IN THE SUPERIOR COURT APPELLATE DIVISION
OF THE ALAMEDA COUNTY SUPERIOR COURT

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff-Respondent, vs. WALTER B. HOYE, II, Defendant-Appellant.	Appellate #4961 Trial Court #541279

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ON APPEAL FROM THE ENTRY OF JUDGMENT AND
POST-JUDGMENT ORDER
IN THE ALAMEDA COUNTY SUPERIOR COURT
HON. STUART HING, PRESIDING

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Opening Brief of Defendant-Appellant Walter B. Hoye, II

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NATURE OF ACTION AND STATEMENT OF APPEALABILITY

This is a misdemeanor criminal matter, wherein Oakland police officers arrested defendant Walter Hoye on May 13, 2008, for allegedly violating Oakland Municipal Code (hereinafter "OMC") §8.52.030, harassment of persons seeking health care. On June 6, 2008, the Alameda County District Attorney's office filed a complaint against Hoye charging him with two counts of violating OMC §8.52.030(b) and two counts of violating OMC §8.52.030(a). (Clerk's Transcript (hereinafter "CT") 6.) Hoye filed a demurrer (CT11) which was overruled and, on June 25, 2008, pled not guilty to all counts and demanded a jury trial. (CT23.)

At the conclusion of the prosecution's case in chief the court partially granted Hoye's motion pursuant to Penal Code §1118.1 and dismissed Count 2, (Reporter's Transcript (hereinafter "RT") 601:19-607:14.) On January 9, 2009, the defense submitted its final requested instructions, including CALCRIM 3500, 3501, 3502 (unanimity) and special instructions defining "approach," yet all the unanimity and "approach" instructions were refused by the court. (CT196-200, 229-232; RT672:21-675:19, 734:28-737:26, 746:9-747:16.) On January 13, 2009, the jury asked for a legal definition of "approach" but the court refused the jury's request. (CT239,240.) On January 15, 2009, a jury found Hoye guilty on Counts 1 and 3 and acquitted him on Count 4 (CT299-301.)

On February 19, 2009, Judge Hing denied Hoye's motion in arrest of judgment and motion for a new trial. (CT334.) The court offered to suspend imposition of sentence and place Hoye on three years informal probation under the following terms and conditions: obey all laws and stay 100 yards away from the abortion clinic located at 200 Webster Street in Oakland. (Reporter's Transcript-Sentencing 02/19/09 (hereinafter "RTS02/19/09"), 16:26-18:22, 30:19-25.) Hoye rejected the courts offer and asked to be

sentenced forthwith. (RTS02/19/09, 18:17-22, 25:18-19.) The court placed Hoye on probation, despite Hoye's refusal to accept probation, and in addition to the previous terms, the court ordered Hoye to serve 30 days in jail, pay a $1,000.00 fine, and pay a $130 restitution fine/court security fee. (RTS02/19/09, 23:6-25; CT333, 349-352.)

On March 20, 2009, the court denied Hoye's request for a stay pending appeal and Hoye was taken into custody. (Reporter's Transcript-Sentencing 03/20/09, 25:2-24.)

Hoye now appeals the court's refusal to instruct the jury on the legal definition of "approach" and to give a unanimity instruction, the denial of Hoye's motion for new trial, motion in arrest of judgment, and demurrer, and the court's probation order. (CT23, 337-343, 359-367.) A defendant may appeal from a final judgment of conviction pursuant to Penal Code §1466(2)(A). A court order placing a defendant on probation after conviction is appealable by the defendant.[1] Upon appeal from a final judgment or an order granting probation the court may review any order denying a motion for a new trial.[2]

STANDARD OF REVIEW

A trial court's rulings on questions of law are subject to independent review by the appellate court.[3] The issues set forth in this appeal are questions of law and are subject to de novo review by this court.

STATEMENT OF FACTS

Hoye has regularly visited the vicinity of the Family Planning Specialists ("FPS") abortion clinic in Oakland for the purpose of offering alternatives to women considering abortion. (RT28:8-14, 29:9-14.) Jacki

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[1] Pen. Code §1466(2)(A); *People v. Minter* (1955)135 Cal.App.2nd Supp. 838.
[2] *Ibid*.
[3] *People v. Glaser* (1995) 11 Cal.4th 354.

Barbic, executive director at FPS, is bothered by Hoye's presence on the sidewalk outside the clinic. (RT18:12-14, 330:6 (Barbic).) After passage of OMC §8.52.030, Barbic sought the assistance of Deputy City Attorney Vicki Laden and arranged for her to observe Hoye's conduct on April 29, 2008. (RT68:6-70:19, 129:11-131:25.) Laden went to the abortion clinic on April 29th, but remained in her vehicle and observed the location undercover. (*Ibid*.)

On April 29 and May 13, 2008, Walter Hoye went to the FPS abortion clinic located in a multi-tenant building at 200 Webster Street, in Oakland. (RT23:10-24:19,53:1-19.) On April 29th, Hoye arrived at about 8:20am and stood on the sidewalk in front of the building holding a sign that read "God loves you and your baby let us help." (Defense Exhibits I & J (video) (hereinafter "DEx-IJ").) On May 13th, Hoye arrived at about 8:40am and stood on the sidewalk in front of the building holding a sign that read "Jesus loves you and your baby let us help." (Defense Exhibit K & L (video) (hereinafter "DEx-KL").) On both occasions, he was met by at least four pro-abortion activists who were also present on the sidewalk outside the clinic, including prosecution witnesses Lucy Kasdin and Sandra Coleman. (DEx-IJ, DEx-KL.)

On both days, Hoye held some literature in one hand and his sign in the other. (*Ibid*.) As people approached the clinic he would turn to face them and in some instances take a few steps in their direction. Clinic escorts would step in front of Hoye to block him. (*Ibid*.; RT361:11-21; 496:10-26) As shown in the videotapes taken on those days, there were at least 20 separate interactions between Hoye and persons entering 200 Webster Street on April 29th and at least four on May 13th. The prosecution's witnesses attempted to recall the encounters between Hoye and the people who approached the building on April 29th. Many of the

witnesses' stories were inconsistent with each other and none of their descriptions could be identified on the video depicting the day's events. (*Compare* RT35:9-41:11, 76:17-92:12, 94:20-96:13 (Barbic); 213:25-26, 279:14-283:12 (Ali); 464:21-474:8 (Kasdin) with DEx-IJ.) Most notably, Barbic described an encounter she purportedly witnessed on the 29th between Hoye and an African-American couple who approached from across the street. Nowhere on the video for the 29th is this encounter depicted.[4] (RT35:9-41:11, 76:17-92:12, 94:20-96:13.)

The prosecutions' witnesses attempted to recall the encounters between Hoye and the people who approached the building on May 13th. The video did not clearly show any violations. (DEx-KL.)

No clinic patient testified at trial regarding either date or count.

ARGUMENT

I. The court prejudicially erred in failing to give a unanimity instruction.

A. ***The Court erred in failing to give a unanimity instruction***.

[4] Barbic had trouble keeping her story straight at trial. About 52 minutes after Hoye arrived, Barbic exited the building and scolded him. (Defense Exhibit B (video) (hereinafter "DEx-B").) Barbic brought out a tape measure and lectured Hoye about how far 8 feet was and insulted him by remarking, "You must not know math very well." (RT43:3-10) At trial, unaware of the existence of the video, Barbic testified that during this encounter Hoye aggressively approached her and she feared for her safety. (RT47:13-51:20; 342:12-343:10.) The video was played for the jury,showing Barbic confronting Hoye, and Hoye remaining stationary and then moving away from her. (DEx-B.) On cross-examination, Barbic then claimed that Hoye's threatening approach had occurred on an entirely separate occasion that day. (RT324:9-325:10.) Neither the video nor the testimony of any other witness showed any other interactions between Barbic and Hoye that day.

The California Constitution guarantees criminal defendants the fundamental right to a unanimous jury.[5] This well-settled principle means a criminal defendant is entitled to a verdict in which all 12 jurors concur, beyond a reasonable doubt, as to each count charged.[6] The jurors must unanimously agree the defendant is criminally responsible for "one discrete criminal event."[7] "When an accusatory pleading charges the defendant with a single criminal act, and the evidence presented at trial tends to show more than one such unlawful act, ***either*** the prosecution must elect the specific act relied upon to prove the charge to the jury, ***or*** the court must instruct the jury that it must unanimously agree that the defendant committed the ***same*** specific criminal act."[8] When, as in this case, no election has been made, and the prosecution shows several acts, each of which could constitute a separate offense, a unanimity instruction is required.[9] In fact, because jury unanimity is a constitutionally rooted

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[5] Cal. Const. Art. 1, §16; See also, *People v. Griffin* (2001) 90 Cal.App.4th 741; *People v. Wheeler* (1978) 22 Cal.3d 258, 265; *People v. Thompson* (1995) 36 Cal.App.4th 843, 850.

[6] *People v. Melendez* (1990) 224 Cal.App.3d 1420, 1427-1428, citing *People v. Jones* (1990) 51 Cal.3d 294, 305.

[7] *Thompson*, 36 Cal.App.4th at 850; *People v. Davis* (1992) 8 Cal.App.4th 28, 41.

[8] *People v. Melhado* (1998) 60 Cal.App.4th 1529, 1534; *Gordon,* 165 Cal.App.3d at 853.

[9] *Ibid*.; See also e.g., *People v. Castro* (1901) 133 Cal. 11, 13 (several acts of rape over several months); (*People v. Williams* (1901) 133 Cal. 165, 168-169 (same); *People v. McNeill* (1980) 112 Cal.App.3d 330, 335-336 (assault on different victims); *People v. Alva* (1979) 90 Cal.App.3d 418, 424-426 (multiple unlawful sex acts over five-month period); *People v. Gavin* (1971) 21 Cal.App.3d 408, 418-420 (possession of narcotics); *People v. Dutra* (1946) 75 Cal.App.2d 311, 321-322 (contributing to the delinquency of a minor based on several acts of sex perversion); *People v. Ruiz* (1920) 48 Cal.App. 693, 694-696 (several acts within an hour of assault with intent to commit rape); *People v. Elgar* (1918) 36 Cal.App. 114 (two acts of rape); *People v. Hatch* (1910) 13 Cal.App. 521, 534-536 (several acts of embezzlement); *People v. Moreno* (1973) 32 Cal.App.3d

principle, the court has a ***sua sponte*** duty to give the unanimity instruction.[10] Failure to give a unanimity instruction has the effect of lowering the prosecution's burden of proof, which violates the Due Process clause of the United States Constitution.[11]

In the instant case, the prosecution presented testimony from four separate witnesses who described with varying degrees of specificity three to twelve different interactions between Hoye and individuals who entered 200 Webster Street on two different days. (RT18-142,177-187,192-364,370-544,555-593.) Additionally, digital video recordings of these two days show more than 20 interactions between Hoye and persons entering the building on April 29th and more than 4 such interactions between Hoye on May 13th, any one of which could have constituted a separate violation of OMC §8.52.030(b) if all of the elements of the crime were met. (DEx-IJ, DEx-KL.) Furthermore, the prosecution did not elect to rely on merely one specific encounter to establish Hoye's guilt. (RT735:10-12.) Rather, in closing argument, the prosecution pointed to all of the incidents described by the witnesses and depicted by the video and argued that Hoye violated the statute multiple times throughout both of the days in question. (RT775:24-779:17.) Despite the court's ***sua sponte*** duty to give the CALCRIM 3500 and 3501unanimity instructions and the defense's specific request for them, the court refused to instruct the jury that it must unanimously agree on which, if any, of the multiple acts for which evidence

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Supp. 1, 8-9 (two acts of resisting arrest approximately one-half hour apart); *People v. Thompson* (1956) 144 Cal.App.2d Supp. 854, 859 (jury must agree defendant unlawfully used or was addicted to narcotics); *People v. McMillan* (1941) 45 Cal.App.2d Supp. 821, 829-830 (multiple batteries); see also *People v. Scofield* (1928) 203 Cal. 703, 709-710 (hit and run statute with separate parts--jury must all agree on which part was violated.)

[10] *Melhado*, 60 Cal.App.4th at 1534; *People v. Salvato* (1991) 234 Cal.App.3d 872, 880.

[11] *People v. Smith* (2005) 132 Cal.App.4th 1537, 1548.

was presented constituted the violation on April 29th, (Count 1) and May 13th (Count 3).

In order to find Hoye guilty of OMC §8.52.030(b), evidence to prove the following elements was required:

1) Within one hundred feet of the entrance of a reproductive health care facility,

2) The defendant willfully, knowingly, and unlawfully approached within eight feet of a person seeking to enter such a facility, or any occupied vehicle seeking entry,

3) Without the consent of such person or vehicle occupant, and

4) For the purpose of counseling, harassing, or interfering with such person or vehicle occupant.

Hoye presented various defenses for each of the thirty encounters presented to the jury as evidence that he violated OMC §8.52.030(b). (RT793:24-798:20, 805:1-816:15.)

For some encounters, the defense argued Hoye did not 'approach;' rather, he simply stood still the person walked towards the building, which is not a violation of the statute. (RT793:27-794:27.) For other encounters, the defense argued Hoye stopped before getting within eight feet of the person walking towards the building, which is also not a violation of the statute. (RT796:2-13.) And still, for other encounters, the defense argued Hoye did not "knowingly approach within eight feet" because he could not have seen or known the distance between himself and the person walking towards the building due to the escorts using giant poster boards to block his line of sight. (RT795:13-796:17.) For other encounters that took place a substantial distance away from the entrance to the building, the defense argued Hoye did not (and could not) 'know' the person walking down the sidewalk was, in fact, seeking to enter the facility. (RT795:1-11.) Because

there is a scienter requirement, Hoye must have had actual knowledge that the person he offered literature to and/or displayed his sign to was seeking to enter a health care facility; without this knowledge, Hoye could not have been found guilty of violating the statute. (*Ibid*.) Finally, there were other alleged encounters that the defense argued simply did not occur, such as the patient and companion coming from across the street, about whom Barbic testified. (RT805:8-806:3, 807:9-14, 809:9-25.)

These different defenses raised the spectre of a less than unanimous verdict. Some jurors could have believed Hoye committed harassment of persons seeking health care by stepping towards and displaying his sign to the person in the gray hoodie depicted on the April 29th video (RT776:18-777:8), while others could have disagreed finding that Hoye was not within eight feet, but rather, believed Hoye still violated the statute when he stood stationary near the entrance and merely extended his hand offering literature to a woman as described by Kasdin. The same risk is true for the May 13th offense. Some jurors could have believed Hoye committed harassment of persons seeking health care by taking a step next to and attempting to display his sign to a couple coming from across the street depicted on the May 13th video, while others could have disagreed finding that Hoye did not 'knowingly approach within eight feet' because he could not see the distance between himself and the couple due to the escort's signs blocking his view, but rather, believed Hoye still violated the statute when he stood still near the entrance and displayed his sign to the person who exited a vehicle depicted on the May 13th video. A unanimity instruction is required where, as in this case, different acts could have constituted the offense and separate defenses were offered for each act.[12]

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[12] *People v. Laport* (1987) 189 Cal.App.3d 281, 283-284; *People v. Castaneda* (1997) 55 Cal.App.4th 1067, 1071; *People v.Wesley* (1986) 177 Cal.App.3d 397.

B. The "continuous course of conduct" exception does not apply here.

A unanimity instruction is not required when the case falls within the continuous course of conduct exception; however, courts have determined that this exception should be narrowly drawn.[13] This continuous course of conduct exception arises in two contexts: 1) when a statute contemplates a continuous course of conduct of a series of acts over a period of time that only result, however, in the commission of ***one crime***[14] and 2) when the acts are so closely connected that they form part of one and the same transaction, and thus ***one offense***.[15]

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[13] *Melendez*, 224 Cal.App.3d at 1429, citing *People v. Madden* (1981) 116 Cal.App.3d 212, 218.

[14] *Madden* 116 Cal.App.3d at 219. *See e.g.*, *People v. Zavala* (2005) 130 Cal.App.4th 758 (stalking); *People v. Jantz* (2006) 137 Cal.App.4th 1283 (stalking); *People v. White* (1979) 89 Cal.App.3d 143, 151 (pandering); *People v. Ewing* (1977) 72 Cal.App.3d 714, 717 (child abuse); *People v. Heideman* (1976) 58 Cal.App.3d 321, 333 (possession of a destructive device); *People v. Feldman* (1959) 171 Cal.App.2d 15, 25 (concealing stolen property); *People v. Lowell* (1946) 77 Cal.App.2d 341, 347-348 and *People v. Schoonderwood* (1945) 72 Cal.App.2d 125, 127 [164 P.2d 69] (contributing to the delinquency of a minor, but see *Dutra*, *supra*, 75 Cal.App.2d 311, 321-322 [171 P.2d 41]); *People v. Knight* (1939) 35 Cal.App.2d 472, 474 (driving under the influence); *People v. Jarvis* (1933) 135 Cal.App. 288, 309-310 (unlicensed fruit dealer); *People v. Morrison* (1921) 54 Cal.App. 469, 471 (failure to provide for minor child.)

[15] See e.g., *People v. Haynes* (1998) 61 Cal.App.4th 1282 [robbery that began when robber took part of torn money and continued when robber pursued victim by car until he obtained remainder of money, acts were so closely connected in time that no unanimity instruction was necessary]; *People v. Dieguez* (2001) 89 Cal.App.4th 266 [unanimity instruction not required as to statements relied on by jury for conviction of making false workers' compensation claim where statements alleged were made at same time to same doctor with single objective of obtaining workers' compensation benefits and *defendant offered same defense to each statement*]; *People v. Parcelle* (2005) 126 Cal.App.4th 164 [unanimity instruction not required in prosecution for using altered, stolen, or counterfeit access card where defendant's two visits to same victimized store were little over hour apart, defendant attempted to make same

1. Section 8.52.030(b) does not contemplate a continuous course of conduct.

OMC §8.52.030(b) does not proscribe a course of conduct that is continuous by nature or as defined by the statute itself. Rather, the law prohibits a ***single act*** of knowingly approaching within eight feet of a person seeking entry to a reproductive health care facility, without their consent, and for the purpose of counseling, harassing, or interfering with such person. By definition a violation of §8.52.030(b) may, and as a practical matter must, transpire in a matter of seconds. Each 'unlawful approach' is punishable as a separate crime, just like in the cases of multiple batteries,[16] animal cruelty,[17] theft,[18] bribery,[19] or check fraud.[20] Each prohibited transaction is a distinct crime. While it may be possible to commit repeated violations of these offenses during the same "crime spree" so to speak, that is not the type of behavior contemplated by the "continuous course of conduct" exception. For example, if a man on a

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purchase with same card on each visit, and *defendant offered same defense to both acts*]; *People v. Carrera* (1989) 49 Cal.3d 291 [Joint custodians of money were robbed. Defendant was charged with one count of robbery naming the two victims. On appeal he claimed it was error to not give unanimity instruction. The California Supreme Court found "[i]t was not necessary that the jury distinguish between the two victims as there was *no evidence here from which the jury could have found defendant was guilty of robbing one of the victims and not the other*."]; *People v. Ramirez* (1987) 189 Cal.App.3d 603 [the defendant was found guilty of conspiracy to commit murder. The court found the failure to give a unanimity instruction to be harmless. "[T]he evidence supporting each [overt] act was the same—a single victim's testimony—so there was *no basis for the jury to conclude that some but not all of the acts took place*." The court concluded that since there was no possibility of disagreement among the jurors the error was harmless.].

[16] *McMillan*, 45 Cal.App.2d Supp. at 829-830.

[17] *People v. Sanchez* (2001) 94 Cal.App.4th 622.

[18] *People v. Norman* (2007) 157 Cal.App.4th 460, 466.

[19] *People v. Deidrich* (1982) 31 Cal.3d 263.

[20] *People v. Ferguson* (1982) 129 Cal.App.3d 1014.

street corner pickpockets a wallet from three different passersby, he is guilty of three separate counts of theft. Similarly, if three different women complained that Hoye unlawfully approached within eight feet of each one without their permission for the purpose of counseling them, at varying times during the day, each prohibited interaction would be a separate violation of the ordinance.

In the instant case, the prosecution presented evidence pertaining to several discrete purported violations of OMC §8.52.030(b). The prosecution did not suggest to the jury that Hoye's allegedly criminal actions were a continuous course of conduct that took place over a two hour period, but actually ***argued to the jury that several acts could be the basis of liability on each count***. (RT775:24-779:17.) Accordingly, the court was required to instruct the jury ***sua sponte*** (and in any case grant the defense's request) that it must *unanimously* agree on the criminal conduct supporting the conviction.[21]

2. The evidence presented showed multiple distinct transactions, to which different defenses were raised.

The legal basis for this application of the "continuous conduct" exception is where there is no conceivable construction of the evidence that would permit the jury to find the defendant guilty of the crime based upon one act, but not another, where evidence of two or more acts is presented to the jury. For example, a person who tries to use a counterfeit debit card at a gas station and moments later tries again at a grocery store could be charged with two separate crimes. In this scenario, if the defendant is charged with only one count of attempting to use a counterfeit access card and his only defense is "there was no evidence presented at trial to prove that the card was in fact counterfeit," the continuous conduct rule applies

[21] *Norman*, 157 Cal.App.4th at 466.

because the defendant *has offered essentially the same defense at to both acts*, and there is no reasonable basis for the jury to distinguish between them.[22]

By contrast, the multiple interactions between Hoye and persons entering 200 Webster Street on April 29th and the other such interactions on May 13th were not so closely connected that they formed only one continuing transaction or offense. As noted above, Hoye proffered separate defenses to the nearly thirty transactions that the prosecution identified as evidence to support a conviction of the two counts of violating OMC §8.52.030(b) charged in the complaint. (RT793:27-796:17, 805:8-806:3. 807:9-14, 809:9-25.) This is not a case where the jury's verdict implies that it believed the prosecution's witness and to the contrary did not believe the sole defense offered.[23] Rather here, each member of the jury could have based his or her vote on one, or several, of the acts described by the witnesses and viewed on the video recordings. Equally, each member of the jury could have believed some, or none, of the defenses raised by Hoye as to each encounter. In this situation, there is no way to ensure the jury unanimously agreed on which act formed the basis of Hoye's criminal liability without a specific instruction requiring them to do so.

Finally, even assuming arguendo that Hoye's actions could conceivably be said to constitute a continuous course of conduct, "this is not what the People argued to the jury."[24] Rather, the People argued that there were a number of discrete incidents for the jury to choose from in reaching a verdict. (RT775:24-779:17.) Consequently, the court erred in

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[22] *Percelle,* 126 Cal.App.4th at 181-182; see also, *Dieguez*, 89 Cal.App.4th 266, *People v. Riel* (2000) 22 Cal.4th 1153.

[23] *See e.g.*, *People v. Epps* (1981) 122 Cal.App.3d 691, 695; *Gordon* , 165 Cal.App.3d at 856; *People v. Gonzalez* (1983) 141 Cal.App.3d 786, 791, fn. 5.

[24] *Diedrich*, 31 Cal.3d at 280-81.

refusing to give the unanimity instruction as requested by the defense.

C. ***The error was prejudicial***.

Once this error has been established, the next question is whether the error was prejudicial. "Because jury unanimity is a constitutionally based concept, the defendant is entitled to a verdict in which all 12 jurors concur, beyond a reasonable doubt, as to each count. . . . From this constitutional origin, the principle has emerged that if the prosecution shows several acts, each of which could constitute a separate offense, a unanimity instruction is required."[25] The constitutional basis for this principle dictates that prejudicial error be determined under the *Chapman* test. The Court in *Chapman* held that "before a *federal constitutional error* can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt."[26] Under the *Chapman* test, the reviewing court first asks "whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction" and secondly, requires "the beneficiary of a constitutional error to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained."[27]

In this case, the prosecution cannot say beyond a reasonable doubt that the jury agreed on the particular act constituting "harassment of persons seeking health care" for either count charged. Hoye presented a plethora of defenses to the various transactions described by the witnesses and depicted on video. Furthermore, the prosecution's witnesses gave

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[25] *Melhado*, 60 Cal.App.4th at 1534 (ellipsis and internal quotations omitted).
[26] *Chapman v. California* (1967) 386 U.S. 18, 24 [emphasis added], *Melhado*, *supra*, at 1536 (failure to give unanimity instruction assessed under *Chapman* test); *Gordon*, 165 Cal.App.3d at 855 (same); *People v. Deletto* (1983) 147 Cal.App.3d 458, 471 (same.)
[27] *Ibid*.

differing and often inconsistent accounts, which themselves conflicted with the videotape, of Hoye's interaction with the various passersby in front of 200 Webster Street, thereby leaving plenty of room for doubt as to which, if any, acts constituted a violation of the law. The different defenses gave the jury a rational basis to distinguish between the various acts.[28]

Further, the jurors themselves indicated that they were looking at the acts separately, and were considering different evidence and defenses as applied to different transactions. On January 7, a juror sent a question asking whether an actual victim was named in the charges in counts 1 and 3. (RT401:12-102:3.) The court's response was simply to re-read the complaint to the jury without any further specification (RT402:4-17) leaving the jury with the impression that any of the "acts" could be used to convict Hoye and, more importantly, without the unanimity instruction, that the jurors need not necessarily all agree on which act constituted the violation.

While each juror may have separately found that one interaction or another violated the law, it is completely unknown whether the entire jury all agreed as to which ***specific act*** constituted the violation. Thus, the prosecution cannot say beyond a reasonable doubt that the jury unanimously agreed on ***the act*** constituting "harassment of persons seeking health care," a violation of OMC §8.52.030(b.) This sort of "patchwork verdict" is constitutionally unacceptable.

The court's failure to give a unanimity instruction was an error which cannot be deemed harmless because it cannot be said that, beyond a reasonable doubt, each of the 12 jurors agreed unanimously that the same act constituted a crime.[29] This is reversible error and Hoye respectfully

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[28] *People v. Thompson* (1995) 36 Cal.App.4th 843, 853.
[29] *Chapman,* 386 U.S. at 24; *Melhado*, 60 Cal.App.4th at 1536.

asks this court to reverse the conviction on both counts and grant him a new trial.

II. The court prejudicially erred in failing to properly instruct the jury on the legal definition of "approach," a key element of the crime charged.

A defendant is entitled, upon request, to an instruction that relates particular facts to a legal issue in the case, when there is evidence to support the theory.[30] Hoye is entitled to a new trial because the court erred in refusing to provide the jury with the legal definition of the term "approach" and it appears reasonably probable Hoye would have obtained a more favorable outcome had the error not occurred.[31] A defendant may be granted a new trial whenever the court has misdirected the jury on a matter of law or erred in any other legal ruling.[32]

A. The Court should have given an instruction defining "approach."

Hoye was charged in Counts 1 and 3 with violating OMC §8.52.030(b). OMC Chapter 8.52 appears to be modeled after a Colorado statute that was upheld by the Supreme Court in *Hill v. Colorado*, 530 U.S. 703 (2000). Like the Colorado statute, OMC §8.52.030(b) makes it a crime to "willfully, knowingly, and unlawfully ***approach*** within eight feet" of a person seeking access to a health care facility without the person's consent for the purpose of communicating in various ways with such person. One of the key elements of the crime is whether or not the accused unlawfully "***approached***" one of the persons insulated by the statute.

In interpreting the Colorado statute, the United States Supreme Court stated, "the 'knowingly approaches' requirement…allows a protestor

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[30] *People v. Saille* (1991) 54 Cal.3d 1103, 1119.
[31] *People v. Watson* (1956) 46 Cal.2d 818. 836.
[32] Penal Code §1181(5). The court may properly grant a new trial in cases where the lower court erred in failing to give a required instruction. (*People v. McCord* (1936) 15 Cal.App.2d 136.)

to stand still while a person moving toward or away from a health care facility walks past [him or] her."[33] The Supreme Court went on to note that "the 8-foot zone does not affect demonstrators with signs [and literature] who remain in place."[34]

In light of the Supreme Court's analysis in *Hill*, any interpretation of 'knowingly approach' that does not permit a person to stand near the path of oncoming pedestrians and extend their hand to offer literature is impermissible and incorrect. The jury should have been instructed as follows, "The word 'approach' means to draw closer to. The defendant did not approach a patient if he merely kept pace with or followed beside or behind a patient who was entering the clinic without 'drawing closer' to the patient. The defendant did not approach a patient if he merely stood still while a person seeking entry to the facility walked by, even if the person approached within eight (8) feet of the defendant." The aforementioned instruction was requested by the defense and refused by the court. (CT196-200, 229-232; RT672:21-675:19, 734:28-737:26, 746:9-747:16.) The failure to give such an instruction invites the forewarned constitutional error, which in this case, most certainly occurred. The first question the jury asked during deliberations was "Is there a legal definition of 'approach.' If so, please provide." (CT239.) The defense requested that the definition noted above be given to the jury in response to their request, dated January 13, 2009 and signed by juror No. 10. (RT838:17-840:5) The court, once again, denied the defense's request to define the correct interpretation of "approach." (*Ibid*; CT240.) The court erred in refusing to define and limit "approach" as set forth in *Hill*.

B. The error was prejudicial.

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[33] *Hill v. Colorado* (2000) 530 U.S. 703, 713.
[34] *Id*. at 726-727.

Failure to give an instruction which defines an element of the crime is an error of constitutional dimension.[35] Such an error is prejudicial unless the reviewing court finds "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained."[36] Here quite the opposite is true.

As noted above, the first request made by the jury was for the court to define "approach". It is clear that the jury was uncertain about what conduct was or was not prohibited by the statute. In fact, jurors were free to assume that the word "approach" could include less typical meanings such as "initiate conversation", as, for example, in the sentence "Fred approached Pat about running for mayor." The court's failure to address the jurors' concern essentially invited the jury to come up with their own definition of "approach," and left the jury completely unaware of the correct understanding of "approach" in this precise context, as set out in *Hill*. This legal confusion combined with the myriad of inconsistent testimony, ranging in varying degrees of specificity, about Hoye's exact conduct, in all likelihood resulted in jurors convicting Hoye for simply standing still on a public sidewalk offering literature to passersby – which is ***not*** a crime. This presupposition is supported by the testimony of both Ali and Coleman, both of whom testified that Hoye would routinely stand still, allow patients to pass by and would extend his arm to simply offer them literature. (RT234:12-26,242:9-15,248:26-249:14,251:8-252:2,299:6-22,412:2-28,) Based on the jurors' request for a 'legal definition of approach' and the jury's presumptive reliance on Ali's and Coleman's testimony, it is quite likely that the jury would have reached an entirely different result had the court provided the correct definition requested by the defense and required under current Supreme Court jurisprudence. As

[35] *Neder v U.S.* (1999) 527 U.S. 1
[36] *Chapman*, 386 U.S. at 24

such, having suffered prejudicial error, Hoye is entitled to a new trial to cure the fatal error, which the lower court wrongfully denied. Hoye respectfully asks this court to reverse the conviction on both counts and grant him a new trial.

III. The court erred in placing Hoye on probation after he rejected probation.

Probation is a privilege, an act of grace that a trial court may extend to a criminal defendant. That being said, a criminal defendant is under no compulsion to accept probation. In fact, a criminal defendant has a right to refuse probation if the conditions appear to him to be more onerous than the sentence that might be imposed.[37] The right of a defendant to refuse probation is a necessary safeguard against the possibility that the conditions of probation may be harsher than the sentence he would otherwise receive.[38] When probation is refused, the court must impose a fair and just sentence on the defendant outright.[39]

Here, the court offered to place Hoye on probation with certain terms and conditions he would be required to follow. (RT02/19/09 16:26-18:22,30:19-25.) Hoye respectfully rejected the court's offer because he felt that the three-year 100-yard stay away order from 200 Webster Street was far more onerous than the sentence the court would otherwise impose. (RT02/19/09 18:17-22; 25:18-19 ["However, as the Court has set forth here in court, Mr. Hoye is refusing those terms and conditions today"].) Over both the above objection of the defense *and the written objection of the prosecution* (CT349-351), the court refused to acknowledge Hoye's right to refuse probation and put Hoye on three years' informal probation under the

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[37] *People v. Osslo* (1958) 50 Cal.2d 75, 103.
[38] *People v. Frank* (1949) 94 Cal.App.2d 740, 742, quoting *People v. Billingsley*, 59 Cal.App.2d Supp. 845, 849.
[39] *People v. Osslo* (1958) 50 Cal.2d 75, 103, quoting *Frank*, 94 Cal.App.2nd at 741-742. *See also*, *People v. Olguin* (2008) 45 Cal.4th 375, 379; *In re Osslo* (1958) 51 Cal.2d 371, 377.

following terms and conditions: serve 30 days in jail, pay a $1,000 fine, pay an additional $130 restitution fine/court security fee, obey all laws, stay 100 yards away from 200 Webster Street in Oakland. (RT02/19/09 23:6-25; CT333, 349-352) Court-ordered probation without Hoye's assent is illegal and unenforceable. (CT349-351.) Thus, if this court denies Hoye's request for a new trial, Hoye respectfully asks this court to reverse the probation order and deem the trial court's order to serve 30 days in jail, pay a $1000.00 fine, and pay a $130 restitution fine/court security fee as the sentence.

IV. Hoye's Due Process rights were violated because the accusatory pleading herein failed to adequately advise Hoye of the charges against him.

The function of criminal pleadings in California is to give an accused adequate notice of the charges against him. Though the particular circumstances of the charge need not be alleged, sufficient notice to satisfy due process must be given.[40]

A bare literal compliance with Penal Code §952 is insufficient where a pleading in the words of the statute fails to give constitutionally adequate notice of the offense. Where the defendant's conduct has allegedly produced several unlawful acts, any one of which might support the criminal charge, it is not sufficient for the prosecution to file an accusatory pleading worded in the language of the statute. The defendant is entitled to be advised with some particularity which of the several available factual theories on which the People will rely.[41] Above all other things, the charge must be so certain that a court would be able to pronounce judgment upon

[40] People v. Jackson (1978) 88 Cal. App. 3d 490.
[41] Lamadrid v. Municipal Court (1981) 118 Cal. App. 3d 786, 791.

conviction, and the defendant in the event of either an acquittal or conviction could not be tried again for the same offense.[42]

The accusatory pleading in this case did not adequately advise Hoye of the charges against him. The chief problem with Counts 1 and 3 is that they give Hoye insufficient information with which to mount a defense. Taken to their core, both counts simply state that Hoye "willfully, knowingly and unlawfully approached . . . within eight feet of an occupied vehicle and a person seeking to enter said facility for the purpose of counseling, harassing or interfering with said person and without the consent of said person". This is a specific intent crime. As the language of the complaint suggests, the prosecution must prove that at the time of the approach (a) the victim was intending to enter a facility, (b) the defendant knew this intent, and (c) the victim failed to give permission for the approach.

Hoye needs to know the identity of the alleged victim in order to fully prepare a defense. As an example, assume a defendant is accused of assault with a deadly weapon by shooting a bullet into a crowd of strangers. The crowd disperses instantly but a bystander looking through the window of a building sees the incident. The alleged perpetrator can easily prepare his defense because the mere single act of shooting into a random crowd would complete the offense. Here, however, defendant can only be convicted if the victim had a specific intention to enter a clinic, the defendant knew of that intention, and the victim failed to give consent. This is not the sort of reckless crime in which one can be convicted merely by the testimony of a distant bystander. Rather, both the prosecution and the

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[42] *People v. Horiuchi* (1931) 114 Cal.App. 415, 422.

defense of this crime necessitate identifying a precise alleged victim, acting in a particular way and possessed of a certain state of mind.

Thus, the difficulty with the complaint's language is that it provides absolutely no notice to Hoye as to the identity of the alleged victim. There is no way to interview the alleged victim or confirm whether he or she was "seeking to enter said facility" as alleged in the complaint. It is not possible to ask potential witnesses if they saw any interaction between Hoye and the particular victim the prosecution has in mind because there is no known victim. This is insufficient information on which to prepare a defense.

Our Supreme Court has stated that "the name of the party assaulted is a material element of the offense, and common justice to the defendant demands that he be notified of the particular offense for which he stands committed."[43]

The People were essentially asking the jury to convict Hoye for intentionally counseling a person whose identity was and still remains a secret. The court was asked to direct the prosecution to give sufficient information so that defense counsel could properly prepare a defense and the court declined this request. (CT10-18,23.) The failure to provide the name, or at the least a description of, the purported victim for counts 1 and 3 has resulted in irreversible prejudice to Hoye.

CONCLUSION

The court erred by misdirecting the jury concerning the law. In one instance, the court erred by refusing to give a unanimity instruction after the prosecution declined to elect a specific act to rely on to prove Hoye's

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[43] *People v. Christian* (1894) 101 Cal. 471, 473; *accord Canon v. Justice Court* (1964) 61 Cal.2d 446 (noting that failure to apprise the defendant of the name of his victim "might be a ground for forcing the prosecution to amend the complaint").

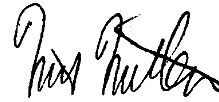
guilt. Additionally, the court erred by refusing to define a key element of the crime – namely, the word "approach." Each of these errors implicates Hoye's constitutional rights and irreversibly caused him undue prejudice. It simply cannot be said of either error that *beyond a reasonable doubt* these defects did not contribute to the guilty verdict.

Hoye respectfully asks this court to reverse the conviction on both counts and grant him a new trial and order the prosecution to amend counts 1 and 3 to name and identify the alleged victims. Alternatively, if this court denies Hoye's request for a new trial, Hoye asks this court to reverse the probation order and deem the trial court's order to serve 30 days in jail, pay a $1000.00 fine, and pay a $130 restitution fine/court security fee as the sentence.

CERTIFICATION BY COUNSEL
PURSUANT TO CRC RULE 8.883(b)(1)

I am appellate counsel for defendant Walter B. Hoye, II. This brief was prepared using my computer program's word processing software which shows a word count (including footnotes) of 6,727 words.

Dated: December 1, 2009



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PROOF OF SERVICE
(*People v. Hoye*, Appeal #4961)

I am an active member of the State Bar of California and am not a party to this cause. My business address is 119 Calle Marguerita #100, Los Gatos, CA 95032. On the date indicated, I served a copy of:

1. Opening Brief of Defendant-Appellant Walter B. Hoye, II

by depositing each of them in a sealed, postage-paid envelope in the United States mail in Los Gatos, CA, on the date indicated below, said envelope being addressed to:

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

Dated: December 1, 2009 By:
Michael Millen