IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

vs.

STEPHEN EDWARD HAJEK and LOI TAN VO,

Defendant and Appellant

Case No. S049626

Santa Clara County
Superior Court No. 148113

APPELLANT'S SECOND SUPPLEMENTAL OPENING BRIEF

Appeal from the Judgment of the Superior Court
of the State of California for the County of Santa Clara

The Honorable Judge Daniel E. Creed

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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. STEPHEN EDWARD HAJEK and LOI TAN VO, Defendants and Appellants.	Crim. No. S049626 Santa Clara County Superior Court No. 148113

APPELLANT'S SECOND SUPPLEMENTAL OPENING BRIEF

A. Introduction

On June 22, 2005, appellant Stephen Hajek filed his Appellant's Opening Brief ("AOB"). He filed his First Supplemental Opening Brief on November 8, 2005. Co-appellant Loi Tan Vo filed his 531-page Appellant's Opening Brief on January 18, 2008. After reviewing Mr. Vo's AOB, counsel for appellant Hajek has determined that in order to provide effective assistance of counsel to him, she must file the instant Second Supplemental Opening Brief. It is based largely on adopting, pursuant to California Rules of Court, rule 8.200(a)(5), certain arguments or parts of arguments set forth in co-appellant Vo's recently filed AOB.

B. Adopting Arguments in Co-appellant's Opening Brief

Rule 8.200(a)(5) of the California Rules of Court provides as follows:

> Instead of filing a brief, or as part of its brief, a party may join in or adopt by reference all or part of a brief in the same or a related appeal.

Co-appellant's AOB, filed about two and half years after appellant's AOB, has adopted, pursuant to rule 8.200(a)(5), fifteen arguments included in Mr. Hajek's AOB. (Vo AOB, pp. 120-122.) After reviewing Mr. Vo's 531-page brief, appellant's counsel has determined that there are a number of arguments or portions of arguments included in the Vo AOB which appellant should adopt, based on rule 8.200(a)(5), for purposes of his own appeal. Since appellant and Mr. Vo were tried together and their appeals are joined, it makes sense that the Court consider all arguments raised by both appellants which are relevant to both of them as co-defendants.

Appellant requests to adopt the following arguments, or portions of arguments, set forth in the Vo AOB:

1. Argument 5 of the Vo AOB

Both co-appellants have challenged the admission of a tape recording made of a conversation between Mr. Hajek and Mr. Vo the morning after their arrest in this case. (See Hajek AOB, Argument VIII, pp. 120-132; Vo AOB, Argument 5, pp. 238-249.) Both briefs argue that the admission of this tape injected unreliable, inflammatory and unduly prejudicial evidence into their trial in violation of state evidentiary rules and federal constitutional guarantees under the Eighth and Fourteenth Amendments.

Appellant wishes to adopt, pursuant to rule 8.200(a)(5), certain portions of Argument 5 of the Vo AOB, to wit, footnote 107 found at page

239 as well as pages 246-249, in order to augment arguments he has already made in his own brief on these issues, as discussed *ante*.

2. Argument 6 of the Vo AOB

Both appellant and Mr. Vo challenged the prosecution's use of an uncharged conspiracy to prove the murder and other charges against them. (See Hajek AOB, Argument V, pp. 92-100; Vo AOB, Argument 6, pp. 249-276.) Nonetheless, appellant wishes to adopt, pursuant to rule 8.200(a)(5), the following portion of Mr. Vo's arguments that the use of the uncharged conspiracy in this case was unconstitutional:

> At no time did the trial court decide the scope of the alleged conspiracy. The alleged uncharged conspiracy was, therefore, 'anything goes' – limited only by the prosecutor's imagination....A limitless *charge* of conspiracy would obviously violate due process of law on many levels – by failing to provide notice and an opportunity to confront the evidence, by failing to ensure that only relevant evidence was admitted, by failing to require that the jury convict only on proof beyond a reasonable doubt.

(Vo AOB, pp. 267-268, emphasis in original.)

3. Argument 13 of the Vo AOB

Co-appellant has argued that the trial judge erred in admitting numerous "grisly" photographs offered by the prosecution in this case. (Vo AOB, Argument 13, pp. 330-337.) As that argument points out, the admission of these gory and inflammatory photographs was improper under state evidentiary rules because they constituted both irrelevant and cumulative evidence. The admission of these photos also violated the Fifth, Sixth, Eighth and Fourteenth Amendment rights of appellant and co-appellant to a fair trial, an impartial jury, due process of law and the heightened reliability standards accorded defendants in a capital trial. Pursuant to rule 8.200(a)(5), appellant adopts Argument 13 of the Vo AOB,

except insofar as that argument attempts to blame appellant for the murder and other criminal charges in this case. (See Vo AOB at p. 336.)

4. Argument 18 of the Vo AOB

Appellant has argued that the trial judge erred by giving incomplete and confusing jury instructions regarding the uncharged conspiracy argued by the prosecution. (See Hajek AOB, Argument XVI, pp. 188-203.) In Argument 18 of co-appellant Vo's AOB, he argued that the judge's instructions regarding the conspiracy theory, including an instruction on aiding/abetting, were confusing and deprived appellant of his federal constitutional rights as guaranteed by the Fifth, Eighth and Fourteenth Amendments. (Vo AOB, pp. 350-355.) Pursuant to rule 8.200(a)(5), appellant adopts Argument 18 of the Vo AOB, except insofar as that argument attempts to blame appellant for the murder and other criminal charges in this case. (See Vo AOB at p. 354.)

5. Argument 21 of the Vo AOB

Both appellant and his co-appellant have challenged, as a violation of Penal Code section 190.9 and the Eighth and Fourteenth Amendments of the United States Constitution, the failure of the trial court to make a complete record of the proceedings at the trial level in their case. (See Hajek AOB, Argument XXIV, pp. 269-275; Vo AOB, Argument 21, pp. 362-374.) Appellant wishes to adopt, pursuant to rule 8.200(a)(5), Argument 21 of the Vo AOB in order to augment the arguments on this issue set forth in appellant's AOB at pages 269-275.

6. Argument 23 of Vo AOB

Co-appellant Vo has argued that the trial judge erred when he excused one sitting juror and refused to excuse another, thus violating Vo's rights to due process of law, a fair and impartial jury, a fair trial, to not be

arbitrarily deprived of state law protections and a reliable determination of the issues in his capital trial. (Vo AOB, Argument 23, pp. 378-386.) During trial, Juror Charles Ernst was excused for hardships over the objections of defense counsel. (7 CT 1702.)

Later in the trial, as the jury was deliberating guilt, another juror, Kathleen Williams, notified the court that if she had to serve on the jury after June 2, 1995, there would be a conflict with her job. (7 CT 1834.) Ms. Williams explained that she had to attend a training session in Washington D.C., beginning on June 5, 1995, and if she missed this training, she would not be able to advance in her job for another year. (22 RT 5643.) Initially, appellant's counsel objected to dismissing Ms. Williams. (22 RT 5643-5644.) Later, however, appellant's counsel told the trial judge that she should not have objected to letting Ms. Williams off the jury. Counsel had decided that not allowing Ms. Williams to attend the training session had caused this juror to resent the trial and the defendants, which would adversely affect her ability to render a fair penalty decision. (22 RT 5699.) The trial judge refused to reconsider dismissing juror Williams. (22 RT 5699-5700.) Counsel objected to this decision, stating that keeping Ms. Williams on the jury would deny appellant's due process rights under the Fifth and Fourteenth Amendments. (22 RT 5699-5700.) Pursuant to rule 8.200(a)(5), appellant adopts Argument 23 of the Vo AOB.

7. Argument 24 of the Vo AOB

Co-appellant Vo has argued that he was denied his due process and statutory right to a timely notice by the prosecution of the evidence it intended to offer as aggravation at the penalty phase. (Vo AOB, Argument 24, pp. 386-393.) In this argument, Vo argued that his rights under the Fifth, Sixth, Eighth and Fourteenth Amendments of the United States

Constitution and under corollary provisions of the California Constitution had been violated by the prosecutor's late notification regarding aggravating evidence. Pursuant to rule 8.200 (a)(5), appellant adopts Argument 24 of the Vo AOB, except insofar as that argument attempts to portray appellant as more culpable than Mr. Vo. (See Vo AOB at p. 393.)

8. Argument 29 of the Vo AOB

Co-appellant has argued that the trial judge erred when he refused to preclude improper argument by the prosecutor during the penalty phase of their trial. (Vo AOB, Argument 29, pp. 424-435.) As this argument states, the prosecutor engaged in numerous instances of misconduct during his closing statements to the jury during the joint penalty trial of appellant and his co-appellant Loi Tan Vo. This misconduct violated state law principles as well as appellants' rights under the Fifth, Sixth, Eighth and Fourteenth Amendments of the United States Constitution to a fair trial, notice, an unbiased jury, cross-examination and confrontation, due process, and a reliable guilt determination and an individualized and reliable penalty determination in a capital case. Pursuant to rule 8.200(a)(5), appellant adopts Argument 29 of the Vo AOB except insofar as that argument attempts to portray appellant as more guilty and more worthy of a sentence of death than Mr. Vo. (See Vo AOB at pp. 432-434.)

9. Argument 30 of the Vo AOB

Appellant argued in his opening brief that the trial judge erred in admitting into evidence a faulty and partially inaudible audiotape of a conversation between him and co-defendant Vo. (Hajek AOB, Argument VIII, pp. 120-132.) Co-appellant Vo also has raised this issue as part of his claim that the trial court improperly denied appellant's motion for a new

trial, Argument 30 of his opening brief.[1] Pursuant to rule 8.200(a)(5), appellant adopts Argument 30(B) at pages 453-464 of the Vo AOB.

C. Additional Arguments

As noted previously in this brief, appellant wishes to adopt arguments, as enumerated *ante*, made by co-appellant Vo in his recently filed 531-page opening brief. In addition, this second supplemental appellant's opening brief includes an argument, Argument XXXIII *post,* regarding prosecutorial misconduct not already discussed in Argument 29 of the Vo AOB and adopted *ante*, pursuant to rule 8.200(a)(5), by appellant. This supplemental AOB also includes an argument, Argument XXXIV *post,* involving the unlawfulness of the sentences imposed on appellant for an arming enhancement, alleged in nine counts of the Information, of which, as a matter of law, appellant is not guilty. These two arguments are numbered sequentially following the last argument in the AOB filed by Mr. Hajek and the unnumbered argument in appellant's first supplemental AOB. That argument in the first supplemental AOB should have been numbered XXXII; thus, the numbering in this second supplemental AOB begins with XXXIII.

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[1] Mr. Vo also argued this issue in Argument 5 of his AOB. Appellant has adopted that argument *ante*, pursuant to rule 8.200(a)(5).

XXXIII.

THE PROSECUTOR ENGAGED IN MISCONDUCT DURING BOTH THE GUILT AND PENALTY PHASES OF APPELLANT'S TRIAL

The prosecutor in this case engaged in misconduct during all stages of the trial in this case. Not all instances of misconduct were objected to by the trial counsel in this case. This argument will address only those instances to which there were objections and which are not already described in Argument 29 of the Vo AOB.

A. References in the Guilt Phase Closing Argument to Defense Counsel's "Salesmanship" Was Improper

In his concluding closing argument at the guilt phase, the prosecutor made several remarks about defense counsel's "salesmanship" on behalf of appellant. He praised, perhaps disingenuously, both defense counsel but especially Ms. Greenwood, appellant's lawyer. The prosecutor stated:

> And it was particularly effective on her part, I think, to admit to you, to tell you what she is after, which is a second degree murder, which avoids all responsibility for any major penalty, is a garden variety, every day average type of murder where there's no plan. And she told you actually that this was such a case. When you think about it that's amazing. *That is really an incredible job of salesmanship*, to get you to think about that even.

(22 RT 5554-555, emphasis added.)

The prosecutor persisted with this theme, observing to the jury that "your role in this case is not to decide who the best lawyer is or what the best job of salesmanship is, but simply to do justice, to follow the law in this case and decide what happened." (22 RT 5557.)

There were several other references to the "salesmanship" of counsel for both defendants. (22 RT 5560, 5562.) Finally, appellant's counsel

objected to "this repeated reference to salesmanship" as improper argument. (22 RT 5562.) When the trial judge overruled this objection, the prosecutor immediately reprised the theme:

> If she finds salesmanship – I will strike that word and call it excellent lawyering. That's what it is. She's an excellent defense attorney. She can't up make up the law, however, and she can't hide those facts.

(22 RT 5562.)

It is obvious from the context of these remarks by the prosecutor about defense counsel's "salesmanship," offered as insincere flattery, that he was disparaging the truthfulness of appellant's attorney. As this Court acknowledged in *People v. Hill* (1998) 17 Cal.4th 800, " '[a]n attack on the defendant's attorney can be as seriously prejudicial as an attack on the defendant himself, and, in view of the accepted doctrine of legal ethics and decorum [citation], it is never excusable.'" (*Id.* at p. 832, quoting 5 Witkin & Epstein, Cal.Criminal Law (2d ed.1988), section 2914, at p. 3570.)

B. The Prosecutor Engaged in Misconduct During the Penalty Phase of Appellant's Trial

During the penalty phase, the prosecutor engaged in pervasive and highly prejudicial misconduct.

1. Questioning Dr. Minagawa About the Bogus Issue of Sadism

During his cross-examination of Dr. Rahm Minagawa, the prosecutor focused on whether appellant was a "sadist." Most of his questions focused on appellant's alleged sadistic tendencies (23 RT 5893-5926), even though Dr. Minagawa, who was offered by appellant solely as a mental health expert witness, later explained that "sadism" is not recognized as a

diagnosis in the DSM-IV.[2] (23 RT 5927.) [3]

The prosecutor, however, was uninterested in Dr. Minagawa's statements that not only had he not diagnosed appellant as a sadist but he could not diagnose him as a sadist. The prosecutor merely wanted the opportunity to ask the psychiatrist as many inflammatory questions about the alleged sadism of appellant as possible in order to put the idea before the jury. There were several objections from both defense counsel during this incendiary examination of Minagawa, but they were largely unsuccessful in curbing the prosecutor's improper questioning. For example, appellant's attorney objected to the prosecutor's questioning about sexual sadism as irrelevant since the case did not involve sexual sadism; the trial judge sustained this objection. (23 RT 5916.) However, the very next question of the prosecutor to Dr. Minagawa was whether a statement in one of appellant's letters about a *dream* he had had about raping and sodomizing Ellen Wang indicated an "inclination toward sexual sadism." (23 RT 5916.)

Defense counsel again objected to questioning about sexual sadism, and this objection was again sustained. (23 RT 5917.) Undeterred, the prosecutor immediately asked Dr. Minagawa: "As to sadism in general, the broad sense — ." Again, defense counsel objected, pointing out that "[t]here is no diagnosis for sadism in DSM-VI, which the district attorney

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[2] The DSM-IV, The Diagnostic and Statistical Manual of Mental Disorders, is a manual published by American Psychiatric Association that includes all currently recognized mental health disorders.

[3] On re-direct examination by appellant's counsel, Dr. Minagawa explained that there is a diagnosis in the DSM-IV for sexual sadism, but that he could not diagnose appellant as a sexual sadist. (23 RT 5927-5929.)

knows well." (23 RT 5917.) This time the trial judge overruled her objection. (23 RT 5917.) Thereafter, the prosecutor continued to ask questions about sadism, even though the questions were outside both the scope of Dr. Minagawa's expertise and of his direct examination since sadism is not recognized as a mental disorder, disease or illness. (23 RT 5918-5919.)

Because the prosecutor's questions focused so intently on the subject of sadism, it was necessary, during her re-direct examination of Dr. Minagawa, for appellant's trial counsel to try to correct the inaccuracies created by the prosecutor. In response to her questions, Dr. Minagawa stated that appellant is not a sexual sadist and that because the murder in this case did not involve any sex act and there was no other evidence of any sexual acts by defendant, such a diagnosis would be inappropriate. (23 RT 5928-5929.) Dr. Minagawa, quoting from classification number 302.84 of the DSM-IV, for sexual sadism, stated that: "The paraphiliac focus of sexual sadism involves *acts real, not imagined.*" (*Ibid.*, emphasis added.) This testimony refuted the prosecutor's claim that appellant's dream about Ellen Wang made him a sexual sadist.

During re-cross-examination, the prosecutor returned to questioning Dr. Minagawa about appellant's alleged sexual sadism even though Minagawa had just stated unequivocally that appellant was not a sexual sadist. (23 RT 5937-5938.) Even after defense counsel made repeated objections, which were sustained by the trial judge, about the prosecutor's improper questions about the issue of sadism, the prosecutor kept asking the questions. (23 RT 5938-5939.)

A prosecutor's refusal to comply with a trial court's ruling is misconduct. (*People v. Price* (1991) 1 Cal.4th 324, 451; *People v. Pigage*

(2004) 112 Cal.App.4th 1359, 1374.) As an officer of the court, a prosecutor is bound to comply with the trial judge's rulings regardless of whether they are right or wrong. (*Hawk v. Superior Court* (1974) 42 Cal.App.3d 108, 126.) As described *ante*, the prosecutor in this case continued to question Dr. Minagawa about appellant's alleged sadism despite the fact that the trial judge sustained defense objections to this line of questioning. Such defiance of court rulings brings disorder to the court process and causes an unfair trial. (*People v. Pigage, supra,* 112 Cal.App.4th at p. 1374.)

2. Improper Argument Regarding Satanism and Sadism

After questioning Dr. Minagawa about the alleged sadism of appellant, the prosecutor then turned to the question of "Satanism," another inflammatory issue which has nothing to do with mental illness and thus was not within the scope of Dr. Minagawa's expertise. These questions were similarly designed to allow the prosecutor to describe the appellant in the most scurrilous ways. For example, the prosecutor asked the following questions:

Q: Isn't it true you didn't ask him about Satanism because if he gave you an answer and you have to tell the jury he was interested in Satanism?
A: No, that's not true.
Q: You have to disclose that he is evil?
A: That is not why I didn't ask him about Satanism.

(23 RT 5920.)

As discussed in Argument IX of appellant's opening brief, the prosecution improperly interjected the issue of Satanism into the trial. (Hajek AOB, pp. 133-145.) In addition, the prosecutor made improper reference to this subject during his closing arguments to the jury at the

penalty phase. Citing to one of appellant's letters which included a reference to a "satanic Bible" and a statement, "Hail, Satan," the prosecutor told the jury that appellant worshiped evil. (25 RT 6393.) During the argument, the prosecutor also conflated his claims that appellant was evil, worshiped Satan and was a sadistic murderer. (25 RT 6412-6413.) The prosecutor also urged the jurors to reject any testimony about appellant's mental illnesses because appellant was simply evil and sadistic. (25 RT 6414-6415.)

Before closing argument began at the penalty phase, appellant's counsel asked the trial judge to order the prosecutor not to bring up the bogus issue of sadism in his speech to the jury. The district attorney first claimed that he should be allowed to argue that the evidence of appellant's anti-social personality disorder and sadism should not be treated as mitigating factors. (25 RT 6361.) The trial judge pointed out that Dr. Minagawa never agreed that a diagnosis of sadism applied to appellant. (25 RT 6362.) Defense counsel discussed how improper the prosecutor's cross-examination of Minagawa about sadism had been and further argued that should the prosecutor refer to this subject or argue that appellant's mental problems were a reason to sentence him to death, such an argument would violate the Eighth Amendment. (25 RT 6362-6363.)

The trial judge equivocated on these objections, merely cautioning the prosecutor as follows:

> I think what we have is another line out in the sand. And it's – where does the line cross from negating a mitigating factor to pushing forth an aggravating factor, the same facts and circumstances. And I guess it's a principle that you can talk about, but when the line crosses, it's error.

(25 RT 6364.)

A review of the prosecutor's penalty phase argument establishes that he did, in fact, cross the line by referring to the irrelevant and inflammatory issues of sadism and Satanism. (24 RT 6393, 6412-6415.)

3. Improper Argument Regarding Lack of Remorse

Before closing argument at the penalty phase, defense counsel filed a document entitled "Defendant Hajek's Motion to Restrict Improper Prosecution Argument." (8 CT 2126-2131.) In part, that motion argued that the prosecutor should be precluded from arguing appellant's alleged lack of remorse as an aggravating factor. (8 CT 2129.) During the hearing on the motion, the prosecutor argued and the trial judge accepted the idea that lack of remorse exhibited by a defendant at the scene of the crime, as part of factor A circumstances of the crime, is an appropriate factor to be considered by the jurors. (25 RT 6367-6368, 6370-6371.)

However, during his closing argument to the jury, the prosecutor did not limit his discussion of alleged lack of remorse to appellant's demeanor and behavior at the crime scene. Instead, he told the jurors:

> After being in jail for months, reflecting on this crime, what does he [appellant] think of to do? What does he think is the appropriate response? He sends a letter to the victim's family, "If you come to court you will die, bitch." That's the true Stephen Hajek. *That's a person who shows absolutely no remorse*. Deserves no mercy, no mitigation."

(25 RT 6392, emphasis added.)

The prosecutor also argued:

> I submit Mr. Hajek is monstrous, voice on that tape. Blood of the 73-year-old woman he never knew on his gloves, *is not remorseful*, but howling how he further wants to beat and damage her granddaughter. That's the type of case that deserves the death penalty.

(25 RT 6419, emphasis added.)

A prosecutor may not present evidence in aggravation that is not relevant to the statutory factors enumerated in Penal Code section 190.3. (*People v. Crittenden* (1994) 9 Cal.4th 83, 148; *People v. Boyd* (1985) 38 Cal.3d 762, 772-776.) Lack of remorse is not a statutory aggravating factor. (See Pen. Code, § 190.3; see also *People v. Ochoa* (2001) 26 Cal.4th 398, 449.)

It is true that "[c]onduct or statements *at the scene of the crime* demonstrating lack of remorse may be considered in aggravation as a circumstance of the capital crime under section 190.3, factor (a)." (*People v. Pollock* (2004) 32 Cal.4th 1153, 1184, emphasis added, citing *People v. Gonzalez* (1990) 51 Cal.3d 1179, 1231-1232.) Post-crime evidence of remorselessness, however, does not fit within any statutory sentencing factor and therefore cannot be used as aggravating evidence. (*People v. Gonzalez, supra*, 51 Cal.3d at p. 1232 ["post-crime evidence of remorselessness does not fit within any statutory sentencing factor, and thus should not be urged as aggravating"]; *People v. Boyd, supra*, 38 Cal.3d at pp. 771-776.)

In the instant case, the prosecutor's use of a letter, written by appellant long after the crime, to support his claim that appellant should receive the death penalty because of his lack of remorse does not fall within the exception described in the *Pollock* and *Gonzalez* decisions, *supra.* The prosecutor's remarks about lack of remorse went beyond what he had agreed to before giving the penalty closing argument. The statements quoted *ante* demonstrate the prejudice created by this improper argument. The prosecutor associated appellant's alleged lack of remorse with his being a monster who deserved the death penalty.

Prosecutorial misconduct may require the reversal of a conviction based on violations of either or both the United States and California Constitutions. As this Court noted in *People v. Harris* (1989) 47 Cal.3d 1047: "A prosecutor's rude and intemperate behavior violates the federal Constitution when it comprises a pattern of conduct 'so egregious that it infects the trial with such unfairness as to make the conviction a denial of due process.'" (*Id.* at p.1089, quoting *Donnelly v. DeChristoforo* (1974) 416 U.S. 637, 642-643.)

Even if the prosecutor's conduct does not render a trial fundamentally unfair, it violates the California Constitution if it involves the use of deceptive or reprehensible methods to attempt to persuade the court or jury. *(People v. Hill* (1998) 17 Cal.4th at p. 820; *People v. Gions* (1995) 9 Cal.4th 1196, 1215.) Nonetheless, prosecutorial misconduct need not be intentional in order to constitute reversible error. (*People* v. *Bolton* (1979) 23 Cal.3d 208, 214.) According to the United States Supreme Court, "[t]he touchstone of due process analysis in cases of alleged prosecutorial misconduct is the fairness of the trial, not the culpability of the prosecutor." (*Smith v. Phillips* (1989) 455 U.S. 209, 219.) Therefore, a claim of prosecutorial misconduct is not defeated by a showing of the prosecutor's subjective good faith. (*People* v. *Price* (1991) 1 Cal.4th 324, 447.)

Appellant's trial was tainted by such wide-spread prosecutorial misconduct that his rights under both the California and United States Constitutions were violated. First, he was deprived of due process and a fundamentally fair trial in violation of the Fifth and the Fourteenth Amendments of the United States Constitution and article I, sections 7 and 15 of the California Constitution. He was also deprived of a reliable adjudication of guilt and penalty in violation of the Eighth Amendment

guarantees in a capital case. Further, prosecutorial misconduct violated appellant's right to an impartial jury in violation of the Sixth Amendment of the United States Constitution and article I, section 16, of the California Constitution. (*People* v. *Chapman* (1993) 15 Cal.App.4th 136, 141.) Prosecutorial misconduct also compromised his right to present a defense and to the effective assistance of counsel in violation of the Sixth Amendment. (*Crane* v. *Kentucky* (1986) 476 U.S. 683, 690-691.)

The pervasive prosecutorial misconduct, described *ante*, prejudiced appellant in this case. By asking highly inflammatory and irrelevant questions, the prosecutor was able to twist Dr. Minagawa's testimony about appellant's mental illnesses into evidence that he was a sadistic and evil man who worshiped Satan. Dr. Minagawa testified that there is not any diagnosis for sadism and that there was no evidence that the diagnosis of sexual sadism applied to appellant. As a result of the prosecutor's relentless distortion of the evidence about appellant's mental illnesses and the introduction of the irrelevant but inflammatory evidence that appellant had expressed interest in Satan worship, the prosecutor was able to persuade the jury to sentence appellant to death despite the facts that the evidence was unclear about who the actual killer was and that appellant was only 18 years old at the time of the crime and had no criminal history of violence. Reversal is required.

XXXIV.

APPELLANT WAS DEPRIVED OF HIS FEDERAL CONSTITUTIONAL RIGHT TO DUE PROCESS WHEN HE WAS SENTENCED PURSUANT TO CALIFORNIA PENAL CODE SECTION 12022.5 FOR PERSONAL USE OF A PELLET GUN

In this case, the information alleged that appellant had personally used a firearm, to wit a pellet gun, in violation of Penal Code section 12022.5. In each of Counts 1-9, the following allegation was made:

> . . . .that at the time of and in the commission and attempted commission of the foregoing offense, the said defendant, STEPHEN EDWARD HAJEK, personally used a firearm, to wit: a PELLET GUN, within the meaning of section 12022.5(a) and 1203.06 of the Penal Code.[4]

(6 CT 1442-1452, capitalization in the original.)

All of the evidence presented by the prosecution about the gun found near appellant when he was arrested in the backyard of the Wangs showed that it was a pellet gun. (14 RT 3385, 3400, 3508, 3509; 15 RT 3623, 3627; 16 RT 3798, 3799; 17 RT 4002.) In the written verdict forms, the jury found the section 12022.5, subdivision (a) allegation in each count to be true. (8 CT 2098-2104.) Those verdict forms contained the following language regarding the firearm allegation:

> We further find that the defendant, STEPHEN EDWARD HAJEK, in the commission and attempted commission of the foregoing offense did/did not personally use a firearm, to wit: a PELLET GUN, within the meaning of Sections 12022.5(a)

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[4] In 1992, the year when the Information in this case was filed, section 1203.06 concerned ineligibility for probation or suspension of sentence for persons personally using a firearm during the commission or attempted commission of a variety of crimes including murder, robbery and burglary.

and 1203.06 of the Penal Code.

(8 CT 2099, capitalization in the original.)

At the sentencing hearing on October 18, 1995, the trial judge sentenced appellant to five years on each of the arming enhancement allegations set forth in Counts 1, 2, 3, 4, 5 and 6; the sentences were to run concurrently. Pursuant to Penal Code section 654, the judge stayed the sentences on Counts 7-9, including the sentences for 12022.5 enhancement. (10/18/95 RT at pp. 13-14; 11 CT 2897.)

The sentences meted out on these enhancement allegations were unlawful and therefore must be reversed.

A. A Pellet Gun Does Not Qualify as a Firearm under Section 12022.5 (a)

The crimes at issue in this case occurred on January 18, 1991. (5 CT 1368.) The First Amended Information in the case was filed on September 23, 1992. (5 CT 1366-1375.) The case went to trial on February 14, 1995. (6 CT 1646.) At all times, the prosecutor alleged that the firearm involved in this case was a pellet gun, indeed, an inoperable pellet gun. In addition, all of the prosecution evidence relating to the gun found near appellant when he was stopped by the police in the victim's backyard showed that it was a pellet gun. (14 RT 3385, 3400, 3508, 3509; 15 RT 3623, 3627; 16 RT 3798, 3799; 17 RT 4002.) As a matter of law, a pellet gun is not a firearm within the meaning of Penal Code section 12022.5, subdivision (a); therefore, the nine true findings for sentence enhancements alleged under this statute and the concomitant sentences must be reversed.

In *People v. Vasquez* (1992) 7 Cal.App.4th 763, the California Court of Appeal found that, after a 1991 repeal and amendment of Penal Code

section 12001[5] changing the definition of "firearm" for purposes of a section 12022.5, subdivision (a) enhancement, a pellet gun no longer qualifies as a firearm.[6] (*Id.* at p. 767.) This change in the statutory definition of firearm became effective January 1, 1992. (*Ibid.*) The current and applicable version of Penal Code section 12001, subdivision (a) defines "firearms" (and handguns, pistols and revolvers) for all Penal Code purposes except for sales to minors, as projectile weapons in which the projectile is propelled by combustion or explosion. Since pellet guns, as well as BB guns, use compressed air, gas, or springs for projectile force, they are not firearms in any sense, except that they are included in the "firearms" which are prohibited from being sold to minors. (Pen. Code, sec. 12001, subd. (g); *In re Arturo H.* (2006) 42 Cal. App. 4th 1694, 1699; *People v. Nasalga* (1996) 12 Cal. 4th 748, 792-793.)

In the instant case, which did not go to the jury until 1995, apparently none of the participants, including the trial judge, the prosecutor

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[5] Before its repeal, section 12001.1 provided:

> "Except for the purposes of Sections 12021, 12025, 12031, 12072, and 12073, *as used in this title* 'firearm' shall also include any instrument which expels a metallic projectile, such as a BB or a pellet, through the force of air pressure, CO2 pressure, or spring action or any spot marker gun, provided, that no instrument described in this section shall be considered a 'pistol,' 'revolver,' or 'firearm capable of being concealed upon the person' for any purpose." (Stats. 1988,ch. 1605, 3, p. 5821, repealed in Stats. 1991, ch. 950, 4; italics added.) This statute was repealed and amended in 1991, effective January 1, 1992.

[6] The *Vasquez* decision also found that BB guns and paint ball guns were no longer included in the definition of firearm found in section 12001.

and the two defense counsel, realized that the pellet gun found in appellant's possession at the scene did not qualify as a firearm for purposes of the arming enhancements alleged in nine counts of the Information. The fact that this issue was not raised at trial is, however, immaterial. In the *People v. Vasquez, supra*, the defendant did not raise the issue at trial that the pellet gun did not qualify as a firearm within the meaning of section 12022.5, subdivision (a). The Court found:

> . . .Vasquez, who admittedly used or was armed with a gas-pressured pellet gun, but whose case has not yet reached final disposition, must be granted the benefit of the change in definition, requiring the reversal of his true firearm findings.

(*People v. Vasquez, supra*, 7 Cal.App 4th at pp. 764-765.)

The Court of Appeal further held that the application of this new more restrictive statutory definition for "firearm," to Mr. Vasquez's crimes committed before its operative date (January 1, 1992) changed the legal consequences of his criminal conduct. (*Id.* at p. 767, citing *Tapia v. Superior Court* (1991) 53 Cal.3d 282, 301.) Also, the *Vasquez* Court noted that when the Legislature repeals or amends a criminal statute or removes the State's condemnation from conduct that was formerly deemed criminal, any pending criminal procedure charging such conduct must be dismissed. (*Id.* at p. 768, citing *Bell v. Maryland* (1964) 378 U.S. 226, 230.) A criminal case is considered a pending procedure until there has been a final disposition in the highest court authorized to review it. (*Ibid.*) Applying these principles, the *Vasquez* court reversed the true findings on the arming enhancement allegations in that case under Penal Code section 12022.5, subd. (a). (*Ibid.*)

B. As a Matter of Law, All True Findings and the Concomitant Sentences Must be Reversed

B. As a Matter of Law, All True Findings and the Concomitant Sentences Must be Reversed

Before the California Legislature changed the definition of "firearm" in Penal Code section 12001 in 1991, a pellet gun qualified as a firearm for purposes of the arming enhancement set forth in Penal Code section 12022.5, subdivision (a). However, effective January 1, 1992, a pellet gun no longer qualifies as a firearm under this arming enhancement. The prosecution specifically charged appellant with using a pellet gun as an enhancement to nine counts of the information in this case. The prosecution's evidence established that the gun was a pellet gun. The written verdict forms used by the jurors also specified that the firearm involved was a pellet gun. This case is obviously still pending and thus "must be granted the benefit of the change in definition, requiring the reversal of his true firearm findings." (*People v. Vasquez, supra*, 7 Cal.App 4th at pp. 764-765.) Therefore, under the principles stated in *People v. Vasquez, supra*, the true findings on those enhancement allegations and the sentences given on those charges must be reversed because an essential element of the alleged enhancement, to wit, the firearm, cannot be proved.

A claim that a sentence is unauthorized may be raised for the first time on appeal, and is subject to correction whenever the error comes to the attention of the reviewing court. (*People v. Barnwell* (2007) 41 Cal.4th 1038, 1048, fn. 7.) A sentence is generally "unauthorized" where it could not lawfully be imposed under any circumstance in the particular case. Appellate courts are willing to intervene in the first instance because such error is clear and correctable independent of any factual issues presented by the record at sentencing. (*People v. Scott* (1994) 9 Cal.4th 331, 354.) "In other words, obvious legal errors at sentencing that are correctable without

referring to factual findings in the record or remanding for further findings are not waivable." (*People v. Smith* (2001) 24 Cal.4th 849, 852.)

Under the personal use arming enhancements, Penal Code section 12022.5, subd.(a), brought against appellant, a pellet gun is not a firearm. Accordingly, as a matter of law, appellant cannot be sentenced for personal use of a firearm under that statute. This Court must reverse the unlawful sentences on these arming allegations.

CONCLUSION

For all of the foregoing reasons and for the reasons set forth in appellant's opening brief and in appellant's first supplemental opening brief, appellant respectfully requests the Court to reverse the convictions and death sentence rendered in this case.

DATED: April 9, 2008

Respectfully submitted,

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Attorneys for Appellant

CERTIFICATE OF COUNSEL
(Cal. Rules of Court, rule 36(b)(2))

I, Alison Pease , am the Deputy State Public Defender assigned to represent appellant Stephen Edward Hajek, in this automatic appeal conducted a word count of this brief using our office's computer software. On the basis of that computer-generated word count, I certify that this brief is 6,148 words in length excluding the tables and this certificated.

DATED: April 9, 2008

Alison Pease
Attorney for Appellant

DECLARATION OF SERVICE BY MAIL

Case Name: ***People v. Hajek***
Case Number: **Superior Court No. Crim. 148113**
Supreme Court No. S049626

I, the undersigned, declare as follows:

I am over the age of 18, not a party to this cause. I am employed in the county where the mailing took place. My business address is 801 K Street, Suite 1100, Sacramento, California 95814. I served a copy of the following document(s):

APPELLANT'S SECOND SUPPLEMENTAL OPENING BRIEF

by enclosing them in an envelope and
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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on **April 9, 2008**, at Sacramento, California.

Saundra Alvarez