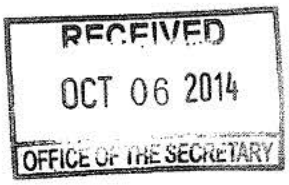
UNITED STATES OF AMERICA

Before the

SECURITIES AND EXCHANGE COMMISSION



SECURITIES EXCHANGE ACT OF 1934

Release No. 73087 / September 12, 2014

INVESTMENT ADVISERS ACT OF 1940

Release No. 391o7 / September 12, 2014

ADMINISTRATIVE PROCEEDING

File No. 3-16104

Order Instituting Administrative Proceedings Pursuant to Sections 15(b) of the Securities Exchange Act of 1934 and Section 203(f) of the Investment Advisers Act of 1940, and Notice of Hearing

Respondent:

Name: MICHAEL L. MENDENHALL

Address: 4545 South Monaco Street, Villa 141
Denver CO 80237

Michael L. Mendenhall #157626
CSP C-713
Post Office Box 777
Canon City, CO 81215

Phone No.: (303) 359-2114
geminirising618@aol.com

RESPONSE AND NOTICE OF APPEARANCE

This case is not ripe for review, or ruling and is soundly premature. While the summary order cites respondents alleged "conviction" status, it is currently without merit and has numerous factual inconsistencies respectfully. It is common "*Black Letter Law*" that Michael L. Mendenhall's conviction is **not** *final* until a Mandate is issued by the Court of Appeals (16-5-402 CRS). In addition, Mr. Mendenhall would also have a 30-day writ of certiorari as well. Again, Mr. Mendenhall's conviction is **not** *final* as this Commission, Court and all legal parties should be fully aware, respectfully. Mr. Mendenhall's counsel has properly and promptly filed in the appropriate time frame under Case Number 12CA1171 in which an opening brief was timely filed August 14, 2014 and uncontested at the time of this filing. [Exhibit A]

It would be *premature* to rule as Mr. Mendenhall has **not** had his *Final* day in court and would be deprived of his basic *Fifth Amendment Rights*. He has **not** had his due process and to prematurely review or rule in this matter would deprive him of ever having that day in court to prove up his innocence and his claims in his current appeal. However, I would like to point out in the attached letter dated November 24, 2010 from Bankers Life signed by Carmella Storto Director of Field Regulatory stating, "She specifically is terminating as a result of Mr. Mendenhall borrowing monies from policyholders." At no point in the letter does it make reference to a claim of securities fraud or theft. [Exhibit B] Again, on December 2, 2010 another letter from Bankers Life Senior Director of Agency also sent Mr. Mendenhall a letter adopting the same as his departure as Unit Sales Manager. Mr. Mendenhall was terminated for ***borrowing*** monies, not securities fraud or any securities violations. They fired him for ***borrowing*** monies and years later have been a catalyst in assisting many regulatory agencies in continuing down this path for their own personal gain. Bankers Life/Conseco's hands are not are clean and should be reviewed themselves in this very matter. Should Mr. Mendenhall be victorious in his appeal he would have been wrongfully accused, incarcerated and terminated by all accounts.

His employers and City and County of Denver would have you believe their hands are clean in this matter and there was no wrong doing on their part. The termination letter Mr. Mendenhall received contradicts the very reason they claim he was terminated to the court. His former employer stand behind this noble premise they had no known knowledge of Mr. Mendenhall borrowing monies from their policyholders when in fact this claim is either to game the system or to intentionally *defraud* the courts. The first Email dated December 22, 2009 from Erin Calebrese of Bankers Life addressed to Mr. Mendenhall, speaks directly to him borrowing monies and a UVEST investigation based on a FINRA inquiry. Also, those included in this E-mail who are associated with the Defendants are Steve Kernahan on December 23, 2009, as well as Steve R. Sanok on December 28, 2009 and finally Dwight Urrs as well as Scott L. Goldberg as of April 26/27, 2010. [Exhibit C] The final outcome of these findings were his former employer took no sanctions taken against Mr. Mendenhall as no violation occurred and he returned to his normal functions. Since 2010 his former employer have gone on record they had no knowledge of Mr. Mendenhall whatsoever borrowing from policyholders when you can see from the attached E-mails dated back to 2009 and the Letter dated 12/31/2009 to Steve R Sanok of LPL Financial Services and which was made available to all the parties as well in 2009 is indisputable. Further more, at Mr. Mendenhall's trial Rick Riser of Conseco/Bankers, Bankers Life went on record stating they did in fact know of Mr. Mendenhalls actions, which they claimed in court otherwise.

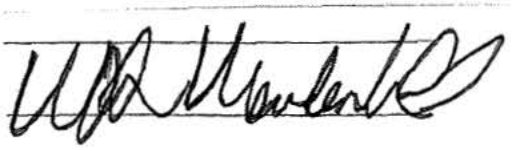
So either they are simply trying to game the system once again by manipulating the truth or purely defraud the court to have their cake and eat it too in order to avoid paying compensation at a later date to Mr. Mendenhall. I have attached the E-mails so this Securities and Exchange Commission can see the lengths these individuals will go to in order to distort their truth of the facts. The transcripts for Mr. Mendenhall's trial also provide Rick Riser's testimony to this fact should you be so inclined to investigate these allegations. Mr. Mendenhall didn't have a problem with his long standing Employer of more than 27 years, his borrowing of monies from what he considered to be life long friends/family not just policy holders as public opinion currently suggests otherwise until he went to Bankers on October 7, 2010 to "whistle blow" on his companies Corporate Wrong Doing and Misconduct.

Allegations Mr. Mendenhall made during an in-person FBI interview on January 22, 2014 at Kit-Carson Correctional Facility regarding the original issues of corporate wrong doing/misconduct he raised to Bankers Life/Conseco October 7, 2010.

Most notably the recent Financial Industry Regulatory Authority (FINRA) arbitration and settlement where there was *admitted* corporate responsibility regarding this matter would suggest his former employer's hands are not clean in Mr. Mendenhall's case. It is also my understanding as a result there is now a Financial Industry Regulatory Authority (FINRA) investigation with his former employer directly related to this matter and their involvement. Again, their hands are not clean but for years have legally gamed the system to have their cake and eat it too in the event Mr. Mendenhall prevails in his Appeal. Essentially, depriving him of ever having claim to what is rightfully due to him after working loyally for more than 27 years with this company as well as continuing to keep him silenced and revealing the truth about Bankers Life/Conseco.

At this time Mr. Mendenhall would respectfully request these allegations be dismissed at this time until his appeal process is finalized. Mr. Mendenhall asks the Securities and Exchange Commission reserve our judicial resources and humbly requests the dismissal in all matters until a final verdict on whether a security violation in fact occurred at which time this matter may be reviewed again.

Respectfully submitted,



Michael L. Mendenhall Redacted

COURT OF APPEALS, STATE OF COLORADO Ralph L. Carr Judicial Center 2 East 14th Ave. Denver, CO 80203	
Denver District Court Honorable Kenneth M. Laff, Brian R. Whitney, Catherine Lemon Case Number 11CR10094	
THE PEOPLE OF THE STATE OF COLORADO Plaintiff-Appellee v. MICHAEL MENDENHALL Defendant-Appellant	♦ COURT USE ONLY ♦
Douglas K. Wilson, Colorado State Public Defender RYANN S. HARDMAN, #37922 1300 Broadway, Suite 300 Denver, CO 80203 PDApp.Service@coloradodefenders.us (303) 764-1400 (Telephone)	Case Number: 12CA1171

OPENING BRIEF

A

COURT OF APPEALS, STATE OF COLORADO Ralph L. Carr Judicial Center 2 East 14th Ave. Denver, CO 80203	
Denver District Court Honorable Kenneth M. Laff, Brian R. Whitney, Catherine Lemon Case Number 11CR10094	
THE PEOPLE OF THE STATE OF COLORADO Plaintiff-Appellee v. MICHAEL MENDENHALL Defendant-Appellant	▲ COURT USE ONLY ▲
Douglas K. Wilson, Colorado State Public Defender RYANN S. HARDMAN, #37922 1300 Broadway, Suite 300 Denver, Colorado 80203 PDApp.Service@coloradodefenders.us (303) 764-1400 (Telephone)	Case Number: 12CA1171

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with all requirements of C.A.R. 28 and C.A.R. 32, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that:

The brief complies with C.A.R. 28(g).

☒ It contains 7,541 words.

The brief complies with C.A.R. 28(k).

☒ For the party raising the issue:
It contains under a separate heading (1) a concise statement of the applicable standard of appellate review with citation to authority; and (2) a citation to the precise location in the record (R._____, p._____), not to an entire document, where the issue was raised and ruled on, if the issue involves (i) admission or exclusion of evidence, (ii) giving or refusing to give a jury instruction, or (iii) any other act or ruling for which the party seeking relief must record an objection or perform some other act to preserve appellate review.

☐ For the party responding to the issue:
It contains, under a separate heading, a statement of whether such party agrees with the opponent's statements concerning the standard of review and preservation for appeal, and if not, why not.

☒ I acknowledge that my brief may be stricken if it fails to comply with any of the requirements of C.A.R. 28 and C.A.R. 32.

Ryann S. Hardman

Signature of attorney or party

A

TABLE OF CONTENTS

Page

ISSUES PRESENTED 1

STATEMENT OF THE CASE 1

STATEMENT OF THE FACTS 2

SUMMARY OF THE ARGUMENT 4

ARGUMENT

I. The Trial Court Reversibly Erred by Instructing the Jury that "Security Means Any Note" and by Refusing Mr. Mendenhall's Alternative Instructions. 7

A. Standard of Review 7

B. General Law 8

C. The trial court erred by instructing the jury that "security means any note," particularly because it was disputed whether these documents were "securities," the documents were entitled "notes," and the State's securities expert testified that the documents at issue were "securities as notes." Moreover, the court should have instructed the jury to consider the context of the transactions in determining whether the notes were securities 12

D. Conclusion 16

II. The Trial Court Reversibly Erred by Allowing the District Attorney's Investigator to Testify About His Decision Whether to Pursue Criminal Charges Against Mr. Mendenhall. 17

A. Standard of Review 17

B. General Law 18

C. The district attorney's investigator's testimony about his pre-trial process and decision to pursue charges against Mr. Mendenhall, including statements that he does not bring charges where "criminal filing is not appropriate" and where the circumstances do not "fall under the statute," constituted improper opinion as to Mr. Mendenhall's guilt and implied State access to additional, inculpatory evidence 20

D. The error, alone or in combination with the error in Argument III, warrants reversal of Mr. Mendenhall's convictions. 23

III. A Witness's Testimony and the Prosecutor's Inflammatory Statements in Closing Argument Violated Mr. Mendenhall's Rights to Due Process and to a Fair Trial by an Impartial Jury. 26

A. Standard of Review 26

B. General Law 26

C. A witness's testimony likening Mr. Mendenhall to Bernie Madoff and the prosecutor's inflammatory statements in closing argument referring to that testimony and calling the alleged victims members of the "Greatest Generation" encouraged the jury to use their passions and prejudices in evaluating the evidence, violating Mr. Mendenhall's rights to due process and to a fair trial by an impartial jury. 28

D. The error, alone or in combination with the error in Argument II, warrants reversal of Mr. Mendenhall's convictions. 30

IV. This Court Should Remand the Case for the Trial Court to Clarify Mr. Mendenhall's Sentence and to Amend the Mittimus. 31

A. Standard of Review 31

B. General Law 32

C. This Court should remand the case for resentencing to clarify Mr. Mendenhall's sentence and to amend the mittimus. 32

CONCLUSION 33

CERTIFICATE OF SERVICE 34

TABLE OF CASES

Abady v. Certain Underwriters at Lloyd's London Subscribing to Mortg. Bankers Bond-No. MBB-06-0009,
317 P.3d 1248 (Colo. App. 2012) 29

Berger v. United States, 295 U.S. 78 (1934) 26

Bloom v. People, 185 P.3d 797 (Colo. 2008) 18

Carter v. Kentucky, 450 U.S. 288 (1981) 8,9

Chapman v. California, 386 U.S. 18 (1967) 8,17

Crane v. Kentucky, 476 U.S. 683 (1986) 9

Domingo-Gomez v. People, 125 P.3d 1043 (Colo. 2005) ..... *en passim*

Dunlap v. People, 173 P.3d 1054 (Colo. 2007) 8,18

Harris v. People, 888 P.2d 259 (Colo. 1995) 26,27,28,30,31

In re Winship, 397 U.S. 358 (1970) 8

Jenkins v. Jacobs, 748 P.2d 1318 (Colo. App. 1987) 14

Oaks v. People, 371 P.2d 443 (Colo. 1962) 27

Old Chief v. United States, 519 U.S. 172 (1997) 18

Payne v. Tennessee, 501 U.S. 808 (1991) 18

People ex rel. Juhan, 439 P.2d 741 (Colo. 1968) 8

People v. Cobb, 962 P.2d 944 (Colo. 1998) 8,17

People v. Cowden, 735 P.2d 199 (Colo. 1987) 9,15

People v. Cuevas, 740 P.2d 25 (Colo. App. 1987) 9

People v. Emeson, 500 P.2d 368 (Colo. 1972) 32

People v. Jimenez, 217 P.3d 841 (Colo. App. 2008) 17

People v. Jones, 832 P.2d 1036 (Colo. App. 1991) 18,19,20,22,23

People v. Jurado, 30 P.3d 769 (Colo. App. 2001) 8

People v. Lucas, 232 P.3d 155 (Colo. App. 2009) 7

People v. Martinez, 634 P.2d 26 (Colo. 1981) 8

People v. Mason, 535 P.2d 506 (Colo. 1975) 32

People v. McBride, 228 P.3d 216 (Colo. App. 2009) 28,30

People v. Milne, 690 P.2d 829 (Colo. 1984) 10

People v. Mullins, 104 P.3d 299 (Colo. App. 2004) 22

People v. Muniz, 190 P.3d 774 (Colo. App. 2008) 17

People v. Nave, 689 P.2d 645 (Colo. App. 1984) 7,17,26

People v. Nunez, 841 P.2d 261, 264 (Colo. 1992) 8,10,14,16

People v. Pahl, 169 P.3d 169 (Colo. App. 2006) 14,16

People v. Reynolds, 575 P.2d 1286 (Colo. 1978) 25,31

People v. Rockne, 315 P.3d 172 (Colo. App. 2012) 31,32

People v. Rodriguez, 794 P.2d 965 (Colo. 1990) 26

People v. Stewart, 55 P.3d 107 (Colo. 2002) 9,15

People v. Turner, 730 P.2d 333 (Colo. App. 1986) 32

People v. Young, 825 P.2d 1004 (Colo. App. 1991) 9

People v. Young, 894 P.2d 19 (Colo. App. 1994) 33

People v. Zukowski, 260 P.3d 339 (Colo. App. 2010) 9

Pima Fin. Serv. Corp. v. Selby, 820 P.2d 1124 (Colo. App. 1991) 13

Quintano v. People, 105 P.3d 585 (Colo. 2005) 7,17,26

Reves v. Ernst & Young, 494 U.S. 56 (1990) 11,12,13,14,16

SEC v. W.J. Howey Company, 328 U.S. 293 (1946) 10

State v. Thompson, 578 N.W.2d 734 (Minn. 1998) 28

Taylor v. Kentucky, 436 U.S. 478 (1978) 9,15

United States v. McKye, 734 F.3d 1104 (10th Cir. 2013) 4,11,13,16

Welsh v. People, 80 P.3d 296 (Colo. 2003) 18

Wilson v. People, 743 P.2d 415 (Colo. 1987) 27

TABLE OF STATUTES AND RULES

Colorado Revised Statutes
- Section 11-51-201(17), C.R.S. 2013 10,11
- Section 11-51-501, C.R.S. 10
- Section 11-51-501(1)(b), C.R.S. 1,10,12
- Section 11-51-501(1)(c), C.R.S. 1,10,12
- Section 11-51-603(1), C.R.S. 1
- Section 18-1-402, C.R.S. 2013 8
- Section 18-4-401(1)(b), (2)(d), C.R.S. 1,2
- Section 18-4-401(1)(b), (4), C.R.S. 1

Colorado Rules of Criminal Procedure
- Rule 36 6,32,33

Colorado Rules of Evidence
- Rule 401 18,22,30
- Rule 402 18
- Rule 403 18,22

CONSTITUTIONAL AUTHORITIES

United States Constitution
Amendment V ..... *en passim*
Amendment VI ..... *en passim*
Amendment XIV ..... *en passim*

Colorado Constitution
Article II, Section 16 ..... *en passim*
Article II, Section 23 ..... *en passim*
Article II, Section 25 ..... *en passim*

OTHER AUTHORITIES

American Bar Association Standards for Criminal Justice,
Standard 3-5.8, Commentary (3d ed. 1993) 27

ISSUES PRESENTED

I. Whether the trial court reversibly erred by instructing the jury that "security means any note," and whether the court should have instructed the jury to consider the context of the transactions in determining whether the notes were securities.

II. Whether the trial court reversibly erred by allowing the district attorney's investigator to testify about his decision whether to pursue criminal charges against Mr. Mendenhall, including statements that he does not bring charges where "criminal filing is not appropriate" and where the circumstances do not "fall under the statute."

III. Whether a witness's testimony and the prosecutor's statements in closing argument likening Mr. Mendenhall to Bernie Madoff and calling the alleged victims "members of the Greatest Generation" violated Mr. Mendenhall's rights to due process and to a fair trial by an impartial jury.

IV. Whether this Court should remand the case for the trial court to clarify Mr. Mendenhall's sentence and to amend the mittimus, if necessary.

STATEMENT OF THE CASE

On April 14, 2011, Mr. Mendenhall was charged by indictment with one count of securities fraud – fraud or deceit,[1] seventeen counts of securities fraud – untrue statement or omission,[2] one count of theft of $15,000 or more,[3] two counts of theft – series of $15,000 or more,[4] five counts of theft – series of $20,000 or more,[5] and one

[1] §11-51-501(1)(c); §11-51-603(1), C.R.S. (F3)
[2] §11-51-501(1)(b); §11-51-603(1), C.R.S. (F3)
[3] §18-4-401(1)(b), (2)(d), C.R.S. (F3)
[4] §18-4-401(1)(b), (4), C.R.S. (F3)
[5] §18-4-401(1)(b), (4), C.R.S. (F3)

count of theft of $20,000 or more.[6] The dates of the alleged offenses spanned September 2005 through November 2010. (PR, CF, Vol.1, p.1-36) The prosecution later dismissed one count of securities fraud and one count of theft-series (counts six and seven). (Tr. 2/21/12, p.4-5)

Following a trial held February 21 through March 2, 2012, a jury found Mr. Mendenhall guilty. (PR, CF, Vol.2, p.343-73) On April 20, 2012, the court sentenced Mr. Mendenhall to thirty years in prison, plus five years mandatory parole. (PR, CF, Vol.2, p.473-76) Mr. Mendenhall filed a notice of appeal on June 4, 2012. (PR, CF, Vol.2, p.485-87)

STATEMENT OF THE FACTS

Mr. Mendenhall worked at Banker's Life and Casualty for twenty-eight years as an agent and a manager. (Tr. 2/29/12, p.39, 41, 47, 53) During his career, he established personal relationships with many of his clients. (Tr. 2/29/12, p.80, 229) In 1999, he bought a townhome near the Denver Tech Center, where he lived for many years. (Tr. 2/29/12, p.57-58)

Because the area was experiencing dramatic growth, in 2005, Mr. Mendenhall bought three other townhomes in the development where he lived. (Tr. 2/29/12, p.63-66) Mr. Mendenhall hoped that the houses would increase in value and that he

[6] §18-4-401(1)(b), (2)(d), C.R.S. (F3)

could sell them for a profit. (Tr. 2/29/12, p.62-65, 67-68) He intended to lease them for three years and then sell them. (Tr. 2/29/12, p.67-68) However, Mr. Mendenhall found that it was difficult to lease the homes. (Tr. 2/29/12, p.72-73)

In 2008, the real estate market crashed. The value of the homes plummeted. (Tr. 2/29/12, p.75) Mr. Mendenhall had difficulty maintaining the real estate. (Tr. 2/29/12, p.73) He began to ask his clients for loans. (Tr. 2/29/12, p.77, 81-82) He hoped that the market would rebound and that his properties would regain value. (Tr. 2/29/12, p.76-77)

All of the loans had similar terms. The clients loaned Mr. Mendenhall an amount of money for one or two years, and Mr. Mendenhall promised to repay them with interest. Mr. Mendenhall documented the loans, entitling them "promissory notes" or "notes." The notes stated that the money was "for the purposes of Mr. Mendenhall's recent residential real estate acquisitions." (*E.g.*, Binder, Ex.202, 304, 402, 504) Mr. Mendenhall testified that he needed the money to pay his four mortgages and many lines of credit that he used to finance the mortgages. (Tr. 2/29/12, p.90, 104) Mr. Mendenhall was not purchasing or developing additional property. (Tr. 2/29/12, p.86)

The prosecution argued that the notes were securities and that Mr. Mendenhall knowingly obtained his clients' money by deception and used it so as to permanently

deprive them of its benefit. (*E.g.*, Tr. 3/1/12, p.11-13, 19, 52-53) The defense argued that the notes were personal loans, not securities, and that Mr. Mendenhall did not obtain his clients' money by deception or use it so as to permanently deprive them of its benefit. (*E.g.*, Tr. 3/1/12, p.37-38, 43-45, 47-48)

SUMMARY OF THE ARGUMENT

It is the duty of the trial court to correctly instruct the jury on the legal principles raised in a case. The definition of "security" includes "any note." However, the United States Supreme Court has explained that not all "notes" are "securities." In *United States v. McKye*, 734 F.3d 1104, 1109-10 (10th Cir. 2013), the court reasoned that whether the alleged fraud involved a security is an element of the crime of securities fraud and the question of whether a note is a security has both factual and legal components. Thus, it was error for the district court to instruct the jury that "the term 'security' includes a note." Here, the trial court instructed the jury that "security means any note." This error was harmful because it was disputed whether these documents were "securities," because the documents were entitled "notes," and because the State's securities expert testified that the documents at issue were "securities as notes." Moreover, the court should have instructed the jury to consider the context of the transactions in determining whether the notes were

securities, and the court erred by leaving it to defense counsel to attempt to cure the erroneous instruction through argument.

A prosecutor's personal opinion as to a defendant's guilt shall not be outwardly indicated nor presented to the jury. This rule is especially important if the opinion of guilt is delivered in combination with the suggestion that the prosecutor's office would not bring charges against anyone who could not be guilty. In one case, our supreme court has explained that a prosecutor's reference to a "screening process" was improper because it hinted that additional inculpatory evidence unknown to the jury supported the defendant's guilt and revealed the prosecutor's personal opinion. And in another case, a division of this Court has disapproved of comments that "unmistakably implied that because of pre-trial screening, there could be no doubt of defendant's guilt," including statements that, because of investigation by the district attorney's office, no charges are filed "if there is any reasonable doubt." Here, the district attorney's investigator's testimony about his process and decision to pursue charges against Mr. Mendenhall, including statements that he does not bring charges where "criminal filing is not appropriate" and where the circumstances do not "fall under the statute," constituted improper opinion as to Mr. Mendenhall's guilt and implied State access to additional, inculpatory evidence.

Prosecutorial misconduct in argument is a matter of special concern because of the possibility that the jury will give special weight to the prosecutor's arguments. A prosecutor may not use arguments calculated to inflame the passions of the jury and may not encourage jurors to determine a defendant's guilt or innocence on the basis of bias or prejudice. No purpose is served by comparing the defendant to another defendant charged with a notorious crime other than to attempt to impassion the jury. Such a comparison constitutes misconduct. Here, a witness's testimony likening Mr. Mendenhall to Bernie Madoff and the prosecutor's inflammatory statements in closing argument referring to that testimony and calling the alleged victims members of the "Greatest Generation" encouraged the jury to use their passions and prejudices in evaluating the evidence.

These errors, alone or cumulatively, violated Mr. Mendenhall's rights to due process, to a fair trial by an impartial jury, to proof beyond a reasonable doubt of every element necessary to constitute the crime charged, to the presumption of innocence, and to present a defense. This Court should vacate Mr. Mendenhall's convictions and remand the case for a new trial.

Finally, Crim. P. 36 allows a court to correct errors in the record arising from oversight at any time. The trial court's oral pronouncement of Mr. Mendenhall's sentence is conflicting, indicating two different sentences. This Court should remand

the case for the trial court to clarify Mr. Mendenhall's sentence and to amend the mittimus if necessary.

ARGUMENT

I. The Trial Court Reversibly Erred by Instructing the Jury that "Security Means Any Note" and by Refusing Mr. Mendenhall's Alternative Instructions.

A. Standard of Review

Defense counsel objected to the court's definition of "security," and the court rejected Mr. Mendenhall's alternative instructions. (Tr. 2/29/12, p.120-31)

An appellate court reviews jury instructions de novo to determine whether the instructions as a whole accurately informed the jury of the governing law. *People v. Lucas*, 232 P.3d 155, 162 (Colo. App. 2009). In addition, the court's errors in instructing the jury violated Mr. Mendenhall's rights to due process, to a fair trial, to proof beyond a reasonable doubt of every element necessary to constitute the crime charged, to the presumption of innocence, and to present a defense. *See* U.S. Const. amends. V, VI, XIV; Colo. Const. art. II, §§16, 23, 25. The determination of whether a defendant's constitutional rights have been violated is reviewed de novo. *See, e.g., Quintano v. People*, 105 P.3d 585, 592 (Colo. 2005); *People v. Nave*, 689 P.2d 645, 647 (Colo. App. 1984).

Preserved errors of constitutional magnitude must be reversed unless the State proves they are harmless beyond a reasonable doubt. *Chapman v. California*, 386 U.S. 18, 24 (1967). The question is not whether the error would have changed the outcome but rather whether the error contributed to the verdict. *People v. Cobb*, 962 P.2d 944, 950 (Colo. 1998).

B. General Law

Due process requires an accused to be presumed innocent at the outset of trial and requires the prosecution to prove the existence of every element of a charged offense beyond a reasonable doubt. U.S. Const. amends. V, XIV; Colo. Const. art. II, §25; *In re Winship*, 397 U.S. 358, 363-64 (1970); *People ex rel. Juhan*, 439 P.2d 741, 743-44 (Colo. 1968); *see also* §18-1-402, C.R.S. 2013. "Instructions which fail to define all the elements of an offense charged, so that a jury may decide whether they have been established beyond a reasonable doubt, are constitutionally deficient." *People v. Martinez*, 634 P.2d 26, 28 (Colo. 1981).

Due process guarantees an accused the right to a fair trial by an impartial jury. U.S. Const. amends. V, VI, XIV; Colo. Const. art. II, §§16, 23, 25; *Dunlap v. People*, 173 P.3d 1054, 1081 (Colo. 2007). An essential feature of a fair trial is that the trial court correctly instructs the jury on all matters of law. *Carter v. Kentucky*, 450 U.S. 288, 303 (1981); *People v. Jurado*, 30 P.3d 769, 771 (Colo. App. 2001); *see also People v. Nunez*,

841 P.2d 261, 264 (Colo. 1992). Moreover, an accused is guaranteed a meaningful opportunity to present a complete defense. *See* U.S. Const. amends. V, VI, XIV; Colo. Const. art. II, §§16, 23, 25; *Crane v. Kentucky,* 476 U.S. 683, 690 (1986); *People v. Young*, 825 P.2d 1004, 1008 (Colo. App. 1991).

It is the duty of the trial court to correctly instruct the jury on the legal principles raised in a case. *E.g., People v. Stewart*, 55 P.3d 107, 120 (Colo. 2002); *People v. Cowden*, 735 P.2d 199, 202 (Colo. 1987). A jury instruction is erroneous if it is misleading. *People v. Cuevas*, 740 P.2d 25, 26 (Colo. App. 1987); *see People v. Zukowski*, 260 P.3d 339, 344 (Colo. App. 2010).

"[A]rguments of counsel cannot substitute for instructions by the court." *Taylor v. Kentucky*, 436 U.S. 478, 488-89 (1978). Defense counsel's arguments do not have the same effect or force as a court's instructions. *Carter*, 450 U.S. at 304 (other trial instructions and arguments of counsel "were no substitute for the explicit instruction that the petitioner's lawyer requested"). And a defendant's constitutional rights cannot "be permitted to hinge upon a hope that defense counsel will be a more effective advocate than the prosecutor" on matters of law in closing argument. *See Taylor*, 436 U.S. at 489.

"In Colorado, an instruction embodying a defendant's theory of the case *must be given* by the trial court if the record contains any evidence to support the theory."

Nunez, 841 P.2d at 264 (emphasis in original). If the trial court rejects the defendant's tendered theory of defense instruction, "a trial court has an affirmative obligation to cooperate with counsel to either correct the tendered theory of the case instruction or to incorporate the substance of such in an instruction drafted by the court." *Id.* at 265.

As pertinent here, section 11-51-501 defines the offense of securities fraud:

> (1) It is unlawful for any person, in connection with the offer, sale, or purchase of any security, directly or indirectly:
>
> ...
>
> (b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading; or
>
> (c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person.

§11-51-501(1)(b), (c), C.R.S. 2013.

Pursuant to section 11-51-201(17), C.R.S. 2013, the definition of "security" includes "any note." Colorado's definition of the term "security" "is virtually identical to the definition of 'security' in the federal securities act." *People v. Milne*, 690 P.2d 829, 833 (Colo. 1984)(applying the test established in *SEC v. W.J. Howey Company*, 328 U.S. 293 (1946)).

Section 11-51-201(17) does not define "note." However, the United States Supreme Court has explained that not all "notes" are "securities." In *Reves v. Ernst & Young*, 494 U.S. 56, 62 (1990), the Court stated "'note' may now be viewed as a relatively broad term that encompasses instruments with widely varying characteristics ...." Notes are used in a variety of settings, not all of which involve investments. *Id.* "Thus, the phrase 'any note' should not be interpreted to mean literally 'any note.'" *Id.* at 63.

In *United States v. McKye*, 734 F.3d 1104, 1109-10 (10th Cir. 2013), the court held that the district court erred when it instructed the jury that the term "security" includes "a note." At trial, the State presented evidence that, the defendant marketed certain investment notes. Each note had a subheading identifying them as "notes" bearing a guaranteed annual return. *Id.* at 1106. The court instructed the jury that the term security "includes a note or an investment contract." *Id.* at 1107, 1110 fn. 6. The court of appeals reasoned that whether the alleged fraud involved a security is an element of the crime of securities fraud and the question of whether a note is a security has both factual and legal components. Thus, it was error for the district court to instruct the jury that "the term 'security' includes a note." *Id.* at 1109-10.

C. The trial court erred by instructing the jury that "security means any note," particularly because it was disputed whether these documents were "securities," the documents were entitled "notes," and the State's securities expert testified that the documents at issue were "securities as notes." Moreover, the court should have instructed the jury to consider the context of the transactions in determining whether the notes were securities.

Here, citing *Reves v. Ernst & Young*, defense counsel requested an instruction stating "a note is not always a security." (Tr. 2/29/12, p.119, 121, 126-28) He further requested that the court instruct the jury to consider context in determining whether the documents constituted securities. (Tr. 2/29/12, p.125, 126-28) The court rejected the proposed instructions and instead instructed the jury that "'Security' means any note ...." (PR, CF, Vol.2, p.331) The court stated that defense counsel could argue that "there's a contextual endeavor" in determining whether the notes were securities. (Tr. 2/29/12, p.129-30)

The elements of securities fraud required the jury to find that Mr. Mendenhall acted "in connection with the offer or sale of any security." *See* §11-51-501(1)(b), (c); (PR, CF, Vol.2, p.232) All of the documents at issue in this case were entitled "Promissory Note" or "Note." (Binder, Ex.202, 203, 205, 304, 308, 402, 419, 504, 604, 704, 803, 901, 1004, 1202, 1205, 1206, 1302, 1402, 1502) The prosecution's securities law expert testified that the documents were "notes" and, thus, "securities."

(Tr. 2/28/12, p.259; 2/29/12, p.17) And the court instructed the jury that "security means any note." (PR, CF, Vol.2, p.331)

The court erred by instructing the jury that the term security included "any note" and by failing to instruct the jury that a note is not always a security. As the United States Supreme Court has explained, not all "notes" are "securities." *Reves*, 494 U.S. at 62. Moreover, although section 11-51-201 defines "security" as "any note," that statute states that the terms have the following definitions "unless the context otherwise requires." The statutory phrase, "unless the context otherwise requires," refers to the context within which the term security is used in the statute's substantive provisions. The phrase requires this Court to examine the statute to determine whether the context of its substantive provisions requires some meaning to be given to the term other than the ones adopted by the definitional portion of the statute. *Pima Fin. Serv. Corp. v. Selby*, 820 P.2d 1124, 1128 (Colo. App. 1991). As *Reves v. Ernst & Young* and *United States v. McKye* make clear, "security" does not mean "any note," and it was error for the court to so instruct the jury.

As in *United States v. McKye*, whether the alleged fraud involved a security was an element of the crime and whether the notes at issue here were securities was a factual question for the jury. Because the jury was instructed that "any note" is a security, the

court deprived the jury of the opportunity to make a finding essential to conviction. *Cf.* 734 F.3d at 1109-10.

The court further erred by failing to instruct the jury that the jurors must consider context in determining whether the transactions constituted securities. In *Reves v. Ernst & Young*, the Court stated that, in determining whether a transaction is a security, courts are not bound by "legal formalities" but instead must take account of the context and "economics of the transaction." 494 U.S. at 61-63. A division of this Court has similarly stated, "whether a transaction is a security does not depend on the label it is given, but upon the substance and economic realities of the situation." *People v. Pahl*, 169 P.3d 169, 181 (Colo. App. 2006)(citing *Jenkins v. Jacobs*, 748 P.2d 1318 (Colo. App. 1987)). The division in *People v. Pahl* held that the district court acted properly by instructing the jury to consider the totality of the circumstances in determining whether the venture was a security. *Id.* at 183-84. Further, this instruction was supported by the evidence in this case. The State's securities expert agreed that, "you just can't look at what the thing is titled, you have to actually look at the substance and the realities of transactions between the parties." (Tr. 2/28/12, p.222, 246) At a minimum, the court should have worked with defense counsel to craft an acceptable instruction. *Cf. Nunez*, 841 P.2d at 265.

Finally, the court erred by leaving it to defense counsel to attempt to cure the erroneous instruction and to explain the law. It is the duty of the trial court to correctly instruct the jury on the law. *E.g., Cowden*, 735 P.2d at 202; *Stewart*, 55 P.3d at 120. And "arguments of counsel cannot substitute for instructions by the court." *Taylor*, 436 U.S. at 488-89. Here, although the expert testified about the importance of considering the context of the transactions and although defense counsel attempted to argue that not all notes are securities and that the jury should consider the context, the court did not instruct the jury to consider context and provided an instruction of law stating "security means any note." The court also instructed the jury, "You have heard witnesses who have testified as experts. You are not bound by the testimony of experts; their testimony is to be weighed as that of any other witness." (PR, CF, Vol.2, p.319) And the court instructed, "While the lawyers may have commented during the trial on some of these rules, you are to be guided by what I say about them. You must follow all the law as I explain it to you." (PR, CF, Vol.2, p.311) The court should have instructed the jury as requested by defense counsel and not left it to defense counsel to explain the law, especially after the court told the jurors they could disregard the lawyers' arguments.

The error is not harmless under any standard. The issue of whether the transactions in this case were securities was disputed. Mr. Mendenhall's defense was

that these transactions were not securities. Instruction No. 20 permitted the jury to convict Mr. Mendenhall without the necessity of the State proving the notes at issue were securities. *Cf. McKye*, 734 F.3d at 1111. Although the securities expert testified that these transactions constituted both "notes" and "investment contracts," the definition of "investment contract" was complex and whether these transactions met the various elements of an "investment contract" was also disputed. (Tr. 2/28/12, p.220-22, 250-58, 259; 2/29/12, p.17, 147; PR, CF, Vol.2, p.331-32) The decision was all but made for the jury after the expert testified that these transactions were "securities as notes" and the court instructed the jury that "security means any note."

D. Conclusion

The trial court's definition of "security" and rejection of Mr. Mendenhall's instructions violated Mr. Mendenhall's rights to due process, to a fair trial, to proof beyond a reasonable doubt of every element necessary to constitute the crime charged, to the presumption of innocence, and to present a defense. *See* U.S. Const. amends. V, VI, XIV; Colo. Const. art. II, §§16, 23, 25; *Reves*, 494 U.S. at 62; *McKye*, 734 F.3d at 1109-10; *Nunez*, 841 P.2d at 264-65; *Pahl*, 169 P.3d at 183-84. This Court should reverse Mr. Mendenhall's securities fraud convictions and remand the case for a new trial.

II. The Trial Court Reversibly Erred by Allowing the District Attorney's Investigator to Testify About His Decision Whether to Pursue Criminal Charges Against Mr. Mendenhall.

A. Standard of Review

Defense counsel objected to this evidence on relevancy grounds. (Tr. 2/23/12, p.86-87)

Evidentiary rulings are generally reviewed for an abuse of discretion. *People v. Jimenez*, 217 P.3d 841, 864 (Colo. App. 2008). A court abuses its discretion when its decision is based on an erroneous understanding or application of the law. *People v. Muniz*, 190 P.3d 774, 781 (Colo. App. 2008). However, the admission of this evidence violated Mr. Mendenhall's rights to due process and to a fair trial. *See* U.S. Const. amends. V, VI, XIV; Colo. Const. art. II, §§16, 23, 25. The determination of whether a defendant's constitutional rights have been violated is reviewed de novo. *See, e.g.*, *Quintano*, 105 P.3d at 592; *Nave*, 689 P.2d at 647.

Preserved errors of constitutional magnitude must be reversed unless the State proves they are harmless beyond a reasonable doubt. *Chapman*, 386 U.S. at 24. The question is not whether the error would have changed the outcome but rather whether the error contributed to the verdict. *Cobb*, 962 P.2d at 950.

B. General Law

Due process guarantees an accused the right to a fair trial, which includes the right to a fair and impartial jury. U.S. Const. amends. V, VI, XIV; Colo. Const. art. II, §§16, 23, 25; *Dunlap*, 173 P.3d at 1081. This requires that a jury reach its verdict based solely on properly admitted evidence. *See, e.g., Domingo-Gomez v. People*, 125 P.3d 1043, 1048 (Colo. 2005). A due process violation occurs when "evidence is introduced that is so unduly prejudicial that it renders the trial fundamentally unfair." *Bloom v. People*, 185 P.3d 797, 806 (Colo. 2008)(quoting *Payne v. Tennessee*, 501 U.S. 808, 809 (1991)).

Evidence is relevant if it has any tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence. CRE 401. Only relevant evidence is admissible. CRE 402. Even relevant evidence should be excluded where its probative value is substantially outweighed by the danger of unfair prejudice. CRE 403; *Old Chief v. United States*, 519 U.S. 172, 180-81 (1997); *Welsh v. People*, 80 P.3d 296, 307-08 (Colo. 2003).

A prosecutor's personal opinion as to a defendant's guilt shall not be outwardly indicated nor presented to the jury. *People v. Jones*, 832 P.2d 1036, 1040 (Colo. App. 1991). Such opinions are improper. *Domingo-Gomez*, 125 P.3d at 1049 ("C.R.P.C. Rule 3.4(e) requires that counsel not 'state a personal opinion as to the justness of a cause,

the credibility of a witness ... or the guilt or innocence of an accused.'"). Similarly, a prosecutor should not intimate that she has personal knowledge of evidence unknown to the jury. *Id.* This rule is especially important if the opinion of guilt is delivered in combination with the suggestion that the prosecutor's office would not bring charges against anyone who could not be guilty. *Jones*, 832 P.2d at 1040.

Prosecutors have a duty to avoid using improper methods designed to obtain an unjust result. *Domingo-Gomez*, 125 P.3d at 1048. Because the prosecutor represents the State, their comments have significant persuasive force with the jury. *See id.* at 1049. For that reason, the possibility that the jury will give great weight to the prosecutor's comments because of the prestige associated with the office and the presumed fact-finding capabilities available to the office is a matter of special concern. *See id.*

In *Domingo-Gomez v. People*, a prosecutor stated in rebuttal argument, "There is a screening process for charging cases, and it takes a lot more than somebody saying that person did it. It takes the type of evidence that we have here." Our supreme court explained that the prosecutor's reference to a "screening process" was improper because it hinted that additional inculpatory evidence unknown to the jury supported the defendant's guilt and revealed the prosecutor's personal opinion. *Id.* at 1052. "Prosecutorial remarks of personal knowledge, combined with the power and prestige

inexorably linked with the office may encourage a juror to rely on the prosecution's allegation that unadmitted evidence supports a conviction." *Id.*

Similarly, in *People v. Jones*, in closing argument, the prosecutor (a) expressed his personal belief in the credibility of a prosecution witness, (b) implied that the charges had received the pre-trial approval of a judge, and (c) stated to the jurors that, after investigation by the district attorney's office, no charges are filed "if there is any reasonable doubt." A division of this Court disapproved of these comments and concluded that the comments "unmistakably implied that because of pre-trial screening, there could be no doubt of defendant's guilt." 832 P.2d at 1039-40.

C. The district attorney's investigator's testimony about his pre-trial process and decision to pursue charges against Mr. Mendenhall, including statements that he does not bring charges where "criminal filing is not appropriate" and where the circumstances do not "fall under the statute," constituted improper opinion as to Mr. Mendenhall's guilt and implied State access to additional, inculpatory evidence.

The district attorney's investigator testified regarding the process through which he received and investigated cases and his decision to "ultimately [bring] the case forward to pursuing criminal charges." (Tr. 2/23/12 PM, p.85-89; 2/24/12, p.6-8)[7] He testified that he received referrals from many sources. He received between 250 and 500 referrals a year and determined whether there was ongoing criminal

[7] An excerpt of Investigator Stevenson's testimony is attached as Appendix A.

activity that required immediate intervention. (Tr. 2/23/12 PM, p.85-86) Some referrals were not appropriate for criminal filing because they did not "fall under the statute," and he did not file charges in those cases. If a case was appropriate for criminal charges, he started an investigation, conducted interviews, obtained bank records, determined whether to file an investigative report, and handed it to the prosecutor. (Tr. 2/23/12 PM, p.87) He testified that of the 250 to 500 referrals, only approximately thirty-five to fifty cases resulted in criminal charges. The court overruled defense counsel's objection to this testimony as irrelevant. (Tr. 2/23/12 PM, p.86-87)

The investigator then detailed the referral and pre-trial process in this case. (Tr. 2/23/12 PM, p.88-89, 2/24/12, p.6-8) In 2008, he interviewed Mr. Mendenhall and a few of the clients. He testified that he did not have enough evidence to proceed with criminal charges at that time. (Tr. 2/24/12, p.6) However, in 2010, an investigator from Mr. Mendenhall's company and prosecution witness, contacted him, and he reopened the investigation. He contacted more of Mr. Mendenhall's clients. He authored an order to produce bank records and examined the records. (Tr. 2/24/12, p.6-8) He testified that he "ultimately brought the case forward to pursuing criminal charges." (Tr. 2/24/12, p.8)

The investigator's testimony about his decision to pursue criminal charges was irrelevant. *See* CRE 401; *cf. People v. Mullins*, 104 P.3d 299, 301 (Colo. App. 2004)("The facts that the police believed they had enough evidence and that a judge found there was probable cause to arrest defendant had no rational tendency to prove that defendant committed [the offense].'"). Moreover, the investigator's testimony about the number of cases that he investigates each year and decides to charge was irrelevant. His decisions in other cases do not make the existence of any fact of consequence in this case more or less probable. *See* CRE 401.

Even if relevant, which Mr. Mendenhall does not concede, the investigator's testimony about his process and decision to pursue criminal charges was substantially outweighed by the danger of undue prejudice. *See* CRE 403. His comments had the same effect as the prosecutors' comments in *Domingo-Gomez* and in *Jones*. He improperly suggested the State's opinion as to Mr. Mendenhall's guilt and on the strength of the evidence. Also, it implied State access to additional, inculpatory evidence against Mr. Mendenhall. The investigator's opinion as to Mr. Mendenhall's guilt, coupled with his statements that he does not bring charges where "criminal filing is not appropriate" and where the circumstances do not "fall under the statute," were particularly improper. (Tr. 2/23/12PM, p.86-87); *See Jones*, 832 P.2d at 1040.

The investigator's comments implied that, because of pre-trial screening, there could be no doubt of Mr. Mendenhall's guilt. As in *Domingo-Gomez*, the investigator's remark indicated a biased opinion on the part of the State. The statement suggested that the State engaged in a "screening process" to weed out weaker cases and, implicitly, that the State did not consider this a weak case. The testimony improperly presented the jury with the State's opinion of Mr. Mendenhall's guilt and encouraged them to rely on the district attorney's judgment. *Cf. Domingo-Gomez*, 125 P.3d at 1052. Moreover, similar to the comments in *Jones*, the investigator's testimony referred to a court order to produce bank records, implying that a court participated in the screening process and also found merit in the allegations. *Cf. Jones*, 832 P.2d at 1040.

D. The error, alone or in combination with the error in Argument III, warrants reversal of Mr. Mendenhall's convictions.

The error warrants reversal of Mr. Mendenhall's convictions. The evidence against Mr. Mendenhall was not overwhelming. Although it was undisputed that Mr. Mendenhall received money from his clients, it was contested whether the promissory notes constituted securities and whether he obtained the money by deception or used it in such a manner as to deprive the clients permanently thereof.

Mr. Mendenhall's defense was that these were personal loans, not securities. (*E.g.*, Tr. 2/29/12, p.81; 3/1/12, p.42-43) Although the prosecution's securities expert opined that there was a "common enterprise," an element of "investment

contracts," and therefore these were securities, the expert conceded that, if property were acquired and merely held with the hope that it would increase in value after time due to its location, which was Mr. Mendenhall's plan, there would be no "common enterprise." (Tr. 2/28/12, p.250, 257-58; 2/29/12, p.147) Moreover, Mr. Mendenhall's clients testified that the return on their investments was not dependent upon the success of the business, which the expert testified was necessary for a "common enterprise." (*E.g.*, Tr. 2/22/12, p.233; 2/23/12 AM, p.13-14; 2/28/12, p.252)

Regarding the thefts, the defense argued that Mr. Mendenhall did not deceive his clients. He showed them promotional materials (*e.g.*, Binder, Ex.301) and told them he owned the four properties. It would be unreasonable for the clients to assume that their loans alone were funding four luxury homes or that Mr. Mendenhall did not have mortgages on the four properties. (Tr. 3/1/12, p.43-44) In addition, the defense argued that Mr. Mendenhall did not use the money in such a manner as to permanently deprive the clients. (Tr. 3/1/12, p.44-47) Mr. Mendenhall testified that he, and occasionally his partner through their joint account, used the money to pay the mortgages and property costs. (*E.g.*, Tr. 2/29/12, p.100, 102, 104-05) Mr. Mendenhall testified that he was fighting to keep the properties afloat, that he

acknowledged his debts, and that he had every intention to pay back the loans. (*E.g.*, Tr. 2/29/12, p.106-16, 149-50)

The district attorney's investigator's improper testimony about his process and decision to charge Mr. Mendenhall was irrelevant, unfairly prejudicial, suggested the State's opinion as to Mr. Mendenhall's guilt, and implied official access to additional inculpatory evidence. This was a large part of the investigator's testimony, and it carried into two days of trial. (Tr. 2/23/12 PM, p.84-89; 2/24/12, p.6-8) And, in closing argument, the prosecutor referred to the investigator's process in deciding whether to charge Mr. Mendenhall. (Tr. 3/1/12, p.27) The evidence weakened Mr. Mendenhall's credibility and his defense. For the foregoing reasons, the court violated Mr. Mendenhall's constitutional rights to due process, to a fair trial, and to an impartial jury and abused its discretion by allowing the improper testimony. *See* U.S. Const. amends. V, VI, XIV; Colo. Const. art. II, §§ 16, 23, 25. This error, alone or in combination with the error addressed in Argument III, warrants reversal of Mr. Mendenhall's convictions. *See People v. Reynolds*, 575 P.2d 1286, 1289 (Colo. 1978)("the combined effect of the errors at trial prevented the defendant from receiving a fair trial"). This Court should reverse Mr. Mendenhall's convictions and remand the case for a new trial.

III. A Witness's Testimony and the Prosecutor's Inflammatory Statements in Closing Argument Violated Mr. Mendenhall's Rights to Due Process and to a Fair Trial by an Impartial Jury.

A. Standard of Review

Defense counsel did not object to this testimony or to the prosecutor's statements. A violation of an accused's due process rights is reviewed de novo. *See, Quintano*, 105 P.3d at 592; *Nave*, 689 P.2d at 647. Where the defense does not object to a prosecutor's statements at trial, a reviewing court must review for plain error and determine whether a reasonable possibility exists that the error contributed to the defendant's conviction such that serious doubt is cast upon the reliability of the jury's verdict. *Domingo-Gomez*, 125 P.3d at 1053. "It has long been recognized that misconduct by a prosecuting attorney in closing argument may be grounds for reversing a conviction." *People v. Rodriguez*, 794 P.2d 965, 972 (Colo. 1990)(citing *Berger v. United States*, 295 U.S. 78 (1934)).

B. General Law

Due process guarantees a defendant the right to a fair trial by an impartial jury. *See* U.S. Const. amends. V, VI, XIV; Colo. Const. art. II, §§ 16, 23, 25; *see also Domingo-Gomez*, 125 P.3d at 1048; *Harris v. People*, 888 P.2d 259, 263 (Colo. 1995). An impartial jury must determine the issues solely on the basis of the evidence introduced at trial and not on the basis of bias or prejudice. *Harris*, 888 P.2d at 264; *see also Oaks v.*

People, 371 P.2d 443, 447 (Colo. 1962)(the right to trial by jury guarantees "a fair verdict, free from the influence or poison of evidence which should never have been admitted, and the admission of which arouses passions and prejudices which tend to destroy the fairness and impartiality of the jury"). "A jury that has been misled by improper argument cannot be considered impartial." *Domingo-Gomez*, 125 P.3d at 1048.

"Prosecutors have a higher ethical responsibility than other lawyers because of their dual role as both the sovereign's representative in the courtroom and as advocates for justice." *Id.* at 1049. "Prosecutorial conduct in argument is a matter of special concern because of the possibility that the jury will give special weight to the prosecutor's arguments, not only because of the prestige associated with the prosecutor's office but also because the fact-finding facilities presumably available to the office." *Wilson v. People*, 743 P.2d 415, 419 n.7 (Colo. 1987)(quoting ABA, *Standards for Criminal Justice*, Standard 3-5.8, Commentary (3d ed. 1993)).

Prosecutors have a duty to not use improper methods designed to obtain an unjust result and must not use closing arguments to mislead or unduly influence the jury. *Domingo-Gomez*, 125 P.3d at 1048-49; *Harris*, 888 P.2d at 263. A prosecutor may not use arguments calculated to inflame the passions of the jury and may not encourage jurors to determine a defendant's guilt or innocence on the basis of bias or

prejudice. *Domingo-Gomez*, 125 P.3d at 1049; *Harris*, 888 P.2d at 266; *People v. McBride*, 228 P.3d 216, 221-23 (Colo. App. 2009)("prosecutors may not resort to 'inflammatory comments' that serve no purpose but 'inflam[ing] the passions of the jury.'").

A prosecutor should not compare the defendant to infamous criminals. No purpose is served by comparing the defendant to another defendant charged with a notorious crime other than to attempt to impassion the jury. *State v. Thompson*, 578 N.W.2d 734, 743 (Minn. 1998)(prosecutor compared the defendant to O.J. Simpson). Such a comparison clearly constitutes misconduct. *Id.* In *Harris v. People*, our supreme court found reversible, plain error where the prosecutor repeatedly referred to military operations by and against Saddam Hussein. 888 P.2d at 265. The references were irrelevant and improperly encouraged the jurors to use their prejudices and passions in evaluating the evidence. *Id.*

C. A witness's testimony likening Mr. Mendenhall to Bernie Madoff and the prosecutor's inflammatory statements in closing argument referring to that testimony and calling the alleged victims members of the "Greatest Generation" encouraged the jury to use their passions and prejudices in evaluating the evidence, violating Mr. Mendenhall's rights to due process and to a fair trial by an impartial jury.

Here, Donald Ledford testified that he had accused Mr. Mendenhall of running a "Madoff scheme." (Tr. 2/24/12, p.35) In closing argument, the prosecutor repeated that testimony likening Mr. Mendenhall to Bernie Madoff: "And then you

remember Mr. Ledford actually kind of jokingly said to the defendant, It seems like a Madoff scheme to me, to which what did the defendant say? Well, Madoff didn't need the money." (Tr. 3/1/12, p.25)

Moreover, the prosecutor, in contrast, repeatedly referred to the alleged victims as "members of the Greatest Generation." She stated, "And remember our group of investors, the members of the greatest generation, those who lived through the depression and worked hard their entire lives, when they heard the term 'owned,' we all know what they thought." (Tr. 3/1/12, p.16) She further argued,

> Let's talk briefly about his investors. They were quite a group of individuals, needless to say, that you saw in the last week, but they were his clients. They weren't his close friends. They were his clients from Bankers Life. Members of the greatest generation who trusted the defendant because he had been with Bankers for 28 years.

(Tr. 3/1/12, p.22)

Here, the court erroneously permitted Mr. Ledford's testimony and the prosecutor engaged in misconduct by employing arguments designed to inflame the passions and prejudices of the jury. The references to Bernie Madoff compared Mr. Mendenhall to a notorious criminal who operated an "infamous Ponzi scheme." *See Abady v. Certain Underwriters at Lloyd's London Subscribing to Mortg. Bankers Bond-No. MBB-06-0009*, 317 P.3d 1248, 1254 (Colo. App. 2012). And the prosecutor's references to the alleged victims as "members of the Greatest Generation" only

served to garner sympathy. Bernie Madoff and the Greatest Generation were irrelevant to Mr. Mendenhall. *See* CRE 401. The inflammatory comments improperly encouraged the jurors to decide the case on the basis of bias and prejudice and were improper. *Cf. Domingo-Gomez*, 125 P.3d at 1048-49; *Harris*, 888 P.2d at 263-66; *McBride*, 228 P.3d at 221-23.

D. The error, alone or in combination with the error in Argument II, warrants reversal of Mr. Mendenhall's convictions.

Mr. Ledford's testimony and the prosecutor's improper statements constitute plain error, and a reasonable possibility exists that the error contributed to Mr. Mendenhall's conviction such that serious doubt is cast upon the reliability of the jury's verdict. As explained in Argument II, there was not overwhelming evidence. Mr. Mendenhall's defense was that these were personal loans, not securities. (*E.g.*, Tr. 2/29/12, p.81; 3/1/12, p.42-43) It was disputed whether the promissory notes constituted securities and whether Mr. Mendenhall obtained the money by deception or used it in such a manner as to deprive his clients permanently thereof. (*E.g.*, Tr. 3/1/12, p.36-47) As detailed in Argument II, although the expert had a different opinion, his testimony supported Mr. Mendenhall's defense that the notes did not constitute securities. (Tr. 2/28/12, p.250) In addition, Mr. Mendenhall testified as to his representations to his clients, supporting his defense that he did not obtain the money by deception, and how he used the money and fought to hold on to his

properties after the crash of the real estate market, supporting his defense that he did not use the money in such a manner as to permanently deprive his clients. (Tr. 2/29/12, p.100, 102, 104-05, 106-16, 149-50)

Mr. Mendenhall's testimony and credibility were very important to the defense. The prosecutor's comments likening Mr. Mendenhall to Bernie Madoff impugned Mr. Mendenhall's credibility. The prosecutor's references to Bernie Madoff and to the alleged victims as "members of the Greatest Generation" encouraged the jury to decide the case on the basis of bias or prejudice and violated Mr. Mendenhall's rights to a fair trial by an impartial jury. *See* U.S. Const. amends. V, VI, XIV; Colo. Const. art. II, §§ 16, 23, 25; *Domingo-Gomez*, 125 P.3d at 1048; *Harris*, 888 P.2d at 263. This error, alone or in combination with the error addressed in Argument II, warrants reversal of Mr. Mendenhall's convictions. *See Reynolds*, 575 P.2d at 1289.

IV. This Court Should Remand the Case for the Trial Court to Clarify Mr. Mendenhall's Sentence and to Amend the Mittimus.

A. Standard of Review

Defense counsel did not notice the discrepancies in the court's pronouncement of sentence. The interpretation of a written transcript is a question of law subject to de novo review. *People v. Rockne*, 315 P.3d 172, 178 (Colo. App. 2012).

B. General Law

"A judge may correct or amend a record so that it speaks the truth." *People v. Emeson*, 500 P.2d 368, 369 (Colo. 1972). Crim. P. 36 allows a court to correct errors in the record arising from oversight or omission at any time. *See People v. Mason*, 535 P.2d 506, 508 (Colo. 1975).

Where a mittimus incorrectly reflects a court's actual sentence, the court may correct the mittimus to conform to the original sentence. *Id.* In determining the effect of a written mittimus, this Court should consider the entire record, harmonizing, if possible, the mittimus with any oral pronouncement of the court, but resolving any conflict in favor of the court's oral pronouncement. *See Rockne*, 315 P.3d at 177 (internal citations omitted); *see also People v. Turner*, 730 P.2d 333, 337 (Colo. App. 1986).

C. This Court should remand the case for resentencing to clarify Mr. Mendenhall's sentence and to amend the mittimus.

Here, when the court listed each conviction and its corresponding sentence, the sentences totaled thirty years in prison. (Tr. 4/20/12, p.43-45) The mittimus reflects those sentences. (Vol. 2, p.473-75) However, when the court was finished listing the convictions and sentences, the court stated that the sentences totaled twenty-five years:

> Mr. Mendenhall, that may be confusing and your attorney may go over it; and it may be confusing to the people that are listening here. But what that sentence results in, because I've done the math, is a 25-year sentence to the Department of Corrections staggered over several different periods with a mandatory five-year period of parole.

(Tr. 4/20/12, p.45)

It appears that the court intended and believed it was imposing a twenty-five year sentence. However, the individual sentences totaled thirty years, and the mittimus reflects a thirty-year sentence. This Court should remand the case for the trial court to clarify this discrepancy in its oral pronouncement of Mr. Mendenhall's sentence and to amend the mittimus, if necessary. *See* Crim. P. 36; *People v. Young*, 894 P.2d 19, 20 (Colo. App. 1994)(remanding for court to correct the mittimus consistent with its oral ruling).

CONCLUSION

For the reasons presented in Parts I-IIII, Mr. Mendenhall respectfully requests that this Court reverse his convictions and remand his case for a new trial.

For the reasons presented in Part IV, Mr. Mendenhall respectfully requests that this Court remand the case for the trial court to clarify Mr. Mendenhall's sentence and to amend the mittimus.

DOUGLAS K. WILSON
Colorado State Public Defender

RYANN S. HARDMAN, #37922
Deputy State Public Defender
Attorneys for Michael Mendenhall
1300 Broadway, Suite 300
Denver, Colorado 80203
(303) 764-1400

Redacted

Appendix A

(The following proceedings were conducted at the bench out of the hearing of the jury:)

THE COURT: I'm not sure you had to approach. It sounds like a legal definition to me.

MR. RENNER: And there's no at-risk charge in this case.

MS. GERDES: I was really trying to give context to the type of investigator he is.

THE COURT: Let's stay away from the legal definitions.

MS. GERDES: We'll do so.

(The following proceedings were conducted in the presence and hearing of the jury:)

Q. (BY MS. GERDES) Mr. Stevenson, there's particular groups of individuals that you have a particular specialty in dealing with, people of a certain age of classification known as at-risk?

A. That's correct.

Q. Okay. Now, how do you normally receive cases as an investigator within the Economic Crime Unit involving at-risk or exploitation?

A. Through many, many different agencies. I receive what I call referrals from Adult Protection Services in the City and County of Denver as well as sometimes outside the City and County of Denver from other law enforcement agencies, from banking institutions, from private citizens, from medical professionals,

from probate court, and off the top --

Q. From family members?

A. And from family members, yes, ma'am.

Q. Okay. In a given 12-month period, how many referrals, as you've called them, do you receive on average?

MR. RENNER: Your Honor, I would object as to relevance.

THE COURT: Overruled.

A. Approximately, it's a range from, I'd say, 250 to 500 referrals a year.

Q. (BY MS. GERDES) And what is the process that you undertake once you've received a referral? Is it a fast track? Is there a particular process that you undertake?

A. When I receive a referral, I try to determine if there's an ongoing exploitation of the victim. If that's the case, the Denver District Attorney's Office has protocol where I'm expected to investigate immediately within 24 hours, if that's the case, and to stop the financial exploitation, if I'm able to do that, through the laws and criminal justice system.

Q. Okay. Now, of the referrals that you receive on a yearly basis, do they all result in the filing of criminal charges?

A. No, they do not.

Q. Why not?

A. Well, because of the nature of the beast, I'll say. There are times when a criminal filing is not appropriate. It

doesn't fall under the statute that I primarily work under or statutes that I work under. Many times, like I say, I'll get referrals from family members. Sometimes it will be a family tug-of-war, trying to get assets of the individual. Again, it won't be appropriate to file criminal charges. Basically, it just will not be criminal charges that I can file on an individual, so I call it a referral and I don't file the charges.

Q. So you actually look at each case. And if appropriate to look at there possibly being criminal charges, what do you do then?

A. Then I continue: Start an investigation, conduct interviews, get bank records, make a determination to file an investigative report, and hand that to a prosecutor.

Q. Of the large number of referrals that you receive in a given year, how many of those of your cases result in the filing of criminal charges?

MR. RENNER: Objection, relevance.

THE COURT: Overruled.

A. Approximately 35 to 50 cases a year that I actually file criminal charges on.

Q. (BY MS. GERDES) Okay. And that's after completing an investigation?

A. That's correct.

Q. Okay. I'd like to date back to 2008, and specifically a referral that you received as a member of the Economic Crime Unit

investigation unit as it related to Michael Mendenhall.

A. Yes, ma'am.

Q. You did receive a referral?

A. Yes, ma'am.

Q. Can you briefly tell us the nature of that referral.

A. The referral came in, actually, through our intake division. We have two individuals who work intake who receive phone calls, again, from some of the same institutions that I receive phone calls. This referral came in from Wells Fargo Bank, Janelle Cavanaugh (phonetically spelled). There was a brief discussion between our intake individual who collected certain documents from Janelle Cavanaugh, and it was forwarded to me.

Q. What did you do with that referral?

A. I spoke to Janelle Cavanaugh specifically to verify the information that she'd reported to our intake personnel. I contacted two of the victims by phone who were designated in the referral, and I also eventually spoke to Mr. Mendenhall.

Q. Do you recall the names of the parties that there was a concern for may be affected or the parties who people were concerned about?

A. Yeah. I believe there were four or five that were reported by Wells Fargo: a Redacted

Q. Did you speak to those individuals?

A. I spoke to two of those individuals.

Q. All right. Do you remember who you spoke to?

A. I'm sorry, and Redacted . I didn't mention to her. I spoke to Redacted and Redacted .

Q. You said you also spoke to Mr. Mendenhall?

A. Yes. At the conclusion of interviewing those two individuals, I contacted Mr. Mendenhall and I asked him to come in for an interview.

Q. And the nature of the referral that came in related to what, specifically?

A. Well, in general terms, it related to the financial exploitation, so that is possible theft charge, and also there was a securities piece to it, as well.

Q. Okay. When you contacted Mr. Mendenhall, was it by phone?

A. Originally, it was by phone, and then Mr. Mendenhall agreed to come into the office and do an interview with myself and another investigator.

Q. And where did Mr. Mendenhall come for this interview?

A. Well, I'm fairly sure it's at the office I'm at now, 2001 West Colfax, but it could have been at 303 West Colfax.

Q. But it was at the Denver District Attorney's Office?

A. Yes.

Q. Depending on where they were located at the time?

A. Yes.

2/24/12

Q As a result of learning that information, what did you do as part of the referral process that you talked to us about?

A Well, the interview of Mr. Mendenhall was on March 8, I believe. Previous to that, on March 3 and March 4, I had interviewed Redacted and Redacted in reference to the referral.

Q And based upon your interviews with them and the information that you learned by speaking with the defendant's mortgage companies, did you proceed forward with your investigation?

A I did not.

Q Why not?

A Well, my primary focus was, again, the financial exploitation or theft from these victims. The two victims that I interviewed, neither of them believed nor did they want to file any kind of complaint against Mr. Mendenhall. At the time of the interviews their notes that they received from Mr. Mendenhall were not due, so I didn't have evidentiary material to go forward with a criminal complaint.

Q Now, I would like to fast forward to 2010.

A Yes.

Q You were contacted by Rick Riser?

A Actually, the contact originally came through

Melissa Adams of the Department of -- Colorado Department of Insurance.

Q And based upon that contact, what did you next do?

A My next contact was with Rick Riser from Conseco Insurance. So Mr. Riser identified approximately 12 to 15 individuals who had funded Mr. Mendenhall's investment through promissory notes. I then began contacting those individuals. Just -- I also worked with Jerry Lowe from the Division of Securities. With the number of alleged victims at that time, we split up the list. I contacted approximately eight originally, and he contacted approximately eight as well.

Q Did you also examine bank documents at that time?

A Yes. The timing wasn't -- after I had done preliminary interviews with these individuals and interviewed Mr. Riser, I authored an order to produce bank records for a Wells Fargo bank account and a KeyBank bank account.

Q Which we have now seen as admitted Exhibits 102 and 129?

A That's correct.

Q You also mentioned that you interviewed the 12 to 15 names that you were given who had funded the defendant's investment?

A That's correct.

Q Did that include -- who did that include interviewing or reinterviewing?

A You want all of the names?

Q As -- let me ask you a better question. The people who so far have testified today, did you speak with some or all of those individuals who invested money with Mr. Mendenhall?

A All of them.

Q All right. You also reinterviewed Redacted ?

A I did.

Q And Redacted ?

A I did. Those are two individuals that I had originally interviewed in 2008, so I kept them on my list to start the investigation again because I had previous contact with them. So I interviewed both of them.

Q Based upon the bank records and the remainder of your investigation, you ultimately brought the case forward to pursuing criminal charges?

A I did.

Q No further questions.

THE COURT: Cross-examination?

MR. RENNER: Yeah. I just have a few questions for you, Investigator.

//

//

BANKERS
LIFE AND CASUALTY COMPANY

For the life of your retirement

Carmella Storto
Director – Field Regulatory
Contract Compliance

November 24, 2010

Michael Mendenhall
Redacted

Dear Mr. Mendenhall:

Please be advised that Bankers Life and Casualty Company is recording your contract termination as a contract termination for cause since you transgressed the policies and procedures of Bankers Life and Casualty Company in violation of your contract with Bankers Life and Casualty Company. Specifically, you borrowed money from policyholders.

The insurance department has been advised of this contract termination for cause.

In accordance with the terms of your contract with Bankers Life and Casualty Company, no commissions or deferred compensation, either vested or otherwise, will be paid to you.

Sincerely,

Carmella Storto

Carmella Storto
Director – Field Regulatory

600 West Chicago Avenue, 4th Floor • Chicago, IL • www.bankers.com
tel (312) 396-7275 • fax (312) 396-7280 • c.storto@banklife.com

B

You replied on 4/27/2010 9:26 AM.

Mendenhall, Michael

From: Urs, Dwight **Sent:** Tue 4/27/2010 8:56 AM
To: Mendenhall, Michael
Cc:
Subject: FW: Michael Mendenhall
Attachments:

Loan?

"DON'T CONFUSE ACTIVITY WITH ACCOMPLISHMENT!"
"IT'S WHAT YOU LEARN..AFTER YOU KNOW IT ALL..THAT COUNTS!"
Dwight Urs
Branch Sales Manager 5053
303-694-3643, ext. 11

From: Goldberg, Scott [mailto:s.goldberg@banklife.com]
Sent: Tue 4/27/2010 5:01 AM
To: Urs, Dwight
Cc: Calabrese, Erin
Subject: Re: Michael Mendenhall

Dwight,

Erin will follow up on this. Our recollection is that there was some concen that Michael may have received a loan from a client, which is not apppropriate practice. We need to ascertain whether this became a FINRA issue and, if so, the resolution. If all is ok, we will put Michael on the list.

Best,
Scott

Scott L. Goldberg
Bankers Life and Casualty Company
W: 312-396-7653
M: 773-230-1569
F: 312-396-5986

On Apr 26, 2010, at 2:09 PM, "Urs, Dwight" <Dwight.Urs@bankers.com> wrote:

> Good afternoon..Is Michael Mendenhall B9900 on the list to get
> appointed with the new entity. As you remember..U-Vest had a problem
> with his debt in the rental properties..which are positive cash flow.
>
> "DON'T CONFUSE ACTIVITY WITH ACCOMPLISHMENT!"
> "IT'S WHAT YOU LEARN..AFTER YOU KNOW IT ALL..THAT COUNTS!"
> Dwight Urs
> Branch Sales Manager 5053
> 303-694-3643, ext. 11

Mendenhall, Michael

From: Calabrese, Erin [e.calabrese@banklife.com] **Sent:** Mon 12/28/2009 9:43 AM
To: Mendenhall, Michael
Cc:
Subject: FW: FINRA Inquiry
Attachments:

Michael,

Per Steve, the updated address for UVEST is below.

Erin Calabrese
Bankers Life and Casualty Company
600 West Chicago Ave
Chicago IL 60654
312-396-7354
312-396-7310 fax

-----Original Message-----
From: Steve R. Sanok [mailto:steve.sanok@uvest.com]
Sent: Monday, December 28, 2009 9:38 AM
To: Calabrese, Erin
Subject: RE: FINRA Inquiry

Erin,

Thank you for your help. My address is:

4828 Parkway Plaza Drive
Plaza 2 Floor 3
Charlotte, NC 28217

Steve Sanok

LPL Financial Institution Services
Senior Branch Examiner | Compliance

Direct: 704-405-4707
Toll-free: 800-277-8802 | ext. 3633
Fax: 704-227-4526
Email: steve.sanok@uvest.com
-----Original Message-----
From: Calabrese, Erin [mailto:e.calabrese@banklife.com]
Sent: Monday, December 28, 2009 10:36 AM
To: Steve R. Sanok
Subject: FW: FINRA Inquiry

FYI

Erin Calabrese
Bankers Life and Casualty Company
600 West Chicago Ave

Chicago IL 60654
312-396-7354
312-396-7310 fax

-----Original Message-----
From: Mendenhall, Michael [mailto:michael.mendenhall@bankerslife.com]
Sent: Wednesday, December 23, 2009 3:07 PM
To: Calabrese, Erin
Cc: Kernahan, Steve
Subject: RE: FINRA Inquiry

Erin,
I will be back in the office on the 30th. I will mail them back on that day. Have a wonderful holiday.
~Michael

Michael L. Mendenhall
LUTCF, AMTC, MDRT
Unit Sales Manager
Bankers Life and Casualty Company

From: Calabrese, Erin [mailto:e.calabrese@banklife.com]
Sent: Tue 12/22/2009 2:59 PM
To: Mendenhall, Michael
Cc: Kernahan, Steve
Subject: FINRA Inquiry

Michael,

UVEST contacted me today and advised me that your name was included in a FINRA inquiry. As a result, UVEST is requesting that you send all of your client files to them so that they may conduct an investigation into the inquiry and work with FINRA to resolve the matter. Unfortunately, at this time, I do not have any more information. Please ship the files directly to Steve Sanok at UVEST. His information is below:

UVEST Financial Services

Attn: Steve Sanok

4828 Parkway Plaza

Plaza 243

Charlotte, NC 28217

Though we have very little information at this point, I feel it is important to stress that your immediate response to this request is important.

Erin Calabrese

Bankers Life and Casualty Company

600 West Chicago Ave

Chicago IL 60654

312-396-7354

312-396-7310 fax

pg 45

December 31, 2009

Steve Sanok
LPC Financial Institution Services
4828 Parkway Plaza Blvd
Plaza 2 Floor 3
Charlotte, NC 28217

Dear Mr. Sanok:

Please find the enclosed client files, which have been requested as a result of a FINRA inquiry.

I consider Redacted to be a longtime friend of mine as well as a client. She and I have known one another for more than 15 years and I would consider her a personal friend before a client. Based solely on our personal relationship, Redacted and I entered into a high-end real estate development project. Our arrangement is based purely on our personal relationship and is no way linked to her UVEST account. Her account was transferred from another broker/dealer a few years ago and was done so based on our relationship. Redacted's account activity has only had a previously small security mature at which time she purchased a mutual fund with a portion of those proceeds for $13,000.00. This is the only trade that has occurred.

Redacted's son has gone against her wishes as well as her daughters by writing this letter to FINRA. Marie and her daughter have spoken with a local FINRA representative and stated they are both completely satisfied and are not making any complaints. They have both placed their statements in written form to FINRA.

If you require additional feedback from me I may be contacted by email: Michael.Mendenhall@bankerslife.com or by phone: 303-694-3643 Ext. 12.

Sincerely

Michael Mendenhall