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SUPERIOR COURT OF RIVERSIDE

APPELLATE DIVISION

THE PEOPLE OF THE STATE OF CALIFORNIA, Respondent/Plaintiff, vs. KEITH HENSON, Appellant/Defendant.	APPELLATE CASE NO.: APP004184 TRIAL CASE NO.: HEM014371

TO THE HONORABLE PATRICK F. MAGERS, PRESIDING JUSTICE OF THE SUPERIOR COURT RIVERSIDE, APPELLATE DIVISION:

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I.
INTRODUCTION

Appellant is a long time internet free speech advocate and an outspoken opponent of the Church of Scientology. Over the past several years, Members of the Church of Scientology have picketed Appellant's home and his wife's work, and Appellant has picketed the Church of Scientology. During this time, the Church of Scientology monitored Appellant's internet postings and disseminated those postings to its members. (RT, Vol. I, 232; 171:2-5.) The Church of Scientology also acquired and disseminated to its members a book written in 1990 (discussing events from the 1970's), which purportedly recounts Appellant's knowledge of explosives. (RT, Vol I, 140-141.) The complaining witnesses asserted, based on information sent to them by their church, that they were scared of Appellant. As a result, the complaining witnesses testified that they refused to walk in the area where Appellant was picketing.

Appellant was charged with one count of Criminal Threats, in violation of Penal Code §422; one count of attempted Criminal Threats, in violation of Penal Code §664/422; and one count of Interfering with Religion by Force or Threat of Force, in violation of Penal Code §422.6. (CT, Vol. I, 00001, 00006.)[1] The jury convicted only on the §422.6. As set forth herein, there was insufficient evidence presented at trial that Appellant used force or the threat of force to interfere with the complaining witnesses' religion. Further, several errors occurred during the course of the trial, including, but not limited to, restricting Appellant's presentation of evidence, limiting Appellant's right to cross-examine witnesses, admitting highly prejudicial and irrelevant evidence, and several instances of government misconduct.

II.
STATEMENT OF APPEALABILITY

This appeal is from a final judgment entered after trial and is

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[1] The Clerk's Transcripts is divided into two volumes, and each volume is numbered starting with 00001. To avoid any confusion, Appellant refers to the Clerk's Transcript, originally prepared October 4, 2001, and starting with the misdemeanor Complaint, as CT, Vol. I. The Clerk's Transcript which begins with the Notification of Filing of Appeal, will be herein referred to as CT, Vol. II.

appealable under Penal Code §1237(a). (Pen. Code, §1237(a).)

III.
STATEMENT OF THE CASE/STATEMENT OF FACTS

A. PRETRIAL RULINGS

Numerous pretrial motions were filed by both parties.[2] Respondent filed a Motion in Limine to Exclude Testimony Concerning Alleged Religious Practice, in which Respondent asked the trial court to prohibit Appellant from mentioning the "fair game" practice of Scientology. (CT, Vol. I, 000074, 000075, 000081, 000083, 000085.) Both parties filed several briefs on the issue. (CT, Vol. I, 000122, 000152, 000173, 000179, 000291.) In his briefing, Appellant argued that the Church of Scientology has an established policy which "allows any Scientologists to do all things necessary to destroy detractors of Scientology" and that "a person which is fair game 'may be deprived of property or injured by any means by any Scientologist without discipline of the Scientologist. May be tricked, sued, or lied to or destroyed'." (CT, Vol. I, 000124, citing, *Hart v. Cult Awareness Network*, 13 Cal.App.4th 777, 783.) Appellant argued not only about the "fair game" policy in general, but proffered that the policy has been specifically applied to him, noting that Scientologists have aggressively pursued him, filed several law suits against him, and repeatedly picketed his house and his wife's work. (CT, Vol. I, 000123.) Appellant also proffered a witness who would testify that he "was in the Circuit Court of Pinellas County, Florida when. . . a Scientology security guard, testified under oath that his Scientology superiors had indicated to him that [Appellant] was among the group that it considered SP's [suppressive persons] and enemies of Scientology." (CT, Vol. I, 000295.) The court granted Respondent's motion and prohibited Appellant from cross-examining Respondent's witnesses on this issue. (RT, Vol. I, 101-102.)

On March 12, 2008, Appellant filed a Motion in Limine to Exclude Evidence contained in a book entitled the Great Mambo Chicken and the Transhuman Condition ("Great Mambo Chicken") written by Ed Regis and

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[2] Because of the space limitations on a misdemeanor appeal, Appellant will only set forth those Motions which are the most relevant to his appeal.

published in 1990. (CT, Vol. I, 000116.) The book described uncorroborated accounts of events which occurred in the 1970's, including: that Appellant and his ex-wife detonated a device in the desert; that Appellant was accomplished in explosive devises; that Appellant owned a civil war replica cannon; and that Appellant owned assorted firearms. (CT, Vol. I, 000117.) Appellant argued that even if this evidence were correct, the description of legal activity which occurred in the 1970's was not evidence of intent in the instant case. (*Id.*) The court allowed the evidence in, and as set forth below, this evidence was a significant part of Respondent's case.

Respondent also filed a Motion in Limine to Exclude And/Or Limit Testimony of Kathleen Pettycrew, Bruce Pettycrew, Barbara Graham, Brent Stone and Arel Lucas. (CT, Vol. I, 00098.) Appellant filed an Opposition and proffered that the witnesses would testify that they also picketed at Golden Era, and that even when they were picketing without Appellant, the members would not use the pedestrian tunnels. (CT, Vol. I, 000146.) This evidence directly conflicts with the testimony at trial that the complaining witnesses refused to use the tunnels because they were afraid of Appellant. (*Id.*) The court granted Respondent's Motion and excluded all of Appellant's witnesses.

Respondent also filed a Motion in Limine to Exclude Lay Opinion of Detective Greer. (CT, Vol. I, 00010.) Specifically, Respondent sought to exclude a statement Detective Greer wrote in the police report which read "there does not appear to be any criminal intent or direct threat in this case." (CT., Vol. I, 000111.) The lower court granted Respondent's Motion and excluded the evidence. (CT, Vol. I, 000170.)

B. EVIDENCE PRESENTED AT TRIAL

Trial commenced on April 17, 2001, in front of the Honorable Robert H. Wallerstein, in Division 4 of the Hemet Courthouse. The government's case focused on three things: 1) Appellant's picketing; 2) Appellant's internet postings; and 3) passages from the Great Mambo Chicken Book.

1. EVIDENCE OF APPELLANT'S PICKETING

The government called Ken Hoden, who testified that he works at a

Scientology center called Golden Era Productions. He described the facility as a sound and film studio that does religious instructional films for Scientology. (RT, Vol. I, 135:12-17.) Mr. Hoden testified concerning the lay out of the property, noting that there are two pedestrian tunnels on the property which go under the highway. (RT, Vol. I, 138:3-10.)

The witness testified that he first saw Appellant in May or June of 2000 when Appellant was walking along the highway which goes over the tunnels, carrying a sign.[3] (RT, Vol. I, 138:26; 138:28; 139:2.) Mr. Hoden testified that "as the staff, the church staff would finish a meal, or were going from one building to another, [Appellant] would stand over the top of the tunnel and he would jeer or hackle at the staff in there." (RT, Vol. I, 142:22-28.) He stated that "in late May or early June [Appellant] was there [picketing] for about three months, and he would show up day after day after day for close to forty days or more." (RT, Vol I, 142:18-20.) Mr. Hoden also testified that Appellant went to the apartment complex where the Scientologists lived, took pictures as they walked out, and wrote down license plates.[4] (RT, Vol. I, 145:14-25.)

2. EVIDENCE OF APPELLANT'S ANTI-SCIENTOLOGY INTERNET POSTINGS

The Los Angeles office of the Church of Scientology monitored anti-Scientology discussions on the internet, and Appellant would purportedly make postings. (RT, Vol. I, 139:27-28.) The church would then send those postings to the complaining witnesses. (*Id.*) At trial, the government called the three complaining witnesses, who had received the postings from the

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3 Respondent filed a Motion in Limine to exclude any reference to why Appellant was picketing Golden Era. (CT, Vol. I, 00104.) The court granted the Motion, and Appellant was not allowed to introduce evidence that he was picketing to raise awareness of three deaths which had occurred at or near Golden Era, which Appellant believed were caused, at least in part, by Scientology. (CT, Vol. I, 000138.)

4 Respondent also called Mr. Petty, who testified that he was a security guard assigned to provide protection at Golden Era. (RT, Vol. I, 126:9-10.) While working at Golden Era, Mr. Petty saw Appellant walking along the highway with the picket sign. (RT, Vol. I, 126:13-14.) Mr. Petty testified that he saw Appellant with a gentleman named Mr. Rice, who was also picketing. (RT, Vol. I, 126:21-23.) Mr. Rice appeared to have a hand held global positioning system with him. (RT, Vol. I, 127:3-4.) The witness testified that Mr. Rice "appeared to be taking readings." (RT, Vol. I, 128:10-11.) He also testified that Appellant appeared to be "participating in" this event, although Appellant did not have a GPS device. (RT, Vol. I, 127:10-11.)

Church of Scientology, to testify that those postings made them scared.

One witness, Mr. Hoden testified that the Church of Scientology sent him a posting in which Appellant purportedly states "the annihilation of the church of Scientology and all its fronts is a worthy goal."[5] (RT, Vol. I, 171:2-5.) The witness also testified about another posting (Exhibit 15A) in which Appellant allegedly states "if you do want to help picket, its an impressive sight to see them getting undercover like roaches when the kitchen light is turned on." (RT, Vol. I, 172:14-16.) Mr. Hoden also testified that Exhibit Number 2 read, "oh, great. Now [a symbol] has to watch for eagles as well as cruise missiles." (RT, Vol. I, 182:8-9.) The witness testified that the symbol was used to indicate the leader of Scientology. (RT, Vol. I, 182:27-28.) The witness testified that Exhibit 10 read: "a group of rag tag SPs, all got different minds and opinions, but all of one goal." And then another person says "what's the goal" to stop the church of Scientology illegal and inhumane practices" or to "destroy it utterly without sorrow, belief system and all." And Appellant writes "either would work for me, but the later seems an easier task." (RT, Vol. I, 193:21-28.)

The postings were part of an internet discussion of the ills of Scientology, which never mentioned the complaining witnesses, and which were never sent to the complaining witness by Appellant. (RT, Vol. I, 220-221.)

3. EVIDENCE FROM THE GREAT MAMBO CHICKEN BOOK

The government also called Bruce Wagoner, who testified that he works for the Church of Scientology. (RT, Vol. II, 310:11-15.) Mr. Wagoner testified that he received "a part of a book about [Appellant] called the Great Mambo Chicken" from the Los Angeles Office of the Church of Scientology. (RT, Vol. I, 312:4-11, 139:27-28; 140:21-23.) The witness read the jury portions of the Mambo Chicken book that "concerned" him, including a passage that read:

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[5] Due to the restraint on brief length in a misdemeanor appeal, Appellant highlights some of the most relevant postings. This does not constitute a summary of all of the postings introduced at trial.

> after a while [Appellant] and Caroline [Appellant's ex-wife] had become semi professional explosive experts . . .'we were mostly going out into the desert and setting things off, mostly just bombs'. . .This was supposed to be a mock atom bomb, and indeed it worked pretty well. 'It made an incredible fire ball and a mushroom cloud. . . I mean, it was really impressive' . . . They came back next week with a device that would not only look like an a bomb explosion, it would actually work like one. . . . The core of the bomb would be a mixture of ammonium nitrate and diesel oil. . . So they set it up, lit the fuse, ran like hell, and jumped in the jeep. . . It was stunning. Everyone agreed that it was a very loud explosion, one of the best recreational bombs ever seen. . . .

(RT, Vol. I, 164:17-28, 165:1-28, 166:1-6.)

On cross, the witness was asked to finish the sentence from the end of his quote, revealing that the true sentence finished, "the Hensons walked away easy winners of the fire festival that Sunday." (RT, Vol. I, 213:23-27.) The book was discussing a social contest, not any sort of illegal activity. (RT, Vol. I, 214:5-8.) The witness acknowledged that the book was written in the early 1990's about events which had occurred in the 1970's. (RT, Vol. I, 214:13-16.) The witness was also asked if he read the cover of the book which quotes the L.A. Times as calling the book "free-wheeling and riotously funny." (RT, Vol. I, 212.)

On April 26, 2001, the jury informed the court that it was deadlocked on Counts One and Two but found Appellant guilty on Count Three. (CT, Vol. I, 000244.) On May 16, 2001, the case was set for sentencing, and the court was informed that Appellant was in Canada seeking asylum. (CT, Vol. I, 000289.) On July 20, 2001, the court found that upon Appellant's return to this country, he could decide between 365 days in jail suspended, with 180 days in jail and with three years probation or 365 days straight jail time, with no probation. (CT. Vol. I, 000318.) On May 30, 2007, Respondent was brought back to Riverside where he pleaded guilty to added Count Four, Failure to Appear, in violation of Penal Code §1320(A). (CT, Vol II, 00025-00026.) Counts One and Two were dismissed in the interest of justice, and Appellant was sentenced on Counts Three and Four to 180 days. (*Id.*) Appellant was denied bail pending the instant appeal. (CT, Vol II, 000034, 000039, 000052, 000067.)

IV.
ARGUMENT

A. THE GOVERNMENT PRESENTED INSUFFICIENT EVIDENCE THAT MR. HENSON VIOLATED PENAL CODE SECTION 422.6

Appellant was convicted of having violated §422.6, a misdemeanor. Section 422.6 provides that "No person. . .shall by force or threat of force, willfully injure, intimidate, interfere with, oppress, or threaten any other person in the free exercise or enjoyment of any right or privilege secured to him or her by the Constitution or laws of this state or by the Constitution or laws of the United States in whole or in part because of one or more of the actual or perceived characteristics of the victim listed in subdivision (a) of Section 422.55."

In the instant case, there was insufficient evidence that Appellant used force or the threat of force against the complaining witnesses or that he interfered with the practice of religion.

1. THERE WAS INSUFFICIENT EVIDENCE THAT APPELLANT USED FORCE OR THE THREAT OF FORCE

Penal Code §422.6 requires the willful use of force or the threat of force. (See Pen. Code, §422.6; *In re M.S.* (1995) 10 Cal.4th 698 (finding that §422.6 expressly requires that a punishable threat be "willful".) Section 422.6 specifically provides that "no person may be convicted of violating subdivision (a) based upon speech alone, except upon a showing that the speech itself threatened violence against a specific person or group of persons and that the defendant had the apparent ability to carry out the threat." (Pen. Code, §422.6(c).)

In *In re M.S.* (1995) 10 Cal.4th 698, the court noted that in enacting 422.6, "the Legislature meant to proscribe 'true threats' as traditionally understood, not what might be termed 'group libel'." (*Id.* at 711.) The court defined a "A threat [as] an "expression of intent to inflict evil, injury or damage on another." (*Id.* at 710.) "[A] threat can be penalized only if 'on its face and in the circumstances in which it is made [it] is so unequivocal, unconditional, immediate and specific as to the person threatened, as to convey a gravity of purpose and imminent prospect of execution . . . '. "

(*People v. Mirmirani* (1981) 30 Cal.3d 375, quoting *United States v. Kelner* (2d Cir. 1976) 534 F.2d 1020, 1027.) The criminal threats statutes were "not enacted to punish emotional outbursts, it targets only those who try to instill fear in others." (*People v. Felix* (2001) 92 Cal.App.4th 905, 913.) They do not punish such things as "mere angry utterances or ranting soliloquies, however violent." (*People v. Teal* (1998) 61 Cal.App.4th 277, 281.) "One may, in private, curse one's enemies, pummel pillows, and shout revenge for real or imagined wrongs-safe from section 422 sanction." (*People v. Teal* (1998) 61 Cal.App.4th 277, 281.)

In the instant case, the evidence showed that Appellant was an outspoken opponent of the Church of Scientology and was picketing the Church's Golden Era facility. Respondent did not present any evidence that Appellant directly threatened, or even spoke to, the complaining witnesses.[6] Respondent's theory was that by making postings on the internet, where posters denounced Scientology in general, Appellant threatened the complaining witnesses.[7] Yet, Appellant's discussions about the evils of a particular religion is protected by the First Amendment. Nothing in the speech itself was a specific threat of force against the complaining witnesses.[8] As such, there was insufficient evidence that Appellant used

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6 In fact, Appellant was not convicted on the threat or attempted threat charges.

7 At trial, several exhibits were proffered in support Respondent's case against Appellant which involved postings to a Usenet (a pre web posting service which has no central server or central system owner). The government argued these postings were authenticated as a result of statements purportedly made by Appellant acknowledging authorship to law enforcement officers and statements purportedly made by Appellant during deposition testimony in a civil bankruptcy proceeding as well as other law suits. Appellant objected to the admissibility of these postings at trial on the basis of lack of proper authentication, but the objections were overruled. It is impossible to discern from the trial transcript whether Appellant did, in fact, properly authenticate the postings. It appears that during these interviews and depositions, Appellant may have initially claimed authorship but would qualify his answers saying he had made hundreds if not thousands of postings over the years, and the postings could, in fact, have been posted by someone else using his name. Appellant also stated that he could not be sure they were his. As such, these documents were never properly authenticated and should have been excluded. (See Evid. Code, §§ 1400, 1401, 1414.)

8 The government called Michael Rowe, a Riverside County Sheriff's deputy. (RT, Vol. II, 339.) Appellant told him that he wanted to take the Church down by psychological means not physical. (RT, Vol. II, 344.) Appellant told him he wanted to "either get them to

force or the threat of force.

2. THERE WAS INSUFFICIENT EVIDENCE THAT APPELLANT "INTERFERED" WITH THE PRACTICE OF RELIGION

In addition to use of force and threat of force, Respondent also had to present sufficient evidence that Appellant "interfered with" members of a religion. Penal Code §422.6 does not specifically define "interfered with" in the statute. However, the same section of the Penal Code, called the California Freedom of Access to Clinic and Church Entrances Act, provides that "'Interfere with' means to restrict a person's freedom of movement." (Pen. Code, §423.1.) "To 'restrict' means to restrain, to confine within bounds." (*Howard v. Babcock* (1993) 6 Cal.4th 409, 429, citing, Webster's New Collegiate Dict., p. 1006 (9th ed. 1988).)

The evidence at trial showed that Appellant routinely picketed the Scientology complex. (RT, Vol. I, 161:1-2.) The witnesses testified that because Appellant would picket on the overpass, the staff decided to walk under the secondary pedestrian overpass. (RT, Vol. I, 156-14-21, 316.) There was no evidence that Appellant ever left the highway or went on Church property. There was also no evidence that Appellant ever came into physical contact with church members, physically blocked their path, or physically restricted their movement in any way. The members may have chosen to walk a different path in order to avoid seeing Appellant, but nothing in Appellant's actions inherently restricted the actions of the church members. Thus, there was insufficient evidence that Appellant "interfered" with religion.

B. APPELLANT WAS PREVENTED FROM CROSS-EXAMINING WITNESSES AND FROM PRESENTING EVIDENCE ON HIS BEHALF

A defendant has the right to introduce any competent, relevant, and material evidence in support of defenses and a right to challenge the government witnesses by cross-examination; failure to allow in the evidence or permit cross-examination is error. (U.S. CONST. 6th amend; Cal. Const. article I, §15.) As set forth herein, Appellant's Sixth

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massively reform or put them completely out of business." (RT, Vol. II, 346:27-28.) Appellant stated he would accomplish this by "picketing." (RT, Vol. II, 347:1-3.)

Amendment rights were violated, resulting in an unfair trial.

1. APPELLANT WAS DENIED THE RIGHT TO PRESENT EVIDENCE ON HIS BEHALF

Under the Sixth Amendment to the United States Constitution, a criminal defendant has the right "to have compulsory process for obtaining witnesses in his favor." (*Washington v. Texas* (1967) 388 U.S. 14, 15; see also, Cal. CONST. article I, §15.) Thus, "the defendant must have a meaningful opportunity. . . to establish the essential elements of his case." (*In re Martin* (1987) 44 Cal.3d 1, citing, Westen, *The Compulsory Process Clause* (1974) 73 Mich.L.Rev. 71, 95.) In *Washington*, the United States Supreme Court noted that:

> The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies. Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law.

(*Id.* at 19; accord, *Webb v. Texas* (1972) 409 U.S. 95, 98 (per curiam).)

As set forth herein, Appellant was improperly prohibited from presenting evidence in his defense.

a. APPELLANT WAS IMPROPERLY PROHIBITED FROM ENTERING EVIDENCE THAT SCIENTOLOGY IS NOT A RELIGION

One of the elements of a violation of Penal Code §422.6 is that the defendant must, by force or fear of force, intend to interfere with an enumerated group. The statute lists the groups as: "(1) Disability, (2) Gender, (3) Nationality, (4) Race or ethnicity, (5) Religion, (6) Sexual orientation." (Pen. Code, §422.55.) Thus, the government had to present evidence that the group Appellant purportedly interfered with (by force or threat of force) was a religion or other listed group.

Appellant sought to present evidence that Scientology is not a religion and thus was not a protected group under §422.55.[9] Appellant

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[9] Appellant would have produced evidence that Scientology is not considered a religion in many countries, including Germany, France, and Greece.

argued that as an element of the crime, Respondent had to show that Scientology was an actual religion. (RT, Vol. I, 5:1-17.) The court found that "whether or not Scientology is a religion. I'm not going to take evidence on that fact. I'm going to accept it, because that's my responsibility to accept something, some entity, some unit that says that they are a church." (RT, Vol. I, 10:1-4.) By refusing to allow Appellant to present evidence that Scientology is not a religion, the lower court restricted Appellant's right to present evidence which would directly counter one of the elements of the crime. As such, Appellant's Sixth Amendment rights were violated.

b. APPELLANT WAS IMPROPERLY PROHIBITED FROM PRESENTING WITNESSES

In *Chambers v. Mississippi* (1973) 410 U.S. 284, the Supreme Court noted that "Few rights are more fundamental than that of an accused to present witnesses in his own defense." (*Id.* at 302; see also, *Faretta v. California* (1975) 422 U.S. 806, 818 (finding the rights to notice, confrontation, and compulsory process are "basic to our adversary system of criminal justice").)

As noted above, Appellant sought to introduce the testimony of five witnesses who would testify that when they picketed Golden Era without Appellant, members of the Church of Scientology would not use the pedestrian tunnels. (CT, Vol.I, 000146.) This evidence would have directly contradicted the witnesses' testimony at trial that they refused to use the tunnels because they were specifically afraid of Appellant. (*Id.*) Yet, the lower court refused to allow Appellant to present this evidence.

Appellant also sought to introduce a statement by the investigating officer that he read the postings and determined that "there does not appear to be any criminal intent or direct threat in this case." (CT, Vol. I, 000111.) The lower court again prohibited Appellant from presenting this evidence. (CT, Vol. I, 0000170.) The lower court's actions in excluding all of Appellant's witnesses, and preventing questioning concerning the officer's assessment of what happened, eviscerated Appellant's case and denied him his right to present evidence in his defense.

2. APPELLANT WAS DENIED THE RIGHT TO CROSS-EXAMINE WITNESSES

The right to cross-examination is part of the fundamental rights available to an accused. (See *Alford v. United States* (1931) 282 U.S. 687.) Wide latitude should be allowed in testing the accuracy or credibility of a witness. (*People v. Ross* (1969) 276 Cal.App.2d 729.) Restrictions upon cross-examination which go to the credibility of a witness violate the Confrontation Clause if a reasonable jury might have received a significantly different impression of the witness's credibility had the questions been allowed. (*People v. Quartermain* (1997) 16 Cal.4th 600, 624; *People v. Williams* (1997)16 Cal.4th 153, 207-208.)

As set forth above, Appellant sought to cross-examine the complaining witnesses about the "fair game" policy. Appellant proffered the declaration of a former Scientologist who asserted that he had been responsible for the implementation of the "fair game" policy. (CT, Vol. I, 000295.) This witness could have explained the policy in detail to the court, but the court would not hear the evidence. (RT, Vol. I, 95-97.) Appellant did not just want to introduce evidence of the general concept of "fair game," he was prepared to show that Scientologists had aggressively pursued him, had filed several law suits against him, and had repeatedly picketed his house. He also had a witness prepared to testify that a Scientology security guard had testified under oath that the Church of Scientology had told him that Appellant was to be considered an enemy of the church. (CT, Vol. I, 000123, 000295.) This evidence goes directly to the credibility of the witnesses and their bias against Appellant, and the refusal to allow Appellant to cross-examine the witnesses on this issue violated his Sixth Amendment rights.[10]

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[10] Evidence of the use of "Fair game" has been permitted in other cases. (See *Hart v. Cult Awareness Network* (1993) 13 Cal.App.4th 777; *Allard v. Church of Scientology* (1976) 58 Cal.App.3d 439; *Church of Scientology of California v. Armstrong* (1991) 232 Cal.App.3d 1060.)

C. THE COURT IMPROPERLY ALLOWED IN HIGHLY PREJUDICIAL AND IRRELEVANT EVIDENCE

While a trial court generally has broad discretion to admit evidence, it has no discretion to admit irrelevant evidence. (Evid. Code, §350; *People v. Babbitt* (1988) 45 Cal.3d 660, 681.) Relevant evidence "means evidence, including evidence relevant to the credibility of a witness or hearsay declarant, having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." (Evid. Code, §210.) "Evidence which produces only speculative inferences is irrelevant evidence." (*Babbitt, supra*, 45 Cal.3d at 682.) Moreover, under Evidence Code §352, the probative value of the proffered evidence must not be substantially outweighed by the probability that its admission would create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury. (*People v. Ewoldt* (1994) 7 Cal.4th 380, 404; Evid. Code, §352.) Additionally, Evidence Code §1101(a) prohibits the admission of evidence of a person's character or a trait of his or her character when offered to prove his or her conduct on a specified occasion. (Evid. Code, §1101.)

As will be shown below, the lower court allowed in evidence which was irrelevant, unduly prejudicial and improper character evidence.

1. EVIDENCE OF THE MAMBO CHICKEN BOOK WAS IRRELEVANT AND HIGHLY PREJUDICIAL

Over Appellant's objections, Respondent had its witnesses read in portions of the Great Mambo Chicken Book. In addition to the section of the book cited *infra*, a witness also read a portion of the book which stated that Appellant "owned a Civil War replica cannon named Terrace Bolba (phonetic spelling) plus assorted guns, rifles and other hardware. Indeed, Caroline and [Appellant] were every inch one of Tuscon's highest tec, highest fire power married couples." (RT, Vol. I, 313:19-25.)

The contents of this book had nothing to do with the charged offenses, and there was no allegation that Appellant sent the book to any of the complaining witnesses in an attempt to scare them. In fact, the record

shows that the Scientologists sent the information to themselves.[11] (RT, Vol. I, 170.) As to the book's probative value, it was minimal at best. Appellant did not write the book nor attest to its accuracy, and the incidents occurred over thirty years before trial. Yet, the book's contents were highly prejudicial. Respondent used information from the book to argue: 1) that Appellant knows how to make pipe bombs (RT, Vol II. 364); 2) that Appellant teaches 7th and 8th graders about pipe bombing (RT Vol. II, 365); 3) that Appellant made an "explosion the size of an atomic bomb" (RT, Vol II, 364); 4) that Appellant owns a cannon (RT, Vol II, 373); and 5) that Appellant owns a "cache of weapons." (RT Vol. II, 365.)

The book had *nothing* to do with the charged offenses, and the evidence was admitted as nothing more than an attempted assault on Appellant's character.[12] (See Evid. Code, §1101.) As such, admission of this evidence was error.

2. THE COURT ADMITTED OTHER IRRELEVANT EVIDENCE

The lower court admitted other evidence that was irrelevant and prejudicial to Appellant. For example, Respondent entered into evidence a patent which Appellant has obtained for a system of delivering a payload into outer space.[13] (RT, Vol. I, 118.) This evidence had nothing to do with the charged offenses. Yet, Respondent's witnesses testified that they were scared because of this patent asserting "the man obviously knew something about missiles. I mean, if he's got a patent on missiles, or how to shoot missiles off,

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[11] Further, at least one witness had read the book in 1997, years before testifying in the instant case. (See RT Vol I, 221.)

[12] In fact, after telling the jury about what was in the book, Respondent stated that Appellant "is not your normal person. Not even close. I mean, who makes pipe bombs? Who teaches 7th graders and 8th graders about pipe bomb -- pipe bombs? Who has knowledge about guidance systems? Who knows how to make an explosion out in the desert the size of an atomic bomb? Who knows -- who has a cannon? Who has a cache of weapons" (RT, Vol. II, 364-365.)

[13] Again, the Church of Scientology obtained a copy of the patent and sent it to its members. (See RT, Vol. I, 201:17-28.)

or how to put payloads in missiles, it concerned me a great deal."[14] (RT, Vol. I, 202.) Respondent also called Wayne Hackermann who testified that he works for Hemet Ready Mix. (RT, Vol. I, 290.) The *only* thing this witness testified to was that Appellant went to his office and stated that he saw trucks pouring concrete at Golden Era and asked if they were building a bomb shelter. (RT, Vol. I, 291.) This evidence has absolutely nothing to do with the charged offenses. Yet, in closing argument, Respondent argued, "Why would anybody . . . Why would anybody go to a concrete place and ask them if they're making bomb shelters? Why would anybody do that?" (RT, 367.) This evidence was wholly irrelevant to the charged offenses and highly prejudicial.

D. RESPONDENT COMMITTED PROSECUTORIAL ERROR IN CLOSING ARGUMENTS

A prosecutor is held to a higher standard 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. Kelley* (1977) 75 Cal.App.3d 672, 690.) Although a "prosecutor has a duty to prosecute vigorously, [and] may strike hard blows, he is not at liberty to strike foul ones." (*People v. Pitts* (1990) 223 Cal.App.3d. 606, 691, quoting *Berger v. United States* (1935) 295 U.S. 78, 88.) As the Supreme Court has noted, government counsel has "as much [a] duty to refrain from improper methods calculated to produce a wrongful conviction as. . . to use every legitimate means to bring about a just one." (*Berger*, *supra*, 295 U.S. at 88.) As set forth herein, Respondent committed several instances of misconduct.

1. RESPONDENT COMMITTED MISCONDUCT BY MAKING INCORRECT STATEMENTS OF LAW

It is misconduct for the government to misstate the law to the jury.[15] (*People v Bell* (1989) 49 Cal.3d 502, 538; *People v Marshall* (1996) 13 Cal.4th 799; *People v. Nguyen* (1995) 40 Cal.App.4th 28.) In the instant case,

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[14] The evidence showed that it was not a patent for a missile, and that an "aircraft is required to do whatever this patent does." (RT, Vol. II, 219)

[15] Further, the Rules of Ethics provide that "in presenting a matter to a tribunal, a member. . Shall not seek to mislead the judge, judicial officer, or jury by an artifice or false statement of fact or law; (C) Shall not intentionally misquote... the language of a book, statute, or decision; (D) Shall not, knowing its invalidity, cite as authority a decision that has been overruled or a statute that has been repealed or declared unconstitutional. . ." (Rule 5-200, Rules Prof. Cond. of State Bar.)

Respondent's whole theory was that Appellant's actions were not themselves threatening (picketing and making anti-Scientology internet postings) but that Appellant's picketing became threatening because of Appellant's knowledge of explosives. Respondent admitted that "[i]f it were anyone else we wouldn't be here. But [Appellant] and he abuses his knowledge." (RT, Vol II, 367.) Respondent plainly told the jury that the law "depends on the person." (RT, Vol. II, 366.) As an example, Respondent argued "In California there is a law called. . . assault with a Deadly Weapon. I'm sure all of us have heard that and I'm sure in the many years that you have spent watching, or if you've watched any television, they said, 'His hands were registered deadly weapons.' . . . Well, it's possible to do that. If someone has the knowledge to be able to break you limb from limb and if fact does that, it's possible that you can charge that person with assault with a deadly weapon, their hands. What makes them different? It's their knowledge. Same thing. [Appellant] has that knowledge."[16] (RT, Vol. II, 366-367.)

Respondent's statement of law was completely wrong. The law does not make something that is not a crime (assault with a deadly weapon) a crime simply because a person possesses some specific knowledge. (See *People v. Aguilar* (1997) 16 Cal.4th 1023 (holding that assault with a deadly weapon requires something extrinsic from the body and cannot be hands and feet).) Respondent did not make some passing reference to incorrect law, it was the whole basis of Respondent's case. Respondent's argument that any other person could do the acts Appellant did (picketing and posting on the Anti-Scientology websites), but it is a crime because Appellant knows how to build pipe bombs, is outlandish. Respondent's wrong statements of law to the jury was misconduct.

* * *

[16] Respondent also used the analogy of getting the same threat from a cat or a larger animal, stating "why are your afraid in one instant and not in another? Simple. It depends on the animal. One has the ability. One can do it. One cannot. That's why your afraid in one instance and you are not in another." (RT, Vol. II, 366.)

2. RESPONDENT COMMITTED MISCONDUCT BY MAKING STATEMENTS OF FACTS OUTSIDE OF THE RECORD AND MAKING HIGHLY INFLAMMATORY STATEMENTS ABOUT APPELLANT

"Statements of supposed facts not in evidence, either because never offered, or offered and excluded or stricken. . . are a highly prejudicial form of misconduct, and a frequent basis for reversal. The effect of such remarks is to lead the jury to believe that the district attorney, a sworn officer of the court, has information which the defendant insists on withholding. . ." (*People v. Johnson* (1981) 121 Cal.App.3d 94, 103, citing Witkin, Cal. Criminal Pro. (1963) §450 at 453-454.) Similarly, the government may not make highly inflammatory allegations against a defendant wholly unsupported by the evidence. (See *People v. Neil* (1950) 97 Cal.App.2d 668; see also *People v. Rodriguez* (1970) 100 Cal.App. 18.) Derogatory remarks about a defendant not founded on evidence can create serious prejudice. (See *People v. Duvernay* (1941) 43 Cal.App.2d 823.)

In closing arguments, Respondent argued facts outside of the record, including that Golden Era hired Mr. Petty, the security guard, because they were afraid of Appellant. Respondent argued "[w]ell, to me that shows me that they're darned afraid, that they're willing to hire private security when [Appellant's] out on the property. That doesn't show me that they're anything but afraid." (RT, Vol. II, 394.) That assertion is well outside of the record. In fact, Mr. Petty testified that he had worked at Golden Era for about five years, and he had first seen Appellant about a year before the trial. (RT, Vol. I, 124:23-25, 125:23-25.)

Respondent also made numerous derogatory statements about Appellant which were not supported by the record, including "[Appellant] is not your normal person. Not even close," that Appellant was "a pretty sick puppy," and that "[i]t is unfathomable to me how anybody could think that you would not be afraid about the type of person that we're dealing with right now." (RT. Vol II, 364:25-26, 367:28, 365:14-15.) These highly inflammatory statements were prosecutorial error.

* * *

3. RESPONDENT COMMITTED MISCONDUCT WHEN IT BLATANTLY APPEALED TO THE PASSION OF THE JURY

The government may not indulge in deliberate appeals to passion or prejudice in closing argument. As set forth herein, Respondent committed misconduct when it asked the jury to put itself in the place of the victims, and when it appealed to the passion of the jury based on the nature of the crime.

a. IT WAS MISCONDUCT TO ASK THE JURY TO PUT ITSELF IN THE PLACE OF THE VICTIMS

Courts have long found that it is improper for the government to tell the jury to put themselves in the position of the victim or to consider the suffering of the victim. (*People v. Fields* (1983) 35 Cal.3d 329, 362; *People v. Simington* (1993) 19 Cal.App.4th 1374.) That is precisely what Respondent did in the instant case, when it argued:

> Let's take it away form the Church of Scientology. Maybe you belong to – let's call it the First Baptist Church of Hemet or some other one. The Catholic Diocese of Hemet, whatever, doesn't' matter. One day you find out that someone absolutely hates that people there that area the First Baptist Church of Hemet. Can't stand them. Hated Baptists. Wants to destroy them utterly, Well, you're going about your business, and you find this out. And so what if someone hates the Baptists or someone hates whatever? I mean, we're all entitled to hate something or like something, doesn't make a difference. But then that person shows up at your front door – or not your front door, but the church's place, the front of the church. That person's carrying a sign.

(RT, Vol II, 392.)

Respondent continued,

> So you go about doing your business. But then you find out that that person had made – that that person has bomb-making abilities, has the abilities and has made pipe bombs, explosives, owns a cannon, has been out there. . . . And he was doing that at your church. Would you be afraid to go to that church? Right you would be. Absolutely you would be. It gets worse. You're a member of that congregation, First Baptist Church of Hemet. And then you get into your car after services on Sunday, and that person starts following you. Chases you, comes up behind you, moves in front of you, follows you to your home. Afraid? You're right you're afraid. Of course you are. You get up in the morning and there he is. He doesn't have a picture? And writing down your license plate numbers? Can you honestly say to yourselves that you would not be afraid? No way. No way.

(RT, Vol II, 391-392.)

Respondent specifically told the jury to put themselves in the position of the complaining witnesses, to imagine these purported acts happening to them, and to acknowledge how afraid they would be. In doing so, Respondent committed error.

b. IT WAS MISCONDUCT TO AROUSE THE PASSION OF THE JURY BASED ON NATURE OF THE CRIME

It is also misconduct for the government to arouse passion of the jury based on the nature of the crime. (See *People v. Adams* (1939) 14 Cal.2d 154, 160, overruled in part on other grounds by *People v. Burton* (1961) 55 Cal.2d 328.) In *Adams*, the defendant was on trial for lewd and lascivious conduct, and the government asked the jury to remember what they had heard in recent years, mentioned two publicized cases, and then asked the jury to return a verdict "you will be proud of." (*Id.*) The court found this argument constituted misconduct. (See also *People v. Hail* (1914) 25 Cal.App. 342.)

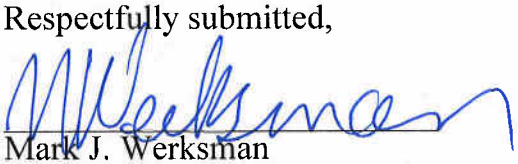
In the instant case, Respondent told the jury "We have all been sad witness to some terrible tragedies that occurred across the U.S. As we have learned recently, there were warning signs. And they were all ignored. . . . We have laws against terrorist threats because there is a history in this country of people ignoring them, and we all know the results. And those people remember making the same comments just like the ones that Mr. Henson makes." After objection, counsel continued stating "Members of the jury, we can't make the same mistake twice. We can't make the same mistake." (RT, Vol. II, 396-397.) In making these comments, Respondent blatantly sought to arouse the passion and prejudice the jury based on the nature of the charges, and Respondent's actions were error.

V.
CONCLUSION

For the reasons set forth herein, the judgment in the lower court should be reversed.

Dated: December 5, 2008

Respectfully submitted,



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PROOF OF SERVICE - 1013A(3), 2015.5 C.C.P.)

STATE OF CALIFORNIA)
) **ss.**
COUNTY OF LOS ANGELES)

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is 888 West Sixth Street, Fourth Floor, Los Angeles, California 90017.

On December 5, 2008, I served the foregoing documents described as: **APPELLANT'S OPENING BRIEF** on interested parties in this matter by placing a true copy in a sealed envelope addressed as follows:

Trial Judge Robert H. Wallerstein (deceased) 880 N. State Street - Department H4 Hemet, CA 92543 Appeared for Proposed Statement on Appeal in front of the Honorable Curtis R. Hinman Banning District - Division B3 135 N. Alessandro Road Banning , CA 92220 c/o: Leticia Serrano Appellate Division Clerk	**R. KLOEPFER** Deputy District Attorney Banning District Attorney's Office 135 North Alessandro Room 210 Banning, CA 92220

(**BY MAIL**) ___ I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. Under that practice, it would be deposited with the 3U.S. postal service on that same day with postage thereon fully prepaid at Los Angeles, California in the ordinary course of business. I am aware that on motion of the party served, service made pursuant to C.C.P. § 1013(a) should be presumed invalid if postal cancellation date of postage meter date is more than on day after date of deposit for mailing in affidavit.

(**STATE**) __X__ I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on this 5th day of December, in Los Angeles, California.

MARTHA RODRIGUEZ