Lualemaga to provide evidence about the identity of the shooter that was false or with reckless disregard of its falsity, or to suppress evidence regarding the falsity of her identification. Consequently, motion for summary judgment is **GRANTED** in favor Lee.

B. Defendants Evans, McMillan, D'Amico, and Johnson

1. Fabrication of Evidence

As to the claim for fabrication of evidence, there are triable issues of fact that preclude judgment in favor of defendants McMillan, D'Amico, and Johnson. A claim for fabrication of evidence requires plaintiff to show that the defendant deliberately fabricated evidence, and that this fabricated evidence caused plaintiff to be deprived of his liberty. *Spencer v. Peters*, 857 F.3d 789, 798 (9th Cir. 2017). [3]

Deliberate fabrication of evidence may be shown by any of the following: (1) the defendant deliberately reporting something the defendant knew to be untrue, or deliberately mischaracterizing a witness statement; (2) continuing the investigation of the plaintiff despite knowing plaintiff was innocent or being deliberately indifferent to his innocence; or (3) using investigative techniques that were so coercive and abusive that defendant knew, or was deliberately indifferent, that those techniques would yield false information. *Id.* While trivial inaccuracies, "mistakes of tone," or mere carelessness are not sufficient to give rise to a constitutional claim, intentional conduct, such as purposefully mischaracterizing witness statements in an investigative report, establishes a constitutional claim based on fabrication. *Id.* (misquotations of witness statement contrary to witness's disavowal that any crime occurred were deliberate fabrication). Likewise, use of impermissibly suggestive procedures that the officer knew or should have known would yield false information establishes a constitutional violation. *See* *Devereaux v. Abbey,* 263 F.3d 1070, 1074–75 (9th Cir. 2001) (en banc); *see also* *Simmons v. United States*, 390 U.S. 377, 384 (1968) (where photographic identification procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification, constitutional violation requires setting aside conviction); *Grant v. City of Long Beach*, 315 F.3d 1081, 1086 (9th Cir. 2002), *opinion amended on denial of reh'g,* 334 F.3d 795 (9th Cir. 2003) (use of suggestive identification procedures, along with lack of indicia of reliability of identification, established lack of probable cause in support of false arrest and false imprisonment claims); *see also*, *Carrillo v. Cty. of Los Angeles*, No. 211CV10310SVWAGR, 2012 WL 12850128, at *5 n.5 (C.D. Cal. Nov. 14, 2012), *aff'd,* 798 F.3d 1210 (9th Cir. 2015) (impermissibly suggestive identification techniques under *Simmons* are "[b]y definition ... 'so coercive and abusive' that officers know or should know that they yield false information ... [and use of] such techniques to procure a conviction violates the requirements of due process.")

***5** Plaintiff has offered evidence from which a reasonable jury could conclude that defendants McMillan, D'Amico, and Johnson misrepresented evidence in the investigation, and used investigative techniques that were so coercive that defendants knew, or were deliberately indifferent to the risk that, they were likely to yield false information. Because plaintiff offers a number of theories for this claim, and evidence in support of each, the Court need not address every

disputed issue to find that summary judgment must be denied. A few examples suffice.

For one, a reasonable jury could find that defendants D'Amico and Johnson used techniques that were so coercive in obtaining an identification of plaintiff from Priscilla Lualemaga that they knew, or recklessly disregarded, the unreliability of that identification. Plaintiff submits evidence which a jury could find: (1) based on Barcenas's testimony, that Johnson knowingly pressured Lualemaga to identify plaintiff the night of the murder and D'Amico was aware of or participated in that identification; (2) defendant D'Amico presented Lualemaga with a single photo the day after the murder, in an interaction that was undocumented in the investigative file and unacceptably suggestive; and (3) defendant Johnson deliberately varied from SFPD policy and practice to present an unduly suggestive six-person photo array, which included persons already identified by Lualemaga as not being the shooter rather than including a sufficient number of non-suspect, unknown "fillers." (*See* Facts 6, 7, 13, 14, 15 and response thereto and evidence cited therein; Facts 59, 63, 65-75, 78-81, and evidence cited therein.)

Further, a reasonable jury could find that officers McMillan and Johnson knew, or recklessly disregarded, the falsity of Latisha Meadows' identification of plaintiff as the shooter. (*See* Facts 21, 22, 23, 24, and response thereto and admissible evidence cited therein; Facts 113-115, and evidence cited therein.) The evidence of coercive circumstances and reckless disregard of the falsity of Meadows' statement —the circumstances under which it was obtained, the inconsistencies with the known facts, and the details omitted from the officers' reports—is, standing on its own, sufficient to permit a reasonable jury to find that McMillan and Johnson knew, or were deliberately indifferent to those circumstances yielding false information. *Cf.* *Gantt v. City of Los Angeles*, 717 F.3d 702, 708 (9th Cir. 2013) (triable issues of fact as to fabrication claim where record indicated officers threatened criminal charges against drug-addicted witness, witness was high at the time of the identification, and officers showed him materials they asked him not to say he had seen). [4]

While defendants argue that plaintiff cannot show causation because the prosecutor's independent decision to bring charges breaks the causal chain, a reasonable jury could find that the prosecutors here were not aware of all the evidence plaintiff submits regarding the investigators' coercive and suggestive conduct. *See* *Awabdy v. City of Adelanto*, 368 F.3d 1062, 1067–68 (9th Cir. 2004) (where officers "knowingly provided misinformation to [prosecutors or] concealed exculpatory evidence," the prosecutor's actions cannot be considered independent, and do not break the causal chain). (*See* Exh. 22 (Fleming Depo.) at 120-21, 127, 142-43, 150, 191-92, 197, 230; Exh. 21 (Allen Depo.) at 41-42, 218-219; 22-229; Facts 29, 32, 33, 34, 36, 38,45, 46 and response thereto and admissible evidence cited therein; Facts 57, 58, 59, 60, 73, 74, 75, 76, 84, 86, 96, 97, 106, and admissible evidence cited therein.)

***6** Defendants are not entitled to qualified immunity. There are triable issues of material fact on the underlying constitutional violations. Depending upon the jury's determination of the disputed issues of fact, defendants would not be entitled to qualified immunity, since the determination of those facts is necessary to establish whether a reasonable officer at the time would have known that such conduct violated clearly established constitutional rights. *See* *White v. Pauly*, 137 S.Ct. 548 (2017); *Devereaux*, 263 F.3d at 1074–75 ("virtually self-evident" that there is a "clearly established constitutional due process right not to be subjected to criminal charges on the basis of false evidence that was deliberately fabricated by the government").

2. Failure to Disclose Exculpatory Evidence (Brady *and* Tatum *Claims*)

As to the claim for failure to disclose exculpatory evidence, [5] there are triable issues of material fact that preclude judgment in favor of defendants Evans, McMillan, D'Amico, and Johnson. A claim for a constitutional violation based upon failure to disclose exculpatory evidence under *Brady* and *Tatum* requires plaintiff to establish that: (1) defendants withheld material evidence that was favorable to plaintiff; (2) that this withholding prejudiced plaintiff; and (3) that defendants acted with deliberate indifference or reckless disregard of the consequences in withholding the material, favorable evidence. *Brady v. Maryland*, 373 U.S. 83 (1963); *Tatum v. Moody*, 768 F.3d 806, 816 (9th Cir. 2014). [6] Evidence is material "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Bailey v. Rae*, 339 F.3d 1107, 1115 (9th Cir.

2003) (quoting *United States v. Bagley*, 473 U.S. 667, 682 (1985)). In order to show that the failure to disclose prejudiced plaintiff, he need not show that it is more likely than not that the withheld evidence would have resulted in his acquittal, but only that the withheld evidence "could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." *Kyles v. Whitley*, 514 U.S. 419, 435 (1995).

Again, plaintiff offers a number of theories for this claim, and evidence in support of each. The Court notes a few examples of the triable issues of material fact on this claim. First, just as the Court finds that a reasonable jury could determine that the eyewitness identifications here were the result of coercive techniques or otherwise fabricated evidence as stated above, a reasonable jury could also determine that McMillan, D'Amico, and Johnson failed to disclose exculpatory evidence concerning the circumstances under which the eyewitness identifications and statements were obtained. *See* *Silva v. Brown*, 416 F.3d 980, 987 (9th Cir. 2005) ("Impeachment evidence is especially likely to be material when it impugns the testimony of a witness who is critical to the prosecution's case."); *Shelton v. Marshall*, 796 F.3d 1075, 1087–88 (9th Cir. 2015) (holding impeachment of witness providing "only direct evidence" of key element was material); *Carrillo*, 798 F.3d at 1225 (failure to disclose evidence that undercut eyewitness's identification, and suggestive statements made in connection with identification, established *Brady* violation).

***7** Second, based upon the evidence in the record, a reasonable jury could find that Evans failed to disclose exculpatory evidence favorable to defendant with respect to his forensic examination of the scene and its contradiction of Lualemaga's statement. The record contains evidence to support a finding that: (1) Evans was aware of the findings in the Shouldice Study when he testified at both the first and second trials, and that the findings were inconsistent with the eyewitness testimony of Lualemaga; (2) that Evans, D'Amico, and Johnson met with the prosecutor about the shell casing evidence just hours prior to the first trial, and prosecutor told him that the "defense had a problem with the location of the casings;" (3) that Evans, D'Amico, and Johnson never disclosed any inconsistencies between Lualemaga's account and the shell casing evidence to the prosecutor. Further, the evidence could support a finding that Evans testified during the second trial that the locations of casings is random, that casings go in all directions, that determining the location of a shooter from the casings is a fallacy, and that "a large percentage" of casings end up in front of the shooter—statements he knew could be impeached by the Shouldice Study. (*See* Plaintiff's Exh. 20, Evans Depo. at 27-29, 329-333; Facts 39, 40, 41, and response thereto and evidence cited therein; Facts 96, 98, 99, 100 and evidence cited therein.)

Evans relied on his understanding of the Shouldice Study for his opinions about the location of the shell casings in connection with what he told prosecutors and his testimony at the first and second trials. A jury reasonably could conclude that Evans was aware of the significance of the shell casings and communicated that significance to Johnson and D'Amico during the course of their investigation. A reasonable jury could further find that, at the second trial, Evans misrepresented the findings of the Shouldice Study in his testimony as to the significance of the shell casing locations at the scene of the crime. Based on that evidence, a jury could find that information not disclosed by Evans, D'Amico, and Johnson—their exculpatory knowledge of the significance of the shell casing evidence, including what was known to Evans based on the Shouldice Study—establishes a *Brady/Tatum* violation. *See* *Paradis v. Arave*, 130 F.3d 385, 393 (9th Cir. 1997) (suppression of evidence that expert witness "initially ... held an opinion in square conflict with his later in-court testimony" states a *Brady* violation); *Paradis v. Arave*, 240 F.3d 1169, 1179 (9th Cir. 2001) (on further review, *Brady* violation finding upheld where notes indicating forensic expert held contradictory or equivocal opinions could have permitted impeachment of opinions at trial); *see also* *Kyles v. Whitley,* 514 U.S. 419, 438 (1995) (knowledge of police investigators imputed to prosecutor); *United States v. Fort*, 478 F.3d 1099, 1103 (9th Cir. 2007) (same).

To the extent that defendants argue that there is no evidence of bad intent regarding any failure to disclose evidence, bad faith is irrelevant to establishing the claim. *See* *Brady*, 373 U.S. at 87 (suppression of evidence favorable to accused "violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution"); *Youngblood v. West Virginia,* 547 U.S. 867, 869–70 (2006) (per curiam) (quoting *Kyles,* 514 U.S. at 438) ("*Brady* suppression occurs when the government fails to turn over even evidence that is 'known only to police investigators and not to the prosecutor.' "); *Tennison v. City*

& Cty. of San Francisco, 570 F.3d 1078, 1087-88 (9th Cir. 2009) (*citing Brady* and *Youngblood*).

Qualified immunity for defendants is denied because there are triable issues of material fact on the underlying constitutional violations. Depending upon the jury's determination of the disputed issues of fact, the defendants would not be entitled to qualified immunity, since a reasonable officer at the time would have known that such conduct violated clearly established constitutional rights. *See Carrillo*, 798 F.3d at 1224–25 ("the type of evidence allegedly withheld—including impeachment and alternative suspect evidence—fell within *Brady*'s scope" precluding a finding of qualified immunity); *White,* 137 S.Ct. 548; *Tennison*, 570 F.3d at 1087 (citing *Brady* and *Youngblood*, failure of police investigators to turn over exculpatory evidence to defense is a clearly established constitutional violation).

3. Malicious Prosecution

***8** As to the claim for malicious prosecution, there are triable issues of fact that preclude judgment in favor of McMillan, D'Amico, and Johnson. To establish a claim for malicious prosecution, plaintiff must show that the defendants wrongfully caused him to be prosecuted, with malice and without probable cause, and that they did so for the purpose of denying him a constitutional right. *See Awabdy*, 368 F.3d at 1066 (9th Cir. 2004); *Yousefian v. City of Glendale*, 779 F.3d 1010, 1015 (9th Cir. 2015) (citing *Albright v. Oliver,* 510 U.S. 266, 271–75 (1994); *Freeman v. City of Santa Ana,* 68 F.3d 1180, 1189 (9th Cir. 1995)).

For the same reasons that a reasonable jury could find that they deliberately fabricated evidence, the jury could reasonably find that they caused plaintiff to be prosecuted without probable cause. A finding of probable cause to proceed with a prosecution "obviously does not resolve whether the officers had probable cause based on the true set of facts known to them.... plaintiffs who can establish that an officer lied or fabricated evidence [may] relitigate the issue of probable cause with the falsified evidence removed from the equation or, in cases involving intentional concealment of exculpatory evidence, with the undisclosed evidence added back into the equation." *Wige v. City of Los Angeles*, 713 F.3d 1183, 1186 (9th Cir. 2013); *see also Beck v. City of Upland*, 527 F.3d 853, 870 (9th Cir. 2008) ("A rational jury could find that the officers had not met their burden to show that [the prosecutor's] judgment was sufficiently independent as to amount to an intervening cause shielding them from liability."); *Torres*, 548 F.3d at 1208–09 (an identification that is the product of impermissible suggestion does not provide probable cause); *see also Grant*, 315 F.3d at 1087. The argument that causation is cutoff by the time of the second trial fails. Although the DA prosecuting the second trial knew of Barcenas' statement at that time, the DA did not know of other evidence offered by plaintiff concerning the fabrication of both Lualemaga's and Meadows' identification of plaintiff, the Shouldice Report, or the evidence that defendants were aware of a possible alternate suspect that was never investigated.

There are disputed issues of material fact as to malice, since malice is not limited to hostility or ill will, but encompasses improper motive, which can be inferred from continued prosecution despite a lack of substantial grounds for believing in plaintiff's guilt. *See Greene v. Bank of Am.*, 216 Cal. App. 4th 454, 464–65 (2013); *see also Pitt v. District of Columbia,* 491 F.3d 494, 503–04 (D.C. Cir. 2007) (where officers withheld exculpatory evidence and misrepresented facts in their affidavit, finding of malice supported).

Defendants argue that the section 1983 malicious prosecution claim is subject to a two-year statute of limitations because it is most analogous to a common law false arrest claim. Thus, defendants contend the statute of limitations began to run on the date of plaintiff's arrest in 2008 and is time barred. The Court finds this argument to be without merit. Ninth Circuit authority holds that a section 1983 malicious prosecution claim is most similar to a common law claim for malicious prosecution, which involves the right to be free from the use of legal process that is motivated by malice and unsupported by probable cause. *Bradford v. Scherschligt*, 803 F.3d 382, 388 (9th Cir. 2015). The statute of limitations does not begin to run until a favorable termination or acquittal. *Id.* The Supreme Court's decision in *Manuel v. City of Joliet*, 137 S. Ct. 911, 921 (2017), expressly did not reach the accrual date of the section 1983 claim. [7]

4. Conspiracy

***9** As to the claim for conspiracy against Evans, McMillan, D'Amico, and Johnson, there are triable issues of fact on the underlying constitutional violations alleged against them, as well as their knowledge of the violations by other defendants. Therefore, summary judgment must be denied on this claim as well.

IV. CONCLUSION

Based upon the foregoing, the motion for summary judgment is **GRANTED** as to defendant Carla Lee only, and is otherwise **DENIED** as to all other defendants.

IT IS SO ORDERED.

This terminates Docket No. 233.

All Citations

Not Reported in Fed. Supp., 2018 WL 1070899

Footnotes

1 Defendants object to the transcripts of unsworn statements of Latisha Meadows. Plaintiff objects to the reply evidence submitted by defendants in the form of excerpts of the deposition of Meadows, conducted after plaintiff's reply was filed and pursuant to this Court's Orders. (Dkt. No. 289, 293.) The Court **SUSTAINS** both objections, and has not considered either set of transcripts in connection with this motion. Defendants' request for judicial notice in connection with the motion (Dkt. No. 234) is **GRANTED**.

2 The facts stated in this section are undisputed unless otherwise noted.

3 The Court previously issued an order regarding the elements of a fabrication of evidence claim in connection with proposed jury instructions. (Dkt. No. 218.) The Court's formulation of the elements stated this second element as "[t]he deliberately fabricated evidence caused [plaintiff] to be ***convicted***." (*Id.*, emphasis supplied.) The proper formulation of this element, as reflected in the Ninth Circuit's decision in *Spencer,* 857 F.3d at 798 (9th Cir. 2017) and Ninth Circuit Model Jury Instruction 9.33 is that the "deliberate fabrication caused the plaintiff's ***deprivation of liberty***." (emphasis supplied). Deprivation of liberty includes include criminally charging, prosecuting, or convicting. *See* Model Jury Instruction 9.33; *Devereaux*, 263 F.3d at 1074-75 ('there is a clearly established constitutional due process right not to be subjected to criminal charges on the basis of false evidence that was deliberately fabricated by the government."). The Court's prior order regarding the jury instruction was too narrowly drafted. The jury instruction will be amended to encompass criminally charging, prosecuting, or convicting.

4 Plaintiff's complaint fairly encompasses any of the three theories of fabrication of evidence and he need not have alleged specifically that the defendants continued their investigation despite knowing or being deliberately indifferent to his innocence. To the extent defendants seek to dismiss this theory, that request is denied.

5 Plaintiff's operative complaint pleaded both *Tatum* and *Brady* claims in his operative complaint. (Dkt. No. 117, ¶¶ 253 *et seq.*) To the extent defendants' motion suggests that the *Brady* claim should be dismissed because it was not pleaded separately, the motion is **DENIED**.

6 The *Tatum* claim includes the additional elements of being subjected to a detention of unusual length and that the exculpatory evidence was "highly significant." *Tatum*, 768 F.3d at 819-20. Neither of these additional elements changes the summary judgment analysis here.

7 Defendants did not assert qualified immunity as to the malicious prosecution claim. (*See* Notice of Motion, Dkt. No. 233, at 3-4, ¶ 2.)

EXHIBIT 3

JAMAL TRULOVE

Other California Cases with Mistaken Witness Identifications

Shortly before 11 p.m. on July 23, 2007, 28-year-old Seu Kuka was fatally shot on the street in front of a public-housing project in San Francisco, California. An autopsy showed he had been shot nine times—six times in the right side of the head. Seven of the nine gunshot wounds were distance shots.

Although there were as many as 30 people on the street at the time of the shooting, most fled at the sound of the gunshots. Only one eyewitness came forward—24-year-old Priscilla Lualemaga—who told police she saw the shooting from a second-floor window. She said that she first heard shouting and looked out the window and saw Kuka, a distant relative of hers, chasing a man around a car. She said that during the chase Kuka bumped into another man and knocked him down.

Lualemaga said that the man who was knocked down got up and chased Kuka on a street that sloped downhill, caught up to him, and began shooting at Kuka from close range.

Police took Lualemaga to a police station where she was taken to a room and asked to look at a bulletin board containing 34 different mugshots. She identified a photograph of Joshua Bradley as the man Kuka was chasing around the car.

Lualemaga recognized many other people on this wall of photographs as people who lived in the neighborhood. However, during the two hours she was in the room, she did not identify the picture that was immediately above Bradley's photograph—that of Bradley's brother, Jamal Trulove. David Bradley, another brother of Joshua and Jamal, was also pictured among the photos.

Two days later, police came to Lualemaga's place of work and told her that they had identified the gunman and wanted her to look at a photographic lineup. In the lineup were photographs of Joshua, David Bradley and Trulove, who was wearing a bright orange sweatshirt, as well as two non-suspects and a friend of the three brothers. At the time, Trulove was an aspiring rapper from Oakland, California, who had just finished taping an episode of a reality shown known as "I Love New York 2."

Lualemaga, having been told by the detectives that one of the men was the gunman, said that Trulove "looks like the guy who could have shot" Kuka. She again identified Joshua Bradley as the man Kuka was chasing.

No weapon was recovered, but eight shell casings were found downhill, east of Kuka's body. The casings moved in a trail up the hill, towards the body.

In October 2007, Lualemaga told police that her identification of Trulove was reinforced when she saw him on television when the episode of the reality show he was in finally aired.

State:	California
County:	San Francisco
Most Serious Crime:	Murder
Additional Convictions:	Illegal Use of a Weapon
Reported Crime Date:	2007
Convicted:	2010
Exonerated:	2015
Sentence:	50 to life
Race/Ethnicity:	Black
Sex:	Male
Age at the date of reported crime:	25
Contributing Factors:	Mistaken Witness ID, Official Misconduct, Inadequate Legal Defense
Did DNA evidence contribute to the exoneration?:	No

Nonetheless, it was not until October 2008 that Trulove was arrested and charged with first-degree murder committed with a firearm and, because he had a prior conviction for receiving stolen property, being a felon in possession of a firearm.

Trulove went to trial in San Francisco County Superior Court in January 2010. Lualemaga now said she was 100 percent sure that Trulove was the gunman. She said that she did not tell police she was 100 percent sure of the identifications—even though she now said she was—because she was afraid she would have to testify and did not want to do so.

She testified that she was afraid she would "be sitting here" and "would have to face him and say, 'I seen you. This is the person I seen shot (Kuka).'"

Asked what she feared was going to happen if she testified, she told the jury, "Just people who are probably related to [Trulove], or friends with him, you know. They're—they want to support him. And I'm just—I was scared. I don't know. Maybe revenge on me, or my family."

Lualemaga testified that she had been placed in a witness protection program by the prosecution, as had her sister.

In closing argument, the prosecutor told jurors that they should believe Lualemaga was telling the truth because she had risked her life to testify against Trulove. The prosecutor urged the jury to show the same courage that Lualemaga did by testifying. On February 9, 2010, the jury convicted Trulove of first-degree murder with a firearm and being a felon in possession of a firearm. He was sentenced to 50 years to life in prison.

While the case was on appeal, Trulove's appellate attorney, Marc Zilversmit, filed a state petition for a writ of habeas corpus claiming that he had found several eyewitnesses who said the gunman was not Trulove.

In September 2013, California's First District Court of Appeal upheld Trulove's convictions, but reduced the murder conviction from first-degree to second-degree murder.

The appeals court agreed to rehear the case at the request of Zilversmit and in January 2014, agreed with Zilversmit's argument that the prosecution had committed misconduct by arguing that Lualemaga had faced threats which caused her to fear for her life.

The appeals court said that because the prosecution "did not present a scintilla of evidence" of any threats, the prosecution argument was improper and likely prejudiced the jury. The court also held that Trulove's defense lawyer had provided constitutionally ineffective assistance of counsel by failing to object to the prosecution's argument.

When the case was remanded for a new trial, defense attorneys Kate Chatfield and Alex Reisman were appointed to defend Trulove. In preparation for a retrial, they arranged for a pathologist to examine the autopsy report on Kuka and a ballistics expert to examine the location of the shell casings in relation to the body.

Lualemaga again testified and identified Trulove as the gunman who shot Kuka while running downhill and from west to east.

The defense pathologist and the ballistics expert testified that based on their analysis of the casings and the bullet entry wounds and wound trajectories, Kuka was shot by someone who was below him—running up the street from east to west, not down the street from west to east—and that Lualemaga could not see far enough down the street from her second floor window to have seen someone shoot Kuka.

On March 11, 2015, after five days of deliberation, the jury acquitted Trulove and he was released.

In January 2016, Trulove filed a federal civil rights lawsuit against the city and county of San Francisco. In April 2018, a jury awarded Trulove $10

million. In May 2018, lawyers in the case agreed that Trulove's attorneys would receive $4.5 million in fees. An appeal of the jury verdict was dropped in March 2019 after attorneys for both sides agreed to settle for $13.1 million.

– Maurice Possley

Report an error or add more information about this case.

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Last Updated: 3/19/2019

STATE OF CALIFORNIA
Supreme Court of California

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ADDITIONAL DOCUMENTS	PDF 2 OF 7 - Ex. 4 to Accusation by Bazelon against Linda Allen
ADDITIONAL DOCUMENTS	PDF 3 OF 7 - Ex. 5-6 to Accusation by Bazelon against Linda Allen
ADDITIONAL DOCUMENTS	PDF 4 OF 7 - Ex. 7 to Accusation by Bazelon against Linda Allen
ADDITIONAL DOCUMENTS	PDF 5 OF 7 - Ex. 8 to Accusation by Bazelon against Linda Allen
ADDITIONAL DOCUMENTS	PDF 6 OF 7 - Exs. 9-10 to Accusation by Bazelon against Linda Allen
ADDITIONAL DOCUMENTS	PDF 7 OF 7 - Exs. 11-17 to Accusation by Bazelon against Linda Allen

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