COURT OF APPEALS, STATE OF COLORADO 101 West Colfax Avenue, Suite 800 Denver, CO 80202	
Appeal from the District Court, Adams County Honorable Patrick T. Murphy, Judge Case Nos. 09CR1158 and 09CR2365	
Plaintiff-Appellee: THE PEOPLE OF THE STATE OF COLORADO **Defendant-Appellant:** VICTOR ARNOLD GABLER	**▲COURT USE ONLY▲** Case No. 11CA1553
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Opening Brief	

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 5,710 words.

☐ It does not exceed 30 pages.

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, not to an entire document, where the issue was raised and ruled on.

☐ 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.

s/ Norman R. Mueller

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STATEMENT OF THE CASE

A. Procedural Statement

Mr. Gabler went to trial in April 2011 in Adams County District Court in two cases consolidated for trial. Both cases arose out of Mr. Gabler's relationship with Lori Marquez. In Case No. 09CR1158, Mr. Gabler faced felony charges of robbery, stalking and vehicular eluding and misdemeanor charges of obstruction of telephone or telegraph service and third degree assault. (V.1,pp.1-3) In Case No. 09CR2365, Mr. Gabler faced felony charges of intimidation of a witness, two counts of stalking and a misdemeanor charge of violation of a protection order. (V.2,pp.326-27;356-57) The jury acquitted Mr. Gabler of the robbery charge but convicted him of all other charges. (V.1,pp.228-40)

A trial to the court was later held on habitual criminal charges filed in both cases, and the court found Mr. Gabler to be a habitual criminal. (6/10/11,p.42) On June 17, 2011, the trial court sentenced Mr. Gabler and enhanced all felony sentences under the habitual criminal act. The court also ordered all felony sentences to run consecutive to each other, as well as the misdemeanor sentence for violation of a protection order, resulting in a cumulative sentence of 77.5 years. (V.1,p.261;V.2,p.385,414)[1]

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[1] The court's sentences in Case No. 09CR1158 were sixteen years on the stalking charge and twelve years for vehicular eluding. In Case No. 09CR2365,

Defendant's timely notice of appeal, filed on August 1, 2011, perfected this appeal.

B. Statement of Facts

The charges in Case No. 09CR1158 concern events in April 2009, and the charges in 09CR2365 resulted from events in August 2009.

Lori Marquez and Mr. Gabler were involved in an intimate relationship from 1993 until late in 1996. After their relationship ended Ms. Marquez had Mr. Gabler's son, but she did not inform Mr. Gabler at the time. In 2009, Ms. Marquez and Mr. Gabler renewed their acquaintanceship in connection with their son. (4/12/11,pp.34-35;Exh.E)

On the afternoon of April 3, 2009 Mr. Gabler came to Ms. Marquez's Northglenn house to retrieve some of his property. According to Ms. Marquez, Mr. Gabler took her phone and then assaulted her. When she attempted to call 911, Mr. Gabler broke her phone. (4/12/11,pp.36-39)

The stalking charge arose from numerous phone calls, text messages and emails between the two during the ensuing week to ten days. Ms. Marquez told police that after Mr. Gabler took her cell phone, she obtained a new phone and a new unpublished phone number. She also claimed that Mr. Gabler continued to

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after finding with the agreement of the district attorney that the two stalking charges merged, the court imposed sentences of twenty-four years for intimidating a witness, twenty-four years for stalking and eighteen months for violation of a protection order.

contact her on the new phone number, having obtained the number through a friend of his at T-Mobile. (4/12/11,pp.99-102) That claim proved untrue as Ms. Marquez testified at trial that while she initially froze her phone number, she unfroze it later and continued to have contact with Mr. Gabler using her old phone number. (4/12/11,pp.53-54) Phone records established hundreds of text messages and phone calls between the two during this time period, many initiated by Ms. Marquez. (Exh.A;4/12/11,pp.107-12)

On April 16, Ms. Marquez was driving several blocks from her work when she encountered Mr. Gabler at a stop light. Mr. Gabler approached her car and gave her some shirts for their son through her open window. (4/12/11,pp.56-57) When Ms. Marquez reported this encounter to the Northglenn police, a sting operation to arrest Mr. Gabler later that day was devised. Ms. Marquez told Mr. Gabler she had an appointment at Kaiser later that day. (4/12/11,p.58) When Mr. Gabler was seen in the vicinity of Kaiser, he was pursued by unmarked police cars but left the scene and was not apprehended. (4/13/11,pp.40-44)

The next day, Mr. Gabler was arrested by Kansas Highway Patrol after a high speed chase. The details of that high speed chase were admitted over defendant's objection. (4/12/11,pp.141-52)

The charges in 09CR2365 involve events in August 2009. Ms. Marquez testified that she was contacted repeatedly by Mr. Gabler in phone calls from the

Boulder County Jail. (4/12/11,pp.74-75) When Mr. Gabler was released from the Boulder Jail, he continued to contact her. According to Ms. Marquez, Mr. Gabler made threats to her and to her boyfriend and now fiancé, Brian Birch. (4/12/11,pp.86-87)

SUMMARY OF THE ARGUMENT

Mr. Gabler's trial and sentencing were riddled with constitutional errors for which he is entitled to relief.

On all counts other than the stalking charge brought under Case No. 09CR1158, which must be vacated for insufficient evidence, he is entitled to a new trial. He was prejudiced by the improper admission, and the jury's unfettered consideration, of irrelevant and prejudicial evidence of the details of a high-speed car chase through Kansas. The court ruled incorrectly that the incident was *res gestae*. In fact, the incident bore no legal relationship to any charged offense.

He is entitled to a new trial on the charge of witness intimidation because the jury received a constitutionally deficient instruction describing the elements of this offense. The court failed to instruct the jury that to convict it had to find beyond reasonable doubt that Mr. Gabler acted with the specific intent to influence a witness' testimony. None of the other instructions addressed this issue or cured this omission, even though the issue was in play throughout the trial.

His conviction for stalking (between April 7 and April 17, 2009) as charged under Case No. 09CR1158 must be vacated and the charge dismissed because the evidence is insufficient to support this conviction. When the numerous contacts encouraged and initiated by the alleged victim during this time period are eliminated, Mr. Gabler's single in-person contact with the victim is not sufficient in number to satisfy the stalking statute.

Finally, the habitual criminal sentences for convictions arising out of case no. 09CR1158 were obtained in violation of Mr. Gabler's right to due process of law and must be vacated. The prosecution had agreed, in writing, that it would not file habitual criminal counts in that case if he waived his statutory right to a preliminary hearing. Mr. Gabler is entitled to full enforcement of that promise because kept his end of the bargain.

ARGUMENT

I. THE TRIAL COURT DENIED MR. GABLER HIS CONSTITUTIONAL RIGHT TO A FAIR TRIAL BY ADMITTING IRRELEVANT AND HIGHLY PREJUDICIAL EVIDENCE OF THE DETAILS OF A HIGH SPEED CHASE IN KANSAS.

A. Standard of Review, Preservation

Evidentiary rulings are reviewed for abuse of discretion. *People v. Lowe*, 660 P.2d 1261 (Colo.1983). A trial court's decision to admit other act evidence will be overturned if the ruling is manifestly arbitrary, unreasonable or unfair. *Yusem v. People*, 210 P.3d 458, 463 (Colo.2009).

The district attorney filed a motion in Case No. 09CR1158 seeking to admit other act evidence, including the details of the high speed chase in Kansas that resulted in Mr. Gabler's arrest. The prosecution argued that the evidence was admissible as *res gestae*, or in the alternative was admissible under CRE 404(b). (V.1,pp.126-130) The defense filed a written objection to the prosecution's motion. (V.1,pp.136-40) On the first day of trial prior to jury selection the trial court ruled that evidence of the Kansas chase was admissible. The trial court did not rule whether the evidence was admissible as *res gestae* or under Rule 404(b). (4/11/11 pp.14-15) Subsequently, the court reaffirmed its ruling and held that evidence of the Kansas chase was admissible as *res gestae*. (4/12/11,p.26) The defense renewed its objection to the evidence and offered to stipulate that Mr. Gabler had fled to Kansas and was arrested in that state. (4/12/11,pp.22,143)

B. Relevant Facts

Trooper Travis Phillips of the Kansas Highway Patrol was contacted by Colorado investigators and informed that Mr. Gabler was near Oakley, Kansas, on I-70 driving a black Range Rover. The trooper was in Wakeeney, Kansas, so he began driving west. He contacted Mr. Gabler driving east in the Range Rover. The trooper began following Mr. Gabler and ran the plates on the Range Rover, which came back as belonging to a 2004 Buick. (4/12/11,p.142)

When the trooper called for back-up and a second trooper arrived, the Range Rover switched lanes and sped away. Along with a deputy sheriff, the two state troopers began chasing Mr. Gabler at speeds of 120 mph. It was raining hard and when the trooper began hydroplaning, he slowed his speed. Shortly thereafter, Mr. Gabler's vehicle rear-ended another vehicle and crashed into the median. The high speed chase had lasted approximately three miles. (4/12/11,pp.144-45)

Mr. Gabler left his vehicle, went over a fence and began running. The trooper gave chase and using Mr. Gabler's name, ordered him to stop. The trooper had his gun drawn and told Mr. Gabler several times to get his hands out of his pockets because of the trooper's concern Mr. Gabler had a weapon. (4/12/11,p.146)

When the trooper pulled his tazer and threatened to use it, Mr. Gabler surrendered. The trooper chased Mr. Gabler less than a quarter of a mile before apprehending him. (4/12/11,p.147) Mr. Gabler asked the trooper if he'd been looking for him long and told the trooper that he had been texting a detective in Colorado about false stalking charges made by his girlfriend. (4/12/11,p.148)

C. The Evidence Was Not Admissible As *Res Gestae*

Res gestae is a theory of relevance that recognizes that certain evidence is relevant because of its unique relationship to the crime charged. *See People v. Rollins*, 892 P.2d 866, 872-73 (Colo.1995) ("*[R]es gestae* evidence is...incidental

to the main fact and explanatory of it...[and is] so closely connected therewith as to constitute a part of the transaction, and without knowledge of which the main fact may not be properly understood.") (internal quotations omitted); *People v. Quintana*, 882 P.2d 1366, 1373 (Colo.1994) (explaining that *res gestae* is "generally linked in time and circumstances with the charged crime, or forms an integral and natural part of an account of the crime, or is necessary to complete the story of the crime for the jury") (internal quotations omitted).

The details of the Kansas high speed chase have nothing to do with the charge faced by Mr. Gabler in his trial. The I-70 chase did not form "an integral and natural part of an account of the crime," nor is it "necessary to complete the story of the crime."

The defense offered to stipulate to the relevant evidence concerning Mr. Gabler's arrest in Kansas. The offered stipulation would have established that Mr. Gabler fled to Kansas and was arrested there. That Mr. Gabler was driving a Range Rover with license plates listed to a Buick, was involved in a high speed chase for up to three miles in the rain, was involved in a collision with another vehicle and was chased through a field by a state trooper with his gun drawn, who had the unfounded fear that Mr. Gabler had a weapon were all irrelevant details.

Whatever probative value can be conjured for this evidence is substantially outweighed by the danger of unfair prejudice. As explained in *Vialpando v. People*, 727 P.2d 1090, 1096 (Colo.1986),

> [t]he balancing required by [CRE] 403 contemplates the consideration of such factors as the importance of the fact of consequence for which the evidence is offered, the strength and length of the chain of inferences necessary to establish the fact of consequence, the availability of alternative means of proof, whether the fact of consequence for which the evidence is offered is being disputed and, if appropriate, the potential effectiveness of a limiting instruction in the event of admission.

The prejudice of the evidence of the Kansas high speed chase is obvious and it was error to admit this evidence over the continuing objection of the defense. Details of the high speed chase were not an integral part of any crime charged and were not "necessary to complete the crime's story for the jury," especially in light of the defense's offered stipulations. *People v. Blackwell*, 251 P.3d 468, 476 (Colo.App.2010) (evidence of second car speeding away from scene of murder not admissible as *res gestae*).

II. THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY FAILING TO CORRECTLY INSTRUCT THE JURY ON THE MENS REA REQUIRED FOR WITNESS INTIMIDATION.

A. Standard of Review, Preservation

Errors in elemental instructions are trial errors of constitutional magnitude, and when preserved by objection they are reviewed for constitutional harmless error. *Griego v. People*, 19 P.3d 1 (Colo.2001).

Trial courts have a duty to correctly instruct juries on all matters of law. *People v. Garcia*, 28 P.3d 340, 343 (Colo.2001). The appellate court reviews jury instructions *de novo* to determine whether the instructions as a whole accurately informed the jury of the governing law. *Day v. Johnson*, 255 P.3d 1064, 1067 (Colo.2011); *People v. Lucas*, 232 P.3d 155, 162 (Colo.App.2009).

Mr. Gabler challenged the prosecution's witness intimidation instruction and tendered an alternative instruction. (V.1,p.193,221;4/14/11,pp.4-9)

B. Instruction 23 Incorrectly Stated The Law

Instruction 23 was intended to state the elements of the offense of witness intimidation under § 18-8-704(1)(d), C.R.S. (2011). Drafted by the prosecution to strictly conform to the statutory language and its theory of the case, the relevant language of Instruction 23 reads:

> The elements of the crime of intimidating a Witness or Victim are:
>
> 1. That the defendant,...
>
> *****
>
> 3. by use of a threat, an act of harassment, or act of harm or injury to any person or property
>
> 4. directed to or committed upon Lori Marquez, a person he believed had been or was to be called to testify as a witness or victim,
>
> 5. intentionally attempted to or did inflict such harm or injury prior to the testimony or expected testimony.

(V.1,p.221)

Defendant objected to Instruction 23, arguing that it inadequately and incompletely described the intent necessary to establish witness intimidation under the statute:

> What I think seems to be missing is ...any element which ties this to the testimony itself, ...and so I wrote, you know a new instruction. And what I added was an element with the intent to influence the witness' testimony. And the way the statute is written, they have the four ways that... you can intimidate a witness. [Three of those ways] very clearly indicate it's a –with the intent to influence the witness' testimony.
>
> And it's sort of absent... on the fourth one [that the prosecution is proceeding under], but I think that has to be read...into the statute. Otherwise, it doesn't make any sense. There has to be a connection between the inflicted harm or injury and tampering with a witness because that's what the statute is. So I think 18-1-503, which is construction of statutes with respect to culpability requirements, requires that the culpable mental state be read into the statute.

(4/14/11,pp.5-6) Counsel's proposed alternative instruction added "specific intent to influence a witness' testimony" as element 4, setting this specific mental state requirement apart from the acts generally described at element 5 of the prosecution's instruction. (V.1,p.193) The prosecution conceded the intimidation statute was confusing on its face but claimed the court had no authority to go beyond the statute's language to instruct the jury.

Incorrectly, the court took the narrowest possible approach to the issue: it rejected Mr. Gabler's instruction and ruled it would not include the phrase "specific intent to influence a witness' testimony" in Instruction 23 because that

language does not appear in § 18-8-704(1)(d). (V.1,p.193,221;4/14/11,p.9) This was reversible error.

The United States and Colorado Constitutions guarantee the defendant in a criminal case both the right to have a jury decide his case and the right to have the prosecutor prove to that jury, beyond a reasonable doubt, every element of the charged offense. *See* U.S. Const. art. III, § 2; U.S. Const. amends. V and XIV, § 1; Colo. Const. art. II, §§16, 23 and 25. To preserve these guarantees, the trial court is required to properly instruct the jury on every element of a crime. *Griego*, 19 P.3d at 7.

Appellate courts often say that elemental jury instructions should "track the language" of the governing statute. *See, e.g., People v. Weinreich*, 119 P.3d 1073, 1076 (Colo.2005). But this statement, like many legal maxims, is true only up to a point. When a statute is poorly written, as is the case with §18-8-704(i)(d), it is wrong to give a narrowly written jury instruction that fails to illuminate or clarify the statutory language. *See, e.g., Leonard v. People*, 149 Colo. 360, 374, 369 P.2d 54, 62 (1962) (generally the giving of instructions in the language of the statute is proper, but supplemental instruction should be given when the statute itself is confusing).

Courts are tasked with discerning and effectuating the intent of the General Assembly based on the statutory language and legislative history. *See, e.g., People*

v. Hickman, 988 P.2d 628, 644-45 (Colo.1999) (holding that the offense of retaliation against a witness, which contains no reference to mental state, necessarily involves the culpable mental state of "intentional" because the statutory language and legislative scheme required that the defendant act with a specifically defined conscious objective).

Section 18-8-704 is part of the "Colorado Victim and Witness Protection Act of 1984," § 18-8-701, C.R.S. 2011. This Act is designed to protect a person involved in a trial from bribery, intimidation, and tampering. *Hickman*, 988 P.2d at 645. Section 18-8-704 is actually titled "Intimidating a witness or victim." Given its title and the location of § 18-8-704 within the Act, it is proper to infer that the legislature intended every section of the statute to prohibit conduct specifically undertaken to influence or interfere with anticipated testimony, even if such language is inexplicably missing from § 18-8-704(1)(d). *See id.* (inferring specific intent to retaliate against witness from the retaliation statute's title and its inclusion within the Victim Witness Protection Act).

Instruction 23 contains no language that addresses what is, implicitly, the gravamen of the crime of witness intimidation—that the conduct prohibited by § 18-8-704(1)(d), like all conduct prohibited under § 18-8-704 and the broader statutory scheme, was undertaken with the specific intent to influence a witness'

testimony. The instruction therefore fails to adequately describe on essential the element of this offense and is constitutionally defective.

C. The Error Was Not Harmless

When constitutional error is preserved, reversal is mandated unless the prosecution can establish the error was harmless beyond a reasonable doubt. *Thomas v. People*, 803 P.2d 144, 154 (Colo.1990); *People v. Torres*, 224 P.3d 268, 278 (Colo.App.2009); *People v. Butler*, 224 P.3d 380, 386 (Colo.App.2009).

The constitutional harmless error test "is not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in this trial was surely unattributable to the error." *People v. Herrera*, 87 P.3d 240, 251 (Colo.App.2003), citing *Bernal v. People*, 44 P.3d 184 (Colo.2002).

An appellate court applying this standard must examine the facts of the case to determine whether the error affected its outcome, *Topping v. People*, 793 P.2d 1168 (Colo.1990), looking to the entire record, including the jury instructions, the evidence and arguments presented at trial. *See Neder v. United States*, 527 U.S. 1 (1999); *People v. Harlan*, 8 P.3d 448 (Colo.2000). Taking all these factors into consideration, the error in this case was not harmless.

First, the error is not harmless in light of all the instructions. Neither the so-called "joint operation" instruction (Instruction 9,V.1,p.204) nor the presence of

the word "intentionally" in Instruction 23 informs the jury that it must find a link between the specific conduct charged and the specifically unlawful intent to influence a witness in order to convict on the witness intimidation charge.

In fact, the joint operation instruction is at odds with Instruction 23. Because it merely parrots a badly-worded statute, Instruction 23 improperly suggests that proof of *either* an intentional attempt to harm or injure, *or the harm itself without regard for intent,* will establish that element of the offense. *See* § 2-4-214 (rejecting the rule of statutory construction that relative and qualifying words and phrases, where no contrary intention appears, are construed to refer solely to the last antecedent with which they are closely connected).

This confusion could have been avoided if the mens rea elements were set apart in the instruction, which is the form the prosecution adopted for every other elemental instruction it tendered and which is the form proposed by Mr. Gabler's instruction. *Compare* Instructions 11-14, 17, 21-22 (V.1,pp.206-209,213,218-19) *and* Defendant's Tendered Instruction *with* Instruction 23. (V.1,pp.193,221) The offset form makes clear that the mental state applies to every element that follows. *People v. Rodriguez*, 914 P.2d 230, 273 (Colo.1996) ("'knowingly,' when offset from other elements, modifies all succeeding conduct elements"); *see People v. Bossert*, 722 P.2d 998, 1011 (Colo.1986) (approving instruction in which "knowingly" element set out in instruction as first element and all others described

under number two); *People v. Stephens*, 837 P.2d 231, 233 (Colo.App.1992) (approving instruction that lists "knowingly" element as number 3 and each later element assigned separate number). In sum, the other instructions do not cure the error in Instruction 23.

Nor is the error harmless in light of the rest of the record. The witness intimidation charge, like all the charges, was hotly contested at trial. The defense moved for judgment of acquittal on that charge at the conclusion of the prosecution's evidence (4/13/11,pp.177-180) and did not concede this or any charge in closing arguments. (4/14/12, pp. 53-78,86) The prosecution wholly failed to tie any of defendant's alleged threats to a belief or expectation that the alleged victim was going to be a witness in a court proceeding. At best, the evidence established that defendant was angry about being falsely accused of the first stalking charge.

The error in Instruction 23 thus cannot be ruled harmless beyond a reasonable doubt. Accordingly, this court must vacate Mr. Gabler's conviction for witness intimidation.

III. THE EVIDENCE WAS INSUFFICIENT TO SUPPORT A CONVICTION OF THE STALKING CHARGE IN CASE NO. 09CR1158.

A. Standard of Review, Preservation

This court reviews *de novo* whether sufficient evidence exists to support a defendant's conviction. *Dempsey v. People*, 117 P.3d 800, 807 (Colo.2005). A

sufficiency of the evidence claim may be raised for the first time on appeal. *See Morse v. People*, 168 Colo. 494, 452 P.2d 3, 5 (1969); *see also People v. McBride*, 228 P.3d 216, 226 (Colo.App.2009) (a *de novo* standard of review applies to sufficiency claims, "even where...a defendant failed to preserve the challenge by raising it in the trial court"); *People v. Duncan*, 109 P.3d 1044, 1045 (Colo.App.2004) ("[A] sufficiency of the evidence claim may be raised for the first time on appeal..."); *People v. Peay*, 5 P.3d 398, 400 (Colo.App.2000) ("reject[ing] the People's contention that defendant failed to preserve the issue of the sufficiency of the evidence...because he failed to raise it in his motion for acquittal").

In this case Mr. Gabler moved for a judgment of acquittal at the close of the prosecution's case and at the close of all the evidence. (4/13/11,pp.177-80; 4/14/11,p.9)

B. There Was Insufficient Evidence To Support Mr. Gabler's Conviction For Stalking From April 7, 2009 Through April 17, 2009

To convict Mr. Gabler of the crime of stalking for the period of April 7-April 17, 2009, under count 2 of the information in 09CR1158, the prosecution was required to prove that Mr. Gabler knowingly, directly or indirectly through another person, repeatedly followed, approached, contacted, placed under surveillance or made any form of communication with Lori Marquez, a person with whom Mr. Gabler has or has had a continuing relationship in a manner which

would cause a reasonable person to suffer serious emotional distress, and caused Ms. Marquez to suffer serious emotional stress. (*See* Instruction 12, V.1,p.207) The evidence is undisputed that the contacts between Mr. Gabler and Ms. Marquez during the time frame relevant to this charge were encouraged by Ms. Marquez and reciprocated by her. In fact, she initiated many of the contacts with Mr. Gabler. Under these circumstances, this conviction for stalking cannot stand.

First, there was only one instance of personal contact during this time period. That contact in person occurred when Ms. Marquez encountered Mr. Gabler stopped at a stop light near her workplace and he gave Ms. Marquez clothing for their son. Ms. Marquez reported this encounter, and her subsequent contact with Mr. Gabler by phone and email was an attempt to have him arrested. This evidence is insufficient to establish the offense of stalking. *People v. Herron*, 251 P.3d 1190, 1194 (Colo.App.2010) (stalking not established unless there is conduct comprising two or more occurrences of the specified acts).

Moreover, it was undisputed that after the events of April 3, and prior to the issuance of a restraining order, the parties exchanged hundreds of text messages, phone calls and emails in the following days. (Exh.A) Ms. Marquez admitted that she initiated many of those contacts and responded to many from Mr. Gabler. She also admitted lying to the investigating detective when she reported that she had obtained a new phone, a new phone number and that Mr. Gabler had nevertheless

obtained the new unpublished phone number from a friend at T-Mobile. In fact, Ms. Marquez was using her old phone number.

Ms. Marquez claimed that she continued to have contact with Mr. Gabler in an effort to persuade him to turn himself in and to keep track of him. Ms. Marquez' phone records, introduced by the defense, established hundreds of contacts between the parties. For example, Marquez admitted that she texted Mr. Gabler 249 times in a three or four day period. (4/12/11,p.112) Phone calls between the two were repeated and lengthy, many initiated by Ms. Marquez. (4/12/11,pp.117-20) For example, on April 7, Ms. Marquez called Mr. Gabler 10 times with five of those calls lasting 10 minutes or longer. Mr. Gabler called her 3 times that day and at 11:30 p.m. they spoke for 31 minutes. (Exh.A,p.28 of 83)[2] The evidence establishes unequivocally that these contacts were not unwanted on the part of Ms. Marquez and do not, as a matter of law, constitute stalking.

That Mr. Gabler had no reason to suspect, let alone know, that Ms. Marquez would later claim the hundreds of text message and phone calls in April were unwanted is confirmed by the two love letters Ms. Marquez sent him later in April while he was in the Kansas jail:

> Hi Honey..I was so thankful to hear from you, ... The night I saw you I felt my world open. I had hope everything was going to be ok someday...The pain I felt when I heard you had a daughter almost did me in. I wanted to experience a family with you...I love you so so

[2] Mr. Gabler's phone number was 303-359-1248. (*see* 4/12/11,pp.117-120)

> much, but this has been so painful...I am going to send this out with stamps for you and write more later. I love you, Lori. P.S. I will send the other letters tomorrow. I love you and always have. Xoxoxo kisses...by the way I love you more. (Exh. E)
>
> Vic, Hi sweets!...I sit here in bed and look around my room and can feel you here with me. I wake up in the night and reach for you also...I wish we were on a desert island the four of us! Laughing around the fire at night, playing in the clear water and "us" making love in the rain! I have always wanted to take care of you and give you lots of love, because you never had it before me. I have always had you in my heart and on my mind...I miss you so much, I hate that this is where we are at...If I could just see you. (Exh. F)

Those letters simply corroborate the fact that the contact between the parties in April was not a case of stalking by Mr. Gabler.

IV. MR. GABLER'S SENTENCES AS A HABITUAL CRIMINAL IN CASE NO. 09CR1158 MUST BE VACATED BECAUSE THE PROSECUTION AGREED NOT TO FILE HABITUAL CRIMINAL COUNTS IN THAT CASE.

A. Standard of Review, Preservation

The meaning of a plea agreement is a question of law subject to *de novo* review. *St. James v. People*, 948 P.2d 1028, 1032 (Colo.1997). Whether a party has breached an agreement is left to the discretion of trial court. *People v. Sanders*, 220 P.3d 1020, 1024 (Colo.App.2009).

Defense counsel filed an objection to the habitual criminal counts being added. (V.1,p.134) Mr. Gabler filed a *pro se* motion for new trial, which the trial court summarily denied. (V.1,pp.241-58)

B. Relevant Facts

While initially represented in Case No. 09CR1158 by the public defender, Mr. Gabler agreed to waive his preliminary hearing in return for the promise by the district attorney that habitual criminal charges would not be filed in that case. The prosecutorial promise was not contingent on any ultimate plea agreement in the case and was unequivocal, stating "DA will not file habitual criminal charges." (V.1,p.15)[3]

The public defender's office subsequently withdrew as counsel for Mr. Gabler and alternate defense counsel was appointed. (V.1,p.16-19) Several months later on September 22, 2009, the prosecution filed a motion to add habitual criminal counts. (V.1,p.20-22) The defense filed a motion to dismiss the habitual criminal counts and an objection to their filing. (V.1,pp.115-17;134) The State's motion was not ruled on while the case was delayed dealing with Mr. Gabler's competency and sanity issues. A year after its first motion, the district attorney filed a new motion to add habitual criminal counts on September 29, 2010. (V.1,p.122)

At a hearing on October 22, 2010, the prosecutor noted the pending motion and defendant again objected. The trial court took the matter under advisement but no ruling was forthcoming. (10/22/10,pp.30-32) Shortly before commencement of

[3] A copy of the waiver of preliminary hearing form is attached as Exhibit A. A copy of this form was also attached to Mr. Gabler's new trial motion. (V.1,p.256)

trial, the addition of the habitual criminal counts was presented to the senior judge presiding at the motions hearing. The motion was granted and habitual criminal counts were added. (3/4/11,p.49)

After the jury returned a verdict convicting Mr. Gabler of two felony counts in that case number 09CR1158, the trial court found Mr. Gabler to be a habitual criminal. Enhanced sentences on the two class 5 felonies were then imposed by the trial court, sixteen years for stalking and twelve years for vehicular eluding. Those two sentences were ordered to be served consecutively with each other and with all other felony sentences. (V.1,p.261;V.2,p.385,414)

C. Due Process Requires the Enforcement of the Prosecutorial Promise Not to File Habitual Criminal Charges in 09CR1158

"The due process clauses of the United States and Colorado Constitutions provide the bases (sic) for enforcing a governmental promise made to an accused in connection with plea negotiations." *People v. Garcia*, 169 P.3d 223, 228 (Colo.App.2007); *see Santobello v. New York*, 404 U.S. 257, 262 (1971). "When a defendant has reasonably relied to his detriment on a government promise made during plea bargaining, he is entitled to enforcement of that promise." *Garcia*, 169 P.3d at 228, quoting *People v. Fanger*, 748 P.2d 1332, 1333 (Colo.App.1987). The promise need not arise in the context of a formal plea bargain. Where, as here, a defendant has detrimentally relied on a prosecutorial promise, he is entitled to

specific performance of a government promise. *People v. Macrander*, 756 P.2d 356, 360 (Colo.1988).

Macrander is on point. In that case, the defendant waived his right to a preliminary hearing in an Arapahoe County case in reliance on a proffered plea agreement. That agreement contemplated felony guilty pleas in the Arapahoe County case and another pending in Denver District Court. The agreement also provided that no new charges would be filed in Arapahoe County. Unbeknownst to the parties, another case had already been filed in Arapahoe County. The Supreme Court upheld the district court's order granting specific performance of the plea agreement and requiring the dismissal of the previously filed Arapahoe County case.

The defendant's waiver of his right to a preliminary hearing constituted detrimental reliance and entitled him to specific performance of the prosecutor's promise. As Justice Rivera summarized in *Macrander*:

> The basis for enforcing promises the prosecution makes to a defendant is found in the due process clause of the fourteenth amendment and its requirement that an accused "be treated with 'fairness' throughout the [criminal] process...." *People v. Fisher*, 657 P.2d 922, 927 (Colo.1983), quoting *Cooper v. United States*, 594 F.2d 12, 16 (4th Cir.1979); *Santobello v. New York*, 404 U.S. 257, 262, 92 S.Ct. 495, 498, 30 L.Ed.2d 427 (1979). That right to fairness requires, in turn, that "when a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled." *Santobello*, 404 U.S. at 626, 92 S.Ct. at 499. The rationale of *Santobello* clearly extends beyond those cases in which a defendant's

> reliance takes the form of a guilty plea. *Fisher*, 657 P.2d at 927-30 (defendant relied on government's promise by participating in videotaped interview during which he discussed his commission of several crimes).

Id. at 359.

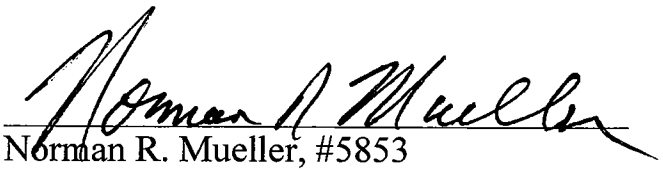
Due process and fundamental fairness require that the prosecution's promise be enforced in this case. Mr. Gabler's sentences as a habitual criminal on stalking and vehicular eluding in Case No. 09CR1158 must be vacated and he must be resentenced on those counts. The habitual criminal counts artificially and unconstitutionally increased the statutory sentencing range for these charges and exposed the court to irrelevant and prejudicial evidence of prior convictions. The due process error so infected the court's exercise of sentencing discretion that the entire sentence for Case No. 09CR1158 is tainted. *Delgado v. People*, 105 P.3d 634, 636-37 (Colo.2005) (if one part of a sentence is illegal, the entire sentence is illegal and a defendant is entitiled to be resentenced on all counts); *accord Leyva v. People*, 184 P.3d 48, 50 (Colo.2008).

CONCLUSION

Mr. Gabler's conviction for stalking in case number 09CR1158 must be vacated. In addition, the judgment must be reversed and a new trial ordered on the remaining charges with directions that habitual criminal charges may not be pursued against Mr. Gabler in case number 09CR1158.

Dated: October 15, 2012.

Respectfully submitted,



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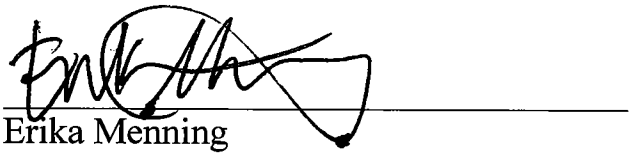
CERTIFICATE OF SERVICE

I certify that on October 15, 2012, a copy of the foregoing *Opening Brief* was served *via* U.S. mail, postage prepaid upon the following:

Colorado Attorney General's Office
Appellate Division
1525 Sherman Street, 7th Floor
Denver, CO 80203



Erika Menning

COUNTY COURT, ADAMS COUNTY, COLORADO

THE PEOPLE OF THE STATE OF COLORADO,
Plaintiff,

v. Victor Gabler
Defendant.

▲ COURT USE ONLY ▲

ATTORNEY:

Case Number: 09CR1158

Telephone Number:
Reg. #:

Division: G Ctrm:

WAIVER OF PRELIMINARY HEARING

I, the Defendant Victor Gabler present with counsel Jon Jones having been previously advised of my right to have a preliminary hearing hereby, knowingly, voluntarily and intelligently waive my right to have a preliminary hearing.

BOND STIPULATION: _____

PROPOSED OFFER: DA will not file Habitual criminal charges

X Case is bound over to the District Court for arraignment on 7/9/09 at 8:30 a.m. in Division G. (Wed, Thurs)

Case is set for Dispo-Bo on _____ at _____ in Division _____.

RECORD IS WAIVED BY THE DEFT.

X _____ 6/3/09
Defendant Date

Jones 37953
Defense Counsel Reg #

Colleen Clark 35309
Deputy District Attorney Reg #

Summons Continued

Bond Continued

Remanded into custody

Exhibit A