STATEMENT OF COMPLAINT

INTRODUCTION

Brooke Jenkins is the appointed interim District Attorney of the City and County of San Francisco. As a member of the State Bar of California and a District Attorney, Jenkins is bound by the Rules of Professional Conduct. This complaint details Jenkin's violations of State Bar Rules 8.4, 8.4(c) and Business and Professions Code section 6106.

THE FACTS

In 2014, after several years as a products liability lawyer representing the automobile industry, Brooke Jenkins joined the San Francisco District Attorney's Office. From 2014 until October 15, 2021 when she resigned from that office, Jenkins was an Assistant District Attorney.

In September 2014, then Assistant District Attorney Jenkins prosecuted a case against Ronnie Wilborn at trial in San Francisco Superior Court case number 14011323.[1] The jury returned guilty verdicts on two counts. On appeal, on February 25, 2016, the Appellate Division of the San Francisco Superior Court reversed the convictions because of Jenkins' prosecutorial misconduct.[2]

In 2019, then Assistant District Attorney Jenkins was tape recorded instructing a 4 or 5 year old child witness (the alleged victim in the case Jenkins was prosecuting). Jenkins told the child what she should state on the witness stand, "Say that – that's what you need to say."[3]

In September - October 2021, Jenkins prosecuted a case against Daniel Gudino, a seriously mentally ill man. Gudino was convicted of murdering his mother. During the sentencing phase, overwhelming mental health expert assessments (including court appointed experts) recommended placement in a locked mental health facility. Despite the assessments and the pleas of Gudino's victim's family, then Assistant District Attorney Jenkins sought incarceration in prison.[4]

The jury hung in favor of placing Gudino in a locked mental health facility. Jenkins would not agree with the advice of her supervisor, or the direction of her boss, then San Francisco District Attorney Chesa Boudin, to mental health placement.[5] Jenkins' superiors stepped in and agreed

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[1] See Attachment 1, Transcript Volume III, Cover Page. Entire transcript available upon request.
[2] See Attachment 2, page 2.
[3] https://www.davisvanguard.org/2021/10/commentary-chronicle-calls-her-a-progressive-prosecutor-but-in-2019-the-vanguard-covered-brooke-jenkins-committing-egregious-prosecutorial-misconduct/
[4] https://www.davisvanguard.org/2021/10/guest-commentary-public-defender-sets-record-straight-on-knight-column-and-gudino-case/
[5] Ibid.

to mental health treatment. Insistent upon being an advocate for extended prison time not Justice, Jenkins publicly resigned her job at the San Francisco District Attorney's Office.

Prior to resigning from her job, in another of her cases, Jenkins failed to turn over to the defense "a heap of evidence that included handwritten notes from a police inspector and video footage." This failure to disclose led to the dismissal and refiling of the case and extensive internal review by the District Attorney's office of all cases she had been working on.[6]

Jenkins next opted to seek her own limelight. To promote her own credentials and credibility, sometime between her October 15, 2021 departure from her Assistant District Attorney job and October 24, 2021, Jenkins was interviewed by San Francisco Chronicle reporter Heather Knight. In that interview, Jenkins announced her new job, "volunteering for the campaign to recall her former boss."[7]

In her new unemployed status, on October 27, 2021, Jenkins rented an approximately $6,000/month Mission Bay San Francisco condominium.[8] At the same time, her State Bar records listed her office address in Union City.[9]

From October 2021 - June 7, 2022 (the date of the recall vote), Jenkins identified herself as a volunteer. During that time, Jenkins spoke to reporters, in community meetings, and even appeared in national talk shows like NPR's *All Things Considered* and HBO's *Real Time with Bill Maher,* to promote the recall of her former boss. In media reports Jenkins was described as a "volunteer" for the recall. Jenkins instructed reporters to say that she was a volunteer. Safer SF Without Boudin, the official recall campaign, described Jenkins as a "Safer SF Without Boudin volunteer spokesperson."[10]

On July 7, 2022, San Francisco Mayor London Breed announced the appointment of Brooke Jenkins to be the San Francisco District Attorney, to serve the remainder of recalled District Attorney Chesa Boudin's term.[11] Jenkins was sworn in as interim District Attorney on July 8, 2022.[12]

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[6]https://sfstandard.com/criminal-justice/failure-to-disclose-evidence-in-murder-case-led-to-full-review-of-da-brooke-jenkins-work-under-chesa-boudin/

[7]https://www.sfchronicle.com/sf/bayarea/heatherknight/article/She-s-a-progressive-homicide-prosecutor-who-16556274.php

[8] https://www.sfchronicle.com/sf/bayarea/heatherknight/article/Brooke-Jenkins-DA-17399111.php

[9] Jenkins updated her address when she was appointed District Attorney. Therefore, public access no longer shows her State Bar address of record from November 2021-July 2022. The State Bar records should reflect the Union City address she used during this period.

[10] 6/6/2022 Press Release, Safer SF Without Boudin, available at: https://www.documentcloud.org/documents/22188042-recall_boudin_release#document/p1/a2143169.

[11]https://sfmayor.org/article/mayor-london-breed-announces-appointment-brooke-jenkins-serve-san-francisco-district/

[12] https://www.sfdistrictattorney.org/about-us/

On August 8, 2022, as required by San Francisco's ethics rules,[13] Brooke Jenkins filed her Form 700 Statement of Economic Interest. In that Statement, Jenkins disclosed that she had been paid a salary of over $100,000 by Neighbors for a Better San Francisco 501(c)(3), a salary of between $10,001-$100,000 by Sister's Circle Support Network, also a 501(c)(3), and a salary of between $10,001- $100,000 by Global SF, another 501(c)(3).[14]

Neighbors for a Better San Francisco, a 501(c)(3), shares an address in San Rafael with the 501(c)(4) political entity, Neighbors for a Better San Francisco Advocacy ("Neighbors (C)(4)"). Both entities were incorporated on the same day, March 11, 2021 and share the same attorney, Secretary and CFO. William Oberndorf, the President and a Director of Neighbors 501(c)(3), also serves as a Director of Neighbors 501(c)(4), which contributed $4.5 million of the total $7.2 million raised for the recall.

Mary Jung served as chair[15] of the recall, Safer SF Without Boudin, and treasurer[16] of Advocacy PAC which paid for the recall, San Franciscans for Public Safety Supporting the Recall of Boudin. In 2020, Jung described herself as a "volunteer director" for Neighbors 501(c)(4). In her commercial job for SF Realtors, Mary Jung supervises Jay Cheng. Cheng is a principal officer in Neighbors (c)(4). Jung and Cheng approached Jenkins proposing that she do paid work for the Neighbors 501(c)(3, the nonprofit connected with their PAC and (c)(4).[17]

Mary Jung is CEO of Sister's Circle and serves on its Board. She has a longtime relationship with the Executive Director of Global SF, Darlene Chiu-Bryant.[18]

Regarding her employment with these 501(c)(3)s, Jenkins stated, "I worked as a consultant for 501(c)(3) organizations."[19] Subsequent to the Form 700 filing, Jenkins disclosed that she had been paid $153,000 for consulting work for Neighbors for a Better San Francisco 501(c)(3). Jenkins claims that her work for the 501(c)(3)s was separate from her volunteer work on the recall. However, on August 15, 2022, Jenkins told the San Francisco Chronicle that she would not provide documentation of her consulting work, claiming attorney-client privilege."[20]

On September 13, 2022 at a district attorney candidate debate, Jenkins forcefully declared: "I want to make clear first and foremost never have I ever been found to have committed

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[13] Regulation 18730 of the California Fair Political Practices Commission (2 Cal. Admin. Code § 18730); San Francisco Campaign and Governmental Conduct Code §3.1-102 et seq.
[14] https://public.netfile.com/pub/?aid=SFO
[15] 6/6/2022 Press Release, Safer SF Without Boudin, available at: https://www.documentcloud.org/documents/22188042-recall_boudin_release#document/p1/a2143169.
[16] Mary Jung is listed as the treasurer title in filings.
[17] Megan Cassidy, SF Chronicle, Exclusive: Brooke Jenkins defends work with nonprofit tied to campaign to recall Chesa Boudin (Aug. 15, 2022), available at: https://www.sfchronicle.com/bayarea/article/Exclusive-Brooke-Jenkins-defends-work-with-17374817.php.
[18] Id.
[19] https://www.sfchronicle.com/bayarea/article/D-A-Jenkins-paid-more-than-100-000-while-17363420.php
[20] https://www.sfchronicle.com/bayarea/article/Exclusive-Brooke-Jenkins-defends-work-with-17374817.php

misconduct in a case."[21] This reiterated her earlier statement that she had never been "proven" to have committed prosecutorial misconduct.[22]

On September 24, 2022, at a San Francisco Democratic Endorsement Committee interview, Jenkins refused to disclose her work for the 501(c)(3)s. While claiming attorney-client privilege,[23] Jenkins acknowledged that she did not represent any of the 501(c)(3)s.

MISCONDUCT

Brooke Jenkins has engaged in a continuing course of deceitful and dishonest conduct in violation of State Bar Rules of Professional Conduct:

I. Lying: State Bar Rule 8.4(c)

State Bar Rule 8.4(c) specifically prohibits any lawyer, including one holding public office, from dishonest conduct. "It is professional misconduct for a lawyer to . . . engage in conduct involving dishonesty, fraud, deceit, or reckless or intentional misrepresentation."[24] A lawyer may be suspended or disbarred under Business and Professions Code section 6106 for any act involving dishonesty, whether the act is intentional, reckless, or grossly negligent.

As documented in The Facts section, *supra,* in multiple public forums, Jenkins proclaimed that she had never been found to have committed prosecutorial misconduct. The appellate decision in the case then Assistant District Attorney Jenkins prosecuted against Ronnie Wilborn (San Francisco Superior Court case number 14011323)[25] proves Jenkins' lie. Specifically, the Appellate Division of the San Francisco Superior Court reversed Wilborn's convictions because of Jenkins' prosecutorial misconduct, a form of misconduct known as *Griffin* error, when a prosecutor violates constitutional protections by improperly commenting to the jury on a defendant's failure to testify.[26] The court found that Jenkins' misconduct met the relevant standard of review: *"An appellate court should overturn an appellant's conviction due to prosecutorial misconduct where: "1. The prosecutor committed misconduct; and 2. It is reasonably probable that a result more favorable to the defendant would have occurred absent*

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[21] Full debate video available at https://www.facebook.com/1048708701805904/videos/1754801094881270. See specifically timestamp 45:20-45:43.

[22] Michael Barba, Joseph Owen Lamb, SF Standard, SF's New DA: Brooke Jenkins, Ex-Prosecutor Who Led Chesa Boudin Recall, Named His Successor (July 7, 2022), available at: https://sfstandard.com/politics/sfs-new-da-brooke-jenkins-ex-prosecutor-who-led-chesa-boudin-recall-named-his-successor.

[23] https://fb.watch/fYs3XyFo7p/

[24] This prohibition on dishonesty applies to all attorneys, but California and State Bar courts have determined that prosecutors, such as Jenkins, are subject to the highest standards of honesty of all attorneys. See, e.g., 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.

[25] See Attachment 1, Transcript Volume III, cover page

[26] See Attachment 2, Appellate Division Opinion dated February 25, 2015.

the misconduct."[27] Holding that Jenkins' misconduct met that standard, the court overturned the convictions.

Jenkins publicly and falsely claiming that she has never been found to have committed misconduct, is deceitful and dishonest conduct. It is the exact conduct which is prohibited by Rule 8.4(c) and Business and Professions Code section 6106.

II. False and Misleading Representations.

State Bar Rule 8.4 defines attorney misconduct. Relevant sections include:

> It is professional misconduct for a lawyer to:
> (b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects;
> (c) engage in conduct involving dishonesty, fraud,* deceit, or reckless or intentional misrepresentation;
> (d) engage in conduct that is prejudicial to the administration of justice.

The Comment [4] to State Bar Rule 8.4 states, "*A lawyer may be disciplined under Business and Professions Code section 6106 for acts involving moral turpitude, dishonesty, or corruption, whether intentional, reckless, or grossly negligent*."

Jenkins' portrayal of her employment by 501(c)(3)s with substantial links to her claimed "volunteer" position with the recall are so tangled that it is difficult to pigeon-hole them into one violation. It is clear that her statements surrounding those relationships have been dishonest, deceitful and either reckless or intentional misrepresentations.

Between October 2021 and June 2022, Jenkins claimed that she was a volunteer spokesperson for SF Safer Without Boudin, the official recall political action committee against her former boss, then San Francisco District Attorney Chesa Boudin. After her appointment as interim District Attorney, Jenkins was legally compelled to disclose financial interests. Those disclosures showed that during her approximately 8 months as a "volunteer," she was paid in excess of $120,000 to work for three non-profit 501(c)(3) organizations with close ties to the recall and the 501(c)(4) recall entity.

When her financial disclosures were scrutinized, Jenkins admitted that her total 501(c)(3) compensation was in excess of $173,000. She also disclosed that two of the individuals responsible for assisting her in obtaining these "consulting" jobs were her "volunteer" supervisors for the recall, Mary Jung, and Jung's associate Jay Cheng, a principal in the Neighbors 501(c)(4) substantially funding the recall.

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[27] See Attachment 2, page 2.

Jenkins has made myriad convoluted explanations about these tangled relationships. In the best light, it is not unreasonable to conclude that Jenkins lied when she held herself out as a volunteer.

More than just violating State Bar Rule 8.4(c), Jenkins likely participated in Internal Revenue Code violations by each of these 501(c)(3)s. These 501[c)(3)s are absolutely prohibited from directly or indirectly participating in, or intervening in, any political campaign on behalf of (or in opposition to) any candidate for elective public office.[28]

Unless Jenkins actually did $173,000+ worth of work for the 501(c)(3) non-profits (during a maximum of 8 months and while actively being a "volunteer"), the 501(c)(3) payments were an unlawful indirect contribution to the recall campaign in violation of the Internal Revenue Code and the nonprofits' charters. To the extent Jenkins accepted inflated pay from the 501(c)(3)s, she would also have been obliged to register with the SF Ethics Commission. The failure to register, even if negligent and not intentional, is a criminal misdemeanor in San Francisco.[29]

To date, Jenkins has refused to provide any documentary evidence, such as contracts, invoices, or work product, to support her claim that she did work for the 501(c)(3)s that was "separate" from her work on the recall. Jenkins refused to answer questions about how she came to work for each of the nonprofits, the extent to which the recall backers were involved in arranging her employment, what work she actually performed, how many hours she worked and how much she was paid in total.[30] And Jenkins has not claimed that the value of her work was worth $173,000, leaving open the possibility that her pay was inflated to account for her work on the recall campaign.

Jenkins has admitted that her actions were misleading and dishonest. "In hindsight, I wish, you know, maybe, that, that, I think, now, um, having not been a politician before, but being in a political role now, it would have been beneficial, I think, to maybe disclose that sooner, just for the sake of transparency…."[31]

Instead of the honesty required by State Bar Rules, Jenkins chose to withhold from the public information about the 501(c)(3) payments until she was legally mandated to disclose. Then she began a course of obfuscation.

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[28] Internal Revenue Service, The Restriction of Political Campaign Intervention by Section 501(c)(3) Tax-Exempt Organizations, available at: https://www.irs.gov/charities-non-profits/charitable-organizations/the-restriction-of-political-campaign-intervention-by-section-501c3-tax-exempt-organizations.

[29] San Francisco Campaign and Conduct Code, sections 1.510, 1.525(e).

[30] Michael Barba, SF Standard, Tangled Web: How All 3 Nonprofits That Paid DA Brooke Jenkins Have Links to the Chesa Boudin Recall (Aug. 29, 2022), available at: https://sfstandard.com/criminal-justice/tangled-web-how-all-3-nonprofits-that-paid-da-brooke-jenkins-have-links-to-the-chesa-boudin-recall/.

[31] Tweet by SF Standard (Aug. 17, 2022), available at: https://twitter.com/sfstandard/status/1559948147844976640.

III. Criminal Conduct: Who Investigates.

The State Bar Rules charge a prosecutor with unique responsibilities. Among other things, a prosecutor must set aside her role as an advocate to assure that she is serving as a minister of justice. Brooke Jenkins' employment relationships give rise to many questions including whether they involve criminal conduct.

First is the question as to whether or not her arrangement as both a volunteer and a salaried contractor for entities tied to the recall was legal. Contrary to Jenkins' unsupported claim that her conduct was legal, the arrangement was not legal if:

(a) the primary, actual purpose and effect of the consulting payments were to ensure Jenkins could (in her words) "provide for her family" while she worked for the campaign in a key role and was consistently described as a campaign "volunteer";

(b) the consulting work wasn't legitimately needed by the non-profits, legitimately performed, and reasonably compensated under the circumstances and in light of the actual work products produced;

(c) even if the underlying work itself was "separate" from the recall campaign, the existence of that work in the first place and the payments to Jenkins were not also somehow (but implausibly) "completely separate" from the recall campaign's goals and from Jenkins' campaign relationships with the very same individuals arranging, facilitating, and paying her for the consulting work; or,

(d) the consulting work was a mere sham device — a "make work" scheme — for making secret payments to Jenkins while she relocated to San Francisco to work on the recall campaign while being aggressively promoted as a sincerely motivated campaign "volunteer".

If Jenkins was a paid campaign consultant she did not register as such. Failure to register as a paid campaign consultant is a violation of San Francisco's Campaign and Conduct Code, section 1.510, a criminal misdemeanor (sec. 1.525).

While the SF Ethics Commission and the City Attorney have roles enforcing San Francisco's local campaign finance laws, the District Attorney is **solely** responsible for prosecuting criminal violations of the code. Section 1.104 states that "Enforcement authority' shall mean the District Attorney for criminal enforcement...." (Sec. 1.104, emphasis added.)

As long as Jenkins is San Francisco's District Attorney, she **is solely responsible** for doing justice in cases of these ethics ordinance violations. She decides who to investigate, criminally charge, and possibly seek significant jail sentences and/or hefty financial fines. When tasked with deciding whether to investigate herself and her allies in the recall campaign, Jenkins' conflict of interest could not be more clear. Jenkins cannot do her ethical duty to do justice when charged with investigating herself.

Instead of acknowledging her conflict of interest and her inability to do justice by investigating herself, Jenkins says that the District Attorney's office does not "fully conduct those investigations."[32] This is a misrepresentation of her obligation as District Attorney and a violation of State Bar Rule 8.4(c).

IV. Deceptive Claims of Attorney Client Privilege.

Jenkins is trying to hide behind "attorney-client privilege" to conceal her possibly illegal electoral campaign payments by 501(c)(3)s. She has refused to produce any retainer agreements or job descriptions (including the 501(c)(3)s job opening advertisements). She has repeatedly stated she worked for the 501(c)(3)s as a "consultant."

Jenkins has described her "consultant" work in a variety of ways:

- Jenkins issued a statement that stated clearly and directly, "**I worked as a *consultant* for 501(c)(3) organizations**...."[33] (Emphasis added.)
- Jenkins described the work as "Advising the nonprofit side of Neighbors about various things, including the *impact of state and local laws on public safety, analyzing crime data* across different jurisdictions, using my prosecutorial experience to *advise them on a number of public safety issues*. What it ultimately evolved into was me looking at, for example, the *impact of certain legislation on public safety. Like Prop. 47. Statutory diversion issues.*"[34]
- When asked in an interview what Neighbors "end-game" might be in seeking her analysis of Prop 47, Jenkins replied - "I didn't ask all those questions. I was just providing information in sort of a *more broader analysis*."[35]

Jenkins has never described her work for the 501(c)(3)s as that of a lawyer providing legal advice.[36] She has never claimed that she was an attorney representing any of these 501(c)(3)s. As a lawyer, Jenkins is fully aware that her repeated descriptions of her "consultancy" is not entitled to the cloak of attorney-client privilege.[37]

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[32] SF DCCC Endorsement Committee Meeting (at 1:21:05), available at: https://www.facebook.com/watch/live/?ref=watch_permalink&v=1178288879391493.
[33] Justin Phillips, SF Chronicle, The Brooke Jenkins story is already sprouting leaks (Aug. 11, 2022), available at: https://www.sfchronicle.com/bayarea/justinphillips/article/The-Brooke-Jenkins-story-is-already-spouting-leaks-17367424.php.
[34] Megan Cassidy, SF Chronicle, Q&A with Brooke Jenkins: San Francisco D.A. weighs in on the recall controversy and her new opponents (Aug. 16, 2022), available at, https://www.sfchronicle.com/bayarea/article/Q-A-with-Brooke-Jenkins-San-Francisco-D-A-weighs-17378307.php
[35] Id.
[36] San Francisco Democratic County Central Committee, 9/24/22 Meeting, available at https://www.facebook.com/watch/live/?ref=watch_permalink&v=1178288879391493
[37] American Bar Association, Maintaining the Privilege: A Refresher on Important Aspects of the Attorney-Client Privilege, available at: https://www.americanbar.org/groups/business_law/publications/blt/2013/10/01_unger/.

Jenkins efforts to hide her unlawful conduct is a violation of State Bar Rule 8.4(c). Her underlying possibly criminal failure to register as a political consultant is a violation of Rule 8.4(b).

CONCLUSION

One of the most fundamental duties of attorneys, enshrined in various statutes and California's Rule of Professional Conduct 8.4, is to be honest. Attorneys are forbidden from engaging "in conduct involving dishonesty, fraud, deceit, or reckless or intentional misrepresentation." This duty is particularly essential for a District Attorney, charged with doing Justice and wielding the tremendous power of her office.

Business and Professions Code section 6106 mandates that "[t]he commission of any act involving moral turpitude, dishonesty or corruption . . . constitutes a cause for disbarment or suspension." A violation may occur whether intentional or involving gross negligence.[38] The rule applies even where an attorney's gross negligence affected the public in general and not a client.[39] Her conduct is a violation of 6106.

This complaint enumerates Jenkins' numerous dishonest and deceitful acts over the several months preceding and during her tenure as interim San Francisco District Attorney. For all the reasons set forth here and based upon all the facts presented, the State Bar must investigate and sanction Brooke Jenkins.

Respectfully submitted,

Martha Goldin

Hon. MARTHA GOLDIN
Judge, Retired

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

[39] 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 though not an intentional misrepresentation).

ATTACHMENT 1

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF SAN FRANCISCO
HON. GERARDO SANDOVAL
Dept. 29

THE PEOPLE OF STATE OF CALIFORNIA,

Plaintiff,

vs. CASE NO. 14011323

RONNIE WILBORN,

Defendant.
_____/

TRANSCRIPT OF PROCEEDINGS
Jury Trial

San Francisco
San Francisco County, California

VOLUME III OF VI
September 18, 2014

APPEARANCES

BEFORE THE HONORABLE GERARDO SANDOVAL

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FOR THE DEFENDANT:

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Proceedings recorded by electronic sound recording; transcript produced by AVTranz

ATTACHMENT 2

SUPERIOR COURT OF CALIFORNIA

COUNTY OF SAN FRANCISCO

APPELLATE DIVISION

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff/Respondent, vs. RONNIE WILBORN, Defendant/Appellant.	App. No. APP-14-007861 Court No. 14011323 **JUDGMENT ON APPEAL**

This matter was heard on December 18, 2015. Counsel for both parties appeared and argued. After considering the evidence, arguments, and applicable law, the September 24, 2014 judgment is REVERSED.

DISCUSSION*

On appeal, Wilborn argues that (1) both the prosecution and trial court committed *Griffin* errors, (2) there was insufficient evidence that the item he possessed was "tear gas" as defined by

* This short form opinion is designed to provide the parties with a brief explanation of the reasons for the disposition, and assumes familiarity with the facts and arguments of the parties.

statute, and (3) the trial court erred by instructing the jury that "tear gas" included pepper spray. In addition to responding to each issue on its merits, the People contend that Wilborn forfeited appellate review of each issue by failing to object at trial. Wilborn denies forfeiture of any issue. In the alternative, though, he claims any failure to object constituted ineffective assistance by his trial counsel.

Because we reverse on the basis of *Griffin* error, we need not reach Wilborn's other claims of error.

A. Standard of Review

An appellate court should overturn an appellant's conviction due to prosecutorial misconduct where: 1) the prosecutor committed misconduct; and 2) it is reasonably probable that a result more favorable to the defendant would have occurred absent the misconduct. (See *People v. Welch* (1999) 20 Cal.4th 701, 753; *People v. Milner* (1988) 45 Cal.3d 227, 245.) *Griffin* error—like other violations of constitutional right—is reversible unless the prosecution can prove beyond a reasonable doubt that it was harmless. (*Chapman v. California* (1967) 386 U.S. 18.) For *Griffin* error to be prejudicial, the improper comment must fill an evidentiary gap or "at least touch a live nerve in the defense." (Simons, CALIFORNIA EVIDENCE MANUAL (Dec. 2015) § 5:14, citing *People v. Vargas* (1973) 9 Cal.3d 470, 481.)

B. Discussion

As an initial matter, we hold that Wilborn's claim of *Griffin* error is reviewable on appeal, despite his failure to object or request a jury admonition. Pursuant to Penal Code § 1259, the claimed error includes an instruction that affected Wilborn's substantial rights.

On the merits, Wilborn claims that the prosecution's closing argument and the trial court's instruction of the jury with CALCRIM 361 (failure to explain or deny adverse testimony)

combined to deprive him of his Fifth Amendment privilege against self-incrimination as to the pepper spray count. Specifically, Wilborn contends that the prosecution urged the jury to consider his decision not to testify in evaluating that count, which the trial court then endorsed by instructing the jury that it could consider his resulting silence on that count in evaluating the evidence. To that end, Wilborn relies heavily on *People v. Tealer* (1975) 48 Cal.App.3d 598, which we believe supports Wilborn's argument.

In *Tealer*, defendant was convicted of a single count of attempted robbery. The Court of Appeal reversed the conviction, however, concluding that it was "compelled to reverse because the effect of improper argument by the prosecutor and erroneous instructions by the trial court was a deprivation of defendant's privilege against self-incrimination under both the United States and California Constitutions." (*People v. Tealer*, *supra*, 48 Cal.App.3d at 600-1.) In his opening brief, Wilborn correctly describes that Tealer testified on direct examination, but limited his testimony to a denial of having made a statement to the police to the effect that he had been passing a clothing store and decided to rob it. The court then instructed Tealer's jury with CALJIC 2.61—substantially similar to CALCRIM 361—after which the prosecution argued that Tealer had not denied the facts of the case when he had an opportunity to do so. (*Id.* at 602.) The Court of Appeal found that the prosecution's argument constituted "clear *Griffin* error." (*Id.* at 604.)

The *Tealer* court also concluded that "the trial court itself then committed *Griffin* error by telling the jury it could 'take . . . into consideration' defendant's '(failure) to explain or deny any evidence or facts against him which he can reasonably be expected to deny or explain because of facts within his knowledge . . . as tending to indicate the truth of such evidence . . .' Without 'specifically . . . (stating) the matters within the scope of proper cross-examination which the

defendant failed to explain or deny.'" (*Id.* at 606.) "But," the *Tealer* court continued, "in view of defendant's flat denial of making the statement, there were no matters 'within the scope of proper cross-examination' apart from the circumstances under which the disputed statement was or was not made. Inasmuch as there was no memorialization by tape recording of what transpired between defendant and Officer Barclay, and no signature or other writing by defendant, there was no occasion to 'explain'" the circumstances of the statement. (*Id.* at 606-7.) Under the circumstances, the Court of Appeal believed that the jury could have understood the trial court's instruction in only one way:

> In context the only sense the instruction could have made to the jury was that the trial judge was telling them that defendant had foregone his opportunity to deny that he had been in the clothing store at all, or in the alternative to explain what his purpose was in being there and in possessing a firearm and leaving so precipitously. Although the jury was told that defendant's failure "to deny or explain evidence against him does not create a presumption of guilt or by itself warrant an inference of guilt," it was also told (we think inconsistently) that such failure to explain or deny could be taken into consideration "as tending to indicate the truth of such evidence (against defendant) and as indicating that among the inferences that may be reasonably drawn therefrom those unfavorable to the defendant are the more probable."

(*Id.* at 607.) The court concluded that the "net effect of the improper argument and instructions was to tell the jury it could infer guilt from silence, a procedure which since *Griffin* has been impermissible." (*Id.*)

The People dispute Wilborn's arguments, arguing that neither the prosecution nor the trial court committed *Griffin* error here. The prosecution's closing argument, they contend, did not comment on Wilborn's silence but on the state of the evidence, especially where the defense could have called "other logical witnesses…to contradict the inculpatory evidence against Appellant" (i.e., that the substance inside the canister was tear gas). As for the court's CALCRIM 361 instruction, the People remind the Court that, unlike Tealer, Wilborn stood

charged of two separate crimes and argue that the instruction was appropriate in light of his testimony about possession of metal knuckles: "given the fact that Appellant did not deny that he was in possession of metal knuckles, CALCRIM No. 361 was an appropriate instruction and the jury reasonably likely associated this instruction with Appellant's testimony regarding the metal knuckles." The People suggest that the jury was able to, and did, limit its application of CALCRIM 361 to the metal knuckles charge. Further, they contend there was no risk that the jury would interpret CALCRIM 361 as commenting on Wilborn's silence, because he did, in fact, testify.

We find the People's counterargument about the limited impact of the alleged *Griffin* errors unpersuasive, especially where the record reveals that the prosecution expressly linked the CALCRIM 361 instruction—quoting the instruction in its entirety, in fact—to the pepper spray count during the relevant portion of its closing argument. (RT 132-3 ["And I would highlight that instruction for you and I would ask that you take that into account in considering why there was no evidence presented against the fact that Officer Jones found that pepper spray.") By doing so, the prosecution drew a link between the lack of the defense evidence as to that count and CALCRIM 361, making it unlikely that the jury considered the instruction only as it related to the metal knuckles count.

The net effect here constituted *Griffin* error, especially where the record shows that the prosecution argued that Wilborn was the only person who could have provided contradictory evidence on that count (e.g., evidence of whether he knew that he possessed tear gas). Under *Tealer*, Wilborn did not give up his Fifth Amendment privilege against self-incrimination as to the pepper spray count. Rather, the record reflects that he provided no testimony on that count. As the *Tealer* court reasoned, by not presenting any evidence of that count within the proper

scope of his cross-examination, Wilborn had no occasion to explain or deny the evidence against him on that count. Overall, as did the *Tealer* court, we conclude that, under the circumstances, the jury understood the CALCRIM 361 instruction as applying to the pepper spray count and that the instruction had the effect of telling the jury it could infer Wilborn's guilt on that count from his silence.

Finally, we agree with Wilborn that the People have not shown that the error was harmless beyond a reasonable doubt. Despite the People's contentions on appeal, the record reflects that the prosecution's closing argument specifically urged to jury to use CALCRIM 361 and Wilborn's silence in considering why Wilborn presented no contradictory evidence on the pepper spray count.

DISPOSITION

For these reasons, we reverse the trial court's judgment.

IT IS SO ORDERED.

DATE: February 18, 2016

Garrett L. Wong, Presiding Judge

Jeffrey S. Ross, Associate Judge

Linda Colfax, Associate Judge