IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. CALVIN LAMONT PARKER, Defendant and Appellant.	**CAPITAL CASE** No. S113962

APPELLANT CALVIN LAMONT PARKER'S OPENING BRIEF

Appeal from the Judgment of the Superior Court
San Diego County, State of California
No. 154640

HONORABLE MICHAEL D. WILLINGTON, TRIAL JUDGE

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APPELLANT'S OPENING BRIEF

STATEMENT OF APPEALABILITY

This is an automatic appeal from a judgment of death. (Pen. Code, § 1239.)[1] The appeal is taken from a judgment which finally disposes of all issues between the parties.

* * * * * *

[1] All further statutory references are to the Penal Code unless otherwise indicated.

STATEMENT OF THE CASE

A. Arrest and Charges.

On Tuesday, August 15, 2000, appellant Calvin Lamont Parker was arrested at his apartment in San Diego. (Prelim tx., p. 42[2]; 34 RT 4112-4115.)

A felony complaint was filed on August 17, 2000, charging him with the murder of Patricia Gallego on or about August 12, 2000, in violation of Penal Code section 187, subdivision (a), and alleging the following special circumstances: by means of lying in wait (Pen. Code, § 190.2, subd. (a)(15)); while engaged in the commission and attempted commission of rape (Pen. Code § 190.2, subd. (a)(17)); while engaged in the commission and attempted commission of sodomy (Pen. Code § 190.2, subd. (a)(17)); and that the murder was intentional and involved the infliction of torture. (Pen. Code § 190.2, subd. (a)(18)). (1 CT 1-3.)

Also on August 17, 2000, appellant was advised of his rights (1 CT 4), and arraigned on the charges that same day. He entered a not guilty plea, bail was denied, and the Public Defender was appointed to represent him. (2 RT 1-2; 11 CT 2430.) Two media requests to permit still and television photography and audio recording in the courtroom were filed and granted. (1 CT 7-8, 1 CT 10-12.) Additional media requests were made and generally granted throughout the trial proceedings.

At a status hearing on August 24, 2000, appellant was advised of and waived his right to have a preliminary hearing within 60 days, and the preliminary hearing was set for October 5, 2000. (11CT 2431.)

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[2] The preliminary hearing was reported in a 143 page transcript which is separate from the trial record; it will hereafter be designated "Prelim. Tx."

A motion to continue the preliminary hearing was filed October 3, 2000, stating that the discovery received thus far was incomplete, and that the Public Defender intended to re-assign the case to a different attorney. (1 CT 19-21.)

B. Preliminary Hearing.

The preliminary hearing was held on February 22, 2001.[3] (11 CT 2438.) The following witnesses testified: Detective James Hergenroeather of the San Diego Police Department (Prelim. Tx. 2 et seq.), San Diego County Deputy Medical Examiner Christopher Swallwell (Prelim. Tx. 58 et seq.), San Diego Police Department criminalist Shawn Montpetit (Prelim. Tx. 81 et seq.), handwriting expert David Oleksow (Prelim. Tx. 95 et seq.), and Detectives Michael Ott (Prelim. Tx. 116 et seq.), and William Holmes of the San Diego Police Department (Prelim. Tx. 139 et seq.). Various exhibits were received. (1 CT 47.)

Defendant/appellant Calvin Parker was held to answer on the murder charge, and the special circumstances were found sufficient to proceed. (11 CT 2438.) Arraignment on the Information was set for March 28, 2001. (11 CT 2438.)

C. Pretrial Motions and Litigation.

The Information was filed on March 27, 2001, charging defendant/appellant Calvin Lamont Parker with murder (Pen. Code, § 187), and special circumstances of murder for financial gain (Pen. Code, § 190.2, subd. (a)(1)), intentionally killing by means of lying in wait (Pen. Code, § 190.2, subd. (a)(15)), murder while engaged in the commission and attempted commission of rape (Pen. Code, § 190.2 (a)(17)), and intentional

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[3] The preliminary hearing was reported in a 143 page transcript which is separate from the trial record; it will hereafter be designated "Prelim. Tx."

murder involving the infliction of torture (Pen. Code, § 190.2 (a)(18)). (1 CT 48-49.)[4] The torture special circumstance would later be dismissed on appellant's motion under section 995. (See 1 CT 59.)

Appellant Parker was arraigned on the information on March 28, 2001. He entered a plea of not guilty and denied the special circumstance allegations. (11 CT 2440.)

At the status conference on May 23, 2001, defense counsel requested a trial date the second week of November, and the case was assigned to Judge Michael Wellington for all purposes. (3 RT 303-304; 11 CT 2441.) The People announced the intention of seeking the death penalty, and appellant entered an open time waiver for trial. (3 RT 303-304, 11 CT 2441.)

On May 29, 2001, the defense filed a Motion to Set Aside the Information Pursuant to PC Penal Code section 995. (1 CT 59-77.)[5] The motion was later granted as to the torture special circumstance allegation only. (1 CT 59.)

On June 12, 2001, the District Attorney filed its Notice of Evidence in Aggravation Pursuant to Penal Code section 190.3. (1 CT 101-102.)

Also on June 12, 2001, a Declaration of David L. Oleksow in Support of Taking Exemplars from Defendant Calvin Parker was filed by

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[4] The Information notes that the torture-murder special circumstance was dismissed pursuant to section 995 on January 24, 2002. (1 CT 48-49.)

[5] On December 17, 2001, the District Attorney responded with the People's Opposition to Defense Motion to Dismiss Under PC 995; Points and Authorities in Support Thereof. (2 CT 275-290.)

The defendant's Motion to Set Aside the Information Pursuant to PC 995 was amended with a handwritten notation stating, "Granted as to PC 190.2 (a)(18) torture spec. alleg [sic] only." (1 CT 59.)

the District Attorney. (1 CT 79-88.) The defense filed its Opposition to People's Motion for Additional Exemplars, an application shortening time due to the DA's late filing, and declaration of counsel on June 19, 2001. (1 CT 90-100.) The hearing was held on June 20, 2001: the District Attorney was ordered to provide discovery; the witness was to advise the defense what language he wanted in exemplars, and what documents feature that language. (5 RT 361-519; 11 CT 2444.) Further proceedings on the exemplars were ordered for June 29, 2001; the trial date remained November 2, 2001. (11 CT 2444.) The additional proceedings regarding the handwriting exemplar were rescheduled to July 5, 2001. (11 CT 2445.)

The defense filed an Opposition to People's Motion for Additional Exemplars from the Defendant on June 28, 2001, appending numerous writings, arguing that the additional exemplars were sought not for identification purposes, but to highlight certain phrases in the writings. (1 CT 104-152.) On July 3, 2001, the District Attorney filed a Notice of Motion and Motion for Order Directing the Defendant to Submit to the Taking of a Handwriting Exemplar, with supporting authorities and a declaration. (1 CT 153-162.) At the hearing on July 5, 2001, regarding handwriting exemplars sought by the District Attorney (5 RT 402-519; 11 CT 2446), the trial court issued an Order that Defendant Provide Handwriting Exemplars (1 CT 167), but stayed the order until July 27, 2001, to permit the defense to seek a writ. (11 CT 2446.)

On July 13, 2001, the defense filed a Notice of Motion and motion to continue the trial pursuant to Penal Code section 1050. (1 CT 170.) This motion was addressed at a status conference on July 16, 2001, at which appellant Mr. Parker also indicated a desire for self-representation. The motion for continuance was granted, with trial anticipated to begin on March 22, 2002; Mr. Parker was advised against self-representation, and

that issue was continued for two weeks; and proceedings regarding the handwriting exemplar were to continue on July 31, 2001. (RT 6 RT 520-546, and 6 RT 558-572; 11 CT 2447-2448.) On July 23, 2001, an order from the Court of Appeal was filed, denying the defendant's Petition for Writ of Mandate without opinion. (1 CT 176.)

At the status conference on July 31, 2001, the trial court addressed defendant/appellant's request for self-representation, which was withdrawn. (7 RT 573-600; 11 CT 2449.) Handwriting exemplars were to be produced after the proceeding that day. (7 RT 573.)

At the November 6, 2001 status conference, the Public Defender sought various subpoenaed documents, and expressed concerns about the non-receipt of items of discovery as well as the great quantity of discovery in the case. The District Attorney was ordered to file a status notice with the court by November 14, 2001, indicating what requested discovery items have been produced, and why any requested items have not been produced. (8 RT 601-631; 11 CT 2452-2453.) On November 14, 2001, the District Attorney wrote the trial court, indicating that video and audio tapes were being copied per court order. (1 CT 203.)

On November 30, 2001, the defendant's Motion for Discovery was filed (PD Motion 2; 1 CT 214.) The People's Response to Defendant's Discovery Motion and People's Request for Reciprocal Discovery was filed on December 14, 2001. (2 CT 259-274.)

The defendant's Motion to Exclude 1995 Conversation was filed On December 3, 2001. PD Motion 3, 1 CT 243; DA response at 4 CT 911.) Also filed that date by the defense were a Notice of Motion and Motion that Defense Motions Include Both California and Federal Constitutional

Grounds filed (PD Motion 4; 2 CT 251-252)[6] and a Notice of Motion and Motion Requesting Notice of Intended Evidence in Aggravation (PD Motion 5; 2 CT 253-256).[7] On January 31, 2002, the District Attorney filed a second notice of evidence in aggravation. (3 CT 637.)

On December 17, 2001, the People's Opposition to Defense Motion to Dismiss Under PC 995; Points and Authorities in Support Thereof was filed (2 CT 275-290); this was in response to the Motion to Set Aside the Information Pursuant to PC 995, filed over 6 months earlier on May 29, 2001. (1 CT 59-77.)[8] On January 23, 2002, the defense filed a Supplemental Argument in Support of Defendant's Motion to Dismiss. (PD motion 1; 3 CT 589-591.)

A discovery hearing was held on December 19, 2001, as defense counsel were having difficulty obtaining discovery and viewing evidence; the trial court ordered that all requested items [absent no. 31, "the NBC tapes"] be produced by January 2, 2002, with further proceedings, if necessary, scheduled for January 22, 2002. (9 RT632-633, 665-719; 11 CT 2454-2455.) An oral *Marsden* motion was made, heard in *in camera* sealed proceedings (9A RT 634-664), and denied. (11 CT 2454.) The defense filed a Request for Review of Specific Evidence Items, supported by

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[6] On January 31, 2002, the District Attorney filed Points and Authorities in Response to Motion That Defense Counsel's Objections Be Based upon Both California and Federal Constitutional Authorities. (3 CT 640.)

[7] Also on January 31, 2002, the District Attorney filed a Second Notice of Evidence in Aggravation Pursuant to Penal Code section 190.3. (3 CT 637.)

[8] The untimeliness of prosecution responses posed difficulties for the defense throughout these proceedings.

counsel's declaration, on January 3, 2002. (PD Motion 6; 2 CT 291-296.)[9] The People's Response to Request for Review of Specific Evidence Items was filed on January 18, 2002. (2 CT 297-302.) On January 23, 2002, the City Attorney filed a Response to Request for Review of Specific Evidence Items on behalf of the San Diego Police Department, opposing the defense request for a confidential location in which to view evidence. (3 RT 592-598.)[10]

During the pendency of these proceedings this case, the District Attorney of San Diego had been working with producers of a proposed television reality show intended to entertain the public with behind-the-scenes stories of actual criminal prosecutions.[11] On January 22, 2002, attorneys for the producers filed hundreds of pages of materials opposing the motion, including a motion to quash the defense subpoena duces tecum; a Notice of Motion and Motion to Quash Subpoena Duces Tecum Directed to Specially Appearing Non-party Journalists (3 CT 519 et seq.); Notice of Lodgment of Exhibit A in Support of Motion to Quash Subpoena Duces Tecum Directed to Specially Appearing Non-Party Journalists (3 CT 550

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[9] A defense Index of motions as of January 21, 2002, was filed on January 22, 2002. (3 CT 587-588.)

[10] It is worth noting that in late January, 2002, the defense was faced with formal opposition not only by the District Attorney, but also by the City Attorney and (as described next) attorneys for the television production company working with the District Attorney to produce television entertainment about this very case. To call this prosecution "aggressive" would be an understatement.

[11] The NBC production team meant to produce and air a show called "Trial and Error" (or "Trial and Punishment"). The defense had served a *subpoena duces tecum* for videotapes recorded of prosecution matters concerning this case during 2001, including DDA Daly's presentation to her superiors in support of the death penalty, and meetings between Ms. Day and others about the case. (3 CT 562-563.)

et seq.); Appendix of Non-California Authorities (2 CT 303 et seq.); and a Proof of Service (3 CT 547). On January 22, 2002, the same date, the defense filed their a Brief in Support of Disclosure of Network TV Videotapes. (PD Motion 7; 3 CT 561-583.) A Specially Appearing Non-party Journalists' Reply to Defendant's Opposition to Motion to Quash Subpoena Duces Tecum was filed on January 31, 2002. (3 CT 606-636.)

At a hearing on January 28, 2002, trial was rescheduled to begin on April 12, 2002. The defense renewed the motion to review specific items of evidence (PD Motion 6), and was ordered to prepare an order. Remaining pretrial motions and discovery matters were set for February 6, 2002 (PD Motions 3, 4, and 7). The District Attorney was directed to inform the defense by March 12, 2002, of which autopsy photos it intended to use at trial. (11 RT 852-883; 11 CT 2459.)

Numerous matters were addressed on February 6, 2002. Counsel for the non-party film production crew argued its motion to quash; and the trial court indicated it would review the crew's four video tapes, which were marked as Court Exhibits 1 through 4and to be kept sealed.[12] (12 RT 885-914, 935-940, 959-974; 11 CT 2461-2463.)[13] The defense motion that

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[12] The four videotapes were are identified as follows: [1] Interview with the victim's mother; [2] Death penalty round table: meeting with Pfingst/Thompson/Pippin (Presentation of Death); [3] Pfingst announces death; and [4] Daly discusses case with Thompson.

[13] The prosecution provided one tape to the defense, of the interview with the victim's mother. (9 RT 684.) On February 7, 2002, having reviewed the videotapes in camera, the trial court ordered that tape 1 be disclosed, and tapes 2-4 remain sealed. (3 CT 649; 11 CT 2464.) Present appellate counsel sought disclosure of those videotapes during the record correction process, urging that they be provided as sealed material and that they would not be disclosed absent further order from the court. (See, e.g., 41 CT 9247 [request in record correction motion; 41 CT 9299 et seq., motion regarding
(footnote continued on next page)

objections be deemed made on both state and fed constitutional grounds was granted. (12 RT 932-935; 11 CT 2462.) An order was issued to permit the defense to review items of evidence privately; the defense waived chain of custody issues for the time they spend reviewing the material. (12 RT 941-948; 11 CT 2462.) A motion to unseal sealed portions of felony files regarding Brenda Graves, the mother of Mr. Parker, was deferred. (12 RT 948-952; 11 CT 2462.) In response to the defense concern that they were not timely receiving materials because the District Attorney was serving them by mail, the District Attorney agreed to work with the defense to more timely provide materials. (12 RT 954-957; 11 CT 2462.) A stipulation was accepted, providing that the District Attorney would retain biological samples for defense testing. (12 RT 974-975; 11 CT 2463.) The defense requested the court's assistance in locating missing dependency and juvenile records, and the court agreed.[14] (12 RT 975-978; 11 CT 2463.)

On February 22, 2002, the defense presented pretrial motions: the Motion in Limine to Declare Death Penalty Imposed via PC 190.3 Unconstitutional (PD Motion 15, 3 CT 711; DA response at 4 CT 861); a

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(footnote from previous page)
videotaped exhibits].) The trial court initially intended to unseal the tapes and making copies available to counsel (67 RT 8056, 8057), following the court's statement that there was nothing terribly secret about the tapes, to which the District Attorney expressed agreement. (66 RT 8047; see 42 CT 9319.) The clerk of court then expressed disagreement with disclosure. (42 CT 9320.) Disclosure subsequently was vigorously opposed by the District Attorney (42 CT 9334 et seq. [requesting withdrawal of the trial court's order of 2/4/11]), and counsel for the successors to the producers of the proposed television show (42 CT 9248-9453); appellant responded to the specially appearing non-party's opposition of limited disclosure of the videotapes for purposes of post-conviction review (42 CT 9471-9491); and the request for disclosure was denied. (42 CT 9492-9494.)

[14] The trial judge apparently previously served in juvenile court. (See, 62 RT 8001.)

Motion in Limine to Ensure Fair and Impartial Jury (PD Motion 18, 3 CT 739; DA response at 4 CT 848); and a Motion in Limine to Exclude Evidence re: Level Post Mortem GHB (PD Motion 19, 3 CT 743; DA response at 4 CT 833).

Additional defense motions were filed on February 25,: including a Motion to Exclude or Limit the Testimony of Norman Sperber, D.D.S. (PD motion 8, 3 CT 657; DA response at 4 CT 891); a Motion in Limine to Limit Victim Impact Evidence (PD Motion 9; 3 CT 670); Motion in Limine to Exclude Application to CVPD (PD Motion 10; 3 CT 682; DA response at 4 CT 914); a Motion in Limine to Exclude or Limit Photographs (PD Motion 11, 3 CT 685; DA response at 4 CT 871); and a Motion in Limine to Exclude "Pornography" (PD Motion 12, 3 CT 698; DA response at 4 CT 882); Motion for Written Findings and Jury Unanimity Regarding Aggravating Factors (PD Motion 13, 3 CT 705; DA response at 4 CT 850); Motion in Limine in Support of Penalty Phase Burden of Proof Beyond a Reasonable Doubt (PD Motion 14, 3 CT 708; DA response at 4 CT 841); Motion in Limine for Full and Fair Hearing re Objections (PD Motion 16, 3 CT 720; DA response at 4 CT 843); Motion in Limine re Juror Script (PD Motion 17, 3 CT 727; DA response at 4 CT 858); Request for Judicial Notice of Orders and Records (PD Motion 20, 4 CT 773; DA response at 4 CT 887); Motion in Limine to Apply Witt and Witherspoon Standards in Jury Selection (PD Motion 21, 4 CT 788; DA response at 4 CT 853); Motion in Limine to Exclude Irrelevant Material (PD Motion 22, 4 CT 795; 4 CT 868); and a Motion in Limine to Preclude Argument in Opening (PD Motion 23, 4 CT 797; DA response at 4 CT 865). Also on February 25, the prosecution filed an in limine motion to admit regarding pornography, and crime scene photographs, and 911 tapes. (4 CT 801 et seq.)

On March 7, 2002, the defense filed a Brief in Support of Admission of Penalty Phase Documents (4 CT 819; DA response at 4 CT 961), as well as a Reply with regard to the prosecution's motion to admit People's Motion to Admit 911 Tapes (4 CT 824) and a Reply regarding pornography (4 CT 827). On March 12, the District Attorney filed numerous documents opposing defense motions. (4 CT 833, 841, 843, 848, 850, 853, 858, 861, 865, 868, 871, 882, 887.) Additional prosecution responses were filed on March 13 (4 CT 911, 4 CT 914) and March 29 (4 CT 961).

On April 2, 2002, testimony of Dr. Norman Sperber was taken in an Evidence Code section 402 hearing; Dr. Sperber was a forensic dentist, offering a "tool mark" opinion that a mark on the victim's back was caused by handcuffs. (14 RT 1090-1158; 11 CT 2468) . On April 3, the trial court ruled that Sperber was qualified as an expert to testify to that opinion. (15 RT 1165-1218; 11 CT 2470.)

Also on April 2, the trial court addressed various items of evidence, reported on progress obtaining juvenile records, and defense motions 3, 9, 10, 11, and 16. (14 RT 1001-1164; 11 CT 2468.) On April 3, the trial court ruled that defendant/appellant's statements after arrest would not be admitted, the defense objected to discussions of other cases and of 9/11, and records of jailhouse informant Edward Lee were requested. (15 RT 1165-1334; 11 CT 2470.) Photographs and large quantities of allegedly pornographic material — the trial court estimated 6-10 six to ten cubic feet of material (16 RT 1337) — were discussed on April 4, and some of that material was admitted over defense objection (16 RT 1481). (16:1335-1484; 11 CT 2474.)

The review of photographs and alleged pornography continued on April 5, 2002; the trial court also addressed defense motions 13, 14, 15, 17,

18 [withdrawn], 19, 20, 21, 22, 23, 24, and discovery matters; and the parties stipulated that defendant's mother did not have cancer, and he did not visit her. (17 RT 1485-1647; 11 CT 2478.) On April 8, the jury questionnaire was discussed. (18 RT 1648-1670; 11 CT 2482.)

During proceedings on April 9, the parties addressed the questionnaire, the marriage contract between defendant and the victim, and allegations that the investigating officers — who were also the investigating officers in the high-profile *Westerfield* case[15] being prosecuted at the same time — had committed misconduct. (18 RT 1671-1733; 11 CT 2484.) The District Attorney had two internal files regarding those allegations. (18 RT 1723.) On April 11, the defense filed a *Pitchess*[16] motion to discover information about the misconduct of these officers (4 CT 1009; 5 CT 1060), an opposition to a *Pitchess* protective order (5 CT 1025), a demand for discovery of *Brady* material in police officer personnel files (5 CT 1036). The District Attorney's opposition to the Pitchess motion was filed on April 16. (5 CT 1075.)

On April 15, 2002, prospective jurors were assembled and excused until April 17. The questionnaire and discovery matters were discussed, as were evidentiary matters, with the trial court admitted admitting certain "morphed" pictures. The District Attorney was not prepared to proceed with the Pitchess motion, but delivered to the court two internal files as well as copies of the material previously disclosed by the trial judge in the *Westerfield* case. (19 RT 1746-1838; 11 CT 2486.)

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[15] See, *People v. (David Allen) Westerfield*, S112691; San Diego Superior Court case no. SCD 165805.

[16] *Pitchess v. Superior Court* (1974) 11 Cal.3d 531.

Another set of prospective jurors assembled and were excused on April 16. The trial court sealed Court Exhibits 10, 11, 12, 13, and 14, materials relevant to defendant's motions for disclosure under *Pitchess* and *Brady*.[17] There was additional discussion of the questionnaire, the marriage contract, and evidentiary matters. (19 RT 1850-1855, 1870-1908, 1924-1944; 11 CT 2488.) The District Attorney filed a list of potential witnesses. (5 CT 1086.) On April 17, trial was continued for one week; prospective jurors were thanked and excused; and some material was released in response to the *Pitchess* and *Brady* motions. (20 RT 1945-1958, 2002-2038; 11 CT 2491.)

Among the peculiar aspects of this case was the involvement of Jack Shale, MD, JD, who interrogated defendant the night of his arrest, hoped to use his new law degree to sit as second counsel for the prosecution, and eventually was offered as a prosecution mental health expert concerning Dr. Shale, and a continuance of trial was requested; the reporter's that transcript of these proceedings was then ordered unsealed and to be provided to the prosecution. (11 CT 2490.) On April 17, defense counsel alleged that Dr. Shale had come came in contact with a defense their expert, Dr. Rogers (20 RT 1946-1955),; and that at time of appellant's defendant's arrest, Shale had identified himself as a pro tem Deputy District attorney; defense counsel stated that they were are appalled at his conduct with their expert, who was expected to be a lynchpin witness (20 RT 1957).

On April 24, the District Attorney's Office moved to quash subpoenas duces tecum regarding Jack Shale (5 CT 1092); that office also filed a response to the defense request for a hearing, arguing *inter alia* that Dr. Shale acted without involvement of the D.A. office, and that the

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[17] *Brady v. Maryland* (1963) 373 U.S. 83.

evidence was is insufficient that he attempted to improperly influence Dr. Rogers. (5 CT 1106 et seq.; an DA interview of Dr. Rogers appears at 5 CT 1118-1216.) On April 25, the defense filed a Request for Sanctions Including Dismissal of Penalty, Recusal of the DA, and/or Exclusion of Witness Shale, together with extensive exhibits. (6 CT 1248 et seq.; the prosecutor's opposition is at 6 CT 1408 et seq.) Hearings regarding Dr. Shale were held on April 29 (22 RT 2119-2198, 2207-2295; 11 CT 2500) and April 30. (23 RT 2296-2493; 11 CT 2503.) Additional information about Dr. Shale was disclosed on May 21 (26 RT 2628) and May 22. (7 CT 1576 et seq.)

Although the parties were most focused on Dr. Shale, additional matters were also discussed during proceedings on April 24 (11 CT 2496) April 29 (11 CT 2500), and April 30 (11 CT 2503). On May 2, the court and parties discussed scheduling matters and various records; trial was to begin on May 22. (24 RT 2494-2534; 11 CT 2507.)

On May 20, 2002, time qualification of jurors began, and various evidentiary matters were discussed; the "professionally unhappy" relationship between the prosecution and defense was noted (25 RT 2546). (25 RT 2535-2613; 11 CT 2509.) On May 21, the prosecution remained unsure if it intended to call Dr. Shale; juror hardships were considered; and various items of evidence were discussed. (26 RT 2616-1838; 11 CT 2513.)

As jury selection proceeded, additional discussions were held regarding evidentiary matters and motions, May 22 (11 CT 2513), and May 24 (11 CT 2517). On June 13, the court ruled on the addressed remaining motions and issues, including the admissibility of marriage contract, crime scene? autopsy? photographs, and pornography, and items of evidence. (32 RT 3792-3914; 11 CT 2532.)

D. Jury Selection.

Jurors were "pre-screened" by the Jury Commissioner and greeted by the trial judge and counsel on May 20, 2002 and May 21, 2002; all who passed screening were ordered to return on May 22. (11 CT 2510, 2512; 25 RT 2564-2565; 25 RT 2632-2663.)

On May 21, the trial judge emailed to counsel a statement he intended to give prospective jurors about the facts of the case. (7 CT 1573; see 7 CT 1600 for the judge's factual synopsis.) On May 22, the synopsis was modified, and jury questionnaires were given to all prospective jurors. (11 CT 2513; see 7 CT 1508, Juror Questionnaire, and sealed CT volume 35, cover sheets completed by jurors.)

On June 3, 2002, examination of potential jurors began with prospective jurors 2-47 (11 CT 2522-2524) and examination of potential jurors continued on June 4, with prospective jurors 48 through 98. (RT vol. 29; 11 CT 2525-2527.) On June 7, twelve jurors were selected and sworn, as were four alternate jurors. (RT vol. 31; 11 CT 2529-2530.)

E. Guilt Phase.

The guilt phase of trial began on June 18, 2002. (33 RT 3915-4099; 11 CT 2536.) The trial court gave introductory instructions (33 RT 3921-3925); and the deputy district attorney (33 RT 3921-3953) and defense counsel (33 RT 3954-3973) gave their opening statements.[18] The following witnesses testified: Rubens Gallego, father of the victim, Patricia Gallego (33 RT 3973-3980); Dale L. Kaler, who found the mattress from the

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[18] The bailiff advised the court judge that one juror noticed a discrepancy between what a witness said and what the interpreter said. (33 RT 4032-4034.) The court instructed jurors to accept the English translation of the interpreter. (33 RT 4035.)

victim's bedroom (33 RT 3985-3995); Devon M. Comb and Jillian A. Carrol, children who saw blood on the mattress (33 RT 3995-4000, 4000-4003); Steve Gomez and Cuauhtemoc Topete, maintenance workers at a the Petsmart location near where certain items of evidence were found in and around a dumpster (33 RT 4003-4017, 4018-4023); Debra L. Derosiers, who located a trash can that was later found to contain the victim's body (33 RT 4024-4031); San Diego Police Officer Phillip Franchina (33 RT 4035-4045) and Detective William B. Holmes (33 RT 4045-4071); and Ilana M. Ivascu, who saw a man with U-Haul truck by the Petsmart dumpster (33 RT 4071-4085.)

The prosecution case in chief continued on June 19 (34 RT 4100-4295; 11 CT 2540), with testimony from: Gary A. Spencer, Carlsbad Police Department, who responded to a call regarding a trash can (34 RT4100-4111); Detective Richard J. Carlson of the San Diego Police Department, SDPD detective (34 RT 4112-4116); Christopher I. Swalwell, deputy medical examiner (34 RT 4116-4266); and Charles Ijames, a former roommate of appellant Parker who was at that time dating the victim, Patricia Gallego (34 RT 4266-4294).

On June 20 (35 RT 4296-4516; 11 CT 2543), examination of Charles Ijames continued (35 RT 4296-4316), and the following witnesses were also called: Arlynn Charles Bove, a consultant, regarding fingerprint comparisons and assembling exhibits (35 RT 4316-4322); Norman Sperber, a forensic dentist, regarding marks on the victim's body (35 RT 4322-4418)[19]; Timonthy Dwyer, a U-Haul dealer (35 RT 4418-4458); Beata Karzi, Mr. Parker's supervisor at Lenscrafters, where appellant was

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[19] The admissibility of the testimony of Dr. Sperber was contested by the defense, and the subject of numerous proceedings outside the presence of the jury. See Argument 3.

employed at the time of the killing in this case (35 RT 4458-4477); and Ernesto Lozano, a co-worker of appellant at from Lenscrafters (35 RT 4477-4495.)

The prosecution case continued on June 21 (36 RT 4517-4680; 11 CT 2546), with testimony from: Joshua S. Dubois, a boyfriend of appellant Parker's neighbor (36 RT 4518-4535); Victoria S. Niderost, employee at Home Depot (36 RT 4536-4568); April K. Carey, employed by Wells Fargo (36 RT 4568-4590); Gerardo Villa, a worker at a the Wells Fargo Bank located in a Ralph's grocery (36 RT 4590-4604); Eudes De Crecy, owner of a café where the victim worked (36 RT 4610-4616, 4623-4648); Loic Vacher, another café worker (36 RT 4649-4655); Anna Ching, who employed the victim at a Japanese restaurant (36 RT 4656-4661); and Robert Morton, manager of a Chevron station (36 RT 4662-4676).

On July 24, 2002, the District Attorney presented the testimony of Detective James F. Hergenroeather (37 RT 4691-4896), and numerous items of evidence were introduced. (37RT 4681-4902; 11 CT 2549.) The testimony of Detective Hergenroeather continued on July 26 (39 RT 4993-5055), and was followed by the as well as testimony of criminalist Shawn Monpetit (39 RT 5061-5113). (39 RT 4980-5120; 11 CT 2555.) Jurors inquired whether they could visit other trials in progress (7 CT 1711, Jury Note #2), and were instructed that it was fine for them to watch other trials. (39 RT 5059).

The testimony of criminalist Shawn Montpetit (40 RT 5121-5172) continued on June 27, and there was also as well as testimony of taken from Jeri Wilkinson, a fraud investigator with Wells Fargo Bank (40 RT 5174-5252); David L. Oleksow, a forensic document inspector (40 RT 5257-5323); and jailhouse informant Edward L. Lee (40 RT 5329-5387). (40 RT 5121-5398; 11 CT 2558.)

On June 28, the prosecution concluded with witnesses Leilani Kaloha, who knew appellant Parker and related appellant's his discussion of marrying the victim (41 RT 5429-5449); and Marilyn Powell, who had previously had an intimate relationships with Parker (41 RT 5450-5489); and the People rested (41 RT 5493). The defense presented evidence from Laura Balza, a neighbor in appellant Parker's apartment building (41 RT 5494-5517), and William Brady, a forensic pathologist (41 RT 5518-5624). (41 RT 5399-5625; 11 CT 2561.)

The defense continued on July 1, 2002 (42 RT 5627-5812; 11 CT 2564), calling the following witnesses: Stephanie Ortiz, who had known knew the victim Patricia Gallego via Charles Ijames, and testified to Gallego's wish to marry a United States citizen (42 RT 5626-5630); Kristina L. Stepanof, a friend of Ms. Gallego, who related that Gallego said she was paying her roommate to marry her (42 RT 5631-5644); Jack Goldberg, an acoustics expert (42 RT 5645-5708); and Gene Rochambeau, Jr., a classified ad manager (42 RT 5708-5732). The jury was excused at the noon recess.

The defense concluded its case and rested on July 2 (43 RT 5813-5958, 5990-5997, 6002-6051; 11 CT 2566), presenting the following witnesses: San Diego Police Detective Mark Keyset (43 RT 5847-5882); John Edwards, the public administrator who took custody of Ms. Gallego's property after her death (43 RT 5883-5923); Marilyn Powell, who described the relationship between of Ijames and Ms. Gallego (43 RT 5918-5923); San Diego Police Detective James Tomosovic (43 RT 5923-5932); and Annie Lee, the mother of jailhouse informant Edward Lee (43 RT 5933-5957). Stipulations were presented regarding a computer (43 RT 5994-5) and that certain items had been were written by appellant Parker (43 RT 5995). The jury was released until the following Tuesday.

Guilt phase jury instructions were given on July 9, 2002 (45 RT 6244 et seq.), followed by the deputy District Attorney's closing argument (45 RT 6293 et seq.) and at the start of the defense closing argument (45 RT 6381 et seq; 11 CT 2573). On July 10, the defense closing argument concluded, the deputy district attorney gave her rebuttal, concluding instructions were given, and the jury began deliberating deliberations of guilt. (46 RT 6411-6506; 11 CT 2575-2576; see 8 CT 1766-1851 for the jury instructions given.) Deliberations continued on July 12 (47 RT 6507-6508; 11 CT 2577), July 15 (47 RT 6509-6510; 11 CT 2578; see also jury note # 7 and answer, 8 CT 1760-1762), July 16 (47 RT 6511-6534; 11 CT 2580; see also 8 CT 1764, Answer to Jury Note).

On July 17, 2002, defendant/appellant was found guilty of first degree murder, and the special circumstances were found true. (47 RT 6535-6548; 11 CT 2585.)

F. Penalty Pretrial Matters.

Pretrial proceedings for the penalty phase were held outside the jury's presence on July 18 (48 RT 6549-6640; 11 CT 2582), July 22 (49 RT 6641-6789; 11 CT 2587), and July 23, 2002. (50 RT 6790-6955; 11 CT 2591.)

G. Penalty Phase.

The penalty phase of trial began on July 24, 2002. (51 RT 6962-6961, 51 RT 6973-7148; 11 CT 2595.) The District Attorney presented victim impact witnesses Terzinha Ramos de Silva, the victim's mother (51 RT 7014-7026); Rubens Gallego, the victim's father (51 RT 7026-7031); and Kristina Stepanof, the victim's friend (51 RT 7031-7036); and Exhibits 113-115. The defense presented mitigation witnesses: Laurence Parker, Sr., appellant Parker's the defendant's father (51 RT 7042-7058); Frances Gesiakowski, a social worker who testified about foster care placement of

defendant Parker appellant and his siblings during his childhood (51 RT 7059-7095); and Ollie Lee, appellant's aunt and his caretaker in early childhood (51 RT 7096-7129); and the defense introduced exhibits S, U, T, and W, reading portions of exhibit S (social service and juvenile records regarding appellant were read into the record).

The defense presented additional testimony on July 25: John W. Breen, appellant's foster brother of Calvin Parker (52 RT 7153-7199); Eva L. Nunn, appellant's foster mother (52 RT 7200-7261); and Javonica Gonzoles, Parker's sister (52 RT 7261-7326). (52 RT 7149-7371; 11 CT 2598.)

On July 30, 2002, the defense case concluded with testimony of: Dr. Marilyn Kaufhold, a pediatrician who testified about the long-term impact of child abuse and neglect (53 RT 7385-7501); and Brenda Graves, appellant's Parker's birth mother (53 RT 7524-7529). The District Attorney presented testimony in rebuttal, from Brenda Chamberlain, Parker's former girlfriend (53 RT 7554-7581).

Penalty phase instructions and argument were presented on August 1 August 2, 2002, and the jury began deliberations. (54 RT 7596-7755; 11 CT 2605.) The jury continued deliberating over six more days: on August 2 (11 CT 2607), August 5 (11 CT 2608), August 6 (11 CT 2610), August 7 (11 CT 2611-2612), August 8 (11 CT 2613-2614), and August 12. (11 CT 2615.) On August 6, the third day of deliberations, the jury asked to be provided with a transcript of the testimony of Dr. Kaufhold; the court directed that the court reporter read that testimony to the jury in the jury room. (8 CT 1924, 1927; 11 CT 2611-2612.) The next day, all 12 jurors signed a note indicating Jurors indicated they were "at a serious impass[e]." on August 7. (8 CT 1927.) On August 8, the court discussed the serious-impasse note with the jurors and directed them to send the court their

written questions, which the jury subsequently did, in a three-page document with nine questions. (54 RT 7772-7777; 8 CT 1928-1930.) Following discussions with counsel (55 RT 7779-7825), the court responded in writing to the jury's questions (8 CT 1932-1934).

The jury returned a death verdict on August 12, 2002, after having deliberated for 20 hours (not including the readback). (11 CT 2615.)

H. Post-Penalty Phase.

During penalty deliberations on August 12, 2002, Calvin Parker sent a letter to Judge Wellington, requesting a new trial based on ineffective assistance of counsel. (8 CT 1938.) The court provided copies of that letter to both counsel for both sides, and appointed the Alternate Public Defender to represent Mr. Parker on the new trial motion issues he had specified by Mr. Parker. (11 CT 2616.) The Public Defender Office was not relieved of representation, and attended proceedings regarding the allegation of incompetence. (See, e.g., 56 RT 7840-7854; 11 CT 2618.) The court confirmed that Mr. Parker would not be waiving any appellate remedies by pursuing these allegations. (56 RT 7850-1.)

On October 4, Mr. Parker provided the trial court with another letter detailing various allegations and stating he wished to be heard in lieu of the Alternate Public Defender, whom he alleged was burdened by a conflict of interest. (8 CT 1953 et seq.) Mr. Parker then advised the court that he had no problem with Alternate Public Defender that counsel representing him, but that he wished to submit his own lengthy motion to the court. (57 RT 7855-7871; 11 CT 2620.)

At further proceedings on December 13 and 16, 2002, the Alternate Public Defender advised that no motion for new trial based on Mr. Parker's allegations would be filed. (RT 58 RT 7872-7888, 7889-7912; 11 CT

2622, 2623.) However, Mr. Parker wished to file his own motion; the motion was sealed and provided only to his appointed counsel, Mr. Gates. (8 CT 1971.)

On January 7, 2003, the public defender conveyed Mr. Parker's request that a hearing be held on his allegations, the contents of which counsel would could not possibly endorse. (60 RT 7913-7920; 11 CT 2624.) The trial court unsealed Mr. Parker's personal handwritten document alleging *inter alia* ineffective assistance of counsel, prosecution misconduct, and witness tampering, and filed it in the public record. (9 CT 1977-2063.) At further proceedings on January 13, Mr. Parker was permitted to express his views at some length, and the trial court concluded there was no basis for further action. (61 RT 7921-7952; 11 CT 2625.)

I. Motions for New Trial and Modification of Verdict; Sentencing.

On January 29, 2003, an Automatic Motion for Modification of Penalty was filed by appellant's counsel. (9 CT 2064.) Defense counsel also filed a Motion for New Penalty Phase Trial on January 31, 2003. (9 CT 2072.) The deputy District attorney filed oppositions to these motions on February 10, 2003. (9 CT 2081 et seq.; 9 CT 2086 et seq.; 9 CT 2091 et seq.; 9 CT 2091 et seq.; 9 CT 2109 et seq.) A letter from Calvin Parker appellant to Judge Michael Wellington was filed on February 21, 2003. (9 CT 2101 et seq.)

On February 24, 2003, the motions for new trial and modification of sentence were heard and denied, and Mr. Parker was formally sentenced to death. (62 RT 7953-8021; 10 CT 2421; 11 CT 2625.1.) Two sets of materials from Mr. Parker personally were marked as Court Sentencing Exhibits 1 and 2. (9 CT 2116-2162; 10 CT 2163 et seq.) The trial court's

written Statement of Reasons for denying the motion to modify the death sentence was entered into the record. (10 CT 2426 et seq.)

STATEMENT OF FACTS

A. Introduction.

This is not a case where there is a question about identity of the perpetrator. Calvin Parker indisputably killed his roommate Patricia Gallego between August 10 and August 12, 2000. The questions in this case have always involved the level of criminal liability, and the appropriate punishment.

B. Guilt Phase.

1. Prior to Offense.

The prosecution's first witness was **Ruebens Gallego**, the father of Patricia Gallego, testifying via a Portugese interpreter. (33 RT 3973.) She was born August 27, 1970, and raised in Sao Paulo, Brazil, where she learned English as a child. (33 RT 3974-5.)[20] Ms. Gallego always wanted to go to the United States; she became a flight attendant based in Los Angeles in 1996. (33 RT 3976-7.) They kept in touch by email and phone; he last saw her alive in February, 1999, when she visited Brazil. (33 RT 3977.) The father planned to visit in August, 2000, but had to change his flight. When he called her apartment on August 14 to say he was not coming that day, he learned that she had been killed. (33 RT 3977-9.)

On cross-examination, Mr. Gallego testified that the Portugese term "nojiento" means dirty or disgusting. (33 RT 3980.)

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[20] Mr. Gallego identified People's Exhibit 1, a photograph of Patricia Gallego and her childhood dog. (33 RT 3975.)

Charles Ijames testified that in about 1997, his former roommate introduced him to Calvin Parker, and he and Parker became roommates. (34 RT 4268.) Earlier in 1997, he met Patricia Gallego through upstairs neighbors who were Brazilian, and he started dating Gallego; Parker and Gallego met when she visited the apartment. (34 RT 4269-71.)[21] Ms. Gallego was a loner, a hard worker, and she spoke English well but was not comfortable with it. (34 RT 4272.) They had a normal sex life. (34 RT 4273.) The relationship was off and on, and ended around July 4, 1998. (34 RT 4275.) She moved to his apartment after the Brazilians asked her to leave, but he eventually asked her to move out because of his religious convictions. (34 RT 4276-7.) Ms. Gallego went back to Brazil; he and Parker remained roommates until November, 1999. (34 RT 4278-79.) Parker did not have a car; he rode a bike, and Ijames vaguely thinks that Parker locked the bike with handcuffs. (34 RT 4280-81.) Ijames wrote songs and poems, and Parker wrote poems or songs about politics, love, and despair. (34 RT 4281-84.) Parker dated an older woman named Marilyn Powell. (34 RT 4282.)

On cross-examination, Mr. Ijames testified that he met Parker in the Navy in 1991, when both served on the USS Port Fisher. Ijames lived with Parker and Parker's then-girlfriend Brenda Chamberlain for a while in 1994; after his discharge in 1995, he dated Ms. Gallego. (34 RT 4285-86.) He had an intimate relationship with Gallego when Parker was his roommate. (34 RT 4287.) In the Spring of 1998, Gallego stayed in the apartment he shared with Parker; he broke the relationship off by July, 1998. (34 RT 4290-91.) Ijames was aware that Gallego wanted to become a United States citizen. (34 RT 4291.) Gallego returned to the U.S. in

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[21] Mr. Ijames identified People's Exhibit 25, a photograph of him and Gallego taken when they were dating. (34 RT 4273-4.)

1999, and Ijames introduced her to his friends Stephanie Ortiz and Kristina Stepanof; she live with them. (34 RT 4293.) Gallego was interested in poetry. (35 RT 4299.) Gallego and Parker were private people; the three of them rarely socialized. (35 RT 4305.) Ijames never met Parker's family. (35 RT 4306.) He cannot remember Parker ever locking his bike with the handcuffs. (35 RT 4309.)

On redirect examination, Ijames that Parker told him about Gallego proposing a marriage arrangement for $5000, which he understood to be a business transaction and not for love. (35 RT 4312.) That would have been about the early summer of 1998; Gallego loved Ijames at that time. (35 RT 4313, 4315.)

Eudes DeCrecy was the owner of Café Chloe in La Jolla; he had owned it for a year by August, 2000, and Patricia Gallego was one of his first employees. (36 RT 4610.)[22] Ms. Gallego began as a waitress, then became the bakery manager; she was serious and he trusted her. (36 RT 4611.) She worked other jobs; but she came by the bakery almost every day, just to check. (36 RT 4612-13.) Mr. DeCrecy walked female employees to their cars if they worked late; he walked Ms. Gallego to her car on August 10, 2000. (36 RT 4615.) On August 10th, Ms. Gallego seemed stressed, tired, and unhappy. (36 RT 4623.) On cross-examination, Mr. Decrecy recalled that when he hired her, Ms. Gallego had a student visa; she liked the United States and wanted to live here. (36 RT 4637.) While Ms. Gallego never told him of a plan to marry for citizenship, one of her friends did; he does not recall if he told a detective that she was

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[22] Mr. DeCrecy identified Defense Exhibit A, a handwritten list of things on the bakery menu. (36 RT 4640-41.)

planning to marry on August 27. He asked if she was in love, and she said no. (36 RT 4638.)

Loic Vacher worked at Café Chloe, managing the restaurant and bakery; after the restaurant closed, he continued to do hiring, payroll, banking, whatever the owner needed. (36 RT 4648-50.) He worked with Ms. Gallego, and she did well. (36 RT 4651-52.) On Tuesday, August 15, he got a call from Ms. Gallegos' roommate saying she had left for Brazil due to an emergency, and that she would be back. (36 RT 4653.)

Anna Ching owned two Japanese restaurants; Patricia Gallego worked at both, as a waitress, bussing tables, and as a hostess. (36 RT 4656-57.)[23] After a morning shift on August 10, 2000, Ms. Gallego did not show up again, which was unusual. (36 RT 4658.) She got a call a few days later from Ms. Gallego's roommate, saying she had to go to Brazil because her mother had an accident. (36 RT 4659.)

In August, 2000, **Beata Karzi** was general manager of the Lenscrafters store at Fashion Valley Mall. (35 RT 4459.) Calvin Parker was one of her best employees. He had been working there for about 3 months, when he requested time off in a letter, and said his mother was dying. (35 RT 4461.) She received the letter before her vacation in July, perhaps around the 23rd or 26th. (35 RT 4462.)[24] They discussed his mother dying, and she arranged his schedule so he could be off work

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[23] Ms. Ching's daughter, Sabrina Steiman, also worked at Yakimoto as a manager. (36 RT 4660.)

[24] Ms. Karzi identified People's Exhibit 30, a letter marked "Beata," and Exhibit 31, an enlargement of that letter. (35 RT 4463-64.) Exhibit 32 is a page from a calendar, on which she marked Mr. Parker's time off. (35 RT 4467.) Exhibit 33 is Mr. Parker's timecard, reflecting a return to work on August 14. (35 RT 4469.)

August 7 through 12. (35 RT 4466.) On cross-examination, she recalled that Mr. Parker rode his bike to work; she did not recall seeing any handcuffs on his bike. (35 RT 4473.)

Ernesto Lozano was the floor supervisor at Lenscrafters, and he worked with Calvin Parker for about a month before August 14, 2000. (35 RT 4478-79.) He thought Parker requested too much time off, given that he was a relatively new employee, but agreed to grant the request after seeing the letter. (35 RT 4479.)[25] Mr. Parker's last day of work before his break was August 6; he returned on August 14. (35 RT 4483.) Mr. Lozano never saw handcuffs on Mr. Parker's bike. (35 RT 4486.)

The parties stipulated that if **Eva Nunn** was a witness, she would testify that she is the foster mother of the defendant, Calvin Parker; in the summer of 2000, Mrs. Nunn lived in Texas; in the summer of 2000, Miss Nunn was neither diagnosed with cancer, nor suffering from any cancerous-related medical condition; and that the defendant had not seen or spoken to his foster mother, Eva Nunn, for at least three years. (35 RT 4495-96.)

Leilani Kaloha was a friend of Calvin Parker, beginning in 1997. (41 RT 5429.) Mr. Parker had a romantic interest in her, but they were just friends. (41 RT 5430.) She spoke with Parker by telephone in April, 2000, and he said that he and Ms. Gallego were going to live together so their upcoming marriage would look believable. (41 RT 5431.) Parker did not express special feelings for Ms. Gallego; later, before August, Parker told her the marriage was off. (41 RT 5432.) Parker rode a bike; she never saw him with handcuffs. (41 RT 5437-39.)

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[25] Mr. Lozano printed the timecard form marked Exhibit 33. (35 RT 4480.) Exhibit 34 is an enlargement of that form. (35 RT 4482.)

Marilyn Powell met Calvin Parker in 1998, and their friendship became a sexual relationship between April and August, 1998; he sometimes spent the night at her place. (41 RT 5450-51.) His friendship served a purpose, but really they had nothing in common. (41 RT 5459.) She remembers that Mr. Parker used handcuffs to lock his bike. (41 RT 5459-60.) After they broke up, she saw him on Christmas Eve, 1998, and when she had a yard sale in February, 2000; she also saw him occasionally riding his bike. (41 RT 5461-62.) On July 18, 2000, they spoke on the phone, and she noted it in her diary[26]; Mr. Parker was upset because Ms. Gallego had backed out of the marriage arrangement they had. (41 RT 5463-65.) Ms. Powell's interpretation was that Gallego and Parker's marriage arrangement was not romantic, and that they were living together so it would look real. (41 RT 5466.)

2. Discovery of the Offense.

Dale Kaler testified that on August 13, 2000, at about 8:00 a.m., he was going to retrieve a chain saw borrowed by a neighbor, Scott Carroll, when he saw a mattress lying on the road by the neighbor's fence. (33 RT 3986.)[27] He did not think anything of the mattress at the time, but later his daughter and Mr. Carroll's set up a lemonade stand; the girls picked the mattress up and noticed blood. (33 RT 3990.)[28] Mr. Carroll called the Sheriff, but officers did not come until that night; they said the detectives would come, but they didn't. (33 RT 3992.) Mr. Carroll called the San

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[26] A page from Ms. Powell's diary, dated July 17-19, 2000, was marked Defense Exhibit J. (41 RT 5468.)

[27] Mr. Kaler identified People's Exhibit 2, three photographs of the mattress (33 RT 3986-8), and Exhibit 3, a large map of the San Diego area. (33 RT 3988.) He also identified Exhibit 4, a mattress cover removed from the mattress and sealed in plastic. (33 RT 3991.)

[28] A defense objection to hearsay was overruled. (33 RT 3990.)

Diego police three days later, after the incident was on the news; Det. Hergenroeather came and they collected the mattress. (33 RT 3992-3.)

On cross-examination, Mr. Kaler testified that when the girls first reported the blood, they had already propped the mattress up against the fence. (33 RT 3994.)

Devon M. Combe (33 RT 3995-9) and **Jillian A. Carroll** (33 RT 4000-2) testified that they set up a lemonade stand on August 14, 2000; business was bad at the corner, so they moved the stand; and then they discovered a mattress with blood on it. They told Devon's mom, and later the police.

Steve Gomez testified via Spanish interpreter that he went to work about 6:30-7:00 a.m. on August 14, 2000, doing parking lot maintenance at the Petsmart store. (33 RT 4003-4.) He initially stated that his sister-in-law dropped him off, then agreed with the prosecutor that he was driven by his supervisor, Temo. (33 RT 4005-6.)[29] Mr. Gomez had a habit of looking in the dumpsters when he went to throw trash out; the store often threw out pet supplies. (33 RT 4008.) He looked through some bags, and saw fingers among other items. (33 RT 4009-11.) He called his supervisor, Temo. (33 RT 4011, 4013.) The fingers looked like a woman's, and they looked black. (33 RT 4012.)

On cross-examination, Mr. Gomez testified that he did not put any trash in the dumpster. He saw lighters and cigarettes, which he removed; and when he tipped the bag on the side, a full bottle of water slipped out. He did not remove other items. (33 RT 4014-15.)

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[29] Mr. Gomez identified People's Exhibit 5, nine photographs depicting the Petsmart lot and its dumpsters. (33 RT 4006.)

Cauhtemoc Topete (also known as "Temo") testified via interpreter. (33 RT 4018.) On August 14, 2000, he dropped two workers off at the Petsmart and went to another location. (33 RT 4019-20.) He got a page about 7:15-7:30, and returned to Petsmart. (33 RT4020.) He looked in the left dumpster, and saw two human fingers that appeared to be burned. (33 RT 4022.) Mr. Topete told his employee not to move anything, and asked the manager of Petsmart to call the police. (33 RT 4023.)

Debra L.Desrosiers testified that on August 14, 2000, she was walking with a friend in her new subdivision when they noticed a trash can wrapped with duct tape, in a ditch near the road. (33 RT 4024-5.) They kicked it, and it seemed heavy; her friend lifted the lid a little, they saw what looked like flesh and dark hair inside plastic, and they went to call 911. (33 RT 4026-7.)[30] The can was perhaps 20 feet from the road. (33 RT 4031.)

Phillip Franchina, a San Diego police officer, was dispatched to the Petsmart on August 14, 2000, about 8:15-8:30 a.m. (33 RT 4036.) He looked in the dumpster and saw a lot of trash. He spoke with Mr. Topete, looked under yellow dishwashing gloves in the dumpster, and saw fingers; he then called his supervisor. (33 RT 4037-8.) His supervisor called homicide, and he set up crime scene tape. (33 RT 4038-9.)

William B. Holmes testified that he is a homicide detective sergeant, supervising a team of four detectives and a forensic specialist. (33 RT 4045.) His team responded to the call about fingers in the dumpster behind Petsmart; and the next day, they were called back because a witness saw a subject throw something toward planters to the west of the

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[30] Ms Derosiers identified People's Exhibit 6, three photos of a trash can, and Exhibit 7, a trash can sealed in plasic. (33 RT 4028, 4030.)

dumpsters. (33 RT 4046-7.) He saw a human thumb, depicted in Exhibit 5, photographs C and F. (33 RT 4048-9.)

At some point, he got a call about a body with no fingers found in Carlsbad, but they felt confident the homicide was in San Diego. (33 RT 4049.) Despite objection, Det. Holmes testified that he has 28 years of experience with handcuffs. He viewed photographs of the victim's wrist and back. (33 RT 4051.)[31] Based on his suspicions, he called Dr. Skip Sperber, a forensic dentist he had worked with before. (33 RT 4056.)

On cross-examination, Det. Holmes testified that he and detectives Hergenroeather, Keyser, and Ott were members of the investigative team. (33 RT 4057.) He did not recall if he called Dr. Sperber at home or at his office, but told him of his suspicions and wanted him to compare marks to handcuffs. (33 RT 4060-61.)[32] He showed Sperber several varieties of old handcuffs kept in a box in the property room, looking for items that had nicks; he does not know how many or what kind Sperber took with him. (33 RT 4062, 4070 .) The box of extra handcuffs is used for training; they probably looked at 20-25 sets that day. (33 RT 4067-8.)

Det. James Hergenroeather, a homicide detective, responded to Petsmart on August 14, 2000. (37 RT 4691-63.) It was his job to go in the

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[31] Det. Holmes identified People's Exhibit 8, two autopsy photographs of a left wrist (33 RT 4052); Exhibit 9, two autopsy photographs labeled "handcuff mark comparison" (33 RT 4054); and Exhibit 10, two autopsy photographs labeled "handcuff mark comparison" with overlay, depicting the back. (33 RT 4054.)

[32] No handcuffs linked to the defendant were found during the investigation. (33 RT 4064.)

dumpster to the south, where fingers had been found. (37 RT 46934.)[33] 171 items were catalogued from the dumpster; they are noted in his Crime Scene Report, and include a brown plastic bag labeled "Ralph's" containing 2 yellow rubber gloves with red stains, 2 empty packages labeled, "Bic Sure Start," 1 blue bar of soap with 1 US penny attached to it, 5 US pennies, 1 plastic top of a spray bottle, pieces of duct tape, 3 white paper towels found wet, and 4 apparent fingertips that were burned. (37 RT 4696-97.)[34] At the dumpster location, he was just sifting and looking for more body parts. (37 RT 4706.)

They eventually transported the dumpsters to the Naval Training Center (NTC); 7 fingers were found in the dumpster, and one on the ground by the other dumpster. (37 RT 4708-09.) Also found in the dumpster were: two cigarettes that had been lit but not smoked (37 RT 4710); a white bottle labeled "Tile Action" (37 RT 4711); a bottle of water (*Ibid.*); two Bic lighters (37 RT 4712); a pack of cigarettes (37 RT 4713); a candy wrapper and empty syrup bottle (*Ibid.*); a Home Depot bag containing a shower cap and packaging for dust masks (*Ibid.*); a rusted single-edge razor blade (*Ibid.*); a plastic bag containing a used roll of duct tape and 8 inch Ohio Forge bolt cutters from Home Depot (37 RT 4714-15). Also found was a black plastic bag containing: a banana peel; 1 piece of green wood; 1 blue shirt; 1 empty 3 fluid ounce clear plastic bottle; one pair of tweezers; 2 empty plastic containers, two metal container tops labeled "Kraft handy

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[33] Det. Hergenroather described various photographs contained on a board marked Exhibit 5, concerning the dumpster and items therein. (37 RT 4693-5.)

[34] There is a great deal of confusion in this case about numbering of evidence items collected by the police, and numbering of exhibits. (See, e.g., 37 RT 4703, wherein the trial court notes different numbering systems.)

snacks"; 1 plastic file; 2 pieces of redwood; 1 plastic bag with 1 paper towel that had apparently been partially removed; 1 white and yellow plastic squirt bottle top; 1 brown wooden comb; 1 pink washcloth that was wet when collected; 1 glass named "dazzling gold Estee Lauder; one 8-ounce empty plastic bottle labeled "bath and body works body splash"; 1 green toilet seat cover; 1 piece of label from the plastic labeled "aphrodisia ten sticks"; 1 pair of blue denim pants labeled "Levi's." inside the pants was 1 tag labeled "waist 29, length 34"; and 1 metal hand drill labeled "Stanley." (37 RT 4717-18.)[35] When they were finished at the NTC, they took items back to the police station and lab to examine them further. (37 RT 4725.)

After the detective got a call about the body, he went to the medical examiner's office; the body was in a green plastic trash can (Exh. 7), which he has wrapped in plastic due to the smell. (37 RT 4726-27.)[36] A scarf was tied loosely around the victim's neck; he has seen such items used before as a gag. (37 RT 4752-3.) Vaginal swabs and samples were taken, and kept at the police lab. (37 RT 4754.) A positive identification was made after identification and her fingerprints were located in the Benecia St. apartment. (*Ibid.*)

He returned to the body with Dr. Sperber, after Det. Holmes asked the doctor to examine the body. (37 RT 4755.) They got a pair of "middle of the road" handcuffs from the property room, then went to the Medical

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[35] Det. Hergenroeather also identified People's Exhibit 58, a piece of paper from the black plastic bag that said "please do not disturb" (37 RT 4719); Exhibit 59, a handwritten "to do" list and Exhibit 60, an enlarged copy of the "to do" list (37 RT 4720).

[36] Photographs of the trash can are displayed on Exhibit 15. (37 RT 4727.) Exhibits 16 and 17 are photographs of the body at the medical examiner's office. (37 RT 4729.) Exhibit 16A depicts a scarf around the victim's neck. (37 RT 4729.)

Examiner's Office. (*Ibid.*) He took more photographs while there with Dr. Sperber. (37 RT 4756.) He has seen marks from handcuffs on other people. (37 RT 4757.)[37] The handcuffs were placed on the victim's body, with her arms behind her back; a mark on her back was close to where the handcuffs were. (37 RT 4760.)

The apartment on Benecia Street was searched after Calvin Parker was removed; it appeared to be clean. (37 RT 4762.)[38] He, Sgt. Holmes, and Tom Washington walked through the apartment; then Holmes left, and he and Washington began collecting evidence. (37 RT 4764.) After inspecting, they marked locations of evidence with placards. (37 RT 4765.) In the living room, they found a white laundry basket with cleaning supplies. (37 RT 4767-68.) There was a manila envelope containing identification, papers, and photos of Ms. Gallego. (37 RT 4768-69.) He confirmed her name from the identification; one of the photographs was altered, with large breasts drawn on. (37 RT 4770.) In the closet, he found plastic bags matching the ones in the dumpster, and a Nash scarf. (37 RT 4771.)

In the dining room, investigators found Ms. Gallego's car keys and some papers, including a handwritten note about how to drive a car with a clutch. (37 RT 4772.) Cleaning supplies and a plastic bag of trash were

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[37] Det. Hergenroeather identified People's Exhibits 9 and 10, photographs taken with Dr. Sperber (37 RT 4757); Exhibit 61, a photograph of the victim's back (37 RT 4758-59);and Exhibit 62, a photograph showing handcuffs close to a mark on the victim's back (37 RT 4760).

[38] Det. Hergenroeather identified People's Exhibit 35, a diagram of the apartment that is marked to show where evidence was found (37 RT 4763-64); Exhibit 63, a photoboard with photos of the interior of the apartment (37 RT 4765-66); Exhibit 13, photos of the apartment (37 RT 4767-68); Exhibit 64, a manila envelope with photos and identification of the victim (37 RT 4768-69).

found in the kitchen; the bag contained a torn check, number 201, from Ms. Gallego's account. (37 RT 4774-75.) A knife was also collected. (37 RT 4775.) Several credit card applications were found, as well as a personal information sheet and $194.30 in cash. (37 RT 4777-79, 4781.) Among the papers was check number 202, made out to Calvin Parker, and receipts for a Rug Doctor rental, a U-haul rental, and a purchase at Home Depot. (37 RT 4787.)

In Ms. Gallego's bedroom, it looked as if things had been cleaned and moved; photographs were taken. (37 RT 4782-83.) Ms. Gallego's bathroom appeared clean. (37 RT 4787.) Blood was found in Ms. Gallego's bedroom; her bedding was not found. (37 RT 4821-22.)

There were cleaning supplies under the sink in Mr. Parker's bathroom; an electric shaver was noted. (37 RT 4790.) In Mr. Parker's bedroom, they found a quantity of papers, and medication, clothing, bedding, posters, and cassette tapes. (37 RT 4792.) Papers were in various locations in the room. (37 RT 4793-96.) A Ralph's receipt dated August 13, 2000 included garbage bags and Rubbermaid. (37 RT 4797.) A lined paper stated, "I am sorry that I'm not able to finish my shifts." (*Ibid.*) A note began with "the loudest clap of thunder"; another item was a letter beginning with, "I didn't feel much like talking last night." (37 RT 4798.) Numerous items described as "pornography" were found; the jury was told that the items they saw were 1% of the quantity collected. (37 RT 4803; descriptions of the items are found at (37 RT 4802-11.)

During the search of the apartment, the detectives were called away because a mattress was found, matching the box spring remaining in Ms. Gallego's bedroom. (37 RT 4812.) Photographs were taken, and the mattress was taken to the lab. (37 RT 4813.) No handcuffs were found during the investigation. (37 RT 4823.)

In Ms. Gallego's car was a Chevron service station receipt bearing the name Erik Smith. (37 RT 4814.) The vehicle was registered to Ms. Gallego. (37 RT 4815.) After collecting evidence from the car, they examined and photographed the U-haul and a blue dolly. (37 RT 4817.)

Ilana M. Ivascu testified that on August 13, 2000, she was in her second floor apartment facing the Petsmart parking lot (33 RT 4072) when she saw an African-American man back a U-haul truck by the dumpsters; the man wore black gloves, and flicked something into the side yard. (33 RT 4074-5.)[39] The man partially opened the back of the truck and put two garbage bags in the dumpster; she also saw part of a Rug Doctor shampoo machine in the back. (33 RT 4075-6.) Then he drove away. (33 RT 4075.) After she heard about the crime, she called police, on the 15th. (33 RT 4077.)

Gary Spencer testified that on August 14, 2000, he was the acting watch commander with the Carlsbad police department, when a call came in about a trash can; an officer could not find the can, but he looked later and located it. (34 RT 4101-3.) The lid was almost closed when found; he looked inside, and saw what appeared to be plastic over hair and skin. (34 RT 4103-4.) He then secured the area and notified the detective division and the evidence technicians. The can was 4-5 feet from the sidewalk. (34 RT 4105.) The can was located some distance from Interstate 5; routes to the scene are limited by barriers. (34 RT 4107-9.)

Richard James Carlson, a detective with the special investigations unit of the San Diego police department, was assigned on August 15, 2000

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[39] Ms. Ivascu identified People's Exhibit 11, four photographs depicting apartment views and Petsmart parking lot (33 RT 4072) and Exhibit 12, four photographs depicting a U-haul van, exterior and interior views.

to assist with surveillance of a residence at 1266 Benicia Street, Apt. 2. (34 RT 4112.)[40] He saw a black male enter the apartment using a key, go back out for a mop and bucket, and eventually leave. (34 RT 4113-14.) Approximately six officers were involved in the surveillance. (34 RT 4114.) Calvin Parker was arrested. (34 RT 4115.)

3. Events Post-Offense.

Timothy Edward Dwyer owned a U-haul truck rental dealership. On August 12, 2000, he got a call from Calvin Parker to reserve a truck. (35 RT 4420-21.) Mr. Parker reserved a 10 by 14 foot truck, and arrived on a bicycle. (35 RT 4422, 4424.)[41] His credit and other information was recorded. (35 RT 4422.) The truck was returned on August 14; it had been driven 254 miles. (35 RT 4438.) He did not notice handcuffs on Mr. Parker's bike. (35 RT 4451.)

Joshua S. Dubois was between homes in August, 2000, just before beginning medical school, and sometimes stayed with his girlfriend at her apartment on Benecia St. in San Diego. (36 RT 4519.) On Sunday, August 13, 2000 he and his girlfriend had plans to go to Huntington Beach; they saw a U-haul in the parking lot of the apartment building. (36 RT 4519.) That night, he slept in the living room; he was awakened twice, by car doors slamming and once by what sounded like duct tape coming off a roll. (36 RT 4528.) He heard the duct tape around 3 a.m. on August 14; the

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[40] Det. Carlson identified People's Exhibit 13, six photographss of the Benicia St. apartment, labeled A-F, interior and exterior views. (34 RT 4113.)

[41] Mr. Dwyer identified People's Exhibit 26, an original U-haul truck receipt dated August 12, 2000. (35 RT 4426.) He identified his truck, depicted in Exhibit 12. (35 RT 4430.) He identified Exhibit 27, which contained information about the return on the back. (35 RT 4437.) Exhibit 29 is the customer copies of the original receipt. (35 RT 4442.)

sounds continued for about an hour, and he asked his girlfriend if someone was moving. (36 RT 4529-30.)

Vicki Niderost is a bookkeeper at Home Depot's Balboa/Genesee location. (36 RT 4536.) In August, 2000, she was assistant store manager at the Sports Arena store. (36 RT 4537.) Detectives asked her to look up some bar codes; she tracked Calvin Parker's purchases. (36 RT 4539-40.)[42] He bought bolt cutters on August 13 at 8:46 a.m. (36 RT 4544.) Credit card and other information shows up on the printout; she was able to determine what other purchases were made. (36 RT 4547-48.) Mr. Parker rented a Rug Doctor carpet cleaner and bought carpet shampoo on August 13 at 9:04 a.m. (36 RT 4549.) On August 12, he purchased a trash can and hand drill at the El Cajon store. (36 RT 4556.)

In August, 2000, **April Carey** was a teller at the Wells Fargo bank, at the Fashion Valley Branch located across from the mall. (36 RT 4568.) She was working on August 14, 2000; a particular transaction about 11:30 a.m. that day stands out. (36 RT 4569.)[43] A man wanted to cash a check for $350, she checked his identification, and then she tried to process the transaction on a different computer because they were having computer

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[42] Ms. Niderost identified People's Exhibit 36, 18-inch bolt cutters by Ohio Force. (36 RT 4541); Exhibit 37, a record of the purchase of the bolt cutters (36 RT 4544); Exhibit 38, a record of rental of a Rug Doctor shampooer (36 RT 4549); Exhibit 39, an imprint of Mr. Parker's credit card (36 RT 4550); Exhibit 40, an original set of receipts for the Rug Doctor (36 RT 4550); Exhibit 41, a record of purchases of a trash can and hand drill (36 RT 4554); Exhibit 42, a SKU look-up document regarding the trash can (36 RT 4561); and Exhibit 44, a hand drill (36 RT 4567).

[43] Ms. Carey identified People's Exhibit 45, check 202 payable to CP for $350 (36 RT 4570-71); Exhibit 46, an enlargement of that check (36 RT 4571); Exhibit 47, Calvin Parker's driver's license (36 RT 4573); and Exhibit 48, a board with 6 photographs from Wells Fargo (36 RT 4578).

problems. (36 RT 4570.) She noted Mr. Parker's driver's license number on the check, which was to be drawn on Patricia Gallegos' account. (36 RT 4572.) Mr. Parker left because the transaction did not go through; security cameras took pictures during the transaction. (36 RT 4577.)

Gerardo Villa was a teller at a Wells Fargo branch located in El Cajon, in a Ralph's supermarket. (36 RT 4591.) On August 12, 2000, about 2:10 p.m., a man tried to cash a check for $350 or $300; the check was No. 200 on Patricia Gallego's account, made out to Calvin Parker, and there was a discrepancy between the numerical amount and that written out on the check. (36 RT 4591-94.)[44] Mr. Villa reconciled the discrepancy, and Mr. Parker was paid $300. (36 RT 4603, 4599.)

Jeri Wilkinson is a Wells Fargo fraud investigator. (40 RT 5174.) Patricia Gallego had a checking and savings account at Wells Fargo; Calvin Parker has a checking account. (40 RT 5176.) Ms. Gallego's checking account was linked to an ATM card. (40 RT 5179.) Check no. 200 was cashed for $300. (40 RT 5182, 5185.) A California driver's license number was at the top of checks 200 and 202. (40 RT 5188.) He produced still photographs from a video camera. (40 RT 5191.) On June 20, 2000, Ms. Gallego had $4,135.62 in her savings account. (40 RT 5201.) Calvin Parker's account shows purchases at Home Depot stores, Ralph's, and a truck rental, and withdrawals of cash, between August 12 and 14, 2000. (40 RT 5221-24.)

Robert Morton is a manager at the Plaza Camino Chevron in Carlsbad. (36 RT 4662.) On August 15, 2000, he remembers a man

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[44] Mr. Villa identified People's Exhibit 49, check no. 200 (36 RT 4592); Exhibit 50, an enlargement of the check (36 RT 4594); and Exhibits 51 and 52, printouts of the transaction (36 RT 4596.)

pushing a 1993 Ford Escort into the station. (36 RT 4663.) The person, an African-American man, said he had been there earlier to purchase a car battery; he gave his name as Erik Smith, and said he had been in the parking lot all night because he could not start the car. (36 RT 4664-46.)[45] Mr. Morton's technician could not find a problem, which is what they told the customer when he returned. (36 RT 4667.) However, Mr. Parker could not start the car; it looked like he did not know how to drive a stick shift. (36 RT 4668.)

Edward Lee was a jailhouse informant who met Mr. Parker in jail, after Mr. Lee was arrested on drug-related charges. (40 RT 5330.)[46] Lee testified that Parker told him he was in jail for murder. (40 RT 5332.) Parker allegedly said he planned to marry a girl from Brazil for $2,000, so she could gain citizenship; but he decided to do another thing because she allegedly had $15,000 in the bank. (40 RT 5334.)[47] Parker discussed cutting her fingers with bolt cutters. (40 RT 5335.) Parker allegedly thought no one would notice since she was from a different country. (40

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[45] Mr. Morton looked at People's Exhibit 53, a board containing 4 photographs of the interior of a car, and said it looked like the car that came in, but he repairs dozens of cars a day. (36 RT 4664.) Exhibit 54 was the service repair order for customer Erik Smith, and exhibit 55 noted that the customer paid cash. (36 RT 4669-70.)

[46] Mr. Lee also pled guilty in August 2000 to violating a restraining order precluding him from being near his mother; he denied that occurred until confronted with a certified copy of the judgment. (40 RT 5348-49.) He lied to the police when arrested, giving his brother's name. (40 RT 5373.)

[47] Bank records indicate that Ms. Gallego had approximately $4,000 in her savings account. (40 RT 5201.)

RT 5337.)[48] According to Lee, the body was disposed of in a dumpster. (40 RT 5342.)[49] He claims Parker told him he drained the blood from her body in the bathroom. (*Ibid.*)[50]

4. Forensic Evidence.

Dr. Christopher I. Swalwell, deputy medical examiner, performed an autopsy on Patricia Gallego on August 15, 2000. (34 RT 4116-18.)[51] Ms. Gallego's body arrived in a plastic trash can. (34 RT 4119.) The body was wrapped in plastic, and there was moisture inside but no blood; the body was naked except for a scarf. (34 RT 4120-21.) The scarf was tied in a double knot; it was removed by pulling it over her head, without untying the knot. (34 RT 4123-24.) Sexual assault swabs were taken. (34 RT 4124.)

There were several areas of discoloration on the body, some from injuries and some post-mortem, due to decomposition. (34 RT 4125.) He was unable to determine a time of death, but estimated two to three days

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[48] Other evidence demonstrates that Mr. Parker knew Ms. Gallego had friends, some of whom he also knew, and that Parker was aware of her two jobs.

[49] Ms. Gallego's fingers were found in a dumpster; her body was found elsewhere.

[50] Although the alleged draining of blood was a favorite theory of the prosecutor, it was not supported by forensic or any other evidence than the word of this jailhouse informant.

[51] Dr. Swalwell identified People's Exhibit 14, a certified copy of the death certificate (34 RT 4118); Exhibit 15, three photographs of the trash can containing the body (34 RT 4119); Exhibit 16, 2 autopsy photos depicting head and neck views (34 RT 4121); Exhibit 17, an autopsy photo of the entire body (34 RT 4121); Exhibit 18, four severed fingertips (34:4129); Exhibit 19, an x-ray of the victim's right hand (34 RT 4130); Exhibit 20, an x-ray of the victim's left hand (34 RT 4130); Exhibit 21, diagram of full body, front and back vies, depicting injuries (34 RT 4132).

earlier. (34 RT 4128.) The pubic area had been recently shaved, with no re-growth of hairs. (34 RT 4128.) The body was missing fingers; he matched those received later with the body. (34 RT 4128-31.) He received eight fingers and one thumb. (34 RT 4131.) Dr. Swalwell marked areas where he noted external findings on a chart (Exh. 21; 34 RT 4133 et seq.) There was a bruise on her right arm, and other faint marks on the arms and wrists which he considered post-mortem. (34 RT 4139.) It is hard to determine if superficial cuts occur before or after death, because there is little bleeding. (34 RT 4139-40.) He has marked the chart with green for areas where he cannot determine if an injury occurred before or after death. (34 RT 4141.) There was a pre-mortem injury to the inner right ankle; pre-mortem injuries are marked in red. (34 RT 4143.) Discolorations behind her knees are probably post-mortem. (34 RT 4144.) There were pre-mortem injuries to the head and neck. (34 RT 4145.)

Defensive wounds are sustained in the act of defending oneself; he found no injuries that were definitively defensive. (34 RT 4149.) A mark on the left wrist might have been defensive. (*Ibid.*) Scratches around Ms. Gallego's wrist could have been made by anything with an edge. (34 RT 4152.) An injury on the back was pre-mortem, as there was bleeding under the skin; but there were also post-mortem changes. (34 RT 4152-53.) Exhibit 22 is three photos of the head at autopsy, showing blunt force trauma resulting in a skull fracture. (34 RT 4154-55.) This injury would cause unconsciousness, but not normally death. (34 RT 4157.)

The neck injury was a sharp force injury. (34 RT 4157.) It was on the left side of the neck, horizontal, 2 inches in length and cut down to the spine, a depth of 1 1/4 inches. (34 RT 4159.) The internal jugular vein was cut. (34 RT 4161.) The spine shows three parallel cuts on the left side; two of those marks were superficial. (34 RT 4163.) This injury was pre-

mortem; the cause of death was blood loss from this injury. (34 RT 4164.) After losing approximately 1/3 of the volume of blood, the body goes into shock; death occurs with a 40-50% loss of blood, because there is no longer enough to provide oxygen to the organs. (34 RT 4166.) It would have taken less than an hour, but over one minute, for Ms. Gallego to die. (34 RT 4167.)

There was no blood at autopsy. (34 RT 4168.) Both her scalp and her neck would have bled. (34 RT 4171.) Head injuries bleed profusely; her scalp was torn. (34 RT 4215.) There was some decomposition and skin slippage by the time of autopsy. (34 RT 4172-73.) There was a fracture of the superior horn of the thyroid cartilage; this is common in asphyxia by hanging or strangulation. (34 RT 4177.) The damage to the thyroid cartilage, however, occurred after death. (34 RT 4240.) The stomach contained a small amount of vegetable or fruit; he could identify a bit of onion. (34 RT 4179-80.) A large meal might take 6-8 hours to digest; a light snack, perhaps an hour or two. (34 RT 4181.)

A sexual assault examination was conducted. (34 RT 4187.) No spermatazoa were found on the swabs. (34 RT 4189.) There were no oral, vaginal, or anal injuries. (34 RT 4197-98.) The fingertips were removed after death; there is no evidence that the burning occurred before death. (34 RT 4199.) The vocal cords were not damaged. (34 RT 4229.) The mark on the back could have been caused by the metal track of a bathtub shower door, but he believes it would have required impact. (34 RT 4244-45.) The injury on the back occurred before death. (34 RT 4248.)

Norman Donald Sperber is a private dentist, and describes his second profession as the chief forensic dentist for San Diego and Imperial

counties.[52] He graduated with degrees in zoology and chemistry from Carleton College, and from the NYU College of Dentistry in 1954; thereafter, he came to California as a dental officer with the Navy. (35 RT 4323.) Teeth make marks, called tool marks; he also gives opinions on other marks allegedly caused by other objects: e.g., a watch, a tire iron, etc. (35 RT 4324-29.)[53] He was asked by Det. Holmes to consult on this case, and examine Ms. Gallego's body; before the examination, he got some handcuffs from the police impound storage area. (35 RT 4329-30.) He examined the body on August 24, 2000, beginning with the back; someone thought marks might be due to handcuffs. (35 RT 4331-2.) Sperber thought the handcuffs matched the mark, in that they were not 6 inches up or 7 inches down. (35 RT 4336-37.) Exhibits 9 and 10 illustrate his examination. (35 RT 4337-42.) The medical examiner had made an incision through the mark on the back, so Sperber held the skin together with forceps. (35 RT 4343.)

On cross-examination, Dr. Sperber testified that "likelihood" is a synonym for "could be." (35 RT 4348.) There is no discussion in his report about examination of marks on the wrists. (35 RT 4350.) He remembers Det. Holmes having suspicions about the wrist. (35 RT 4351.) He is not an expert on handcuffs (35 RT 4354), and he made no effort to record the type he used. (35 RT 4357.) That examination was the first time he ever applied handcuffs to a body. (35 RT 4360.) He had already concluded the wrist marks were from handcuffs before he examined the

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[52] On cross-examination, Sperber admitted that no "chief forensic dentist" job title exists; it is how he explains his work. (35 RT 4384-85.)

[53] Objections to Dr. Sperber's qualifications to render opinions in this case were overruled. (15 RT 1181-1183.) The opinions he expressed regarding handcuffs were not endorsed by the actual medical examiner who performed the autopsy. (See, e.g., 34 RT 4151-4152.)

body. (35 RT 4361, 4363.) Sperber had previously testified that he was not an expert in tool marks, and he agreed he is not a tool mark expert as defined by forensic science. (35 RT 4366, 4369.) In almost all of the other cases, he had the item to compare to the mark. (35 RT 4371.) He has no notes of what he was told by Det. Holmes, or of the process he undertook when examining the body on August 24. (35 RT 4414.)

Shawn Montpetit is a criminalist with the San Diego Police Department, primarily analyzing evidence for biological material and conducting DNA tests; he also responds to crime scenes. (39 RT 5061.) He compares crime scene evidence to reference samples; he had hair from Patricia Gallego and blood from Calvin Parker. (39 RT 5064.) Human DNA, believed to belong to Ms. Gallego, was found on the bolt cutters, Exh. 36. (39 RT 5065-66.) Five areas on the mattress cover, Exh. 4, tested positive for blood. (39 RT 5066-7.) He also located at least 100 sperm cells, and non-sperm cells belonging to Ms. Gallego. (39 RT 5082, 5071-72.)

On June 27, 2001, he tested areas of the scarf, Exh. 89, for saliva; the results were inconclusive. (39 RT 5075-77.) On vaginal swabs taken from Ms. Gallego, he found a mixture of sperm and epithelial cells; Mr. Parker and Ms. Gallego were "possible contributors," because they could not be excluded as the sources. (39 RT 5082-85, 5092.)[54] He also conducted luminol testing of Ms. Gallego's bedroom; blood was found in

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[54] Mr. Montpetit identified People's Exhibit 99, a Chart titled "DNA Types Detected" (39 RT 5085-86); Exhibit 97, photographs of areas tested with luminol (39 RT 5093); he pointed out areas of blood on Exhibit 12, photographs of the truck (39 RT 5100-01), and Exhibit 35, a diagram of the apartment (39 RT 5102-05); Exhibit 100, "DNA Types Detected" Chart and Exhibit 101, "PCR DNA Results DNA Types Detected" Chart (39 RT 5110).

the corner of the room, by the bathroom door, on the door and doorframe, and on the bathroom floor. (39 RT 5093, 5095-98.) The U-haul truck was examined, and five areas of blood were located; DNA testing was not performed. (39 RT 5099.) He also tested a banana peel, but he isn't sure where it came from; the marker just says [item] 12A, and his notes do not correspond with what the police marked as evidence in 12. (40 RT 5132-33.)

On cross-examination, Mr. Montpetit testified he started at the Benecia Street apartment on August 15, 2000, and worked there for three days; he did luminol testing on the 16th and 17th. (40 RT 5135.) Exhibit 35 has red markers referring to places where he saw blood, or blood was evident with chemical testing. (*Ibid.*) He could see blood at the apartment, and also evidence of a clean-up. (40 RT 5141.) He first examined the bolt cutters on September 27, 2000, and they and apparent pieces of tissue tested negative for blood. (40 RT 5143-44.) He retrieved vaginal swabs and examined them, observing a small number of sperm cells[55] and also epithelial cells (40 RT 5147-50); Parker's sperm was found, but he cannot tell when it got there. (40 RT 5151.) He took two pieces from the mattress on September 25, 2000; both showed blood, and he found 85 sperm on one and 3 on the other; however, sperm can stay on a mattress for 15 years. (40 RT 5153-55.) Sperm can also be transferred from surface to surface; he can't say how or when those sperm arrived on the mattress. (40 RT 5156-57.)

David Oleksow is a forensic document examiner. (40 RT 5257.) He was presented with known writing samples (exemplars) of Calvin

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[55] A normal male ejaculation contains 3 billion sperm cells. (40 RT 5150.) Montpetit found between 16 and 43 sperm cells on the slides. (40 RT 5148.)

Parker, and personally collected exemplars on July 31, 2001. (40 RT 5268, 5273.)[56] He examined Exhibit 68 B, a handwritten personal information sheet, and concluded it was written by Mr. Parker. (40 RT 5274, 5281.) Credit card applications were also written by Parker, although he could not verify the signatures. (40 RT 5282-89.) Other items, including receipts and checks, bore Mr. Parker's writing. (See footnote, below.)

5. Additional Material Proffered by the Prosecution.

The prosecution of this case relied significantly on graphic sexual material found among Mr. Parker's belongings after his arrest; this material was called "pornography" throughout the trial[57], but it does not appear to be

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[56] Mr. Oleksow identified People's Exhibit 68 B, a handwritten personal information sheet (40 RT 5272); Exhibit 107, a chart marked Questioned and Known (40 RT 5278); Exhibit 68 C, a Macy's credit card application (40 RT 5282); Exhibit 68 D, a JC Penney credit card application (40 RT 5283); Exhibit 68 E, a Mervyn's credit card application (40 RT 5285); Exhibit 68 F, a Robinson's-May credit card application (40 RT 5286); Exhibit 68 G, a Nordstrom's credit card application (40 RT 5287); Exhibit 68 H, a Wells Fargo credit card application (40 RT 5288); Exhibit 40, receipts from Home Depot and for a Rug Doctor (40 RT 5290); Exhibit 45, check 202 on Ms. Gallego's account (40 RT 5292); Exhibit 66, check 201 (40 RT 5293); Exhibit 108, a copy of a handwritten impression (40 RT 5301); Exhibit 58, paper with Do Not Disturb on one side and a note beginning "I didn't feel much like talking last night" on the reverse (40 RT 5302); Exhibit 65, handwritten notes regarding how to drive a manual transmission (40 RT 5303); Exhibit 75 A, envelope postmarked 7/11/00 with handwritten list of stores (*Ibid.*); Exhibit 75 B, "I'm sorry that I'm not able to finish my shifts" (40 RT 5305); Exhibit 75 C, a letter beginning "I didn't feel much like talking last night" (40 RT 5306); Exhibit 109, a book of Wells Fargo checks (40 RT 5308); and Exhibit 110, a chart with Questioned and Known comparisons (40 RT 5311).

[57] There was extensive litigation about admissibility of this material. The quantities were large; at one pretrial hearing, the trial court described seeing "six to ten cubic feet" of material in the courtroom. (16 RT 1337.) The (footnote continued on next page)

illegal material, nor was there any indication that the material was distributed.[58] The ostensible reason for introducing such evidence was to show a sexual motive for the crime. The unavoidable effect was to cast Mr. Parker as a repellant character, and make the jury less likely to demand proof of the prosecutor's theories.

Although **Marilyn Powell** was called during the guilt phase to testify about the marriage contract between Ms. Gallego and Mr. Parker, the first line of questioning by the prosecution focused on graphic images incorporating photographs that once belonged to her; she was unaware of these altered images before the police showed them to her. (41 RT 5452-58.) She described their sexual relationship as "boring"; and remembered that he recorded "porn" from her television.[59] (41 RT 5451-52.)

6. Defense Case.

Laura Balza was a neighbor of Mr. Parker and Ms. Gallego; she lived at 1266 Benecia Street during August, 2000. (41 RT 5494.)[60] The week before the incident, she heard an argument between a man and a woman, in the middle of the night; she told police that argument was August 8. (41 RT 5496-97, 5502.) She thought the noise was from

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(footnote from previous page)
images are often described as "morphed" (e.g., 16 RT 1346), although "collage" is a better description of the non-digital artistic methods used.

[58] The graphic material was not digital, and mostly consisted of collages made with commercially available explicit images and/or drawings of intimate body parts, sometimes incorporating photographs of people known by Mr. Parker. While they appear to be depictions of private sexual fantasies, none suggest homicidal fantasies.

[59] Ms. Powell recalled Mr. Parker watching the "Spice" channel on commercial cable television at her home. (41 RT 5482.)

[60] Ms. Balra identified Defense Exhibit K, photographs of the apartment building. (41 RT 5495.)

upstairs, but it could have been from Mr. Parker and Ms. Gallego's apartment, next door to hers. (41 RT 5511-12.) She was not home the week that Ms. Gallego was killed; she found out when she returned home. (41 RT 5500.)

Dr. William J Brady, a forensic pathologist (41 RT 5518), reviewed material in this case including autopsy and crime scene photographs, the autopsy report, and tissue slides provided by Dr. Swalwell. (41 RT 5524-26.) Decomposition affects the presence of blood in the body. (41 RT 5529.) Ms. Gallego ate some fruit or vegetables within 4 hours of the time of her death. (41 RT 5533.) Blood loss from a wound does not stop with death. (41 RT 5548.) Ms. Gallego suffered a crushing blow to her scalp and skull. (*Ibid.*)[61] Head wounds bleed extensively. (41 RT 5551.) The dura was not torn, but as shown in Exhs. 22 and 24, the bone was pressing against the dura; the injury would have resulted in unconsciousness. (41 RT 5555-56.)

There was also a large sharp cut in Ms. Gallego's neck. (41 RT 5560.) The head wound was not necessarily fatal, but the neck injury resulted in enough loss of blood to kill her. (41 RT 5563.) He did not see any ligature wounds, or evidence she was gagged. (41 RT 5563-64.) He did not see any defensive wounds, nor injuries to Ms. Gallego's genitalia. (41 RT 5568.) There was no evidence of forced sexual contact. (41 RT 5569.) Three circular reddish marks on Ms. Gallego's back were all post-mortem, as were the removal and burning of her fingers. (41 RT 5571.)

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[61] Dr. Brady identified Defense Exhibit L, a diagram with overlay depicting a cross-section of the skull and brain (41 RT 5549); Exhibit M, a diagram with overlay entitled "superficial veins and cutaneous nerves of neck" (41 RT 5557).

There is no such thing as a "natural position" of a limb after death; the body's position is however it is placed or falls. (41 RT 5574.) Dr. Swalwell observed two marks on the back, one contusion and one abrasion, off to one side (41 RT 5576-77); the contusion was a perimortem injury, close to the time of death. (41 RT 5579.) Dr. Brady disagrees with Dr. Sperber's conclusion that handcuffs were placed on the body. (41 RT 5582.) The neck injury is clean and indicates it took place after unconsciousness. (41 RT 5585.) The two injuries happened close in time; the neck injury was severe, with blood pressure rapidly dropping and the heart stopping, and thus there was no bleeding within the skull. (41 RT 5586.)

Stephanie Ortiz was a former roommate of Patricia Gallego. Their mutual friend, Charles Ijames, asked Ortiz if Gallego could stay with her, in 1998. (42 RT 5627.) Ijames was also a member of Horizon Christian Fellowship. (42 RT 5628.) Ms. Gallego stayed with Ortiz and her roommate Kristina Stepanof for about a month; they discussed Ms. Gallego's plan to marry a U.S. citizen and gain citizenship. (Ibid.) After Ms. Gallego moved, they saw one another once or twice a week at church, then not as often; she did not see Gallego at all during 2000. (42 RT 5629.)

Kristina Stepanof lived with Ms. Gallego previously. (42 RT 5631.) A church friend approached her and Ms. Ortiz, and asked them to take in his former girlfriend, who was from Brazil; the two had lived together, but he wanted to move away from that relationship. Ms. Gallego stayed with them for about a month. (42 RT 5632.) They discussed Ms. Gallego's citizenship; she was here on a student visa, but she needed to work. Ms. Gallego did not attend school while living with them, or thereafter. (42 RT 5633-34.) Ms. Gallego continued to go to church with them once in a while. (42 RT 5634-35.) Ms. Gallego came to visit Ms.

Stepanof at her job in July, 2000; she was happy and excited, and explained she was living with someone so it would look like they were in love, and paying her roommate to marry her. (42 RT 5637-39.)

Jack Goldberg is an expert in acoustics. (42 RT 5645-49.) In January, 2002, he took sound level measurements at five of the six apartments located at 1266 Benicia Street. (42 RT 5650.)[62] He was asked to determine the likelihood that someone would wake up if there was screaming in Apartment 2. (42 RT 5651.) A screaming woman could be 108 decibels (or louder); the sound of a power mower or leaf blower is a similar level, and sufficient to wake someone up. (42 RT 5661, 5664.) Their testing looked at how much isolation there was between Apartment 2 and other locations; how loud the sound was in the other locations; and the level of sound that would wake a person. (42 RT 5663.) Research indicates that fire alarms sounding at 55 decibels and traffic noise are matters that concern communities, and it was likely that people would wake at that level. (42 RT 5665-66.) It was likely that residents in Apartments 3 and 5 would wake if their window was open, and borderline if the window in Apt. 5 was closed; in addition, he notes that the apartment building behind is only 10-12 feet away. (42 RT 5666-67.) He was asked to measure the sound level when someone pulls duct tape off a roll, and found it was 90 decibels; that is significantly less than the sound of a woman screaming, since each 10 additional decibels sounds twice as loud. (42 RT 5668-69.) If someone sleeping in Apartment 5 could hear duct tape with the window closed, it is likely they could hear screaming. (42 RT 5670.) If

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[62] Mr. Goldberg identified Defense Exhibit K, photographs of the apartment (42 RT 5650); Exhibit N, a photograph of the equipment used (42 RT 5652); Exhibit O, two photographs depicting the alley and sound analyzer (42 RT 5653); Exhibit P, a chart of data measured in apartments 1, 2, 4, and 5 (42 RT 5657).

some of the ceiling was removed between Apartment 2 and upstairs apartment 5, the sound would be more likely to travel. (42 RT 5706.)

In the summer of 2000, **Gene Rochambeau, Jr.** was the classified advertising manager for the *San Diego Reader* newspaper. (42 RT 5709.) He checked all of the ads between June 1 and August 15, 2000, and did not find Calvin Parker's name. (42 RT 5710.)

Giacomo Behar is an immigration lawyer. He is familiar with Café Chloe, and knew Eudes DeCrecy; he also knew the previous owner, who was a client. (42 RT 5713.) He recalls speaking to one of the Brazilian waitresses; he was not directly asked for legal services, but asked to leave his card because one might need services in the future. (42 RT 5714-15.) A person with a student visa is required to be enrolled in school full-time. (42 RT 5716.) A person's immigration status can be adjusted by marrying an American, although it is still for the INS to decide if the marriage is legitimate. (42 RT 57167)

Det. Mark Keyser is a San Diego police officer; in August, 2000, he was assigned to the homicide unit. (43 RT 5847.) He participated in the investigation of Patricia Gallego's death, and interviewed residents of the apartment house on Benecia Street. (43 RT 5848-49.) Ms. Balza told him about the argument she heard on August 8, which she initially thought was upstairs and later believed was in Apt. 2. (43 RT 5850.) Ying Lee and Paul Lee lived in Apt. 1 (5852-3), Anthony Dalfio lived in Apt. 4 upstairs, and Melissa Bausch lived in Apt. 5, directly upstairs. (43 RT 5854.) Ms. Bausch's boyfriend was Josh Dubois.[63] (43 RT 5855.) He interviewed

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[63] Joshua S. Dubois previously testified for the prosecution that on Sunday, August 13, 2000 he was staying with his girlfriend at her Benecia Street apartment. (36 RT 4519.) That night, he slept in the living room; he was (footnote continued on next page)

Kristina Stepanof on August 16, 2000, and Ms. Stepanof described it as "somewhat of a friendship" after Ms. Gallego had lived with her for a few weeks. (43 RT 5866-67.) Ms. Stepanof said that Ms. Gallego was excited and happy, said she was in love, and said she had a business arrangement to be married to her roommate; this seemed odd to Ms. Stepanof, who did not feel comfortable pursuing details. (43 RT 5868-70.)

John Lee Edwards was the deputy public administrator assigned to try to locate next of kin, and handle disposition of the body and estate; he was notified by the Medical Examiner's office, and the procedure is to take property left after the police are finished to a storage facility. (43 RT 5883-84.) All the property in the apartment (belonging to either her or Calvin Parker) was stored under Patricia Gallego's name. (43 RT 5885.) A bike seen in People's Exh. 13D, in a storage closet in the common area of the apartment, appears the same as a bike depicted in Defense Exh. Q, which photo includes a bike lock. (43 RT 5885-88.)

Marilyn Powell was recalled. She testified that when Ms. Gallego and Charles Ijames were together a couple of years before her death, they had fights, both swearing and raising their voices. (43 RT 5918-19.) Ijames was an irate alcoholic, and Ms. Gallego had temper tantrums. 43 RT 591-20.)

Det. James Tomsovic was with SDPD's homicide unit in August, 2000. (43 RT 5924.) He interviewed Eudes DeCrecy on August 29, 2000. DeCrecy was one of Ms. Gallego's employers, and knew little about her personal life, but she talked about getting married on August 27, 2000. She

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(footnote from previous page)
awakened twice, by car doors slamming and once by what sounded like duct tape coming off a roll. (36 RT 4528-30.)

did not mention the man's name, and she seemed happy and upbeat when he last saw her on August 10. (43 RT 5925-26.)

Annie Lee is the mother of witness Edward Lee; he lives at her house, although she has a restraining order against him, stating he cannot see her at her house. (43 RT 5933.) In March, 2000, her son threatened to kill her and a boarder; her son was on drugs, and she sought the restraining order so he would get out and get help. (43 RT 5935-38.) She does not remember the police coming in June, 2000 regarding a threat, and thinks the handwriting on the document looks like her daughter-in-law's. (43 RT 5939-41.) Her son is a drug user, and has threatened her more than once; he will say anything. (43 RT 5941-43.) He was arrested in August, 2000 for violating the restraining order; he was up on the hill where drug users go, getting beaten up, and he came down for help. (43 RT 5953.)

C. Penalty Phase.

1. Victim Impact Evidence Proffered by the Prosecution.

Terezinha Ramos da Silva, Ms. Gallego's mother, testified through an interpreter. (51 RT 7014.) Her daughter was born on August 27, 1970; she was a happy girl, and taught herself English. (51 RT 7016.) She started working young, and always supported herself; she moved to the United States about 4 years earlier. (51 RT 7017.) Ms. Gallego's dog is named Julie, and lives with the mother. (51 RT 7018.) Various photographs of her as an adult were identified. (51 RT 7018-22.)[64] She heard that Ms. Gallego's father had gotten phone calls he did not understand, and called her daughter's number; a woman answered and said

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[64] Ms. Ramos da Silva identified the photographs in People's Exhibit 113. (51 RT 7018.)

Ms. Gallego was dead. (51 RT 7024.) She screamed and cried; it did not seem real; now she has died twice, when her daughter died and in court today. (51 RT 7025.)

Rubens Gallego, Ms. Gallego's father, testified via interpreter. (51 RT 7026.) He had just heard the mother's testimony, and agreed that his daughter was enchanting, always happy, pleased everyone, caused no trouble. (51 RT 7027.) He separated from the mother and had another family; Ms. Gallego was close to her brothers. (*Ibid.*) He visited her when she lived in Los Angeles, and had contact with her monthly by phone or email. (51 RT 7028.) He was planning to visit for her 30th birthday; he originally planned to go on August 14. (51 RT 7028-29.) A friend in the U.S. called a friend in Brazil, and asked to pass a message to call; he and his family tried to call the apartment, but nobody spoke English very well, and they could not understand. (51 RT 7029.) Ms. Gallego's visa had expired; he thought it might be about something else. (51 RT 7030.) Her mother called and learned she was dead; we learned the circumstances later, and were all very upset. (51 RT 7030.) He knew she was murdered, but it was much worse than he thought, and he does not know what will happen from here on. (51 RT 7031.)

Kristina Stepanof again described meeting Ms. Gallego, and that she lived with Ms. Stepanof and her roommate for about a month while she looked for work. (51 RT 7032.) Ms. Gallego went to church with them, and the friendship grew; she was ambitious, energetic, a good cook. (51 RT 7033.) She introduced them to friends from Brazil; she was loving and

caring. (51 RT 7034.)[65] She learned of Ms. Gallego's death in a call from Det. Keyser; it has been hard. (51 RT 7036.)

The People also introduced a photoboard of autopsy photographs, marked Exhibit 115. (51 RT 7037.)

2. Mitigation Evidence Proffered by Defense.

Lawrence Parker is the father of Calvin Parker, the second son he had with Brenda Graves. He had not seen his son in 15 years, and is uncertain of his birthday. (51 RT 7043.) Lawrence, Jr. was born first, maybe two years after he started seeing Brenda; she also had a daughter named Gigi. He lived with Brenda after Lawrence, Jr. was born, and while she was pregnant with Calvin. (51 RT 7044.) She was slower than normal during the pregnancy with Calvin, and might have been using heroin, but he did not see her use it. (51 RT 7045.) When Brenda was pregnant with Javonica, Calvin got into some of her pills when the father was not home. Brenda said Calvin was upstairs; she was nervous, biting her nails, talked about calling an ambulance. (51 RT 7045-46.) Calvin's lips were blue. He had to call the ambulance; Calvin's stomach was pumped, and he was kept at the hospital a couple of days. (51 RT 7047-48.) The children were taken from him and Brenda about a year later, after Calvin was injured by her in a rage. (51 RT 7048-49.) He heard the commotion upstairs; Calvin had a gash on his head and was bleeding. (51 RT 7049.) The father hit the mother, then ran downstairs to call the police and ambulance. The children were taken a couple days later, and he left Brenda and moved to Los Angeles. (51 RT 7050.) He lived with Brenda Graves again, a couple of brief occasions. (51 RT 7053.) She had a nervous breakdown when she

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[65] Ms. Stepanof identified People's Exhibit 114, a letter written to her by Ms. Gallego. (51 RT 7034.)

went to Los Angeles to try bringing him back to San Diego; she went to a hospital for a couple weeks. (51 RT 7053-54.) After Calvin was injured, his father next saw him in a foster home about 4 months later. (51 RT 7054.) He next saw Calvin as a teen; and saw him again as an adult, at his brother Lawrence's funeral. (51 RT 7055.) Otherwise, he did not keep in touch with Calvin. (51 RT 7057.)

Frances Gesiakowski was a longtime county employee, who began in a clerical position and became a social worker in 1965. (51 RT 7059-60.) There have been a number of changes in the laws, and there are far more resources for parents now than there were in the 1970's. (51 RT 7065.) The preference now is for every social worker to have an MSW; Ms. Gesiakowski got her MSW in 1990. (51 RT 7066.) She supervised the placement of Calvin Parker; the first entry in the records, Defense Exhibit S, was August 25, 1976. (51 RT 7066-67.) Entries were made every time there was a contact with or about the family, such as a phone call, home call, interview, or conference. (51 RT 7067.)[66]

On August 24, 1976, Brenda Graves was living with a friend's mother, and was out of it, making unrelated remarks; she did not ask about getting her kids back, but was told it would not be soon. (51 RT 7068-69.) The older two children were staying with Mrs. Bolton, who reported that Gigi and Lawrence Jr. were wetting their beds. (51 RT 7069, 7075.) In September, 1976, the grandmother Katherine Graves' interest in guardianship of Calvin and Javonica was discussed, but she was recovering from a stroke, her speech was incoherent, and her daughter Ollie Lee was exercising her arm to aid in recovery; if the children were placed in that

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[66] Earlier social services records had apparently been destroyed. The records in Defense Exhibit S had been complied from remaining case files concerning Calvin Parker's siblings, since his own files had been destroyed.

home, Ms. Lee would be the caretaker. (51 RT 7070-71.) By November, 1976, the grandmother had suffered another stroke, and Ms. Lee was caring for all the children in the house. When Brenda Graves went by to visit, Calvin became physically sick. (51 RT 7073.) No changes in Calvin's plan were made as a result; a child suffering physical distress concerning a parent might be offered treatment now, but fewer services were available then. (51 RT 7073-74.) In February, 1977, the foster mother who cared for the older siblings had openings for two children of Calvin and Javonica's ages; but placement with her was not considered, because it was thought at the time that placement with family members was better. (51 RT 7074-75.)

In March, 1977, Brenda Graves said she wanted to get her own place so she could get her children back; however, it was unclear how often she was seeing her psychiatrist. (51 RT 7075-76.) In June, 1977, a house call revealed that Ollie Lee was caring for her disabled mother, as well as eleven children, the six who lived in the house and five belonging to another sister. (51 RT 7076-77.) The notes did not reflect anyone helping Ms. Lee with the children. (51 RT 7078.) In June, 1977, the plan was to refer all four children to adoption, leaving Gigi and Lawrence in their foster home and Calvin and Javonica at their grandmother's house. The mother, Brenda Graves, was back in jail, and it was unlikely she could ever care for her children due to schizophrenia. (51 RT 7078-79.) In September, 1977, it was noted that Calvin was sick the previous week because of his mother's phone call. (51 RT 7081-82.)

In September, 1977, Gigi was found not suitable for adoption; they did not want to separate her from Lawrence. Calvin and Javonica were adoptable, but their home situation was deprived and the agency did not feel they could prepare them for adoption without another placement first. (51 RT 7082.) Conditions at the grandmother's house were deplorable. (51

RT 7083.) Calvin and Javonica enjoyed school; but when the mother visited and talked about having them live with her again, Calvin was sick for two or three days. (51 RT 7085.) Calvin and Javonica had previously been placed with their mother from August, 1973 to May, 1974; but she had great difficulty caring for them. (51 RT 7086.)

Ollie Lee is Calvin Parker's aunt. She was born in 1954, and lived in San Diego until recently, when she moved to North Carolina. (51 RT 7097.) She is the daughter of Katherine Graves, who had ten children, and is about ten years younger than Brenda Graves, Calvin's mother. She last saw Calvin when he was about 7 years old. (51 RT 7098.) She remembers when Brenda and Lawrence Parker were together; he was abusive, pushing her against the wall and hitting her with fists. (51 RT 7099.) She was a teenager when Calvin was born in 1969. Her mother had a house at K Street and 25th for 33 years; she is not sure if Brenda lived there when Calvin was born. (51 RT 7100.) She remembers going with her mother to Brenda's apartment. She saw Brenda hit her children; when Calvin was little, Brenda backhanded Calvin across the room, and his lip was split. (51 RT 7101.)

Ms. Lee remembers when Calvin overdosed on his mother's iron pills; someone called and they rushed over. Calvin was laying on the floor, bluish and not breathing; his grandmother made him throw up, and called the paramedics. (51 RT 7102.) The children were placed in foster care; then Calvin and Javonica came to live with their grandmother, while Gigi and Lawrence stayed with a foster parent. (51 RT 7102-03.) When Calvin and Javonica stayed with them, their income was AFDC. Her mother bought the food, and also cared for the other grandchildren. There were 13 children altogether. (51 RT 7104.) Two of Patricia's children were mentally retarded. (51 RT 7105.) Two of her older brothers also lived in

the house. (51 RT 7106.) When Calvin was 6 or 7, they found out he had gonorrhea; he said his pee-pee hurt, and it was all swollen. (*Ibid.*) Calvin said a neighbor girl, Moonbaby, had been messing with him; she was one of Cleo's girlfriends. (51 RT 7107.) The doctor said it was VD, and gave him a shot and some medicine; they did not report it. (51 RT 7108.)

Brenda came to visit sometimes; she talked to Calvin and Javonica like they were babies. She talked to herself, and kept talking about a big black ape. She told Calvin and Javonica that they were white, and they shouldn't be around black people, meaning the people in their family. (51 RT 7108.) The children were confused. Ollie Lee's mother had a stroke, and Ms. Lee became the caretaker for them and eleven other children when she was 19 years old. (51 RT 7110.) After Katherine Graves' stroke, she was in a wheelchair and couldn't talk. (51 RT 7111.) She used to do the food shopping, get holiday toys for the children from places where they gave out toys; later, her daughter Sandra did the shopping, and they often ran short of food at the end of the month. (51 RT 7112.) The last time she saw Calvin, Ms. Lee was leaving for a weekend; Brenda came while she was gone, the police were called, and the children were taken. (51 RT 7113-14.) Calvin mostly played by himself, sometimes with Javonica. She did her best to care for them. (51 RT 7118.)

John Breen was Calvin Parker's foster brother at the home of James and Eva Nunn; they met when Mr. Breen was eight. (52 RT 7153-54.) Breen's mother died, and he was adopted by cousins; but the cousins divorced and he was placed in foster care at age 6. (52 RT 7154-56.) He stayed in many foster homes before arriving at the Nunn home a few months before Calvin arrived. (52 RT 7157-59.) The Nunns were older, and did not play with Breen. (52 RT 7650.) Breen was angry all the time because Calvin was in his room, and Calvin was black like the Nunns;

Calvin fit, and Mr. Breen felt he did not. (52 RT 7659.) Breen mentally and physically abused Calvin Parker every day; the Nunns did not come to Calvin's aid. (52 RT 7660-61.) He once hit Calvin over the head with a full piggybank, cutting him; he threatened Calvin with butcher knives to scare him. (52 RT 7161-62.) Breen abused Calvin when they were ages 9 through 16; at 16, Breen learned that part of his maternal family was also black. (52 RT 7164.) Calvin took the abuse, kept it inside; he only lashed back once, when Breen attacked him at Magic Mountain. (52 RT7165.) Mr. Nunn yelled to break it up, but he didn't do anything. (52 RT 7166.)[67]

El Cajon, where they lived, was 99% white. (52 RT 7167.) The only blacks at the high school were Breen, Calvin and his sister Javonica, and one other boy. (52 RT 7168.) Calvin did not date in high school. (52 RT 7171.) Calvin moved out at age 16 or 17 and went to Job Corps; then he joined the Navy. (52 RT 7171-72.) Breen began getting in trouble for drugs, fights, shooting; he went to prison for armed robbery and attempted murder. (52 RT 7172-74.) It took a long time for him to change, but he got treatment, was released and successfully completed parole, and now he has a job, a wife, and four children. (52 RT 7175.) The Nunns loved Breen like a son, spoiled me much more than Calvin and Javonica; whatever he wanted, he got. (52 RT 7181.) Calvin and Javonica (called "Bonnie") were close; he was her protector. (52 RT 7187-88.)

Eva L. Nunn, Calvin Parker's foster mother, now lives in Texas, where she moved with her husband in 1993; Mr. Nunn passed away in December, 2000. (52 RT 7201.) In 1992, Mrs. Nunn retired from the San Diego school system, where she worked 23 years; her husband was a heavy

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[67] Mr. Breen identified defense Exhibit X, four photographs of Calvin Parker in his youth. (52 RT 7176.)

equipment truck driver for 32 years, retiring in 1986. (52 RT 7202-03.) They were licensed for foster care in 1977, and John Breen came in 1978. (52 RT 7203.) Calvin and Javonica ("Bonnie") Parker came later the same year. (52 RT 7204.) The neighborhood was 1% black. (*Ibid.*) Breen arrived with personal belongings — photographs, clothing, a teddy bear — but Calvin and Bonnie arrived with nothing. (52 RT 7204-05.) They were sent with a trash bag of clothing, but the bag smelled of urine and the clothes were large adult sizes. (52 RT 7205.) School was in session, but they had to go buy clothes for the children; Bonnie was happy to be there, but Calvin cried. (52 RT 7206.) Calvin was not really interested in sports. (52 RT 7207.)

When John arrived, they received "secret" information about his background and behavior problems, and she arranged for him to get therapy; when Calvin and Bonnie arrived, no information about their background was provided. (52 RT 7207-09.) Calvin and Bonnie both wet the bed two or three times per night, until perhaps age 11; Ms. Nunn changed Bonnie's sheets, but not Calvin's. (52 RT 7210.) John Breen was physically aggressive with Calvin, attention seeking, and he broke doors with his fists. (52 RT 7210-11.) Bonnie was a happy child, smiling; Calvin was quiet, and liked to keep to himself and draw. (52 RT 7212.) Calvin shared a room with John. (*Ibid.*)

Brenda Graves visited sometimes; she talked to herself and acted like a child. (52 RT 7213.) Ms. Graves wrote letters, and said she was marrying Michael Jackson. (52 RT 7214.) When Ms. Nunn took the children to Ms. Graves' apartment, it was dirty and smelled like urine. (52 RT 7215.) Once, Ms. Nunn reminded Bonnie that the social worker said not to drink liquids after 6 p.m.; Ms. Graves' reaction was irritable, and Ms. Nunn decided not to pick her up and bring her for visits any more. (52 RT

7216-17.) Calvin and Bonnie became adoptable, but the Nunns did not really consider adopting them. (52 RT 7218.) They disciplined the children to some extent, but Calvin did not get into anything; if left alone, he would just go to his room and draw. (52 RT 7220.) Only one relative besides Brenda Graves visited Calvin and Bonnie; an uncle came once. (52 RT 7221.) They were not notified when Katherine Graves died. (52 RT 7222.) They saw Calvin's father once, at the funeral for Calvin's brother; that was the last time she saw Calvin, probably in 1993. (52 RT 7223.)

After high school, Calvin worked at Taco Bell and a grocery, then went to job corps. (52 RT 7223.) While he was in the Navy, there was an incident where Calvin came by when he knew they were away; he did not have a key, but John's girlfriend found him outside and let him in. The thermostat was set very high when they got home. (52 RT 7224-25.) Calvin was looking at a scrapbook from Bonnie's room, something the social worker gave each of them; he did not explain why the heat was so high. (52 RT 7225.) She kept Bonnie's things when they moved to Texas, while Bonnie was in the service; she does not know what happened to Calvin's. (52 RT 7225-26.) John Breen moved to Texas in 1999, while he was on parole; they told the parole board they would help him in Texas. (52 RT 7226-27.) They visited John yearly in prison; on one of those visits, they looked for Calvin in San Diego with the help of a friend, but could not find him. (52 RT 7228-29.) Calvin asked them to co-sign for a car, but they would not do that; they did buy Calvin a scooter. (52 RT 722-31.) Calvin's artwork was outstanding. (52 RT 7238-39.) For a long time, Calvin always called on Mother's Day, Easter; but after 1997, they stopped hearing from him. (52 RT 7256.)

Javonica Gonzales is Calvin Parker's sister. (52 RT 7262.) Her biological father's first name was Kenneth, and she is not sure of his last

name; but Brenda Graves is her mother. (52 RT 7262-63.) She does not recall living with Ms. Graves, and first remembers her visiting at the Nunn's house when she was about seven. (52 RT 7263.) During those visits, perhaps twice a year until Ms. Gonzales was about eleven, her mother talked to herself or yelled at people who were not there; she was crazy, and it was embarrassing for Ms. Gonzales and Calvin. (52 RT 7264-65.)

She and Calvin lived at their grandmother's until she was 5 or 6; she was 7 when they moved to the Nunn's. (52 RT 7265.) Lots of children and adults lived at the grandmother's; they were treated badly by everyone, physically abused by older cousins and uncles, and there was not enough food to eat. (52 RT 7266, 7278-79.) Her grandmother kept order, kept everyone fed, sent kids to school on time; but after her grandmother's stroke, when Ms. Gonzales was about 4, things got bad and she does not recall anyone in particular caring for her. (52 RT 7267-68.) She knows Ollie Lee and saw her at the hotel, but did not recognize her. (*Ibid.*) After her grandmother's stroke, it seemed like more people were in the house; they shared beds, and did not have bedding. (52 RT 7272-73.) The older cousins hit her, frightened her, treated her like a slave, and sexually abused her and the other younger children; they were all forced to participate. (52 RT 7273-75.) An uncle and the others would wake them up and sexually abuse them; she pretended to be asleep, hoping they would go away, but then they found someone else. There was nobody to tell. (52 RT 7275-76.)

Ms. Gonzales was 7 when she and Calvin moved to the Nunn's home in 1978; she graduated high school in 1989, joined the Navy, served in the Gulf, married in the service, and served four years. (52 RT 7270-71.) Calvin joined the Navy after she did, and she last saw him in November, 1996, when she took her daughter to Disneyland. (52 RT 7271.) After they

moved to the Nunn's, no relatives visited, and they were not told when their grandmother passed away. (52 RT 7280.) When she and Calvin moved to the Nunn's, she was glad to be anywhere but where they had been; the Nunns took care of them, even if they weren't very affectionate. (52 RT 7281-85.) Ms. Gonzales was afraid that if they were a burden, they'd be sent back, so she tried to get good grades and do chores. She did not want to be adopted because she thought her foster parents got money to care for them, and that they would be sent back without the money. (52 RT 7285.)

She likes John Breen now, but he was a horrible brother; he was Calvin's age, but bigger and a bad kid, always beating Calvin up when the Nunns weren't looking. (52 RT 7285-86.) She remembered coming home one day and seeing John holding a butcher knife and pinning Calvin against the window. (52 RT 7287.) John fought outside the home, too; Calvin did not. (*Ibid.*) Calvin liked to listen to music and draw. (52 RT 7288.)

Marilyn Kaufhold has been a pediatrician since 1967, and is an assistant medical director for the Chadwick Center at Children's hospital; she studies and treats children suspected of being abused, sexually abused, and/or neglected. (53 RT 7385-86.) She also provides training for other professionals — law enforcement, protective service workers, the District Attorney's office, other physicians — in identifying circumstances associated with child abuse and neglect. (53 RT 7388.) Child abuse, child neglect, and sexual abuse all have a serious impact on children; neglect has the greatest impact, because it occurs over long periods of time, and involves people who are important in a child's life, but unavailable to them. (53 RT 7388.)

Physical abuse — even if it does not cause brain damage or permanent physical defects — still affects the child who is harmed by someone who should be trustworthy. (53 RT 7396.) Repeated emotional

trauma on children affects the neurodevelopment of the brain; these individuals may become hyperaroused, misinterpret input and respond differently than others, and have difficulty forming normal relationships. (53 RT 7396-97.) Dr. Kaufhold reviewed Exhibits S and Y, medical records from UCSD hospital, and additional CPS and social service records of Calvin Parker and his siblings. (53 RT 7397.) When a mother backhands a 12 month old and splits his lip, that is child physical abuse. With young children, there is an increased risk of injuries to the brain, eyes, ears. (53 RT 7397-98.) Caretakers who injure children often do not take them for care, so injuries may heal without being documented; medical neglect is part of the larger picture.. (53 RT 7399.)

In March, 1971, Calvin Parker was admitted to the hospital for iron ingestion; he was 20 months, and had swallowed 118 iron pills. (53 RT 7399-7400.) This is an example of neglect. (53 RT 7401.) He was admitted in critical condition; within an hour, he was comatose and in shock. He remained critical for at least 5 days, and was treated with fluids and an antidote for iron. (53 RT 7402.) He had clotting problems, and received platelets, whole blood, and plasma expander; his ear had bled and became necrotic. (53 RT 7403.) This is a form of neglect; in addition, Calvin had not had any immunizations at that time. (53 RT 7404.)

In July, 1971, Calvin was taken to the Emergency Room by the police, with a 2 inch laceration on his forehead; the other children reported that his mother had swung him into a dresser when he was crying. (53 RT 7406-07.) This is an example of child physical abuse; given the prior history of having been hit for crying at age 12 months, one would be very concerned about his environment. Those incidents that are reported are the tip of the iceberg. (53 RT 7409.) Skull x-rays did not show a fracture, but

there was soft tissue swelling. After the head laceration, Calvin was placed in the Receiving Home. (53 RT 7410.)

In August, 1971, Calvin was again admitted to the hospital with significant abdominal pain, requiring a laparotomy. (53 RT 7410-11.) The surgery revealed an abscess at the end of the small intestine, a complete blockage of the small intestine, and another partial blockage of the small intestine; this was due to the corrosive effects of the iron, and the infection resulted from a perforation of the bowel. (53 RT 7412-13.) The iron ate through the bowel, leaking bacterial contents; although the perforation had healed over, the bacteria caused an infection and abscess. (53 RT 7414.) The chart contains a psychiatric note about Calvin's mother; there is a concern that a mentally ill mother may not be able to provide a safe environment. (53 RT 7416-18.) Calvin lost 5 lbs. during the hospitalization, and was only 21 lbs. at discharge; he developed an infection and possible sepsis post-operatively. (53 RT 7419.) He was discharged to the Receiving Home, indicating his mother was unable to care for him. (53 RT 7420.)

Social service records show the condition of the grandmother's house when Calvin was placed there; there were unpaid bills, not many light bulbs, many children, no designated places to sleep, not enough food, and the home was dirty. (53 RT 7421-22.) CPS accepts somewhat lower standards to keep families together. (53 RT 7424-25.) A situation where young children, ages 4 and 6, are coerced into sexual acts by older relatives is child sexual abuse. (53 RT 7426.) Records indicate that Calvin was diagnosed with gonorrhea in September, 1975, when he was six years old; that is a sexually transmitted disease, and would be painful for a child. (53 RT 7426-27.) It was treated with an injection of penicillin. (53 RT 7428.)

Calvin and his sister both had problems with bedwetting; for Calvin, this lasted until his mid-teens. (53 RT 7432-33.) The problem is unpleasant for both child and caretaker; it can affect how the child is regarded in the family. (53 RT 7433-34.) Calvin's caretaker did not change his sheets, which is a form of emotional abuse. (53 RT 7434.) There are more treatments available now, but the main one was in use then: a pad with a bell to wake the child when the pad is wet. (53 RT 7435.)

Acting out is not the only way adverse development of neural pathways may be exhibited; there can also be internal tension, unproductive behavior patterns, isolation, not a lot of friends. (53 RT 7488.) The person's ability to perceive and react appropriately may be affected. (53 RT 7489.) Bonding between a parent and child is important; a child needs someone on whom they can depend. (53 RT 7490.) Without that relationship, children become anxious and may fail to thrive. (53 RT 7491.) When the parent figure is not a source of comfort, but instead a source of confusing, negative, or painful stimuli, there are changes in brain chemistry; Calvin reportedly became physically ill when his mother wanted to visit or reunite. (53 RT 7493.) Physical illness is a normal response to distressing news or a threat to safety. (53 RT 7494.) Calvin's later successes — graduating high school, joining the Navy, working — do not negate the experiences he had. (53 RT 7495.)

Brenda Graves is Calvin Parker's mother; she appeared in court in a wheelchair and accompanied by a social worker. (53 RT 7524-25.) She last saw her son at a foster home. (53 RT 7525.) Calvin was born in July, but she is unsure of the day; Lawrence Parker was Calvin and Javonica's father. Calvin and Javonica were taken from her custody; then they stayed with her mother. (53 RT 7526.) The grandmother took care of some other children of her siblings, too; her sister Ollie and brother Cleophus Jr. also

lived in the home. (53 RT 7527.) She visited Calvin and Javonica when they lived with her mother, and when they lived with the Nunns. (*Ibid.*)

Ms. Graves got in trouble with the law and was sent to CIW and CRC; she also went to Camarillo State Hospital and Patton State Hospital, and stopped using heroin and alcohol. (53 RT 7527-28.) She denies being in trouble with the law for hitting or being violent. (53 RT 7528.) Now she lives at Brighton Place Nursing Home; the lady behind her is the social worker. (53 RT 7529.) There was no cross-examination of this witness

Counsel read excerpts from **Exh. Y, UCSD records**. In July, 1971, Calvin was brought to the hospital by his father and the police, with a laceration on his face; the mother had said she was going to kill him. (53 RT 7530.) In August, 1971, a child psychiatry note recorded the mother's inappropriate affect, her prior psychiatric history, and that she was schizophrenic and actively hallucinating. (53 RT 7532.)

Exh. S is a binder of social service records concerning Calvin Parker and his siblings; many portions were read to jurors by counsel. A 1980 adoption summary noted that Calvin and Javonica's relatives were unable to care for them. Calvin's past medical history included hospitalization in March, 1971, in critical condition, for accidental ingestion of iron pills; hospitalization in August, 1971, for nineteen days when surgery was required for a bowel obstruction caused by the iron ingestion; gonorrhea in September, 1975, treated and resolved; surgery in October, 1978, to correct a blockage of the urethra, probably due to scar tissue; and enuresis for many years. (52 RT 7328-29.) In March, 1985, Calvin was in good health, and reportedly a very advanced painter and artist. (52 RT 7330.)

In August, 1971, a social study noted the mother's pattern of withdrawing and failing to care for her children, and her diagnosis of schizophrenia. It would have taken Calvin a long period of time to swallow

so many iron pills. Her older son Lawrence had a suspicious injury, and daughter Gigi reported being hit and getting a nosebleed. All the mother's complaints center on her inability to cope with the children. (53 RT 7533.) The mother was diagnosed in September, 1969, with an inadequate personality; when released from her most recent hospitalization in July, 1971, the diagnosis was schizophrenia, prognosis was guarded, and she refused a referral to the CMH clinic. (53 RT 7534.) In January, 1972, a psychiatric evaluation of Ms. Graves noted she was tense, had a flat affect, and had little recognition of the seriousness of her illness; her thought processes were vague; she lacked goal-directed thinking or behavior; and she thought she saw shadows in the dark. (53 RT 7534-35.)

In March, 1974, Ms. Graves was noted to love her children, but be handicapped in caring for Calvin and Javonica; she had great difficulty attending to details of care, like dressing the children appropriately and keeping them clean; and she seemed detached and unaware of things around her. (53 RT 7535-36.) In June, 1974, the grandmother attested that Ms. Graves was unable to care for the children, and that she was very confused. The grandmother had to ensure that Ms. Graves appeared at appointments, and she had been caring for the children since April, except a few days. (53 RT 7536-37.) In August, 1974, Ms. Graves' psychiatrist of two years stated that she had deteriorated, was unable to care for herself, and that she needed treatment in a closed setting; he recommended treatment rather than incarceration. In addition to her mental illness, he noted drug dependence, illegal activities, borderline intelligence and dependence on male companionship. (53 RT 7537-38.)

In July, 1971, Calvin was placed under the jurisdiction of the court; his home was unfit because of cruelty of and abuse by his mother. (53 RT 7538-39.) In August, 1971, there was an order that Calvin be held in the

University Hospital pending release to the Hillcrest Receiving Home. In October, 1971, he was ordered placed in a foster home. In February, 1972, Calvin was placed in a different foster home. In August, 1973, he was placed with his natural mother. (53 RT 7539.) In May, 1974, he was placed in the custody of his grandmother, Katherine Graves; that order was confirmed in June, 1974 and July, 1975. In July, 1977, his placement was continued with his aunt, Ollie Lee. In April, 1978, he was ordered returned to the Hillcrest Receiving Home. In May, 1978, he was then placed in foster care with James and Eva Nunn. (53 RT 7540.)

Other exhibits were also introduced by defense counsel: Exh. Z, a photoboard marked "childhood homes" (53 RT 7541); Exh. AA, conviction and change of plea form for Brenda Graves, 2/7/80 (53 RT 7541); Exh. BB, conviction of Brenda Graves, CR66556 (53 RT 7542); Exh. CC, conviction and sentence of Brenda Graves - CR 80210 (53 RT 7542); Exh. DD, DOC incarceration of Brenda Graves - 7/23/86 (53 RT 7542); Exh. EE, placement, released to custody of grandmother pending hearing on 6/11/74 (53 RT 7542); Exh. FF, death certificate of Katherine Graves (53 RT 7543); Exh. GG, Montgomery Middle School Honor roll, High School Graduation diploma (53 RT 7543); Exh. HH, diploma from Granite Hills High School (53 RT 7543); Exh. II, Job Corp Center diploma (53 RT 7543); Exh. JJ, department of veterans affairs records (53 RT 7543); Exh. KK, longs drugs, employment records for Calvin Parker (53 RT 7544); Exh. LL, Sunset Bowl, employment records of Calvin Parker (53 RT 7544); Exh. MM, Radio Shack employment records of Calvin Parker (53 RT 7544); Exh. NN, Fry's Electronics employment records of Calvin Parker (53 RT 7545); Exh. OO, crown books, 1997 W-2 form (53 RT 7545); Exh. PP, crown books, 1998 W-2 form (53 RT 7545); Exh. QQ, Just for Feet, 1998 W-2 form (53 RT 7545); Exh. RR, Subway, employment

records of Calvin Parker (53 RT 7545); Exh. SS, Costco Wholesale, employment records of Calvin Parker (53 RT 7545); Exh. TT, employment records of Calvin Parker (53 RT 7545); Exh. UU, Lenscrafters, employment records of Calvin Parker (53 RT 7545).

Exh. VV is a timeline prepared by the defense, from 1968 to 2000. (53 RT 7553.)

3. Alleged Rebuttal Evidence.

Brenda Chamberlain knows Calvin Parker. (53 RT 7554.) They first met in May, 1992, through a mutual friend, Todd Dunbar, who was in the Navy with Mr. Parker. She was ultimately in an intimate relationship with Parker. (53 RT 7555.) Parker was deployed for six months, shortly after they met; they kept in touch, and started dating after his return in November, 1992. A few months later, she moved in with him; they were together three years. She loved him, and thought he loved her. (53 RT 7556.) They lived together about two years; the last year of the relationship was on and off. (53 RT 7557.) They broke up in October, 1995, and did not keep in touch. She heard from him about 6 months later; she was not comfortable sharing her address so he could send a card. (53 RT 7559.) He called again in March, 1997, and said he missed her; she did not want to have lunch. (53 RT 7560.) She did not hear from him again. (53 RT 7561.)

During the relationship, they did things together and took pictures. She did not notice him cutting and pasting pornography. (53 RT 7561.) Ms. Chamberlain identified photographs incorporated in People's Exhibit 116. (53 RT 7561-66.)

Exh. 117 is a prosecution exhibit, presented as a time line of the murder. (53 RT 7582.)

* * * * * *

ARGUMENT

1. THE TRIAL COURT ERRED IN FAILING TO DECLARE A DOUBT AS TO APPELLANT'S COMPETENCE TO STAND TRIAL.

Appellant's confinement and sentence are illegal, unconstitutional, and void under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution, under Article I, sections 1, 7, 13, 15, 16, and 17 of the California Constitution, and the statutory and decisional law of the State of California, because the trial court unreasonably failed to declare a doubt as to appellant's ability to understand adequately the proceedings against him or to aid and assist in his defense, to suspend proceedings, and to conduct an investigation of and hearing concerning appellant's competence. (*Drope v. Missouri* (1975) 420 U.S. 162; *Pate v. Robinson* (1966) 383 U.S. 375, 378; *People v. Laudermilk* (1967) 67 Cal.2d 272, 282.) The trial court failed to declare a doubt as to appellant Parker's competence despite numerous indicators that he was, in fact, incompetent to stand trial.

A defendant is incompetent to stand trial "if, as a result of mental disorder ..., the defendant is unable to understand the nature of the criminal proceedings or to assist counsel in the conduct of a defense in a rational manner." (§ 1367, subd. (a).) Penal Code section 1368 (a) provides:

> If, during the pendency of an action and prior to judgment, a doubt arises in the mind of the judge as to the mental competence of the defendant, he or she shall state that doubt in the record and inquire of the attorney for the defendant whether, in the opinion of

> the attorney, the defendant is mentally competent. If the defendant is not represented by counsel, the court shall appoint counsel. At the request of the defendant or his or her counsel or upon its own motion, the court shall recess the proceedings for as long as may be reasonably necessary to permit counsel to confer with the defendant and to form an opinion as to the mental competence of the defendant at that point in time.

Reversal of the judgment in this case is required because the trial court failed to order a hearing to inquire into whether Parker was mentally competent to stand trial in the face of substantial evidence of his mental incompetence.

A. Facts Compelling a Declaration of Doubt.

1. Introduction.

Appellant Parker, while never overtly disruptive in the courtroom, manifested a severe mistrust of counsel which grew in urgency throughout the case, and the fixed belief that all involved — the prosecutor, the judge, the medical examiner, the police, and even his own counsel — were joined in a conspiracy to fabricate evidence and secure a death sentence.[68] In camera hearings were held on numerous occasions as a consequence, as set forth more fully below. Following the death verdict, alternate counsel was appointed to investigate Mr. Parker's allegations concerning his counsel; however, appointed counsel were not relieved in spite of the obvious conflict of interest.[69] (55 RT 7832-7833.)

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[68] Delusional thinking and paranoia can be symptoms of major mental disorders. This is true even when the subject is intellectually bright and articulate. (E.g., Theodore Kazcinski, the "unabomber," had a Ph.D.)

[69] Appellant refers to and incorporates herein the allegations of Argument 24, concerning counsel's conflict of interest.

Mr. Parker filed several documents regarding his concerns, some lengthy and all repetitive[70]; some of these documents were filed under seal (see, e.g., 38 supp. CT 8759-8769; Court Exh. 9, filed at 38 supp. CT 8781-8782; 9 CT 1977-2063 [initially sealed, then unsealed]), although at sentencing the trial court filed Mr. Parker's pro se "motion for new trial" and materials allegedly supporting that motion. (9 CT 2116-2162; 10 CT 2163-2420.) The trial court did not read the extensive supporting information, but entered it into the public record despite the fact that Mr. Parker was represented by counsel who did not endorse the introduction of this material into the record.

Some of the facts introduced by the prosecution suggested severe disturbance. Mr. Parker had no criminal record prior to the events underlying this trial, yet he not only killed his roommate, but then undertook striking and horrifying efforts to conceal the crime. The burning and severing of fingertips is a highly unusual circumstance, for example. He rented a truck and a carpet shampooer using his own name; he bought bolt cutters, cleaning supplies, and other materials using his own name. He did not know how to drive a manual transmission, and wrote himself instructions. He wrote a list of tasks to cover up the crime, and left that in a bag containing fingertips and other incriminating evidence.[71]

Another extremely unusual circumstance is the police investigation turned up huge quantities of commercial and hand-crafted erotic material;

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[70] Hypergraphia can be a symptom of a major mental disturbance. (See, e.g., Waxman, SG; Geschwind, N (March 2005). "Hypergraphia in temporal lobe epilepsy. 1974.". Epilepsy & behavior : E&B 6 (2): 282-91.)

[71] The numerous writings introduced by the prosecution also suggest hypergraphia and/or bizarre obsessions.

the quantity is described as garbage bags full of material.[72] While appellant contends that this has nothing to do with the circumstances of the crime and none should have been admitted, the nature, quantity, and obsessiveness indicated by this collection raise questions about Mr. Parker's mental health. The material suggests hypersexuality, which also can be a symptoms of severe mental disturbances.[73]

Moreover, evidence presented by the defense also raises concerns about the presence of major mental disturbance compromising Mr. Parker's competence to stand trial. He personally experienced and witnessed egregious abuse (physical, sexual, emotional) and neglect during the early years of his development. His mother was severely disabled by schizophrenia, a major mental disorder, which raises his risk of developing a major mental disorder.

2. Red Flags indicating Mr. Parker's Competence was compromised, and that Proceedings should have been suspended.

On **July 16, 2001**, appellant Parker sought to pursue self-representation. (11 CT 2447.) Trial counsel advised the court in chambers

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[72] This material was described in court proceedings as "pornography," "porn," or "morphed" images. As set forth more fully in Argument 2, incorporated herein by reference, the material does not appear to be illegal, merely distasteful and bizarre; it was not disclosed until the prosecution introduced some of it at trial.

[73] Mr. Parker's compulsion to draw erotica extended to documents he filed during his trial. One in particular, a massive, largely hand printed document entitled "Memorandum of Points and Authorities Pretrial Motion Hearings and Guilt Phase Trial Transcripts and Discovery Evidence (10 CT 2245-2420) includes several pages of drawings scribbled over in an attempt to conceal their content. One drawing not crossed out is of an erect penis with a hand around it, pointing toward what appears to be a mouth. (10 CT 2396.)

— outside the presence of Mr. Parker — that at Parker's request he and Parker had repeatedly discussed Parker's interest in representing himself, and Parker could not seem to make up his mind what to do. (6 RT 520-521.)

When the hearing resumed with Parker present, Parker told the judge he wished to represent himself because he "just wanted to be more informed about the particulars of the case." (6 RT 522.) When the judge explained the disadvantages of representing himself against an experienced prosecutor and asked why he wanted to proceed in pro per, Parker answered, "I just need certainty. I just wanted to find out some things that — that — well, I guess I felt like certain aspects of the case have alluded (sic) me, and I just want a little more certainty about those things. I figure if I go in and go on my own, I can get that certainty and pursue it from there." (6 CT 524.) A little later, he added, "I want everything. It's not that attorneys have refused, but it's been over a year and there are some things I'm not privy to. Doesn't sit well. I want 100 percent of everything." (6 RT 526.)

After some further discussion of the difficulties of self-representation, the judge asked Parker, "is there anything that I can do or that your attorneys could do to give you the information that you seek? I'm not sure exactly what it is you're after." Parker said again, "I want everything."

After that exchange, the hearing turned into something more like a *Marsden* hearing than a *Faretta* proceeding, with Parker's attorneys explaining and defending their work on the case and their efforts to explain to Parker what they were doing and to assure him that work was being done on the case in a timely manner. Counsel's frustration with Parker's demands and distrust was obvious; and the lead attorney made it clear that

if Parker was allowed to represent himself, he would not agree to be advisory counsel. (6 RT 531.)

The judge advised Parker that he did not have a right to advisory counsel (6 RT 536), and advised him against self-representation. (6 RT 536-539.) He asked Parker whether he had a history of being treated for any mental illness or whether he'd taken psychiatric drugs of any kind. Parker said he had not. (6 RT 540.) The judge asked trial counsel whether he had any reservations about Parker's ability to stand trial, referring to Penal Code section 1368. Trial counsel answered, "I don't know of anything, your honor, that would cause me to make a declaration under 1368." (6 RT 540.)[74]

Asked if he had anything to add, Mr. Parker stated that he had concerns with the medical examiner's report, which "didn't sit well" with him. (6 RT 541.)[75] Parker wanted some time to think over his decision whether to go pro per. (6 RT 541.) The judge decided not to rule, and to it revisit the motion for self-representation in a couple of weeks. (6 RT 544.)

On July 31, 2001, as promised, the court revisited Parker's motion. (11 CT 2249; 7 RT 573-600.) Parker stated he still wished to represent himself, and his distrust of his attorneys and fear that he was not receiving accurate or complete information from them manifested itself in the ensuing dialogue with the court:

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[74] Although the judge would not have known, Parker's statement appears to have been less than candid. In the search of Parker's apartment after his arrest, the police found and seized two bottles of Prozac pills. (10 CT 2384.)

[75] Later proceedings revealed that at the center of Mr. Parker's voluminous complaints about the alleged conspiracy against him, and the alleged fabrication of evidence, was a fixed belief that the medical examiner's report was falsified.

> The Defendant: I just want to make certain that the information I'm getting is accurate. As far as I'm concerned — because if you have from point "a" to point "d," there are a lot of things that can be interpreted as this and that and the other. If there are things from point "a" to point "b," then there's a lot less area for interpretation.
>
> The Court: Are you saying that you're not sure that, as the evidence is filtered through your attorney, you're getting the whole story?
>
> The Defendant: I just want to be certain or as certain as I can be in this situation. That's, I guess, what I'm saying.

(7 RT 580-581.)

The judge, obviously reluctant to let Parker represent himself, made it clear that if Parker chose that path he would not receive extra time to prepare for trial for that reason alone. (7 RT 588.) The judge then turned to the question whether Parker was competent to choose whether to represent himself and asked counsel whether they had any information bearing on that question. Lead counsel asked for a moment to confer with his associate, but at that point Parker withdrew his motion, saying he thought he would be able to get a continuance and advisory counsel. (7 RT 590-591.) The judge, apparently nonplussed, reminded Parker that he had told him all that at the earlier hearing, and that Parker had not changed his mind then. (7 RT 591.) Without waiting for counsel to answer on the question of Parker's competence, the judge observed that he had not seen anything in Parker's behavior or statements in court that suggested he would not be competent to make the choice of self-representation, but noted that he did not need to rule on the motion because it had been withdrawn. (7 RT 591-592.)

On **December 19, 2001**, defense counsel advised the trial court that Mr. Parker would be making a motion in the nature of a Marsden request. (9 RT 632; 11 CT 2454.)[76] In *in camera* proceedings (9A RT 634-664), trial counsel requested that the motion be transferred to another department, expressing concern that the trial court could ultimately decide whether Mr. Parker lives or dies, and that what appellant said might prejudice him in future proceedings. (9A RT 634-635.)[77] The trial court declined to transfer the motion. (9A RT 636.)

At the in camera hearing, Mr. Parker informed the trial court that he wished to have different representation because he had no confidence in his assigned public defenders. (9A RT 640.) Parker spoke of an "established pattern of behavior wherein my representation has contradicted themselves and lied." (9A RT 641.) On the 13th, he said, he had received a "veiled threat" from his attorneys to dissuade him from requesting new counsel from the Alternate Public Defender. He cited a contradiction in what his attorneys told him, saying they told him that "certain injuries to the decedent were ascertained by a pathologist to whom they had spoken," but then told him weeks later that they hadn't spoken to a pathologist yet. (9A RT 641.) He was certain his attorneys were lying to him and said he asked for a copy of "state legislation" regarding the crime of rape. When the judge said he wasn't getting what Parker meant, Parker clarified that his attorneys had lied, telling him that for the purpose of the rape charge it didn't matter whether the victim was alive or dead. "They asked, and I told

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[76] *People v. Marsden* (1970) 2 Cal.3d 118.

[77] Mr. Parker's statements in pleadings he filed later in the case make it clear that even at this early stage, his attorneys knew he was making statements and advancing theories about his case that, if revealed, would undermine both his defense and his credibility, and were rightly concerned about what he might say to the judge.

them I didn't rape her. Sounded to me like circular question he just wanted me to admit something. I believe that was the lie." (9A RT 641-642.) Parker stated that counsel was "baiting me." (9A RT 645.)

The judge expressed concern, echoed by counsel, that Parker was revealing confidential admissions that should remain between him and his attorneys. (9A RT 643-648.) Parker, oblivious to all warnings, began to explain why he thought his attorneys had lied to him about the pathologists' findings as to the cause of the victim's death. (9A RT 649.)

In the discussion that followed, counsel explained their constant difficulty explaining the realities of the case and their defense strategies to Parker. In a statement that suggested counsel's doubts about Parker's mental state, lead counsel told the court, "I have benefitted greatly by having co-counsel assigned to the case with me so that we can share our insights and share out judgments about the case and to share judgments and insights about Mr. Parker because I wasn't comfortable that I knew it all and I wanted to have another person's eye on the situation just so that they could hear the way he speaks, the words that he chooses, the body language he employs, the manner that he communicates with us, just so that I had another opinion to work with." (9A RT 658.)

Counsel stated that Mr. Parker genuinely lacked confidence in his counsel, adding, "I don't know that he will ever hold confidence in his representation." (9A RT 659.) The Marsden motion was denied. (9 RT 665.)

On January 24, 2002, Parker again requested new counsel, submitting a motion hand-written by himself. (10A RT 731; 38 supp. CT 8759-8769 [sealed].) The written motion contained numerous complaints about counsel: they had not provided appellant with copies of discovery materials and had not completed investigation. Parker cited disparities in

the evidence and alleged tampering with the tapes of his post-arrest statements. (See, 38 supp. CT 8759-8769 [sealed].)

After reading the motion, the trial court held a hearing in camera. (10A CT 738-775.) Counsel summarized their efforts at investigating the case and spoke of Parker's unceasing and obsessive demands for investigation, his discontent with counsel's efforts ("We thought we had exhausted the questions he had at the time. But he ruminates and writes more"), and his desire to call witnesses on issues his attorneys felt were irrelevant. (10A RT 745-746.) Lead counsel Gates complained:

> And then we have Mr. Parker, who is, shall we say, affecting the prioritization of our work by his — by the demands that he continues to make and that we endeavor to respond to in an effort to maintain a relationship that he himself will not work to improve and seems determined to sabotage and that no amount of effort by his counsel — by his counsel on his behalf — if you go and spend two and a half hours with him and you answer all of the items that he has demanded that you address in his previous letter and then spend the rest of the time answering matters that came up in his head between the time he prepared the earlier letter and the time you saw him, your reward for that effort is to go back to the office and get another letter, 16, 18, 20 pages with another 16 or 20 demands. Then you endeavor to answer all those questions, to back to interview him again for four-and-and-half hours and answer 16, 18, 20 additional questions in addition to the questions you just answered.

(10A RT 753.)

Counsel was "frustrated by the constant forays into marginally-relevant areas, which, frankly, border on delusions sometimes." (10A RT 755.) "There isn't any give and take with Parker,: he said. "There is nothing I can do that will stop the torrent of marginally-relevant requests and

demands on our time that — that keep us from preparing issues of unquestioned legal significance." (10A RT 756.)

The video portion of the first part of a police interview of Parker on August 15, the day of his arrest, was missing, and Parker was convinced that it and the audiotape of a second interview the following day had been deliberately tampered with to suppress exculpatory evidence. (10A RT 757-758.) Counsel had submitted the tape for examination and the testing firm found no evidence of tampering, but Parker was not mollified. (10A RT 758-759.) Counsel noted that Parker believed the state was making great efforts to manufacture evidence against him and noted his paranoia about "the powers around him" — the police, courts, and attorneys. (10A RT 760-761.)

Counsel said his mental health expert told him he had found nothing to support a finding of incompetence or a mental defense. But the expert had not been able to complete testing on Parker because Parker found some terms the expert used "offensive."

Discussions with Parker were futile, counsel said. There was "no moving on, just rehash and rehash." (10A RT 765.) Parker filed the memo he submitted to the court before this hearing against the advice of his attorneys, and his attorneys again expressed concerns about Parker's lack of understanding of the dangers of revealing privileged material in his filings and letters. (10A RT 764-765.)

Parker's second counsel recounted a related set of frustrations. The attorneys had met with Parker recently, she said, and she had noted 29 questions which he had asked and they had answered. A few days later she received five letters from him, including two that were 24 pages long, asking the same 29 questions, plus more questions covering material that had been reviewed with him during the visit. (10A RT 768-769.)

The trial court saw that counsel needed help from Parker which they were not getting. (10A RT767.) But despite counsel's repeated references to Parker's paranoia, apparent delusions, and inability to trust his counsel or absorb the information he was receiving from them, the court viewed the motion only through the lens of the conventional Marsden inquiry and found neither that counsel were ineffective nor that the relationship between them and Parker had irretrievably broken down. (10A RT 770-775.)

The *Marsden* request was denied. (10A CT 775; 11 CT 2457.)

On April 15, 2002, around the beginning of jury selection, his attorneys requested another in camera hearing after noticing that Parker had come to court with papers apparently intended for submission to the court. Parker gave the court a letter and a two-page note about counsel's supposed failure to elicit testimony at the preliminary hearing about certain facts. Parker was concerned that without the court's intervention this evidence might be omitted from the trial. Parker's note to the trial court was filed under seal as Court Exh. 9. (38 supp. CT 8781-8782.)[78]

On **April 15, 2002**, an *in camera* proceeding was held regarding Mr. Parker's complaints about the alleged omission of facts from the preliminary hearing, and that there was systematic complicity among the actors in the case, including his own defense counsel. (19A RT 1839-1849.) Mr. Parker did not wish to represent himself. Mr. Parker's note to the trial court was filed under seal as Court Exh. 9. (38 supp. CT 8781-8782.)

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[78] The letter, referred to by counsel at 19A RT 1848, was apparently not made part of the record.

On **July 2, 2002**, at the close of the guilt phase of trial, another in camera proceeding was held about disagreements between Parker and his attorneys. His lead counsel told the court that Parker wanted to testify because Parker thought his attorneys had sabotaged his defense in their examination of some of the witnesses. Counsel spoke yet again of Parker's complete lack of trust in his counsel and said that Parker had misinterpreted a bit of well-meant advice by another deputy public defender as a warning that his attorneys would actively seek to subvert his testimony and had come to court with a list of questions for his counsel to ask him. (43A RT 5960-6962.)

After a long discussion in which the court and counsel tried unsuccessfully to convince Parker not to testify, they asked him if he wanted a different attorney to question him if he testified. Parker said he wanted new counsel but had not made another Marsden motion because he expected it would be denied, like his previous motions. (43A RT 5981.) At the court's invitation, Parker made a verbal Marsden motion, explaining that he felt his attorneys were continuing to lie to him and give him inconsistent information. (43A RT 5982-5983.) Lead counsel said the problem arose from the fact that Parker wanted to testify but had given his attorneys an account of the crime different from what he had told the police, placing them in an ethical position where they could not question him should he take the stand, and that Parker did not understand that a new attorney would receive that information and be subject to the same ethical strictures. (43A RT 5985.) stated that Mr. Parker did not understand that he could only tell the truth in testimony, whether represented by these counsel or new counsel. (43A RT 5985.) The court told Parker it saw his motion as an attempt to replace counsel who could not ethically examine him with counsel who were ignorant of his conflicting statements, and it

denied the motion. The defense rested without Parker testifying. (43 RT 5994; 11 CT 2566.)

On *July 24, 2002*, during the penalty phase, another in camera proceeding was held so that Parker could bring to the court his suspicions that his trial counsel had given him inaccurate information that brought about his decision not to testify at the guilt phase. (51A RT 6962-6972 [sealed]; 11 RT 2595.) Parker told the judge that his attorneys had told him if he testified they wouldn't be able to give a closing argument and would not be able to ask the court to instruct on voluntary manslaughter, because Parker's description of the crime in his statement to the police was inconsistent with that theory. Parker asked the judge if he agreed. (51A RT 6463.) The court once again explained counsel's ethical dilemma, precluding them from arguing false testimony. The judge noted that he had watched the video of Parker's first statement to the police as part of a pretrial hearing and pointed out that even the police had told Parker there were discrepancies between. Parker's statements and the physical evidence. (51A RT 6964-6966 [sealed].)

While the jury was deliberating penalty, Parker presented a letter to the trial judge requesting a hearing on his request for a new trial based on allegations of ineffective assistance of counsel. Parker claimed to have documentation supporting his assertions. (8 CT 1938.) That letter is undated, but was filed on August 12, 2002, the day Mr. Parker's jury returned a verdict of death. (55 RT 7826.) The trial court appointed the alternate public defender to investigate Mr. Parker's claims that his counsel were incompetent, but did not relieve appointed counsel pending resolution of these issues. (55 RT 7832-7833.)

On **September 11, 2002**, a status conference was held regarding the alternate public defender's investigation. (56 RT 7840-5854.) Toward the

end of the hearing, Mr. Parker asked to address the court. (56 RT 7852.) the judge, acquainted by this time with Parker's propensity to air confidential material against his attorneys' advice, asked, "Does your attorney know what you want to talk to me about?" Parker answered, "Basically." The judge told him he had better talk with his attorney. A moment later, Parker interrupted a discussion between the judge and the alternate defender, saying, "My problem is that there was something going on with the autopsy report." The judge stopped him before he could go on and made another futile plea for Parker to work with his attorneys:

> The Court: Mr. Parker, let me explain. Mr. Parker —
>
> The Defendant: Yes, sir.
>
> The Court: -- Throughout our relationship with this case, you've been expressing concerns about Mr. Gates and Miss Gilzean, and I've heard you repeatedly about that. At this point, I've actually gone to the extent of appointing separate attorney to you to examine those issues. You've got another very experienced, very capable counsel. You need to work through counsel, talk to him. He knows how to take care of it. He will raise the issues with me. but you've got to work through the attorney.
>
> The Defendant: the information is being filtered.
>
> The Court: you need to speak with your attorney.

(56 RT 7853.)

On **October 7, 2002**, at another status conference, the trial court mentioned that it had received another letter from Parker, dated September 28, 2002 and had had copies sent to all his attorneys. (56 RT 7855.) The alternate public defender stated that he interpreted the letter as a *Marsden* motion concerning *his* performance. (56 RT 7855.)

The alternate public defender also had a letter from Mr. Parker that he thought might be a motion intended for filing. (56 RT 7856.)

The judge confirmed with Parker that he was not asking the court to remove his attorney. (56 RT 7856.) But this did not end the matter. The alternate public defender said that in his letter Parker had suggested that there was collusion between him and Parker's appointed trial counsel. When asked by the trial judge, Parker stated he feared the alternate public defender would "filter" his information; he had not given the information to alternate counsel yet, but had a "bad feeling." (56 RT 7858) In the ensuing discussion, the court tried yet again to explain to Parker that his attorneys were working in good faith, but to no avail. Parker believed that because the alternate public defender had expressed respect for trial counsel in talking with Parker, he did not intend to do more than engineer a coverup of counsel's deficient performance. (56 RT 7859-7860.)

On December 13, 2002, at a hearing regarding the motion for new trial, the alternate public defender told the court that Mr. Parker wished to file his own 85 page motion. (56 RT 7872-7873.)

On **December 16, 2002**, the alternate public defender appointed on the case and his supervisor informed the court that the office did not intend to file a motion for a new trial on Parker's behalf and submitted a declaration to that effect. (59 RT 7893; 8 CT 1973-1974.) The reason they gave was that their limited investigation had revealed no colorable issues of ineffective assistance. (59 RT 7897.) The trial court relieved the alternate public defender. (59 RT 7903.)

A discussion ensued about what to do with the long document Parker had produced and given to the alternate public defender — on the face of it, a handwritten motion for new trial based on Marsden and ineffective assistance of counsel. (59 RT 7907ff.) Neither the judge nor trial counsel

had been given it to read, and trial counsel was concerned that Parker was again putting forth prejudicial information about his case that had not been part of the trial evidence. (59 RT 7907-7908.) Ultimately, the court and counsel decided that counsel, but not the court, should review it and discuss it with Parker before the court took action on it. (59 RT 7909.) The court received Mr. Parker's document and made it part of the record under seal. (59 RT 7911; 9 CT 1971, 1977-2063.)[79]

Mr. Parker's motion, entitled "Notice of Motion and Marsden Motion for Removal of Counsel and Reversal Based on IAC, Prosecutor Misconduct and Witness Tampering" (9 CT 1977-2063) was comprised of numerous and repetitive complaints about his counsel's representation,[80] including the following: failure to challenge "manufactured" evidence by the Medical Examiner (9 CT 1981); failure to present the strongest defense evidence "that would have prevailed on every facet of the People's charges" (9 CT 1983-4); failure to expose the autopsy report and Medical Examiner's testimony as "false" (e.g., 9 CT 1984, 2000-2001, 2015, 2025, 2040, 2046 [false in about 20 ways]); focusing on the report of 3 horizontal marks on the victim's spinal vertebra at the base of the fatal wound, which Mr. Parker contended were not present (e.g., 9 CT 1985-7, 1991-6, 2013, 2015, 2017-2021, 2027); complaints about the knife evidence (specifically that the police expended great effort in analyzing a knife which all agreed did not cause the victim's fatal wound (e.g., 9 CT 1987-91; 2009-2010, 2022-2023,

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[79] The court ordered the motion unsealed on January 7, 2003. (11 CT 2624.)

[80] The motion is also quite lengthy. Hypergraphia is a symptom of mental dysfunction. The alleged legal arguments in this document reflect what might be fairly characterizes as obsessions, also a symptom of mental dysfunction. Many of the complaints are repetitive, suggesting perseveration.

2027); the medical examiner's failure to confirm Parker's statement to the police that he had struck the victim in her collarbone area (9 CT 1997-2000, 2021-2023); that defense counsel allegedly did not press for voluntary manslaughter or second degree murder (9 CT 1999); that defense counsel lied to appellant (e.g., 9 CT 2001-2002, 2044); that the owners of the apartment building would have refuted lying-in-wait and premeditation allegations because they were doing repairs on the bathroom ceiling in Parker's apartment and could have come into the apartment at any time; that "no juror in the world would believe the prosecutors completely implausible theory" (e.g., 9 CT 2004-2005, 2040, 2042); that counsel failed to present available evidence that Parker had requested time off from Lenscrafters to look for other employment, not to plot a murder (9 CT 2012, 2026-2027); and that counsel failed to investigate various persons associated with appellant's employment (9 CT 2005-2006) because counsel were "not seeking to protect the defendant's right to a fair" trial or due process. Appellant also complained in the motion that counsel failed to present witnesses who could have testified that he was to be paid only $2,000 and not $5,000 or $10,000 for marrying Ms. Gallego, and that she never had $5,000, which he contended undermined the financial gain allegations (9 CT 2007-2008, 2029-2032, 2037; 2049-2050); that jailhouse informant Lee's testimony that Parker told him Ms. Gallego had savings of $10,000 or $15,000 could have been impeached by Parker's post-arrest statement to the police that he thought she had only $3,000-$4,000; that appellant was injured in the struggle, proving he had no premeditation and there was no lying in wait, and witnesses lied about the victim being gagged and other matters (9 CT 2012-2013); that defendant's statements disprove the lying-in-wait allegation (9 CT 2025-2026), as would evidence from bank tellers (9 CT 2028-2029); that there was no evidence of rape (9 CT 2028); that trial counsel "deceived" appellant to get him to create

physical evidence in the form of [court ordered] handwriting samples (9 CT 2034-2035); that Det. Ott, one of the investigating officers, was a liar, and defense counsel allegedly colluded with him and others (e.g., 9 CT 2035-2039, 2049-2052); that defense counsel "leaked" information from the February 18, 2002 *Marsden* request to the prosecution, apparently by mentioning things that might be presented at penalty phase (9 CT 2041-2043); that counsel allegedly brought out information about handcuffs that were never in evidence, via cross examination of Dr. Sperber [a forensic odontologist called by the prosecution specifically to opine that handcuffs were used] (9 CT 2044-2045); that counsel allegedly had a conflict of interest (e.g., 9 CT 2033 et seq., 2047-2048, and multiple mentions throughout); that counsel failed to suppress evidence of various sorts [despite counsel's many motions] (e.g., 9 CT 2049 et seq.); and that counsel's sole purpose was to deceive the defendant and present the weakest evidence (9 CT 2053-2054), in order to secure a death sentence. (9 CT 2056-2057.)

At a hearing on **January 7, 2003**, defense counsel advised the court about the purpose of Parker's motion. Counsel stated that Mr. Parker was alleging a conflict of interest by his counsel and did not want the motion treated as a Marsden motion. Parker understood the prosecutor would receive a copy, and was requesting a full hearing on the motion. (RT 7913-7915.) The court confirmed this with Mr. Parker. (60 RT 7914.) Mr. Parker's appointed counsel noted the awkwardness of a represented client bringing a motion against his attorneys and made it clear that though they were not in a position to object, they did not endorse the contents of the handwritten motion or the public hearing procedure. (60 RT 7916.) The judge unsealed Mr. Parker's document and, after confirming with Parker

that he understood that the motion would be served on the prosecution, gave a copy to the district attorney. (60 RT 7917, 7919.)

A further hearing to discuss the new trial motion was held on **January 13, 2003.** When the judge suggested that Parker's motion appeared to be a Marsden motion, defense counsel explained that the relief Parker was seeking was actually broader: that a conflict of interests had existed between him and his counsel throughout the preparation and trial of his case and that he wanted a new trial because of it. (61 RT 7922.) When the court inquired of Mr. Parker whether he wanted his attorneys removed, he said he did, not just for the reasons his attorney had explained, but because "their motives throughout the trial were to assist the prosecution." (61 RT 23.)

After pointing out errors in fact and reasoning in Parker's motion (which the court called his "letter") and the fact that the counsel it had appointed to examine Parker's allegations had found them to be without merit, the court said it found no reason for further proceedings, in effect, denying Parker's motion for a new trial. (61 RT 7926, 7240.)

In an impassioned statement to the court, defense counsel spoke at length of the seriousness of the accusations Parker had leveled at him and his co-counsel, the court's haste in appointing alternate counsel, only to find that Parker immediately distrusted that attorney also, and the difficult position in which lead counsel now found himself of advocating for the life of a client who believed he had worked with the prosecution to get him the death penalty. As counsel described it, "We're in a totally Wonderland place now."

The judge acknowledged the troubled history of the case:" a long case where Mr. Parker had repeatedly, throughout the case, expressed dissatisfaction with counsel. Things he wanted done, things he wanted

access to, suspicions and concerns every time it was raised — it was raised multiple times ...." (61 RT 7935.) After recounting his efforts, in consideration for Parker's concerns, to hear him out, by appointing independent counsel to investigate his accusations, and by reviewing his motion, the judge concluded, in language recalling that of his attorneys months before:

> I do not believe, based on all of my contacts with Mr. Parker throughout this case, that it is possible to find an attorney that he is going to be happy with. Having watched the performance that you provided him, having watched his reaction to [the alternate defender] I do not — I do not believe that it is possible to provide counsel that will satisfy him.

(61 RT 1740.)

Mr. Parker then made a long statement in which he claimed that the alternate defender had told him that the purpose of his investigation was only to "cover our butts" and that his attorneys had tried to push him to take a plea offer of life without parole, and then reiterated the complaints he had obsessively repeated throughout the trial and in his motion, culminating in a repeat of his accusation that his attorneys had colluded with the prosecution. (61 RT 7942-7949.)

The trial judge attempted, once again, to reason with him and explain why the actions of his attorneys were reasonable and in his best interest and averted the introduction of what would have been distasteful and prejudicial admissions from his post-arrest statements. (61 RT 7950), and in the end repeated his earlier findings that Parker's allegations did not present any basis for further proceedings.

On **February 21, 2003**, the trial judge filed two copies of a letter dated February 16, 2003, from Parker to the court. (9 CT 2101-2103; 9 CT 2105-2107.) The letter requested all autopsy photographs, photographs of

the apartment, x-rays, trial transcripts, minute orders, and other evidence. (9 CT 2101.)

Mr. Parker was sentenced on **February 24, 2003.** (62 RT 7953-8021; 11 CT 2625.) Two more long documents prepared by Mr. Parker, were entered into the record as court exhibits (9 CT 2116-2162; 10 CT 2163-2420), although they were apparently not read by the trial court. These materials repeated Parker's themes of falsified evidence and collusion by counsel, the prosecution, and others to obtain a death verdict. Mr. Parker asserted that the medical examiner and the defense forensic pathologist lied in order to aid the prosecution. (Ibid.) He continued to assert that the prosecution and defense conspired to use false testimony and manufactured evidence against him, and that everyone in the process was attempting to cover up the collusion and lies. (9 CT 2101-2103.)

At the hearing, the trial court permitted Parker to allocute, and he did so at length, apparently reading from materials amounting to well over 150 pages. (62 RT 7960-7980, 7982-7988, 7990-7994; 7981.) Mr. Parker's comments again repeated the themes he raised in prior proceedings and his other writings: collusion amongst the lawyers and other participants, fabrication of evidence, and his belief that the medical examiner's findings about manner of death were wrong.

B. Legal Overview.

In *Dusky v. United States* (1960) 362 U.S. 402, the Supreme Court announced the test for evaluating a defendant's competency to stand trial:

> [T]he "test must be whether [the defendant] has **sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding - and whether he has a rational as well as factual understanding of the proceedings against him."**

(*Id.* at p. 402; emphasis added.)

The trial and conviction of a defendant who is legally incompetent violates a defendant's right to due process of law. (*Pate v. Robinson, supra,* 383 U.S. at p. 378.) As Justice Kennedy has observed,

> Competence to stand trial is rudimentary, for upon it depends the main part of those rights deemed essential to a fair trial, including the right to effective assistance of counsel, the rights to summon, to confront, and to cross-examine witnesses, and the right to testify on one's own behalf or to remain silent without penalty for doing so.

(*Riggins v. Nevada* (1992) 504 U.S. 127, 139 (conc. opn. of Kennedy, J.).)

The right to be tried only while competent is so critical a prerequisite to the criminal process that "state procedures must be adequate to protect this right." (*Pate v. Robinson, supra,* 383 U.S. at p. 378; see also *Drope v. Missouri, supra,* 420 U.S. at p. 172 [the failure to observe procedures adequate to protect a defendant's right not to be tried or convicted while incompetent to stand trial deprives him of his due process right to a fair trial].) The Due Process Clause thus demands adequate protective procedures to minimize the risk that an incompetent person will be convicted. The Supreme Court has expressly recognized that one of the required procedural protections is "further inquiry," when there is a sufficient doubt raised about a defendant's competency. (*Drope, supra,* 420 U.S. at p. 180.) When a reasonable doubt has been raised, a court's failure to make further inquiry violates due process by depriving the defendant of his right to a fair trial. (*Pate v. Robinson, supra,* 383 U.S. at pp. 385-86; *Pate v. Smith* (6th Cir. 1981) 637 F.2d 1068, 1072 ["Once a reasonable doubt arises as to the competence of a person to stand trial, the issue must be decided on the basis of a hearing."].)

In keeping with the Supreme Court's guidelines, California law specifically provides as follows:

> A person cannot be tried or adjudged to punishment while that person is mentally incompetent. A defendant is mentally incompetent ... if, as a result of mental disorder or developmental disability, the defendant is unable to understand the nature of the criminal proceedings or to assist counsel in the conduct of a defense in a rational manner.

(Pen. Code, § 1367.)

As this Court explained in *People v. Jones* (1991) 53 Cal.3d 1115:

> "A defendant who, as a result of mental disorder or developmental disability, is 'unable to understand the nature of the criminal proceedings or to assist counsel in the conduct of a defense in a rational manner,' is incompetent to stand trial. (§ 1367.) When the accused presents substantial evidence of incompetence, due process requires that the trial court conduct a full competency hearing. Evidence is 'substantial' if it raises a reasonable doubt about the defendant's competence to stand trial."

(*Id.* at pp. 1152-1153 [citations omitted]. See also *People v. Danielson* (1992) 3 Cal.4th 691, 726, overruled on other grounds in *Price v. Superior Court* (2001) 25 Cal.4th 1046, 1069, fn. 13.); *People v. Lawley* (2002) 27 Cal.4th 102, 131; *People v. Koontz* (2002) 27 Cal.4th 1041, 1063.) The court must consider "all of the relevant circumstances" when determining whether a reasonable doubt exists, and "counsel's opinion is undoubtedly relevant." (*People v. Howard* (1992) 1 Cal.4th 1132, 1164.) "When there exists substantial evidence of the accused's incompetency, a trial court must declare a doubt and hold a hearing pursuant to section 1368 even absent a request by either party. (*See People v. Aparicio* (1952) 38 Cal.2d. 565, 568; § 1368, subd. (a).)" (*Id.*) Failure to conduct a full evidentiary hearing violates fundamental due process and is reversible *per se*. (*Pate v. Robinson, supra,* 383 U.S. at p. 385; *People v. Pennington* (1967) 66 Cal.2d 508.)

California Penal Code section 1367 provides that a person may not be tried unless competent; this provision conforms to the federal constitutional prohibition against putting a defendant on trial unless he has *both* "'a rational as well as factual understanding of the proceedings against him'" *and* "'sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding.'" (*People v. Castro* (2000) 78 Cal.App.4th 1402, 1414, quoting *Cooper v. Oklahoma* (1996) 517 U.S. 348, 354 [other internal quotation marks omitted]; see also *Dusky v. United States, supra,* 362 U.S. 402.)

As this Court recently declared in *People v. Lightsey* (2012) 54 Cal.4th 668, 690-91:

> The United States Supreme Court has "repeatedly and consistently recognized that 'the criminal trial of an incompetent defendant violates due process.' " (*Cooper v. Oklahoma* (1996) 517 U.S. 348, 354 [134 L.Ed.2d 498, 116 S. Ct. 1373].) A defendant is deemed incompetent to stand trial if he lacks " ' "sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding ... [or] a rational as well as factual understanding of the proceedings against him." ' " (*Ibid.*, quoting *Dusky v. United States* (1960) 362 U.S. 402, 402 [4 L.Ed.2d 824, 80 S.Ct. 788] (*Dusky*).) "Even when a defendant is competent at the commencement of his trial, a trial court must always be alert to circumstances suggesting a change that would render the accused unable to meet the standards of competence to stand trial." (*Drope v. Missouri* (1975) 420 U.S. 162, 181 [43 L.Ed.2d 103, 95 S. Ct. 896] (*Drope*).) State constitutional authority is to the same effect. (See *People v. Koontz* (2002) 27 Cal.4th 1041, 1063 [119 Cal.Rptr.2d 859, 46 P.3d 335].)
>
> The applicable state statutes essentially parallel the state and federal constitutional directives. Section 1367, subdivision (a) provides: "A person cannot be tried or adjudged to punishment while that person is

mentally incompetent. A defendant is mentally incompetent for purposes of this chapter if, as a result of mental disorder or developmental disability, the defendant is unable to understand the nature of the criminal proceedings or to assist counsel in the conduct of a defense in a rational manner."

Section 1368 provides in pertinent part: "(a) .If, during the pendency of an action and prior to judgment, a doubt arises in the mind of the judge as to the mental competence of the defendant, he or she shall state that doubt in the record and inquire of the attorney for the defendant whether, in the opinion of the attorney, the defendant is mentally competent. If the defendant is not represented by counsel, the court shall appoint counsel. At the request of the defendant or his or her counsel or upon its own motion, the court shall recess the proceedings for as long as may be reasonably necessary to permit counsel to confer with the defendant and to form an opinion as to the mental competence of the defendant at that point in time. [¶] (b) If counsel informs the court that he or she believes the defendant is or may be mentally incompetent, the court shall order that the question of the defendant's mental competence is to be determined in a hearing which is held pursuant to Sections 1368.1 and 1369. If counsel informs the court that he or she believes the defendant is mentally competent, the court may nevertheless order a hearing. Any hearing shall be held in the superior court."

As we stated in *People v. Welch* (1999) 20 Cal.4th 701, 737-738 [85 Cal.Rptr.2d 203, 976 P.2d 754], a trial court is obligated to conduct a full competency hearing if substantial evidence raises a reasonable doubt that a criminal defendant may be incompetent. This is true even if the evidence creating that doubt is presented by the defense or if the sum of the evidence is in conflict. The failure to conduct a hearing despite the presence of such substantial evidence is reversible error.

It is well established that the trial court has a sua sponte duty to declare a doubt when there is substantial evidence that the defendant is incompetent. (Pen. Code, § 1368 (a).) Proceedings must be suspended when a doubt as to competence is declared. (Pen. Code, § 1368 (c).) A doubt must be declared when a trial court is apprised of evidence that the defendant is incompetent any time before judgment.

Penal Code section 1367 provides that "[a] person cannot be tried *or adjudged to punishment* while that person is mentally incompetent." (Emphasis added. See *People v. Lawley, supra,* 27 Cal.4th at p. 136 ["When, at any time prior to judgment, a trial court is presented with substantial evidence of a defendant's incompetence to stand trial, due process requires a full competency hearing."]; *People v. Wade* (1959) 53 Cal.2d322, 335 ["Penal Code section 1368 provides for a hearing on the present sanity of a defendant if, at any time before judgment, the judge entertains a doubt as to that sanity."]; *People v. Jones, supra,* 53 Cal.3d at pp. 1152-1153 ["The court's duty to conduct a competency hearing arises when such evidence is presented at any time "prior to judgment."]. Accord, *United States v. Garrett,* (7th Cir. 1990) 903 F.2d 1105, 1115 ["need for competency also extends beyond trial to the sentencing phase of a proceeding"]; *Saddler v. United States* (2d Cir.1976) 531 F.2d 83, 86 [a "court should not proceed with sentence unless the defendant is mentally competent."]; *United States v. DeLuca* (S.D.N.Y. 1982) 529 F.Supp. 351, 356 ["If the Court had sentenced defendant in spite of his incompetence the sentence would clearly have been invalid"].) Blackstone explained the rationale for this rule: "If, after he be tried and found guilty, he loses his senses before judgment, judgment shall not be pronounced ... for peradventure, says the humanity of the English law, had the prisoner been

of sound memory, he might have alleged something in stay of judgment or execution." (4 William Blackstone, Commentaries *24-25.)

The rationale — that a competent defendant "might have alleged something in stay of judgment" — has particular force where the defendant is representing himself.[81] If a defendant is not competent, by definition he is unable "to conduct his own defense in a rational manner. [Citations.]" (*People v. Merkouris* (1959) 52 Cal.2d 672, 678.) In such a case in which a incompetent defendant is representing himself, he is left without a rational advocate representing his interests before the court. This is tantamount to having no advocate at all. As the Supreme Court explained in *Indiana v. Edwards* (2008) 554 U.S. 164, "Moreover, insofar as a defendant's lack of capacity threatens an improper conviction or sentence, self-representation in that exceptional context undercuts the most basic of the Constitution's criminal law objectives, providing a fair trial." (*Id.* at pp. 176-177.)

The question here is whether the superior court should have conducted an inquiry into appellant's competence. Due process requires a trial court to hold a full competency hearing if "substantial evidence" has been produced of the accused's incompetence to waive counsel. (*People v. Welch, supra*, 20 Cal.4th at p. 738.) Evidence is "substantial" if it raises a reasonable doubt about the defendant's competence to stand trial. (*People v. Jones, supra,* 53 Cal.3d at p. 1153; accord *People v. Welch, supra,* 20 Cal.4th at p. 739.) If there is such substantial evidence, a full competence hearing is required, even if contrary evidence would support a finding of competence (*ibid.*), and indeed "even if the court's observations lead it to

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[81] In this case, appellant Parker was represented; but the trial court nonetheless placed into the record extensive pro se writings that Parker's counsel did not and could not endorse, and permitted Mr. Parker to make statements on the record.

believe the defendant is competent." (*People v. Jones*, *supra*, 53 Cal.3d at p. 1153; accord, *People v. Castro, supra,* 78 Cal.App.4th at p. 1415; *People v. Pennington, supra,* 66 Cal.2d at p. 518 ["no matter how persuasive ... the court's own observations of the accused [] may be"].)

C. The Evidence Before the Trial Court Required the Court to Declare a Doubt as to Appellant's Competence to Stand Trial.

Mr. Parker's consistent mistrust of his counsel, his belief that there was a conspiracy against him (involving the prosecutors, police, trial court, and his own counsel), his belief that evidence in his case was fabricated — all of these are evidence of his inability to rationally understand the proceedings, and rationally cooperate with counsel. (*Drope v. Missouri, supra,* 420 U.S. 162; *Pate v. Robinson, supra,* 383 U.S. at p. 378; *People v. Laudermilk, supra,* 67 Cal.2d at p. 282; Pen. Code, §§ 1367, 1368.)

As the problem proceeded and grew, the trial court attempted to resolve Parker's differences with his counsel by appealing to reason — by defending his attorneys' efforts on his behalf, and by explaining to him why it was not in his interest to attempt to represent himself or reveal privileged statements to people outside his defense team, including the court itself. The trial court fell into the common error of assuming mental competence from the defendant's apparent intelligence and his demeanor in court and failed to see behind that to the fact that Parker's paranoid distrust of all the players in the trial process and his delusional beliefs about the evidence and what it purportedly showed was substantial evidence that Parker lacked both a rational understanding of the proceedings and the ability to cooperate rationally with his counsel.

Well before trial, Parker's attorneys told the court in frustration that they did not believe Parker was capable of cooperating with any counsel

who might represent him. (9A RT 653.) By the time of Parker's sentencing, the trial court had come to the same conclusion, that Mr. Parker would not be able to trust or cooperate with any counsel. (See, e.g., 43A RT 5985, 61 RT 7941.) That perception, along with the other evidence of Parker's mental illness and irrational beliefs related to his case and counsel, should have made clear the need for a formal inquiry into appellant's competence to stand trial.

In any case where the prosecution is seeking a death sentence, a defendant's feeling that people are out to kill him is not necessarily paranoid or delusional; that is factually true. The situation is markedly different, however, when a defendant facing capital charges believes that *his own lawyers* (and everybody else in the process) are part of a conspiracy against him. Likewise, it is far out of the ordinary for a defendant to hold unreasonable beliefs, contradicted by the record, discovery, and his counsel's investigations, that witnesses have fabricated or falsified much of the evidence against him.

D. Reversal is Required.

The trial court erred in failing to declare a doubt as to appellant's competence, suspend proceedings, order assessments of appellant's competence, and hold a full hearing on the matter.

The California Supreme Court has held that the failure to suspend proceedings when a doubt arises of the defendant's competence to stand trial requires reversal without a showing of prejudice. (*People v. Marks* (1988) 45 Cal.3d 1335, 1344 ["'The sub silentio disposition of the section 1368 proceedings without a full competency hearing rendered the subsequent trial proceedings void because the court had been divested of jurisdiction to proceed pending express determination of the competency

issue'"], quoting *People v. Hale* (1988) 44 Cal.3d 531, 541; *People v. Stankewitz* (1982) 32 Cal.3d 80, 94 [quoting both bases from *Pennington*].)

Federal constitutional law requires the same result. Trial of a mentally incompetent person violates the right to due process within the meaning of the Fourteenth Amendment. It also produces violations of the host of trial rights protected by the Sixth and Fourteenth Amendments, including fair trial, to present a defense, to compulsory process, to confrontation, and to the assistance of counsel. In a capital case such as this, it further violates the protections of the Eighth and Fourteenth Amendments, including the rights to a reliable, accurate, non-arbitrary determination of capital murder and the appropriate punishment. Petitioner's state and federal constitutional rights were violated, and the conviction and sentence are void. (*Lokos v. Capps* (5th Cir. 1980) 625 F.2d 1258, 1261; *Zapata v. Estelle* (5th Cir. 1979) 588 F.2d 1017, 1021; *Adams v. Wainwright* (11th Cir. 1985) 764 F.2d 1356, 1360; *Bundy v. Dugger* (11th Cir. 1987) 816 F.2d 564, 567.) Petitioner was deprived of his right to put on a defense because he was tried while incompetent. (*Crane v. Kentucky* (1986) 476 U.S. 683.) He was deprived of his right to be present at trial under section 1043 of the Penal Code, because his mental incapacity rendered him mentally "not present."

1. Remand for a Retrospective Competency Proceeding is Not Appropriate in this Case.

The United States Supreme Court has "accepted the possibility of a constitutionally adequate ... postappeal evaluation of the defendant's pretrial competence." (*People v. Superior Court* (*Marks*) (1991) 1 Cal.4th 56, 67.) At the same time, however, the High Court has repeatedly warned of the difficulties of a retrospective inquiry, and, in fact, it refused to allow such an inquiry in either *Dusky*, *Pate*, or *Drope v. Missouri*. (*Dusky v.*

United States, supra, 362 U.S. 402, 403 [discussing the "difficulties of retrospectively determining the petitioner's competency as of more than a year ago"]; *Pate v. Robinson, supra*, 383 U.S. at p. 387 [similar]; *Drope v. Missouri, supra,* 420 U.S. at p. 183 [noting "the inherent difficulties of such a nunc pro tunc determination under the most favorable circumstances," citing *Pate* and *Dusky*].)

Prominent among the difficulties pointed out by the Supreme Court are the lapse of time — the "difficulties of retrospectively determining the petitioner's competency as of more than a year ago" — and the facts that it would now be impossible to observe the defendant's past demeanor and that expert witnesses would now have to testify "solely from information contained in the printed record." All of these anti-retrospectivity factors are present in the case currently before this Court, as is the fact that Mr. Parker's personal writings were wrongfully made public on the mere uninformed assumption he was competent.

There are cases from the Ninth Circuit Court of Appeals allowing at least an attempt at a retrospective inquiry into competency at the time of trial-court proceedings. (See *Odle v. Woodford* (9th Cir. 2001) 238 F.3d 1084, 1089; *Miles v. Stainer* (9th Cir. 1997) 108 F.3d 1109, 1114; *Evans v. Raines* (9th Cir. 1986) 800 F.2d 884, 885-887; see also *De Kaplany v. Enomoto* (9th Cir. 1976) 540 F.2d 975, 986 fn. 11.) In those cases, however, "the record contain[ed] sufficient information upon which to base a reasonable psychiatric judgment," including, in each case (as *Pate* intimated), expert mental health testimony presented during the trial court proceedings. No such record of psychiatric assessment relevant to competence is present in this case.

The trial court's failure to declare a doubt and hold a hearing concerning appellant's competence to stand trial leaves the record bereft of

the evidence that could and would have been presented at such a hearing. While this Court ordered a remand to determine if a retrospective competence hearing might be feasible in *People v. Lightsey*, *supra*, 54 Cal.4th 668, the factors making that a possibility in *Lightsey* are not present here. This Court observed in *Lighstey* that:

> Here, despite the error in the manner in which the competency proceedings were conducted, the subject of defendant's mental competence actually was reviewed at the time of the trial and contemporaneous evidence specifically addressing that issue presumably still exists. In addition, individuals who formed opinions on defendant's competence based on their observations of his mental state at that time may be available to testify at a retrospective hearing. In contrast, in the circumstances of Pate error, where there was substantial evidence of incompetence but no proceedings to develop the record further, there is by definition a shortcoming in the evidence, and the trier of fact at a retrospective competency hearing would have to rely on after-the-fact opinions and evidence in the record (such as the defendant's courtroom behavior) that might only circumstantially assist in determining the defendant's mental state at the time of trial.

There were no competence proceedings or reviews at the time of appellant Parker's trial. This is not a case of an incomplete inquiry, but instead, the record reflects the absence of any inquiry at all.

2. Retrial would be Inappropriate Because the Trial Court's Failure to Declare a Doubt Resulted in Irreversible Prejudice to Appellant.

In this case, because the trial court did not recognize and pursue appellant Parker's incompetence to stand trial, the court also prejudicially exposed to public and prosecution scrutiny a great many matters which should have remained confidential and privileged, including abundant writings of the defendant, who was represented and whose counsel opposed

those disclosures. Appellant refers to and incorporates Argument 25, regarding this separate but related error. That bell cannot be un-rung; a new capital trial would be an insufficient remedy. Appellant Parker's rights are forever compromised concerning the charges of which he was convicted, and for which he was sentenced to death.

A new capital trial should be precluded because of the public disclosure of the defendant's own writings and statements, despite abundant evidence that he was in fact unable to rationally understand matters in his case or cooperate with counsel.

2. THE TRIAL COURT ERRED IN ADMITTING INFLAMMATORY IMAGES PROTECTED BY THE FIRST AMENDMENT, AND PERMITTING THE PROSECUTION TO INFECT THE ENTIRE TRIAL WITH THE SPECTER OF ALLEGED "PORNOGRAPHY" THAT WAS NEITHER OBSCENE NOR RELEVANT TO THE DEFENDANT'S GUILT OR INNOCENCE OF THE ALLEGATIONS.

The trial court committed error under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution, under Article I, sections 1, 7, 13, 15, 16, and 17 of the California Constitution, and the statutory and decisional law of the State of California, when it unreasonably permitted the prosecution to introduce, at both guilt and penalty phases, graphic materials of a sexual nature, and permitted the prosecution to repeatedly refer to those materials as "porn" or "pornography"[82] suggesting they sufficed as proof of premeditation and deliberation as well as intent to commit rape.

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[82] Even the descriptions of exhibits in the Clerk's Transcript include multiple designations of items as "pornography" or "morphed," a term used to indicate the graphic collage materials found in Mr. Parker's bedroom.

The bulk of this evidence was in fact irrelevant to the issues at both the guilt and penalty phases, and highly inflammatory and prejudicial. The allegations of "porn" permeated the case, and egregiously inflamed the factfinders against appellant Parker. The alleged "pornography" was used both to lighten the prosecution's burden of proof, and to persuade jurors that appellant was just a bad person.

A. Factual and Procedural Background.

Throughout the trial, and beginning well before trial, the prosecution characterized both commercial explicit images and images created by Mr. Parker (often a combination of commercial images, photographs, and sometimes drawing or writing) as "porn" or "pornography." That characterization was thoroughly embedded in the trial record, affecting not only jurors, but also the trial court and participants.

While this was fundamentally — and according to the charges — a trial about whether Mr. Parker killed his roommate, and whether that killing was murder or manslaughter, it thus also became a trial about whether his interest in and hobby concerning sexually graphic images was so odious that no result would do but a murder conviction, true findings on special circumstances, and a death sentence.

The preliminary hearing was held on February 28, 2001. That proceeding set the stage for the rest of the proceedings. Evidence was presented that in the victim's bedroom, officers found "porn" material from men's magazines, and an explicit commercial videotape in her VCR. (Prelim. at 18-19.) The investigating officer said that more than 1,000 pieces of "porn" were found in Mr. Parker's bedroom, including items on his walls, items on his bed, and duffle bags full of "porn." (Prelim. at 19-20.) A few items (identified as pages 366, 312, 373, 297, 396, 394 of Exh. 9 at the preliminary hearing) involved photographs of the victim which had

been altered with large breasts and/or male and female sexual organs . (Prelim. at 21-24.) The vast bulk of the material characterized as "porn" did not involve any photographs of Ms. Gallego.

On February 25, 2002, the defense filed a Motion in Limine to Exclude "Pornography." (3 CT 698-704; quotations in text.) That motion noted, "The cut-and-paste depictions are sexually explicit and graphic." (3 CT 699.) The defense sought to exclude all of the allegedly "'pornographic' materials seized from the defendant, specifically evidence items 30, 35, 36, 54, 56, 87, 96, 97, 99, 102, 103, 104, 107, and 109," as well as testimonial references to these materials. (*Ibid.*) The motion was based on grounds of irrelevance, as none of the materials depicted matters at issue in the criminal charges (3 CT 700-701), and a lack of probative value under Evidence Code section 352. (3 CT 701-703.) As counsel stated, "The only purpose the People could have in presenting the pornographic materials to the jury is to show that Mr. Parker is some kind of sex fiend and therefore capable of rape." (3 CT 702.)

The prosecution filed its own set of motions in limine on February 25, 2002 (4 CT 801 et seq.), and argued that pornographic materials were relevant to the defendant's intent, motive, and state of mind. (4 CT 805-806.) It principally relied on *People v. Memro* (1995) 11 Cal.4th 786, 861 (4 CT 805), concluding that

> A picture does speak a thousand words, and these images and what defendant has done with them clearly demonstrate his sexually sadistic fantasies and obsession with Patricia Gallegos. *The altered pornography should be admitted.*

(4 CT 806; emphasis in the original.)

The defense responded on March 7, 2002, arguing that the state's reliance on *Memro* was misplaced. (4 CT 827-830.) Not only was that

case factually dissimilar — with the defendant admittedly luring boys to his apartment to take their photographs — but Mr. Memro also had a history of past convictions and conduct related to sexual misconduct with minors. (4 CT 827-828.) The defense argued, "The People are trying to use the pornographic materials in order to link mere possession to murder and rape." (4 CT 829.)

> The fact is that he had created pictures of many other known and unknown person and the reality is that he never took any inappropriate action against those women. So maybe the more accurate conclusion to draw from the created pictures is that they do not mean anything more than what they are, fantasy.

(*Ibid.*) The prosecution submitted additional points and authorities on March 12, 2002, arguing that these materials were necessary to establish the defendant's intent, motive, and state of mind. (4 CT 882-886.)

At a hearing on April 2, 2002, the prosecution argued for admission of cut-and-paste materials regarding witness Brenda Chamberlain, with whom Mr. Parker had a previous relationship, who did not know of Parker's interest in alleged pornography, and who was expected as a witness for the defense. (14 RT 1047-1048.) The trial court ruled that such evidence would not be allowed in the case in chief. (14 RT 1049.) It was later admitted as "rebuttal" evidence. (9 CT 2078-2079, motion for new trial.)

On April 4, 2002, in pretrial hearings, the trial court noted that it saw six to ten cubic feet of material identified as "porn" by the prosecution. (16 RT 1337.) The prosecutor said she only wanted to present the jury with a 3-4 inch stack of that material (16 RT 1340), including writings and "porn." (16 RT 1342.) Discussions of various graphic images followed. (16 RT 1343 et seq.) Endeavoring to justify admission of images, the prosecutor

argued that appellant could look like a normal person, but he was secretly a "psychopath" with sexual urges. (16 RT 1396.)

The trial court noted that the quantity and nature of this material risked characterizing appellant as a "deeply scary guy." (16 RT 1398.) In response to the trial court's concern about Evidence Code 352 issues, the prosecutor argued that jurors would wonder why Ms. Gallego accepted him as a roommate, how did she not know? (16 RT 1399.) That response, however, reflected a commitment to tarring the defendant's character, not to proving his guilt of the charges by legitimate means, prompting a defense objection requesting the prosecutor refrain from ad hominem attacks. (16 RT 1400.)

The defense argued that it could not overstate the prejudicial and inflammatory nature of this material, and noted that the prosecution had offered no law in support of its admission; nor had the prosecution explained its relevance to the murder charge, given that none of the material depicted murder. (16 RT 1407-1408.) Moreover, there was no information about when pieces of the material were created. (16 RT 1410.) "Propensity" evidence is precluded under Evidence Code section 1101, and the 14th Amendment guarantee of due process; and this material is particularly dangerous because it is so viscerally disturbing, no matter how few items are admitted. (16 RT 1411-1412.) Even as to the rape-murder charge and special circumstance, there is no forensic proof of rape. (16 RT 1413.) There is a giant leap from possession of alleged pornography to proof of forcible rape. (16 RT 1417.) The material is singularly capable of being mis-used, and its affects being carried over to the penalty phase. (16 RT 1421.)

The trial court ruled that items including the victim's photograph could be admitted. (16 RT 1442.) Given the remoteness of Brenda

Chaimberlain's relationship with the appellant, during which she was aware only that he had commercial graphic materials, the trial court ruled against confronting that witness with later materials including her image. (16 RT 1454, 1461.) The court was inclined to allow the prosecution to admit a selection of images focusing on shaved pubic areas of women (16 RT 1478), despite the defense objections on grounds of irrelevance and the inflammatory nature of the material. (16 RT 1477, 1481.)

On April 5, 2002, discussion of alleged "porn" continued at length. (17 RT 1485-1647; 11 CT 2478.) The defense registered ongoing objections to all the material. (17 RT 1521.) The trial court, among other actions, overruled defense objections to a photograph of allegedly pornographic videotapes [apparently with no connection to the victim at all] found in the defendant's room. (17 RT 1526-1527.)

Discussions about admissibility of "porn" continued on April 15, 2002 (19 RT 1787 et seq.), with the defense inquiring whether evidence that the actions alleged were not in character would "open the door" to rebuttal evidence. (19 RT 1787-1790.) The prosecution argued that bringing in character evidence from prior relationships opened the door to both the entirety of its alleged "porn," and to prior marijuana use. (19 RT 1792-1794.) Further, the prosecution argued, showing altered images to a prior lover who never suspected that activity was proper rebuttal. (19 RT 1798 et seq.) Having seen the altered images now, because they were shown to witness Chamberlain by the prosecution, that witness now knows — the prosecution argued — the defendant's true sexual character. (19 RT 1802.) The defense argued that the prosecution wanted to present an abundance of irrelevant graphic evidence, should the defense present evidence of the defendant's non-violence and lack of know sexual deviance in the past. (19 RT 1811 et seq.) The trial court ruled that as to Brenda

Chamberlain, the prosecution would be permitted to show her "morphed" photographs and elicit her reaction. (19 RT 1816, 1821.) The defense argued that it was being precluded from presenting a balanced picture of Mr. Parker, and that the impact of these materials would be overwhelming to the jury; but the trial court dismissed those concerns. (19 RT 1832-1833.)

Discussions of alleged "porn" exhibits continued on June 13, 2002. (32 RT 3799 et seq.) The prosecution presented a number of "photo boards," and stated an intent to call witness Brenda Chamberlain at the penalty phase if the defense did not call her. (32 RT 3807.) The court stated that if Ms. Chamberlain was called by the defense at guilt phase as a character witness, she could be presented with graphic material including explicit sexual statements. (32 RT 3808.) The prosecutor argued that the defendant's sexual fantasies and desires were relevant at the guilt phase, because the witness never knew him to be like that. (32 RT 3812.) The trial court concluded that there was a lot more material than was being offered, and that the prosecutor could *ask the witness about what she did not know*. (32 RT 3814-3416.) The trial court explicitly approved letting the jury know that there was a great quantity of material they were not seeing. (32 RT 3817.)

Defense counsel reiterated that the allegedly pornographic material was being offered only to present an image of him as a sexual predator, although his former intimate partners saw nothing of that; counsel differentiated between appellant's reputation and his actual behavior with other people, which was not consistent with the fantasy life pressed by the prosecution. (32 RT 3822-3824.) The prosecutor argued that once the appellant's sexual practices came up, that invoked character in general. (32 RT 3828.) The trial court ruled that evidence regarding Ms. Chamberlain

could be admitted, either as a response to character evidence or to show that the appellant was no longer the same person he had been. (32 RT 3836-3838; see Arg. 26, regarding the new trial motion, including the error in admission of this evidence, incorporated herein by reference.)

Speaking of other alleged pornography that the state wished to introduce, the trial court — while limiting what could be introduced out of the vast quantity proposed — quite remarkably opined that it was just more pornography, the question was whether it was in the appellant's possession. (32 RT 3847.)

That afternoon, the prosecutor presented another photo board containing what the judge described as a variety of "porn" images, some enhanced by drawing or writing. (32 RT 3855.) The defense objected on grounds that the board was to focus on shaved pubic areas, that the persons depicted looked underage, and to the writings. (32 RT 3856-3857.) The trial court observed that in the "sea" of "porn," few materials included writing, which he regarded as risky. (32 RT 3858.) The court instructed defense counsel not to read the writings for the transcript, as the words were not appropriate for court or social settings. (32 RT 3860.) The court then permitted the items to be read as the objection was based on relevance and Evidence Code section 352, ultimately ruling that the offensive words did not alter the character of the images. (32 RT 3861.) The trial court stated that if the defense wished to put on evidence that the defendant did not act on his fantasies, the prosecution would be allowed to confront witnesses with these materials to show a raging beast inside. (32 RT 3905.) The defense again noted the highly upsetting nature of these materials, such that one of the potential witnesses vomited when confronted with some of them. (32 RT 3905-3906.)

Following jury selection, the trial presentation began on June 18, 2002. (11 CT 2536.) In a hallway behind the courtroom — so as not to address the matter in a packed courtroom — the defense objected to a new item brought to court by the prosecution, depicting a young woman with pigtails added to the original image. (33 RT 3915, 3918.) The trial court's impression was that the woman depicted did not look underage, but lamented the commodity of sex sold in the United States, and that such images overwhelmingly depict young women. (33 RT 3919-3920.)

In opening statement, the prosecutor showed jurors numerous allegedly pornographic images, stressed the large quantity of such material in Mr. Parker's possession, and theorized an association between his fantasies and the violence done to Ms. Gallego. (33 RT 3947-3949.) Among other discussion, the defense stated that Mr. Parker did not want to kill Ms. Gallego; he wanted to marry her. (33 RT 3972.)

On June 24, 2002, the prosecution presented the testimony of the investigating officer, Det. Hergenroeather, who testified at length about various items of alleged pornography. (See, e.g., 37 RT 4801-4811, 5048-5049.) The detective did not know when any of the images were created. (37 RT 4840.) None of the tapes collected depicted either appellant or Ms. Gallego. (37 RT 4841.)

Marilyn Powell, a former girlfriend of appellant, testified on June 28, 2002. Among other things, she testified that appellant liked to record commercial explicit shows during the time they dated. (41 RT 5452.) She did not know he had taken some of her photographs, nor that he altered them. (41 RT 5455, 5458.) She — and jurors — were shown images presented as Exhibits 98, 84, and 79. (41 RT 5452-5458.) Mr. Parker never exhibited unusual sex practices with her, not did he behave inappropriately with her children. (41 RT 5484.)

On July 8, 2002, discussions regarding jury instructions referenced the alleged pornography evidence on a number of occasions, regarding character evidence and the heat of passion defense. (44 RT 6117-6120, 6122; 6182-6185, 6187.)

The prosecutor's guilt phase closing argument was given on July 9, 2002. (11 RT 2573.) The prosecutor argued extensively about the alleged pornographic material, and the theory that appellant's fantasies culminated in the killing of Ms. Gallego. (45 RT 6297-6299, 6303-6904, 6322, 6326, 6444, 6450, 6454, 6456, 6482.)

In pretrial motions for the penalty phase, held on July 18, 2002, the prosecutor stated that she intended to submit no additional alleged pornography in the case in chief. (48 RT 6609.) However, if appellant presented evidence of difficulty forming substantial relationships, the prosecution intended to call witness Brenda Chamberlain in rebuttal, and present images involving her. (48 RT 6607, 52 RT 7333-7335.) The defense objected, arguing this would be improper rebuttal, and was merely an attempt to further inflame jurors at the end of the case. (52 RT 7336-7399, 7345.) The prosecutor's justification was that the allegedly pornographic images demonstrated sheer rage, a degradation of women. (52 RT 7343.) The trial court opined that it was proper rebuttal (52 RT 7346), and that the porn — rather than childhood issues — led to the homicide. (52 RT 7347-7348.) The court further opined that if appellant's relationship with Chamberlain was relevant to penalty phase, the prosecution should be able to present its strongest information in support of a death sentence. (52 RT 7353.) There followed additional discussion of what photographs could be used, as apparently the prosecution now had two poster boards regarding Ms. Chamberlain. (52 RT 7356 et seq.)

On July 30, 2002, the defense announced that it would complete its penalty phase presentation without calling Dr. Rayna Rogers, whose testimony the prosecutor anticipated rebutting by calling Brenda Chamberlain. (53 RT 7511.) The trial court concluded that even without the testimony of Dr. Rogers, the defense presentation made rebuttal by Ms. Chamberlain (and photographs involving her) legitimate rebuttal. (53 RT 7511-7515.) Ms. Chamberlain was called by the prosecution, and confronted with alleged pornographic material. (53 RT 7561-7567.)

On August 1, 2002, the prosecution closing argument stressed pornography and degradation. (54 RT 7628, 7740.)

At the hearing on February 24, 2003, the trial court based the denial of the new trial motion in part on the alleged pornography that permeated the case, stating that it served to "show that the dark side which resulted in his being here in this case was not a recent development but something that was part of his personality at a time when he was able to maintain a relatively normal relationship." (62 RT 7959.) Regarding sentencing, the prosecutor again urged the alleged pornography as a reason for a death sentence. (62 RT 8005-8009.)

B. Appellant's Statutory and Constitutional Rights Were Violated by the Admission of this Irrelevant Evidence, and the Drumbeat of Alleged "Pornography."

In *Dawson v. Delaware* (1992) 503 U.S. 159 [112 S.Ct. 1093, 117 L.Ed.2d 309], the United States Supreme Court held that the Constitution prohibited the State of Delaware from introducing evidence of the appellant's racist associations and abstract beliefs as aggravating circumstances, when the associations and beliefs were unrelated to the crimes. Appellant respectfully submits that, like Dawson, the trial court here permitted the prosecution to introduce evidence of constitutionally

protected personal materials to inflame the jury's passions in determining the appropriate sentence.

Quantities of sexually graphic material seized from appellant's apartment were, as demonstrated below, not legally obscene; nor were they relevant to proving guilt of the charges, or to permissible sentencing factors under California's capital punishment scheme. They were, however, highly inflammatory — particularly since at that time in San Diego, a notorious high-profile child homicide that also included child pornography allegations was underway. The prosecution exploited the alleged "pornography" before and during trial, thoroughly infecting the proceedings with what amounted to a distasteful but perfectly legal hobby of viewing and hand-crafting crude and juvenile graphic images.[83]

The visceral reactions of participants in the trial, including jurors, was utterly predictable. It was with the expectation of arousing revulsion that the prosecutor so relentlessly pressed the alleged "pornography," using private thoughts of the defendant formed at some uncertain time in the past

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[83] The alleged "pornography" seized by police, described in quantity as filling "bags and bags" (16 RT 1336; see also 37 RT 4807, 37 RT 4810, 39 RT 5049), consisted of commercially available materials and some collages made by appellant Parker, using commercial magazines, photographs of people, and sometimes embellishment with a pen.

These images were not stored on a computer, or disseminated in any way by Parker. There was no evidence that any person besides Mr. Parker had ever seen the collages, before they were seized. None of the images involve homicide. At most, the collages reflect private fantasies of a sexual nature.

There was no evidence about when the collages were created; these private efforts could have been created substantially earlier than the events of this case, and no nexus to the homicide was presented — only the implication that someone who had sexual fantasies might have harbored an intent to rape at some other point in time.

to distract attention from the fact that evidence of premeditation was weak, and that there was evidence to support the heat of passion defense offered. A criminal case, and particularly a capital case, must comport with the constitutional requirement of being decided on facts and reason, not on passion and prejudice. That requirement was betrayed in this case.

1. The Alleged "Pornography" Was Not Legally Obscene, and Was Protected by the First Amendment.

The government may not prohibit or punish the expression of an idea simply because society finds the idea itself offensive or disagreeable.[84] Instead, the First Amendment prevents the government from proscribing speech or expressive conduct because of its disapproval of the ideas being expressed, and therefore, the government generally has no power to restrict expression because of its message, ideas, subject matter, or content.[85]

The Constitution's protection of speech is not limited to conduct that communicates a political social, philosophical, or religious message. Instead, it applies to "expressive conduct," including the visual arts, music, poetry, and literature.[86] Aesthetic and moral judgments about art and

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[84] *Texas v. Johnson* (1989) 491 U.S. 397, 109 S.Ct. 2533, 105 L.Ed.2d 342.

[85] See *R.A.V. v. City of St. Paul, Minn.* (1992) 505 U.S. 377, 112 S.Ct. 2538, 120 L.Ed.2d 305; see also, e.g., *Ashcroft v. American Civil Liberties Union* (2002) 535 U.S. 564, 122 S.Ct. 1700, 152 L.Ed.2d 771. The First Amendment applies to state action. (See *Joseph Burstyn, Inc. v. Wilson* (1952) 343 U.S. 495, 500 ["In a series of decisions beginning with *Gitlow v. People of State of New York* [(1925) 268 U.S. 652] this Court held that the liberty of speech and of the press which the First Amendment guarantees against abridgment by the federal government is within the liberty safeguarded by the Due Process Clause of the Fourteenth Amendment from invasion by state action."].)

[86] See *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston* (1995) 515 U.S. 557, 569; *Ward v. Rock Against Racism* (1989) 491 U.S.
(footnote continued on next page)

literature are for an individual to make, not for government to decree, even with the mandate or approval of the majority.[87]

a. Unprotected Expressive Activity: Obscenity.

The First Amendment does not protect obscenity.[88] However, the judicial definition[89] of obscenity is quite narrow.[90] Specifically, the United States Supreme Court has confined the judicial definition of obscenity to "shameful or morbid,"[91] hardcore[92], sexual conduct.[93] According to the

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781 [music]; *United States v. O'Brien* (1968) 391 U.S. 367, 377 [symbolic speech and expressive conduct].

[87] *Brown v. Entertainment Merchants Ass'n* (2011) 131 S.Ct. 2729.

[88] See, e.g., *United States v. Williams* (2008) 553 U.S. 285; *United States v. Schales* (9th Cir. 2008) 546 F.3d 965, 970. See also, *Ashcroft v. American Civil Liberties Union* (2002) 535 U.S. 564, 122 S.Ct. 1700, 152 L.Ed.2d 771 ["obscenity in any form is not protected by the First Amendment"]; *Miller v. California* (1973) 413 U.S. 15, 24.

[89] The Supreme Court recognized that the word "obscene" in the judicial context is distinct from the traditional English usage of the words "obscene" and "pornography." The Court pointed out that the word "obscenity" has a "specific judicial meaning" as "material which deals with sex in a manner appealing to prurient interest." (*Miller v. California, supra*, 413 U.S. at p. 20, fn. 2.) Notably, the Court's definition of "obscenity" derived from their previous holding in *Roth v. United States* (1957) 354 U.S. 476. (*Id.* ["We note, therefore, that the words 'obscene material,' as used in this case, have a specific judicial meaning which derives from the *Roth* case, i.e., obscene material 'which deals with sex.'"].)

[90] The Supreme Court expressed concern over "the inherent dangers of undertaking to regulate any form of expression" and explicitly stated that the purpose of the *Miller* test is to "carefully limit" the scope of state statutes designed to regulate obscene material to only "hardcore" sexual conduct. (See *Miller v. California, supra*, 413 U.S. at p. 24.)

[91] See *Miller v. California*, supra, 413 U.S. at p. 20, fn. 2 [citing ALI Model Penal Code section 251.4 (l) 'Obscene Defined.'"]; See also, Model Penal Code § 251.4 for ["Material is obscene if, considered as a whole, its
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Model Penal Code, "material is obscene if, considered as a whole, its predominant appeal is to prurient interest, that is, a shameful or morbid interest, in nudity, sex or excretion, and if in addition it goes substantially beyond customary limits of candor in describing or representing such matters."[94]

The Supreme Court's opinion in *Miller v. California* established a three-prong test for determining whether something is obscene: the trier of fact must establish (a) "the average person, applying contemporary community standards would find that the work, taken as a whole, appeals to the prurient interest; (b) "the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable ... law;" and (c) "the work, taken as a whole, lacks serious literary, artistic,

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predominant appeal is to prurient interest, that is, a shameful or morbid interest, in nudity, sex or excretion, and if in addition it goes substantially beyond customary limits of candor in describing or representing such matters."].

[92] *Miller v. California*, *supra*, 413 U.S. at p. 27 ["Under the holdings announced today, no one will be subject to prosecution for the sale or exposure of obscene materials unless these materials depict or describe patently offensive 'hard core' sexual conduct ... ."]; *United States v. Schales*, *supra*, 546 F.3d at pp. 972-73 [recognizing that the term "obscenity" is "limited to the 'patently offensive representations or descriptions of that specific 'hard core' sexual conduct given as examples in *Miller*.'"].

[93] See *Miller v. California*, *supra*, 413 U.S. at p. 24 ["[W]e now confine the permissible scope of such regulation to works which depict or describe sexual conduct."].

[94] Model Penal Code § 251.4.

political, or scientific value."[95] The three-part *Miller* test is "still the operative framework used to evaluate obscenity."[96]

The following five points concerning the application of the *Miller* test warrant particular notice:

> [1] The *Miller* test applies to both state and federal action.[97]
>
> [2] The Supreme Court and the Ninth Circuit do not limit obscenity to a specific medium.[98]
>
> [3] Whether or not expressive activity - such as pictures or conduct - is obscene under the *Miller* test is a question of fact that must be submitted to the trier of fact for a determination in accordance with the requirements of due process.[99]

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[95] *Miller v. California*, *supra*, 413 U.S. at p. 24 [internal citations and quotation marks omitted].

[96] (*United States v. Schales*, *supra*, 546 F.3d at p. 970 [citing *Ashcroft v. Free Speech Coal.* (2002) 535 U.S. 234, 246].)

[97] See *Hamling v. United States* (1974) 418 U.S. 87, 106; *United States v. 12 200-Foot Reels of Super 8mm. Film* (1973) 413 U.S. 123, 130 ["These standards [from *Miller*] are applicable to federal legislation."]; *United States v. Schales*, *supra*, 546 F.3d at p. 973.

[98] *Kaplan v. California* (1973) 413 U.S. 115, 119 [holding that a non-illustrated fictional book, described as containing obscenity from cover to cover, was not protected by the First Amendment]; *Shoemaker v. Taylor* (9th Cir. 2013) 730 F.3d 778, 785.

[99] See, *Miller v. California*, *supra*, 413 U.S. at p. 26 ["In resolving the inevitably sensitive questions of fact and law, we must continue to rely on the jury system, accompanied by the safeguards that judges, rules of evidence, presumption of innocence, and other protective features provide, as we do with rape, murder, and a host of other offenses against society and its individual members."]; see also, e.g., *Smith v. United States* (1977) 431 U.S. 291, 300-01 [emphasizing that whether something "appeals to the prurient interest" or is "patently offensive" are questions for the jury to decide in its traditional role as factfinder]. Cf. *Alexander v. Virginia* (1973) 413 U.S. 836 [noting that a judge may act as a finder of fact in civil

(footnote continued on next page)

[4] A work cannot be held obscene unless each element of the test has been evaluated independently and all three have been met. For example, "mere entertainment" lacking serious literary, artistic, political, or scientific value will get First Amendment protection so long as it is not patently offensive or not primarily directed at the prurient interest.[100] In contrast, even prurient, patently offensive depictions of sexual conduct will receive First Amendment protection if the work if found to have serious literary, artistic, political, or scientific value.[101]

[5] A work must be considered as a whole. Therefore, when a portion of the work is found to be offensive, the work itself does not become obscene for that portion alone — even though the scene in isolation might be offensive.[102]

(footnote from previous page)
proceedings involving obscenity]; see also *United States v. Smith* (9th Cir.1986) 795 F.2d 841, 848 fn. 7 ["[T]he existence of these characteristics is ultimately a question of fact, submitted to a jury, [and] a determination of this 'fact' involves complicated knowledge and information far beyond that which is evident from the face of a photograph alone. ..."]; *United States v. Arvin* (9th Cir.1990) 900 F.2d 1385, 1390 ("[W]hether a given photo is lascivious is a question of fact...[and] whether the item to be judged is lewd, lascivious, or obscene is a determination that lay persons can and should make." (citations omitted)).

[100] Non-obscene entertainment is protected by the First Amendment. See *Chase v. Davelaar* (9th Cir. 1981) 645 F.2d 735, 737 ["The Supreme Court has made it clear that 'mere entertainment' is protected speech."] [citing *Stanley v. Georgia* (1969) 394 U.S. 557, 566].

[101] See *Miller v. California*, *supra*, 413 U.S. at p. 26 ["At a minimum, prurient, patently offensive depiction or description of sexual conduct must have serious literary, artistic, political, or scientific value to merit First Amendment protection."].

[102] See *Kois v. Wisconsin* (1972) 408 U.S. 229, 229.

b. Pornography and Sexually Explicit Expression.

Pornography, sexually explicit expression, and nudity are all First Amendment protected activity so long as these materials or conduct do not "depict or describe patently offensive 'hard core' sexual conduct."[103] Therefore, if sexually explicit expression does not satisfy each of the three prongs under the *Miller* test, it is protected by the First Amendment, regardless of how unsavory, morally reprehensible, or socially unpopular it might be.[104]

For example, in *Jenkins v. Georgia*, Justice Rehnquist, writing for the majority, held that "nudity alone is not enough to make material legally obscene under the *Miller* standards."[105] Similarly, "sexual expression which is indecent but not obscene is protected by the First Amendment."[106] Further, the Supreme Court has held that "outrageous," "offensive," or even

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[103] *Miller v. California, supra*, 413 U.S. at p. 29 ["no one will be subject to prosecution for the sale or exposure of obscene materials unless these materials depict or describe patently offensive 'hard core' sexual conduct specifically defined by the regulating state law, as written or construed."]. In this case, there was no sale or distribution; the private materials in appellant's possession only came to light when the police seized them following appellant's arrest.

[104] See, e.g., *Sable Commc'ns of California, Inc. v. F.C.C.* (1989) 492 U.S. 115, 126 ["Sexual expression which is indecent but not obscene is protected by the First Amendment"]; *Street v. New York* (1969) 394 U.S. 576, 594 [A Court cannot "sustain a conviction that may have rested on a form of expression, however distasteful, which the Constitution tolerates and protects"; *Dworkin v. Hustler Magazine* (9th Cir. 1989) 867 F.2d 1188, 1199-1200 [refusing to extend the definition of obscenity or to create a new class of expression excepted from First Amendment protections to non-obscene pornography].

[105] *Jenkins v. Georgia* (1974) 418 U.S. 153, 161; see also *Chase v. Davelaar* (9th Cir. 1981) 645 F.2d 735, 737.

[106] *Sable Communications of California, Inc. v. FCC, supra,* 492 U.S. 115.

"unsavory" conduct is not enough to strip expressive activity of the First Amendment protections. In sum, if the expression is not "obscene" under *Miller*, it receives First Amendment protections.[107]

The Ninth Circuit's rulings are consistent with the Supreme Court's narrow definition of obscenity. For example, in *Dworkin v. Hustler Magazine*, the Ninth Circuit emphasized that sexually explicit pornography can only be considered obscene if it passes the *Miller* test.[108] Notably, the Ninth Circuit has refused to strip pornography and sexually deviant expression of First Amendment protections on the grounds that the government has a compelling interest in preventing the harms caused by pornography. Specifically, the court rejected Dworkin's attempt to "equate the expressive activity of pornographers with 'rape, batter[y], torture, brutaliz[ation] and sometimes kill[ing]' allegedly perpetrated by pornographers." Instead, the Ninth Circuit affirmatively rejected this

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[107] *Hustler Magazine, Inc. v. Falwell* (1988) 485 U.S. 46, 55-56, 108 S.Ct. 876, 882, 99 L.Ed.2d 41 [holding that the First Amendment's freedom of speech protection extend to the making of patently offensive statements about public figures]; *NAACP v. Claiborne Hardware Co.* (1982) 458 U.S. 886, 910 [holding that picketers were not stripped of First Amendment protections when using demeaning and explicit language because "[s]peech does not lose its protected character ... simply because it may embarrass others or coerce them into action"]; *FCC v. Pacifica Foundation* (1978) 438 U.S. 726, 745-746 ["[T]he fact that society may find speech offensive is not a sufficient reason for suppressing it. Indeed, if it is the speaker's opinion that gives offense, that consequence is a reason for according it constitutional protection. For it is a central tenet of the First Amendment that the government must remain neutral in the marketplace of ideas."]; *Street v. New York, supra,* 394 U.S. at p. 592 ["It is firmly settled that ... the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers"].

[108] *Dworkin v. Hustler Magazine, supra,* 867 F.2d at pp. 1199-1200.

argument and held that this view "runs contrary to fundamental first amendment principles, and we refuse to adopt it."[109]

c. Obscenity in the Home ("Private Obscenity").

The First and Fourteenth Amendments provide protection for sexually deviant expressive behavior in the privacy of one's home, *even if it is considered obscene.*[110] The right to private possession of obscene material is limited to mere possession in one's home and does not extend to the right to give, receive, distribute, or transport obscene materials.[111]

In *Stanley v. Georgia*, the Supreme Court held that the First and Fourteenth Amendments prohibit making mere private possession of

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[109] *Ibid.*

[110] *Stanley v. Georgia, supra,* 394 U.S. at p. 568. Of course, this rule does not extend to child pornography, which does not receive First Amendment protection regardless of whether it is publicly or privately possessed. See, e.g. *Ashcroft v. Free Speech Coal.* (2002) 535 U.S. 234; *New York v. Ferber* (1982) 458 U.S. 747. Appellant Parker's case, unlike the contemporaneous and very high profile *Westerfield* case in San Diego County, did not involve alleged child pornography.

[111] See, e.g., *Smith v. United States, supra,* 431 U.S. at p. 307 ["*Stanley* did not create a right to receive, transport, or distribute obscene material, even though it had established the right to possess the material in the privacy of the home"]; *United States v. Orito* (1973) 413 U.S. 139, 141 [holding that *Stanley*'s tolerance of obscenity within the privacy of the home created no "correlative right to receive it, transport it, or distribute it"]; *United States v. Thirty-Seven (37) Photographs* (1971) 402 U.S. 363, 376 ["That the private user under *Stanley* may not be prosecuted for possession of obscenity in his home does not mean that he is entitled to import it from abroad free from the power of Congress to exclude noxious articles from commerce"]. As noted, appellant Parker's case does not involve distribution of the materials; they were private until seized from his home by the police, and the collages used legal and commercially available images.

obscene material a crime."[112] The Court's holding relied on the following three determinations: (1) the First Amendment protects both popular and unpopular expression, no matter how unsavory, offensive, or repulsive[113]; (2) the government's compelling interest - i.e., justification - for regulating public obscenity does not extend to the regulation of obscenity in private[114]; and (3) the right to be let alone means that the government cannot regulate private thoughts, speech, or expression.[115]

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[112] *Stanley v. Georgia*, *supra*, 394 U.S. at p. 568.

[113] *Stanley v. Georgia*, *supra*, 394 U.S. at p. 566 [pointing out that the constitution's guarantee of freedom of speech "is not confined to the expression of ideas that are conventional or shared by a majority. ...And in the realm of ideas it protects expression which is eloquent no less than that which is unconvincing."]; see *id.*, 394 U.S. at p. 564 ["This right to receive information and ideas, regardless of their social worth is fundamental to our free society", citing *Winters v. New York* (1948) 333 U.S. 507, 510]; *Whitney v. California* (1927) 274 U.S. 357, 377 fn. 5 ["'You really believe in freedom of speech, if you are willing to allow it to men whose opinions seem to you wrong and even dangerous.'"].

[114] See *Stanley v. Georgia*, *supra*, 394 U.S. at p. 565 ["Whatever may be the justifications for other statutes regulating obscenity, we do not think they reach into the privacy of one's own home."]; *Id.* at p. 566 ["Whatever the power of the state to control public dissemination of ideas inimical to the public morality, it cannot constitutionally premise legislation on the desirability of controlling a person's private thoughts."]. It is indeed the appellant's thoughts and personal expression in his own home that the prosecutor in this case sought to exploit, knowing they shed light not on the crime, but on his character.

[115] *Stanley v. Georgia*, *supra*, 394 U.S. 557, 565 [explaining that "traditional notions of individual liberty" and the paramount importance accorded in our society to the "privacy of a person's own home" create a "right to be free from state inquiry into the contents of [one's home] library" and "If the First Amendment means anything, it means that a State has no business telling a man, sitting alone in his own house, what books he may read or what films he may watch. Our whole constitutional heritage rebels at the thought of giving government the power to control men's minds."].

The Supreme Court has consistently reaffirmed the right to privately engage in obscene expression but has declined to expand the right to possess obscenity in private to the right to give, receive, transfer, or distribute obscenity to private consumers.[116] No such exception to constitutional protection presents itself in this case; the material was strictly private until seized by police.

d. Private Sexually Explicit Collages as First Amendment Protected Activity.

With regard to the case at hand, even if the appellant's personal collages are found to be "obscene" under the *Miller* test, they still receive First Amendment protection due to their private nature.

Of particular interest, the Supreme Court, in *Stanley v. Georgia, supra,* rejected the State of Georgia's argument that the government has a compelling interest in regulating the private obscene expression and consumption because sexually deviant and repulsive obscenity can lead to antisocial tendencies, such as violent rape and murder.[117] Instead, the Supreme Court suggested that the argument that sexually deviant private

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[116] See, e.g., *Smith v. United States, supra*, 431 U.S. at p. 307 ("Stanley did not create a right to receive, transport, or distribute obscene material, even though it had established the right to possess the material in the privacy of the home"); *United States v. Orito, supra*, 413 U.S. 139 (holding that Stanley's tolerance of obscenity within the privacy of the home created no "correlative right to receive it, transport it, or distribute it"); *United States v. Thirty-Seven (37) Photographs, supra*, 402 U.S. at p. 376 ("That the private user under Stanley may not be prosecuted for possession of obscenity in his home does not mean that he is entitled to import it from abroad free from the power of Congress to exclude noxious articles from commerce").

[117] See *Stanley v. Georgia, supra*, 394 U.S. at p. 566. In *Stanley*, the State of Georgia argued that it had a compelling interest in regulating the private possession of obscenity because the "exposure to obscene materials may lead to deviant sexual behavior or crimes of sexual violence." *Id.*

obscenity leads to violent rape and murder (1) lacks confirmation and (2) even if it was confirmed as valid, is a risk that a free society must bear.[118] In other words, the right to private, non-child pornographic, obscenity is unequivocal.

Therefore, pursuant to the Supreme Court's holding in *Stanley*, the collages warrant First Amendment protection even if they are obscene, highly offensive, repulsive, and despite any government assertion that this type of expression may lead to anti-social behavior such as rape and murder.

Even though the First Amendment protects an individual's right to read anything he or she wishes to read[119], "[t]he First Amendment ... does not prohibit the evidentiary use of speech to establish the elements of a crime or to prove motive or intent."[120] The Supreme Court has held that evidence of a criminal defendant's First Amendment activity is not admissible as evidence if it is wholly irrelevant to the elements of the crimes of which he is charged.[121] As demonstrated in the next section, this material was irrelevant to the charges in appellant's case, and did not

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[118] See *Stanley v. Georgia*, *supra*, 394 U.S. at pp. 566-67 [explicitly rejecting the State of Georgia's argument that private possession can be regulated on the grounds that it leads to antisocial behavior and holding that "in the context of private consumption of ideas and information we should adhere to the view that '(a)mong free men, the deterrents ordinarily to be applied to prevent crime are education and punishment for violations of the law."].

[119] *Stanley v. Georgia*, *supra*, 394 U.S. at p. 565.

[120] *Wisconsin v. Mitchell* (1993) 508 U.S. 476, 489.

[121] *Dawson v. Delaware, supra,* 503 U.S. 159 (aggravating evidence is invalid if it allows a jury to draw adverse references from constitutionally protected conduct).

provide substantial evidence that he was guilty of premeditation, deliberation, or an intent to rape.

2. The Evidence and Inflammatory Characterization of that Evidence by the Prosecution Tainted the Guilt Phase of the Trial.

Under California Evidence Code section 352, a trial court "may exclude evidence if its probative value is substantially outweighed" by the probability that it will "create substantial danger of undue prejudice, of confusing the issues, or misleading the jury." In recognition of the severely biasing effect of bad character and irrelevant bad conduct evidence, California Evidence Code section 1101 prohibits admission of evidence of bad character and conduct to prove conduct on a specific occasion. (See, e.g., *People v. James* (2000) 81 Cal.App.4th 1343, 1354 [noting that "three hundred years of jurisprudence recognizes" the biasing effect of propensity evidence on unguided jurors; see also, *Garceau v. Woodford* (9th Cir. 2001) 275 F.3d 769, 776 (reversed on other grounds, *Woodford v. Garceau* (2003) 538 U.S. 202).) The arbitrary deprivation of the state law protections of Evidence Code section 1101 amounts to an independent federal due process violation. (*Hicks v. Oklahoma* (1980) 447 U.S. 343, 346-47 [65 L.Ed.2d 175, 100 S.Ct. 2227].) This state law evidentiary error "so infused the trial with error as to deny due process of law." (*Estelle v. McGuire* (1991) 502 U.S. 62, 75.)

Such "propensity" conduct is prohibited independently on federal constitutional grounds, as it creates an undue danger of prejudice in contravention of the right to due process of law. (*Michelson v. United States* (1948) 335 U.S. 469, 475-76.) The fact that appellant Parker created collages reflecting thoughts that might be reprehensible or unappealing to others, but were unconnected to the offense, was his First Amendment right. (*Dawson v. Delaware*, *supra*, 503 U.S. at p. 163.)

The Eighth and Fourteenth Amendments to the federal constitution require heightened standards of reliability in capital cases. (*Woodson v. North Carolina* (1976) 428 U.S. 280, 305.) As stated by Justice Mosk in his concurring opinion in *People v. Jones* (1998) 17 Cal.4th 279:

> ... [B]ecause the death penalty, once exacted, is irrevocable, the need for the most reliable possible determination of guilt and penalty is paramount as a matter of policy. It is also constitutionally compelled: "[T]he Eighth Amendment imposes heightened reliability standards for both guilt and penalty determinations in capital cases ...."

(*Id.* at p. 321, quoting *People v. Cudjo* (1993) 6 Cal.4th 585, 623, conc. opn. of Mosk, J.) *See also Beck v. Alabama* (1980) 447 U.S. 625, 638 [the heightened reliability required by the Eighth and Fourteenth Amendments in capital cases applies to both the guilt and penalty determinations].)

Mr. Parker had the right to be convicted only if the State proved beyond a reasonable doubt every fact necessary to constitute each crime. (*In re Winship* (1970) 397 U.S. 358, 364.) The admission of wholly irrelevant and inflammatory information impermissibly lightened the state's burden of proof (*Sandstrom v. Montana* (1979) 442 U.S. 510, 520-24), and cannot be reconciled with the constitutional protections to which he is entitled even in an ordinary criminal trial.

3. The Evidence and Inflammatory Characterization of that Evidence by the Prosecution Tainted the Penalty Phase of the Trial.

a. State Law.

The California death sentencing scheme limits the scope of aggravating evidence to only certain factors listed in Penal Code section 190.3. (See *People v. Davenport* (1985) 41 Cal.3d 247, 288-90.)

Moreover, the due process clause of the California Constitution "guarantees a fundamentally fair decision-making process." (*People v. Ramos [II]* (1984) 37 Cal.3d 136, 153.)

The trial court's rulings violated each of these state law principles. Appellant's graphic materials were not admissible under any aggravating circumstance contained in Penal Code section 190.3. Moreover, the prosecution could not properly introduce the writing under the guise of rebuttal. Although evidence is admissible to "disprove any disputed fact that is of consequence to the determination of the action," *People v. Rodriguez* (1986) 42 Cal.3d 730, 791, at the time of the trial court's rulings, appellant proffered no character evidence that warranted rebuttal with these materials.

A court has a responsibility to ensure that the adversary process functions in accordance with state and federal law. (*People v. McKenzie* (1983) 34 Cal.3d 616, 626.) A court fails in that responsibility when it refuses to make appropriate rulings and to provide sufficient guidance to the parties. Such a failing occurred when the trial court refused to rule that the examples of alleged "pornography" were inadmissible, and that the prosecution was allowed to indicate that the pieces admitted comprised only a small portion of the materials collected by police.

Under well-established California law, rebuttal evidence is restricted to evidence "made necessary by the defendant's case in the sense that he has introduced new evidence or made assertions that were not implicit in his denial of guilt." (*People v. Carter* (1957) 48 Cal.2d 737, 753-54.) The opportunity to rebut is a concept designed for fairness and reliability, and courts should prevent any undue surprise or trickery caused by the manipulation of rebuttal. (*Carter, supra*, 48 Cal.2d at pp. 753-54; *People v. Castro* (1960) 182 Cal.App.2d 255, 263-64.)

Reflecting concerns over fairness and due process, the California Evidence Code has long restricted the use of "bad acts" evidence in the rebuttal context. Generally, the use of specific acts in rebuttal to general character evidence is prohibited "to avoid the possibility of prejudice, undue confusion of issues with collateral matters, unfair surprise and the like." (Law Revision Comment to Evidence Code section 1102; Evid. Code, §§ 787, 1101, 1102; *People v. Warner* (1975) 13 Cal.3d 612, 619.) Although the rule is designed, in part, to avoid the corruption of ultimate guilt-phase determination (i.e., the fact that the defendant committed a specified crime), these same concerns, including "prejudice, consumption of time, and diversion of effort," are present in the penalty trial. (*People v. Boyd* (1985) 38 Cal.3d 762, 774; *People v. Jackson* (1981) 28 Cal.3d 264, 333 (dis. opn., of Mosk, J.).)

In light of these principles, the court had an obligation to rule that the graphic materials were inadmissible, and to curtail the extensive efforts of the prosecution to hammer home the idea of "pornography" throughout the case. Had the court done so, the jury would not have been influenced by the irrelevant, but prejudicial materials. (See. e.g., *Ramos II*, 37 Cal.3d at p. 153.)

b. Federal Law.

Although the Constitution affords states wide latitude in designing death penalty statutes, the manner in which a defendant is sentenced to death is subject to constitutional scrutiny. In *Zant v. Stephens*, the Supreme Court expressly stated that the Constitution prohibits the use of certain factors as aggravating circumstances:

> Nor has Georgia attached the "aggravating" label to factors that are constitutionally impermissible or totally irrelevant to the sentencing process, such as for example the race, religion, or political affiliation of the

> defendant, *cf. Herndon v. Lowry*, 301 U.S. 242 (1937), or to conduct that actually should militate in favor of a lesser penalty, such as perhaps the defendant's mental illness. *Cf. Miller v. Florida*, 373 So. 2d 882, 885-886 (Fla. 1979). If the aggravating circumstance at issue in this case had been invalid for reasons such as these, due process of law would require that the jury's decision to impose death be set aside.

(*Zant v. Stephens* (1983) 462 U.S. 862, 885; see also *Baldwin v. Alabama* (1985) 472 U.S. 372, 382.)[122]

The Supreme Court more recently applied these principles in *Dawson v. Delaware* to conclude that the First Amendment prohibits the admission of a capital defendant's "morally reprehensible" abstract beliefs when those beliefs have no relation to the crime or to legitimate aggravating circumstances. (*Dawson v. Delaware, supra,* 503 U.S. at p. 167.) In *Dawson*, the state merely presented evidence that the defendant was a member of the Aryan Brotherhood and that the Aryan Brotherhood was a "white racist prison gang." (*Id.* at p. 166.) Noting that the

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[122] The recognition that constitutional limitations apply to the sentencing stage of a capital proceeding has been long established. One of the principle constitutional limitations on states' sentencing procedures is that they must sufficiently protect against the risk of arbitrary and capricious imposition of death sentences. (*Lowenfield v. Phelps* (1988) 484 U.S. 231, 244; *California v. Brown* (1987) 479 U.S. 538, 544 [O'Connor, J., concurring]; *Godfrey v. Georgia* (1980) 446 U.S. 420, 428; *Gregg v. Georgia* (1976) 428 U.S. 153, 189.) For example, in holding that a defendant has a due process right to review aggravating evidence used to determine the death sentence, the Court recognized that "[i]t is of vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion." (*Gardner v. Florida* (1977) 430 U.S. 349, 358; see also *Johnson v. Mississippi* (1988) 486 U.S. 578, 585 [death sentencing decisions "cannot be predicated on mere 'caprice' or on 'factors that are constitutionally impermissible'"] [quoting *Zant, supra*, 462 U.S. at pp. 884-85].)

prosecution failed to present any credible and admissible evidence that the Aryan Brotherhood engages in unlawful and violent conduct, this Court concluded that the state's presentation "tended to prove nothing more than the abstract beliefs of the Delaware chapter." (*Id.* at p. 166.) Without more, admitting the evidence violated Dawson's First Amendment rights.[123]

The Court then examined whether the evidence was properly introduced to rebut mitigating evidence. (*Id.* at pp. 166-167.) Although a State has a legitimate interest in rebutting mitigating evidence presented by a capital defendant, the Court rejected the State of Delaware's assertion that evidence about Dawson's membership in the Aryan Brotherhood was proper rebuttal to the mitigating evidence presented. (*Id.* at pp. 167-168.)

Appellant respectfully submits that, as the State of Delaware did, the prosecution here interjected constitutionally irrelevant factors, which were unrelated to the crimes alleged or to the mitigation presented. By any definition, the constitutional protections applied in Dawson encompass the writings and beliefs used to obtain appellant's death sentence. (*Id.* at p. 169 [First Amendment prohibits the State from punishing individuals for beliefs].) Since the drafting of the Bill of Rights, the Supreme Court has adhered to the principle that an individual's associations, political beliefs, and writings are entitled to constitutional protection.

As the Supreme Court reaffirmed in *Dawson*, the First Amendment protects an individual's abstract beliefs or thoughts, even when those beliefs are "morally reprehensible." (*Id.*; see also *Texas v. Johnson* (1989) 491

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[123] The Supreme Court has concluded that constitutionally protected beliefs and expressions may be used as aggravating circumstances when they were the motivating factors for the crime. (*Barclay v. Florida* (1983) 463 U.S. 939, 949 [defendant's racist beliefs properly considered as they were the basis for crime].)

U.S. 397, 414 ["If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.;']; *Abood v. Detroit Board of Education* (1977) 431 U.S. 209, 234-35 ["At the heart of the First Amendment is the notion that an individual should be free to believe as he will, and that in a free society one's beliefs should be shaped by his mind and his conscience rather than coerced by the State."].) Such protection extends to membership in unpopular organizations. (*Bates v. Little Rock* (1960) 361 U.S. 516; *Schware v. Board of Bar Examiners of New Mexico* (1957) 353 U.S. 232.)

C. Reversal is Required.

The United States Supreme Court in *Dawson* decided that the introduction of such evidence constituted a constitutional violation. It did not purport to describe the standard of prejudice required to reverse the death sentence. The question confronting this Court is what standard of prejudice analysis applies to the type of constitutional error present here. Appellant respectfully submits that under either a per se or harmless-error analysis, appellant's conviction and death sentence must be vacated.

1. Prejudice of the Constitutional Error Must Be Presumed.

In his concurring opinion in *Dawson*, Justice Blackmun eloquently provided substantial reasons why the constitutional error present here cannot be subject to a harmless-error analysis:

> "Because of the potential chilling effect that consideration of First Amendment activity at sentencing might have, there is a substantial argument that harmless-error analysis is not appropriate for the type of error before us today."

(*Dawson v. Delaware, supra*, 503 U.S. at p. 169 [Blackmun, J., concurring].) Justice Blackmun's analysis is consistent with both the importance afforded to similar infringements on the First Amendment and with case law regarding punishment exacted for constitutionally impermissible factors. The United States Supreme Court has long recognized that certain fundamental constitutional errors require reversal of a criminal judgment without regard to the likely outcome of the criminal proceeding absent the violation. (*Batson v. Kentucky* (1986) 476 U.S. 79, 100; *Vasquez v. Hillery* (1986) 474 U.S. 254, 261-62; *Waller v. Georgia* (1984) 467 U.S. 39, 49-50 & n.9; *Tumey v. Ohio* (1927) 273 U.S. 510, 535.) A verdict based in part upon unconstitutional error cannot stand. The *Stromberg v. California* line of cases[124] stands for the rule that:

> [A] general verdict must be set aside if the jury was instructed that it could rely on any of two or more independent grounds, and one of those grounds is insufficient, because the verdict may have rested exclusively on the insufficient ground. *Zant v. Stephens*, 462 U.S. at 881.

In *Stromberg*, the defendant was found guilty under a statute that allowed a conviction if any of three factors were found to be true. One of the factors was found to be unconstitutional, and it was impossible to discern from the record which factors the jury had relied on. In reversing the conviction, Chief Justice Hughes stated:

> It follows that instead of its being permissible to hold, with the state court, that the verdict could be sustained if any one of the clauses of the statute were found to be valid, the necessary conclusion from the manner in

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[124] *Stromberg v. California* (1931) 283 U.S. 359; see also *Yates v. United States* (1957) 354 U.S. 298; *Terminiello v. Chicago* (1949) 337 U.S. 1; *Cramer v. United States* (1945) 325 U.S. 1; *Williams v. North Carolina* (1942) 317 U.S. 287.

> which the case was sent to the jury is that, if any of the clauses in question is invalid under the Federal Constitution, the conviction cannot be upheld.

(*Stromberg v. California* (1931) 283 U.S. 359, 368.) The Supreme Court in *Zant v. Stephens* did not find this rule applicable. Although one of the three statutory aggravating factors that the appellant was adjudged guilty of was later found to be unconstitutionally vague, the Court noted that the evidence presented regarding the unconstitutional factor (prior criminal record) would have been admissible as a non-statutory aggravating factor.

By contrast, in the present case, where the evidence itself was constitutionally protected, the prosecution's introduction violative of the First and Eighth amendments, and the state statutory scheme requires a weighing of the aggravating and mitigating circumstances, the per se standard is appropriate. The fact that the other aggravating factors found to be present may have been sufficient to justify a death sentence does not mollify the prejudicial effect of the unconstitutional evidence, nor can it be determined to what extent the evidence affected the jury's calculus during the weighing phase of deliberations.

2. Even if a Harmless-Error Analysis Applies, Appellant's Conviction and Death Sentence Must be Vacated.

Even if this constitutional error is subject to the harmless error analysis, reversal of appellant's death sentence is required. Under *Chapman v. California* (1967) 386 U.S. 18, a constitutional violation requires reversal unless the prosecution can prove beyond a reasonable doubt that the error did not effect the result. (See, e.g., *Satterwhite v. Texas* (1988) 486 U.S. 249, 258-60 [applying harmless-error analysis to constitutional violations affecting capital sentencing proceeding].

The conclusion that the introduction of the constitutionally protected evidence requires reversal is supported by the Delaware Supreme Court's conclusion on remand from the United States Supreme Court that the error in *Dawson* — the erroneous admission of a brief stipulation — was not harmless beyond a reasonable doubt. (*Dawson v. State* (Del. 1992) 608 A.2d 1201.) On remand, the Delaware Supreme Court applied the harmless error standard and concluded that despite the gruesome nature of the crime, a new capital sentencing hearing was required:

> Given the United States Supreme Court's characterization of the Aryan Brotherhood evidence presented by the State, and the State's acknowledgement that the purpose of presenting that evidence was to weave Dawson's "embrace of the Aryan Brotherhood into the central theme that Dawson had an incorrigible character with his entire life showing repeated decisions to reject any redeeming paths," it is impossible for this Court to conclude the State has demonstrated, beyond a reasonable doubt, that the Superior Court's error in admitting the evidence about the Aryan Brotherhood did not contribute to the death sentences obtained by the State.

(*Dawson v. State, supra*, 608 A.2d at p. 1205.)

In light of the record on appeal, the admission of such "morally reprehensible" evidence in appellant Parker's case, and the emphasis accorded it by the prosecution, cannot be deemed to be harmless beyond a reasonable doubt. Similarly, the state law violations require reversal because there was a reasonable possibility that, absent the error, the jury would not have found Mr. Parker guilty of premeditated murder and the special circumstances alleged, or returned the death verdict. Reversal is required.

3. THE TRIAL COURT ERRED IN PERMITTING A DENTIST TO TESTIFY AS A "TOOL MARK" EXPERT REGARDING ALLEGED HANDCUFF MARKS ON THE VICTIM'S BACK (MARKS NOT CONSIDERED SIGNIFICANT BY THE FORENSIC PATHOLOGIST), AND IN PERMITTING A THOROUGHLY UNRELIABLE "RE-ENACTMENT" USING THE VICTIM'S BODY AND A RANDOM PAIR OF HANDCUFFS FROM THE EVIDENCE ROOM.

A. Introduction.

Appellant's confinement and sentence are illegal, unconstitutional, and void under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution, under Article I, sections 1, 7, 13, 15, 16, and 17 of the California Constitution, and the statutory and decisional law of the State of California, because the trial court unreasonably permitted the prosecution to introduce scientifically insupportable evidence of Dr. Normal Sperber, a forensic dentist, purporting to identify marks on the victim's back and wrist as being created by handcuffs.

There were no witnesses to the homicide. No handcuffs were found; an investigator selected a random pair of handcuffs from a box in the evidence room. The medical examiner did not opine that handcuffs created the marks. Dr. Sperber was recruited to perform an examination some time after autopsy. The forensic discipline of bite mark identification by forensic dentists has been debunked and rejected by the scientific community; Dr. Sperber's technique in purporting to identify "tool marks" on the body is even less reliable, and should not have been permitted by the trial court.

B. Factual and Procedural Background.

Trial counsel filed a motion to exclude or limit the testimony of Norman Sperber, DDS, on February 25, 2003. (3 CT 657 et seq.) That motion argued that Dr. Sperber should not be permitted to testify as to

alleged "tool marks" allegedly caused by handcuffs, for the following reasons, among others:

- That Dr. Sperber's proposed testimony was beyond his expertise, under Evidence Code section 710, as his experience is in forensic odontology, and his proposed testimony was to be on the origin of a mark on the victim's skin. (3 CT 658-659.)

- That the proffered opinion fails to meet the criteria of Evidence Code section 801, prohibiting the admission of an expert opinion unless it is sufficiently beyond the common experience of jurors, and that it is based on special skill, knowledge, and experience. (3 CT 659-660.)

- That Dr. Sperber's proposed testimony failed to meet the standards for admissibility under the standards set forth in *Frye v. United States* (1923) 293 F. 1013, and *People v. Kelly* (1976) 17 Cal.3d 24, 30, which together require that [1] the reliability of the method must be established, [2] the expert furnishing such testimony must be qualified as an expert to give an opinion in the field, and [3] the proponent of the evidence must demonstrate that correct scientific procedures were used in the particular case.

- That the burden of proof is on the proponent of the evidence. See, *People v. Shirley* (1982) 31 Cal.3d 18, 54, fn. 32; *People v. Reilly* (1987) 196 Cal.App.3d 1127, 1134. (3 CT 662-663.)

- That this "experiment" lacks the indicia of reliability, yet poses a significant risk of undue influence. (3 CT 663-664.)

> "In other words, he saw it and *it kinda looks like a fit.* The problem with this proposed testimony is that he didn't look at anything else. The doctor didn't even travel to the crime site and inspect for other potential injury causing objects. Add to this that as a witness he would testify with the title of doctor .... There would be a natural tendency to ... respect his opinion."

(3 CT 664; emphasis in original.)

In response to the defendant's motion, the prosecutor argued that Dr. Sperber was "a nationally recognized expert in the field of tool mark identification," and that "His testimony is not based on any issue of *Kelly*-

Frye standards." (4 CT 891-895, at 892.) In fact, the prosecution claimed that Sperber was a "world renowned expert in the field of ligature and tool mark identification." (4 CT 893.) The prosecution claimed that nothing Dr. Sperber did was "novel" (4 CT 893), and that his testimony and that of the officer with the hunch was necessary. (4 CT 894.) Dr. Sperber's Biography and Curriculum Vitae was attached as an exhibit. (4 CT 897-910.)[125]

On April 2, 2002, the defense motion was heard regarding limiting or excluding Dr. Sperber's testimony. (14 RT 1003.) Dr. Sperber testified in a hearing concerning his qualifications. (14 RT 1090-1158; see 3 CT 657-666.) Sperber testified that he had testified in a number of "tool mark" cases, describing events allegedly involving anything from screwdrivers to lug wrenches, tire irons, hammers, hatchets, indentations of a female victim's watch, and belt marks. (14 RT 1091-1095.) He likened the training in dental school to that in medical school (14 RT 1093), although he did not attend medical school. (14 RT 1101.)

Sperber selected a "typical" handcuff from the police property room, since they all seem pretty much alike to him (14:1104-1105), and then staged a "reconstruction" with the victim's dead body. (14 RT 1105-1108.)

The trial court ruled that Sperber was qualified as an expert. (15 RT 1165-1218.) Dr. Sperber subsequently testified to the jury as a forensic dentist and tool mark expert. (35 RT 4322-4418.)

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[125] This Court should take Dr. Sperber's announcement of his credentials with a grain of salt, in part because the first page of his lengthy CV claims he was the Chief Forensic Dentist for San Diego and Imperial counties, but he admitted on cross-examination that no such position existed. (34 RT 4384.) Other reasons tied to the "science" he claimed are set forth below.

C. The Trial Court has an Obligation to Ensure the Reliability of Evidence Admitted for the Jury's Consideration, and Nowhere is that more Important than in a Capital Case.

Exaggerated and unsupported claims made by forensic scientists are a leading cause of wrongful conviction.[126] The State makes a special claim on the jury's trust when it offers scientific evidence because such evidence offers insights that lay jurors cannot themselves draw from the facts. Nor are lay jurors capable of evaluating the underlying scientific validity of the evidence. When such testimony turn out to be false or misleading, the use of that evidence constitutes a due process violation, and the conviction cannot stand if "the false testimony could ... in any reasonable likelihood [could] have affected the judgment of the jury."[127]

A fundamental principle of due process in a criminal trial is that the State may neither adduce or use false or misleading testimony nor allow such testimony to stand uncorrected.[128] The false testimony need not have

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[126] Approximately 50% of all wrongful convictions overturned through post-conviction DNA testing involved the use of unvalidated or improper forensic science. See *Unreliable or Improper Forensic Science* [http://www.innocenceproject.org/understand/Unreliable-Limited-Science.php].

In this capital case, consideration of the high rate of errors exposed when DNA evidence sheds light on a contested issue is relevant to issues other than identity, which is not contested. Rather than charging voluntary manslaughter or a lesser degree of murder, the prosecution chose to frame the case in the most egregious terms possible, and to employ any means at its disposal, including junk science, in pursuit of a capital conviction and death sentence. The use of unreliable evidence in this way is reprehensible.

[127] *Napue v. Illinois* (1959) 360 U.S. 264, 271.

[128] See *Mooney v. Holohan* (1935) 294 U.S.103; *Pyle v. Kansas* (1942) 317 U.S. 103; *Napue v. Illinois, supra,* 360 U.S. 264; *Miller v. Pate* (1967) 386 U.S. 1; *Giglio v. United States* (1972) 405 U.S. 150, 153.

constituted perjury; it is enough that testimony was misleading or created a false impression.[129] Nor is actual knowledge that the testimony was false or misleading required. It is enough that the prosecutor should have known of the false or the misleading character of the testimony.

In *Kyles v. Whitley* (1995) 514 U.S. 419, 437, the United States Supreme Court held that Giglio's imputed knowledge rule encompasses not only what fellow prosecutors know, as in Giglio itself, but also what others acting on the government's behalf in the case, including the police know. (*Id.* at p. 438.) As the Court explained,

> "any argument for excusing a prosecutor from disclosing what he does not happen to know about boils down to a plea to substitute the police for the prosecutor, and even for the courts themselves, as the final arbiters of the government's obligation to ensure fair trials."

(*Id.*) Thus, the knowledge of one member of a prosecutor's team may be imputed to other members of the same office.[130] Further, "[i]t is 'irrelevant' whether the defense knew about the false testimony and failed to object or cross-examine the witness, because defendants 'c[an]not waive the freestanding ethical and constitutional obligation of the prosecutor as a

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[129] *Alcorta v. Texas* (1957) 355 U.S. 28 (misleading, though technically accurate, testimony concerning nature of witness's relationship with the victim violated petitioner's due process rights).

[130] *N. Mariana Islands v. Bowie* (9th Cir. 2001) 243 F.3d 1109, 1122; see also, e.g., *United States v. Antone* (5th Cir. 1979) 603 F.2d 566, 569 ("In considering use of perjured testimony this Court has declined to draw a distinction between different agencies under the same government, focusing instead upon the "prosecution team" which includes both investigative and prosecutorial personnel.").

representative of the government to protect the integrity of the court and the criminal justice system.'"[131]

Due process is implicated more broadly than this doctrine where, as here, it is clear that establishes that evidence that was proffered to a capital jury as "scientific" evidence of guilt had in fact no basis in science whatsoever. In such circumstances as these, the adversarial process — the foundation upon which our criminal justice system is based — has not served its truth-seeking purpose, and the doctrine of "fundamental fairness" requires that such a conviction be vacated.[132] Put simply, a trial premised

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[131] *Id.* (citing *N. Mariana Islands v. Bowie*, *supra*, 243 F.3d at p. 1122). In this case, of course, counsel did object to the admission of this evidence; but if this Court should deem those objections imperfect, the improper admission of the evidence should nonetheless be reviewed.

[132] See *Brecht v. Abrahamson* (1993) 507 U.S. 619, 639 (1993) (Stevens, J., concurring) ("The Fourteenth Amendment prohibits the deprivation of liberty 'without due process of law'; that guarantee is the source of the federal right to challenge state criminal convictions that result from fundamentally unfair trial proceedings."); *Estelle v. McGuire, supra*, 502 U.S. at p. 70) ("[T]he Due Process Clause guarantees fundamental elements of fairness in a criminal trial.") (internal citations omitted); *Chambers v. Mississippi* (1973) 410 U.S. 284, 294 ("The right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the State's accusations."); *Spencer v. Texas* (1967) 385 U.S. 554, 563-564 ("Cases in this Court have long proceeded on the premise that the Due Process Clause guarantees the fundamental elements of fairness in a criminal trial."); see also *United States v. Cronic*, 466 U.S. 648, 657 (1984) ("The right to the effective assistance of counsel is thus the right of the accused to require the prosecution's case to survive the crucible of meaningful adversarial testing."); *Strickland v. Washington* (1984) 466 U.S. 668, 696 ("[T]he ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged. In every case the court should be concerned with whether, despite the strong presumption of reliability, the result of the particular proceeding is unreliable because of a breakdown in the adversarial process that our system counts on to produce just results.").

on false and unreliable scientific evidence, particularly in a capital case, is fundamentally unfair and cannot stand.

D. Dr. Sperber's Expertise, If Any, Was In The Field Of Bite Marks, Which Has Been Thoroughly Discredited As It Is Not Based On Science; And The Backup Field Of Tool Marks Is Similarly Discredited.

The National Academy of Sciences (NAS) determined in its report, *Strengthening Forensic Science in the United States: A Path Forward*, that bitemark evidence lacks scientific validity and has never been proven reliable.[133] The NAS found that there is "no science" establishing how to quantify the probability of a "match" between a suspect's dentition (the biting surface of teeth) and a bitemark, and "no evidence of an existing scientific basis for identifying an individual to the exclusion of all others."[134]

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[133] See National Academy of Sciences, Committee on Identifying the Needs of the Forensic Sciences Community, *Strengthening Forensic Science In The United States: A Path Forward* (2009) (NAS Report). Congress authorized and funded "the National Academy of Sciences to conduct a study on forensic science" and directed that the committee tasked with assessing and identifying the needs of the forensic sciences to "include members of the forensics community representing operational crime laboratories, medical examiners, and coroners; legal experts; and other scientists as determined appropriate." *Id.* at p. 1. Significantly, among the members of the forensic community whose testimony was relied upon was Dr. David R. Senn, past president of the American Board of Forensic Odontology (ABFO). See *id.* at xii. Thus, the devastating conclusions drawn by the NAS were based partially on input from a prominent practitioner of bitemark analysis.

[134] *Id.* at p. 174. The NAS recognized the role bitemark analysis has played in wrongful convictions, noting that "[s]ome convictions based mainly on testimony by experts indicating the identification of an individual based on a bite mark have been overturned as a result of the provision of compelling evidence to the contrary (usually DNA evidence)." *Id.* at pp. 174, 176.

Both bite mark and tool mark assessments are pattern-matching techniques, bitemarks differ from ordinary toolmark analysis in that, unlike toolmarks, bitemark analysis attempts to interpret injuries on human skin, which drastically undermines the reliability of the technique, according to both the NAS Report and the scientific research discussed in detail below.

Today, the NAS has concluded that individualization claims are false as a matter of science.[135] The NAS's conclusions are consistent with the extensive legal scholarship in this area published since Mr. Parker's trial.[136] A review of that scholarship failed to identify a single article in support of the admissibility of bitemark evidence.

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[135] See NAS Report at 175 ("[T]he scientific basis is insufficient to conclude that bite mark comparisons can result in a conclusive match.").

[136] See Jennifer L. Mnookin et al., *The Need for a Research Culture in the Forensic Sciences* (2011) 58 UCLA L. Rev. 725 (discussing lack of validity and reliability testing across a range of forensic disciplines, but predicting that bitemark analysis would be amongst the least likely to provide probative evidence); Erica Beecher-Monas, *Reality Bites: The Illusion of Science in Bite-Mark Evidence* (2009) 30 Cardozo L. Rev. 1369, 1379-80; Adam Deitch, Comment, *An Inconvenient Tooth: Forensic Odontology is an Inadmissible Junk Science When It is Used to "Match" Teeth to Bitemarks in Skin* (2009) 2009 Wis. L. Rev. 1205; Brandon L. Garrett & Peter J. Neufeld, *Invalid Forensic Science Testimony and Wrongful Convictions* (2009) 95 Va. L. Rev. 1 (discussing analysis of wrongful convictions of 156 exonerees, including those involving bitemark evidence); Michael J. Saks & David L. Faigman, *Failed Forensics: How Forensic Science Lost Its Way and How It Might Yet Find It* (2008) 4 Ann. Rev. L. Soc. Sci. 149, 157; Paul C. Giannelli, *Bite Mark Analysis* (2007) 43 Crim. L. Bull. 930 (discussing DNA exonerations in bitemark cases); D. Michael Risinger, *Navigating Expert Reliability: Are Criminal Standards of Certainty Being Left on the Dock?* (2000) 64 Alb. L. Rev. 99, 137 ("The literature of forensic dentistry is full of claimed improvements on the technique of deriving dependable information from bite marks, but virtually free of any reports of tests designed to map when forensic dentists, in fact, can make such identifications dependably and when they cannot.").

1. Findings by the NAS Reveal that the Two Foundational Hypotheses of Bitemark Evidence are Scientifically Invalid.

As noted by the NAS and by the FBI in its peer-reviewed forensic science journal, Forensic Science Communications, testing a forensic discipline's basic hypothesis through the scientific method is the only way to validate the discipline and establish its reliability.[137] Bitemark analysis rests on two hypotheses: (a) that a properly trained forensic dentist can determine that a bitemark and a suspect's dentition are indistinguishably similar, i.e., "match," and (b) that once an association is made, a forensic dentist can provide a scientifically valid estimate of the rareness or frequency of that association. Neither of these hypotheses has ever been validated. In fact, the NAS determined that there are no criteria and no objective standards to render conclusions about whether a particular suspect's dentition can be associated with a bitemark.[138]

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[137] The FBI defines the scientific method as follows:

> The scientific method involves generating a hypothesis and testing it to determine if it is false. In order for the hypothesis to be valid, it must be able to be supported repeatedly via reproducible experiments. This process distinguishes science from other professional endeavors. By establishing a reliable, repeatable set of procedures and criteria by which the results are evaluated, an objective scientific methodology can be achieved. This, coupled with a properly trained, qualified examiner operating within a rigorous quality assurance/quality control program, provides credible and reliable results.

Cary T. Oien, *Forensic Hair Comparison: Background Information for Interpretation*, 11 Forensic Sci. Commc'ns 2 (Apr. 2009), available at <http://www.fbi.gov/about-us/lab/forensic-sciencecommunications/review/2009_04_review02.htm>.

[138] See NAS Report at 175 ("[T]he scientific basis is insufficient to concluded that bite mark comparisons can result in a conclusive match.").

As to the first hypothesis, in order for a comparison or measurement between a suspect's dentition and a bitemark to be scientifically valid, there must be an objective, standardized method for measuring the two items and declaring them to be indistinguishably similar.[139] That is, the two items cannot simply be "eyeballed;" or, more even more crudely, as Dr. Sperber did here, the two items cannot be pushed together and declared a "match."[140] To be valid, there must be an objective process, based on standard metrics, to measure a bitemark and dentition and come to a conclusion concerning a potential source.[141] This process cannot depend on the claimed abilities of one specific expert.[142] Without a validated measurement or comparison process, the expert's opinion is impossible to verify and must be accepted as an article of faith.

The NAS Report revealed that no scientifically valid studies have ever been conducted to determine what aspects of the teeth and bitemark (or in this case, the handcuffs and mark on the victim's back) should be measured to make any such comparisons.[143] No study has demonstrated whether the instruments dentists use for measurements or comparisons are

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[139] See e.g., Karen Kafadar, *Statistical Issues in Assessing Forensic Evidence* <http://www.stat.indiana.edu/files/TR/TR-11-01.pdf> (in revision). Dr. Kafadar, the Rudy Professor of Statistics and Physics at Indiana University, was a member of the NAS committee that that produced the NAS Report. See also NAS Report.

[140] There is no evidence, moreover, that forensic dentists are capable of "eyeballing" the evidence since they are never required to demonstrate their proficiency and there are no known error rates.

[141] See e.g., Kafadar, *Statistical Issues in Assessing Forensic Evidence.*

[142] *Id.*

[143] See NAS Report at 176 ("A standard for the type, quality and number of individual characteristics required to indicate that a bite mark has reached a threshold of evidentiary value has not been established.").

reliable under a wide variety of conditions, or whether, after a measurement is taken, that measurement would be considered "unique" or "different" enough to identify the mark as coming from a particular source.[144] The crude instruments used here, for example, consisted of a random set of handcuffs and the victim's body.

The second unproven hypothesis upon which bitemark evidence depends is that the probability of a given "match" of a biter to a bitemark can be quantified. The NAS Report establishes that this hypothesis has not been validated as to bitemarks because there have been no population studies that establish how rare or common the variables in human dentition are; therefore, there is no way of knowing how many other persons could also be associated with or excluded from the mark.[145] Similarly, there are no studies whatsoever validating the ability to reliably exclude all other possible sources of a mark where, as here, the factual basis for the prosecution theory that an absent pair of handcuffs made the mark was supported by no more than a hunch.

Moreover, Dr. Sperber did not examine the body until significantly after autopsy, and days after the decomposing body was found. Distortion of the skin is inevitable post-mortem.[146] It is clear from a cursory glance at

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[144] See *id.*

[145] See NAS Report at 174 ("No thorough study has been conducted of large populations to establish the uniqueness of bite marks.... If [a suspect's dentition cannot be eliminated as having made the bite mark in question], there is no established science indicating what percentage of the population could also have produced the bite.").

[146] See NAS Report at 175 ("[One] of the basic problems inherent in bite mark analysis and interpretation ... [is that] the ability to analyze and interpret the scope or extent of distortion of bite mark patterns on human skin has not been demonstrated.").

the photographs taken during his examination that, in addition to decomposition, the area in question had been excised during the autopsy, and was gruesomely held together with clamps, further distorting the original mark. (See, 34 RT 4343.)

2. The Field of Bitemark Analysis Lacks a Known Error Rate.

DNA exonerations in bitemark cases are suggestive of the field's error rates. The specific error rate in the discipline of bitemark comparisons measures the ability of an expert to declare a "match" between a bitemark and a known sample under controlled conditions. But when Dr. Sperber testified at Mr. Parker's trial, the jury heard only his impressive credentials, on which the prosecution capitalized, and his subjective opinion in lieu of any verifiable or objective measurement of his (or the field's) error rate. Because bitemark experts are not required to take proficiency tests, there is no evidence that Dr. West or any other expert in his field could at the time of Mr. Parker's trial reliably associate a known dentition. The unproven reliability of the methods is, one must conclude, exponentially worse when the opinion concerns a mark inflicted by an instrument other than teeth.

The extraordinary number of wrongful convictions and the few reported proficiency tests conducted suggest unacceptably high false positives — even in the context of controlled studies — as evidenced by:

- a 1999 ABFO Bitemark Workshop "where ABFO diplomats attempted to match four bitemarks to seven dental models [and] found 63.5% false positives"
- a 2001 study of "bites made in pig skin, 'widely accepted as an accurate analogue of human skin,'" which resulted in 11.9 to 22.0 percent "false positive

identifications ... for various groups of forensic odontologists"[147]

There is nothing inherent in the field of bitemark analysis that precludes proficiency testing to measure error rates. Bitemark experts could, for example, use evidence from casework in which the "biter" was known, as established through DNA, to test dentists' ability to accurately associate the injury with the correct dentition. In fact, a similar research design was recently used to test a more fundamental skill required to perform bitemark analysis: the claimed ability to distinguish a bitemark from different types of skin injuries. In this study, which was published in a peer-reviewed scientific journal, experienced forensic dentists were routinely wrong about whether the injury at issue was even a bitemark.[148] The same paper also cites incidents of forensic dentists mistaking markings caused bottle tops, glass bottles, defibrillators, the heel of a child's shoe, toys, and jewelry for bitemarks.[149]

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[147] C. Michael Bowers, *Problem-Based Analysis of Bitemark Misidentifications: The Role of DNA*, 159 Forensic Sci. Int'l 104, 106-177 (2006) (In addition, "bite mark experts have benefited from their ability ... to do few proficiency studies and to keep secret the results of such proficiency studies."); D. Michael Risinger, *Navigating Expert Reliability: Are Criminal Standards of Certainty Being Left on the Dock?, supra,* 64 Ala. L. Rev. at 142.

[148] See Mark Page et al., *Expert Interpretation of Bitemark Injuries — A Contemporary Qualitative Study* (2013) 58 J. Forensic Sci. 664, 671 ("There is considerable variation among odontologists in even the most elementary aspects of the forensic diagnostic sieve and that of deciding whether the injury was indeed a bitemark or not.").

[149] *Id.* at p. 664.

3. Published Research Demonstrates that Skin Does Not Accurately Record Bitemarks.

Apart from the invalidation of the two hypotheses underlying bitemark analysis, the NAS Report concluded that two critical assumptions underlying the discipline have not been scientifically validated; specifically: "(1) The uniqueness of the human dentition; and (2) the ability of the dentition, if unique, to transfer a unique pattern to human skin and the ability of the skin to maintain that uniqueness."[150] According to the NAS Report: "Some research is warranted in order to identify the circumstances within which the methods of forensic odontology can provide probative value."[151] Subsequent to the publication of the NAS Report and the attention the Report brought to the shortcomings of odontology, this research was taken up by a team led by Dr. Mary Bush, a tenured professor at the School of Dental Medicine, State University of New York at Buffalo and past president of the American Society of Forensic Odontology. Twelve studies that tested the foundational issues related to skin as a substrate to interpret data were conducted. Each of these studies used a cadaver model and each was published in a peer reviewed scientific journal.[152]

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[150] See NAS Report at 175.

[151] *Id.* at 176.

[152] See Mary A. Bush et al., *A Study of Multiple Bitemarks Inflicted in Human Skin by a Single Dentition Using Geometric Morphometric Analysis* at 1-8; Mary A. Bush, et al., *Biomechanical Factors in Human Dermal Bitemarks in a Cadaver Model* (2009) 54 J. Forensic Sci. 167, 167-176; H. David Sheets et al., *Dental Shape Match Rates in Selected and Orthodontically Treated Populations in New York State: A Two Dimensional Study* at 621-26; Mary A. Bush et al., *Similarity and Match Rates of the Human Dentition In 3 Dimensions: Relevance to Bitemark Analysis* (2011) 125 Int'l J. Leg. Med. 779, 779-784; Mary A. Bush et al.,
(footnote continued on next page)

Broadly speaking, the studies' research strongly suggests what is intuitive: even assuming the uniqueness of human dentition, human skin is not capable of capturing that uniqueness with sufficient fidelity to identify "the biter."[153] Moreover, bitemarks created by the same dentition on the same individual appeared substantially different, depending on the angle of the body and whether the mark was made parallel or perpendicular to "Langer lines."[154]

(footnote from previous page)
Statistical Evidence for the Similarity of the Human Dentition (2011) 56 J. Forensic Sci. 118, 118-123; Mary A. Bush et al., *The Response of Skin to Applied Stress: Investigation of Bitemark Distortion in a Cadaver Model* (2010) 55 J. Forensic Sci. 71, 71-76; Raymond G. Miller et al., *Uniqueness of the Dentition as Impressed in Human Skin: A Cadaver Model* (2009) 54 J. Forensic Sci. 909, 909-914; Mary A. Bush et al., *Inquiry into the Scientific Basis For Bitemark Profiling and Arbitrary Distortion Compensation* (2010) 55 J. Forensic Sci. 976, 976-983; H. David Sheets & Mary A. Bush, *Mathematical Matching of a Dentition to Bitemarks: Use and Evaluation of Affine Methods* (2011) 207 Forensic Sci. Int'l 111, 111-118; H. David Sheets et al., *Bitemarks: Distortion and Covariation of the Maxillary and Mandibular Dentition as Impressed in Human Skin* (2012) 223 Forensic Sci. Int'l 202, 202-207; H. David Sheets et al., *Patterns of Variation and Match Rates of the Anterior Biting Dentition: Characteristics of a Database of 3D Scanned Dentitions* (2013) 58 J. Forensic Sci. 60, 60-68.

[153] See *The Response of Skin to Applied Stress: Investigation of Bitemark Distortion in a Cadaver Model* (no two bitemarks created by the same dentition were measurably identical; shorter teeth created indentations smaller than their actual width, some as much as 25% smaller); *Mathematical Matching of a Dentition to Bitemarks: Use and Evaluation of Affine Methods* (matching of dentition to the bitemarks created was not possible within limits of repeatable measurements).

[154] "Langer lines" is the term used to describe the direction within human skin along which the skin has the least flexibility. See *A Study of Multiple Bitemarks Inflicted in Human Skin by a Single Dentition Using Geometric Morphometric Analysis* (a single dentition was used to create 89 bitemarks; none of the bitemarks matched the measurable shape of the dentition;
(footnote continued on next page)

The Bush studies confirm the NAS Report's observation that the "validity of forensic odontology" may be "severely limited" because it relies on interpreting data from a bitemark, which "will change over time and can be distorted by the elasticity of the skin, the unevenness of the surface bite, and swelling and healing."[155] It is for this same reason that there are no measurement processes or objective standards for bitemark analysis. The field simply has no methodology to account for the great variation in the size and shape of the bitemarks created by the same dentition.[156] Moreover, manipulating a mold of a suspect's teeth on the victim's decomposing body and declaring a "match" (similar to the experiment placing handcuffs in proximity to the mark in this case) is plainly a scientifically invalid method, incapable even of associating a particular dentition with a bitemark, i.e., "consistent with."

In sum, because skin is an unreliable and unpredictable substrate to record bite marks (or other marks), and because there are no standards for declaring a positive association, no information about how rare or common variables of the human dentition are (much less marks made in other ways), and no information about how often experts correctly associate an injury with the dentition or implement that made the mark, bitemark analysis (and

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bitemarks were also compared to 411 other dentitions, showing the closest match to the bitemark was not always the teeth that created the mark); *Biomechanical Factors in Human Dermal Bitemarks in a Cadaver Model* (of the 23 bitemarks made for the experiment, none were visually or measurably identical); see also Iain A. Pretty, *Unresolved Issues in Bitemark Analysis, in Bitemark Evidence* (Robert B.J. Dorian ed., 2005) at 549 (noting that "skin is a poor registration material").

[155] NAS Report at 174.

[156] See *id.* at 175 ("[t]he effect of distortion on different comparison techniques is not fully understood and therefore has not been quantified.").

the related evidence concerning alleged tool marks on skin) is today not generally accepted science. Instead, it is now understood to be a dangerously unreliable technique masquerading as science, as evidenced by the two-dozen convictions and indictments of innocent people. Nevertheless, this "evidence" was proffered to the jury as reliable and scientific proof that Mr. Parker employed handcuffs to restrain the victim, in violation of his fundamental due process rights.

E. Dr. Sperber Leveraged His Non-Expertise in Bite Marks to an even more Unreliable Endeavor, Identifying Alleged Handcuff Marks When There Were No Handcuffs.

Dr. Sperber testified that in his opinion, the mark on the victim's back was consistent with being made by handcuffs. (34 RT 4339.) Research demonstrates that, although the term "consistent (with)" was defined by the ABFO to be a weak estimate of an association, laypersons interpreted it (76 on a 100-point scale) to indicate a degree of association that was as strong or stronger than terms intended to convey much higher degrees of certainty. (Dawn McQuiston & Michael Saks, *Communicating Opinion Evidence in the Forensic Identification Sciences: Accuracy and Impact* (2008) 59 Hastings L. J. 1159.)

F. The Trial Court Erred In Admitting this Completely Unreliable and Non-Scientific "Evidence" to Bolster The Prosecutor's Unsupported Theory that the Victim was Restrained by Handcuffs.

Both this Court and the United States Supreme Court require expert scientific evidence to be reliable, and outside the general experience of lay persons. (*People v. Kelly, supra,* 17 Cal.3d 24; *Frye v. United States, supra,* 293 F. 1013.) The *Frye* test requires the Court to strike a balance in properly defining the "relevant" scientific community in which the

reliability of a forensic technique must have gained (or have maintained) general acceptance.

If a conclusion testified to by an expert at trial has been shown by advances in scientific knowledge, or by scrutiny under the lens of the scientific method, to be no better than a guess, courts should not ignore the reality that the stated conclusion was unreliable, probably incorrect, and almost certainly misleading to the trier of fact. As this Court has recognized, "[l]ay jurors tend to give considerable weight to 'scientific' evidence when presented by 'experts' with impressive credentials." (*People v. Kelly, supra,* 17 Cal.3d at p. 31.)

In other contexts, notably the admission of evidence based on new scientific principles or techniques, California courts have been mindful of the need to protect juries from being misled by "unproven and ultimately unsound scientific methods." (*People v. Shirley, supra,* 31 Cal.3d at p. 53.) Similarly, when evidence emerges after conviction that establishes that unsound scientific evidence was presented at trial, the focus of the inquiry should be whether the jury was misled to the defendant's prejudice by unreliable evidence, not whether the defendant can prove the converse of the fact the evidence purported to establish. If advances in science or technology have established that a trial expert's testimony was unworthy of reliance, and if it is reasonably probable that the evidence was relied upon by the trier of fact and affected the outcome of the trial, the state's interest in preserving the integrity of criminal trials requires that the verdict be set aside.

The U.S. Supreme Court's decision in *Daubert v. Merrell Dow Pharmaceuticals, Inc.* (1993) 509 U.S. 579, is also instructive here. The *Daubert* court stated:

> Throughout, a judge assessing a proffer of expert scientific testimony under Rule 702 should also be mindful of other applicable rules .... Rule 403 permits the exclusion of relevant evidence "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury ...." Judge Weinstein has explained: "Expert evidence can be both powerful and quite misleading because of the difficulty in evaluating it. Because of this risk, the judge in weighing possible prejudice against probative force under Rule 403 of the present rules exercises more control over experts than over lay witnesses."

(*Id.* at p. 595 (citation omitted).) Thus, even if forensic odontology evidence could be found to satisfy California's Kelly-Frye standard, which it cannot, the Court must also separately assess and weigh its probative value against the unquestioned potential for unfair prejudice. Because, as demonstrated above, bite mark evidence purports to provide proof that the suspect violently and viciously assaulted a victim, but lacks any basis in science, it should also be separately excluded on this ground.

The evidence of Dr. Sperber (and other forensic odontologists performing more traditional comparisons of bite marks) should also be deemed inadmissible because its highly questionable probative value is substantially outweighed by its overwhelming prejudicial effect. Under Evidence Code sections 352 and 402, relevant evidence may be excluded if its probative value is outweighed by the danger of unfair prejudice or surprise, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time or needless presentation of cumulative evidence.

Here, the thoroughly unreliable probative value of Dr. Sperber's "tool mark" comparison must be weighed against the substantial prejudicial effect on a jury from testimony by a forensic dentist that the defendant used

handcuffs to create marks on the victim. The allegation of restraint, immobilizing the victim's hands behind her back, was obviously explosive, skewing the jury's sympathies toward conviction of the maximum permitted and away from an objective consideration of what the prosecution was able to prove beyond a reasonable doubt.

G. Reversal is required.

For all of the above reasons, reversal is required.

4. THE TRIAL COURT ERRED IN REFUSING TO RELEASE TO DEFENSE COUNSEL THIRD PARTY VIDEOTAPES CONCERNING THE DISTRICT ATTORNEY'S CONDUCT IN THIS CASE, INCLUDING THE MEETING AT WHICH THE DECISION WAS MADE TO PURSUE CAPITAL PUNISHMENT.

Appellant Parker's rights under the 5th, 6th, 8th, and 14th Amendments to the United States constitution, and corollary rights under the California Constitution, were violated by the trial court's unreasonable refusal to disclose to defense counsel videotapes concerning the prosecution of this case, which were prepared by a television production company with the full cooperation of the prosecution. This error deprived appellant of his rights to due process of law, to adequate representation by counsel, to equal protection of law, to reliable determinations of guilt, death eligibility, and punishment, and to meaningful appellate review.

The videotapes are part of the trial record, but remain under seal. In essence, the trial court's rulings both pretrial and during record correction and completion demonstrated a preference for the proprietary interest of the television production company, and it determined that appellant's rights as a defendant facing capital punishment are subsidiary. That result is at

complete odds with the constitutional protections meant to safeguard the fairness of capital proceedings, and the rights of a capital defendant. Reversal is required. Alternatively, this Court should order disclosure under seal to appellant's post-conviction counsel, and permit additional briefing on any legal issues disclosed by the contents of the tapes.

A. Factual and Procedural Background.

On or about January 3, 2002, appellant's trial counsel issued a subpoena duces tecum to Trial & Error Productions, seeking disclosure of the videotapes at issue. (3 CT 576-577; duplicated at Exh. A to Opp., 42 CT 9359-9360.) The production company had been filming members of the District Attorney's Office and their actions and thoughts regarding Mr. Parker's case, with the full cooperation of that office.

Counsel for Trial & Error Productions filed a Motion to Quash the subpoena, on or about January 22, 2002. (3 CT 519.) Appellant filed a Brief in Support of Disclosure of Network TV Videotapes. (3 CT 561.) Counsel for Trial & Error Productions filed a reply on or about January 31, 2002. (3 CT 606.) The matter was heard on or about February 6, 2002 (12 RT 885-914, 935-940, 959-974), and the videotapes were ordered sealed as court exhibits. (3 CT 644.)

During record correction proceedings, appellant's undersigned counsel requested disclosure of the videotapes, under seal, for purposes of post-conviction review. (41 CT 9200-9305.) With the agreement of the District Attorney, the tapes were ordered copied by the District Attorney and disclosed under seal, on or about November 5, 2010. (41 CT 9307-9308.) An order facilitating the release of the tapes from the evidence room for copying issued on or about February 4, 2011. (42 CT 9321.)

The District Attorney later requested withdrawal of the February 4, 2011 order, contending that the producers of the tapes might have a proprietary interest. (42 CT 9334-9336.) Status conferences were held on February 16 (42 CT 9338-9339; 66 RT 8040-8053) and March 7, 2011. (42 CT 9345; 67 RT 8054-8059) In the interim, the District Attorney located counsel for the now-defunct production company, which prepared its Opposition dated March 21, 2011. (42 CT 9348 et seq.)

Appellant's Response to Specially Appearing Non-Party's Opposition to Limited Disclosure of Videotapes for Purposes of Postconviction Review was filed on April 18, 2011. (42 CT 9471 et seq.) On April 20, 201, the trial court reversed its earlier decisions and precluded appellant's counsel from receiving and reviewing Court's Exhibits 2, 3, and 4.[157] (42 CT 9492-9494.)[158]

The contents of the three sealed court exhibits at issue were described by the trial court as follows in the minute order of the status conference held on February 16, 2011 (42 CT 9338):

> Video - A meeting discussing whether the decision ought to be taken to seek the death penalty.
>
> Video - discussion between Ms. Daly and Greg Thompson of the D.A.'s office regarding the case.

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[157] One additional sealed videotape, Court Exhibit 1, was ordered released to appellant's counsel, as it had been provided to appellant's trial counsel. (42 CT 9494.)

[158] The portions of the record dealing with proceedings and filings regarding these videotapes were sent to appellant's counsel by the trial court clerk on August 9, 2011. However, they were misplaced by counsel's mailbox service and only received on or about August 23, 2011. Counsel needed these materials to prepare this motion.

Video - with then District Attorney Paul Pfingst, stating to Ms. Daly his Intention that the D.A. would seek the death penalty.

These contemporaneously-recorded materials, created with the full cooperation of the District Attorney's Office, have relevance to the capital charging decision and the conduct of the prosecutors at trial. As a representative of that office stated, "Obviously our office participating in this filming with the idea that anything could be aired on television. So from our perspective it's not secret stuff as to our office ...." (66 RT 8047.)

These three videotapes, designated Court Exhibits 2, 3, and 4, are part of the record before this Court on automatic appeal. The videotapes were prepared by a television production company for a now-defunct reality show, reportedly meant to feature "day in the life" segments concerning criminal prosecutors. They were prepared pre-trial with the full consent and cooperation of the San Diego District Attorney's Office, with the understanding they would be aired. These segments were not aired. One tape reportedly documents the meeting at which prosecutors decided to seek the death penalty against Mr. Parker. The trial court reviewed the tapes; the prosecution starred in them; but counsel for Mr. Parker have had no access to them.

During record correction, the trial prosecutor agreed to release of these videotapes to counsel, it was so ordered, and the trial court later ordered the tapes unsealed for the purpose of copying. The trial prosecutor subsequently asserted that the production company might have proprietary interests, and located counsel for the defunct company. NBCUniversal

filed an opposition[159] to release of the tapes, and the trial court reversed its previous decision to release them.

Specially appearing non-party NBCUniversal Media (hereinafter referred to as NBCUniversal) asserted that it has a "constitutional right" to preclude appellant's counsel from viewing three sealed videotapes, and that the trial court's ruling at the trial level precludes any postconviction review under an innovative theory of "law of the case." NBCUniversal exaggerates and misrepresented the protection afforded news organizations under the California Constitution, ignored the constitutional rights of a defendant facing a death sentence, and misunderstood the nature and purpose of capital postconviction proceedings.

As demonstrated below, the tapes should have been disclosed to trial counsel for appellant. The trial court further erred in refusing to disclose this part of the court record to post-conviction defense counsel, even under seal, precluding full evaluation and litigation of Mr. Parker's direct appeal.

B. The Holding of *Delaney v. Superior Court* is Limited.

NBCUniversal contended that the California Reporter's Shield Law (Cal. Const., Art I, § 2; Cal. Evid. Code, § 1070) and the First Amendment to the United States Constitution required the trial court to withhold the videotapes at issue (Court Exhibits 2, 3, and 4) from appellant's counsel, even under seal. NBCUniversal relied primarily upon *Delaney v. Superior Court* (1990) 50 Cal.3d 785. (Opp., p. 1; 42 CT 9349.)

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[159] Specially Appearing Non-Party NBCUniversal Meda, LLC's Statement of Opposition to Defendant's Request to Unseal Unpublished Newsgathering Videotapes; Declaration of Tania Hoff (hereinafter referred to as "Opp.") appears at 42 CT 9348 et seq.

Delaney does not afford the broad shield against disclosure that NBCUniversal urged. Its primary holding is that the reporter's shield law does *not* provide a complete shield or privilege, only that reporters are protected against contempt for failing to disclose information. (*Delaney*, *supra*, 50 Cal.3d at pp. 796-797.) **The limited protection provided to newsgatherers may be overcome by a criminal defendant's constitutional rights.** (*Delaney*, *supra*, 50 Cal.3d at pp. 805-806.) Once a threshold showing is made that there is a reasonable possibility that the information sought will materially aid the defense (*Delaney*, *supra*, at p. 808), the court is to employ a balancing test regarding the interests of the defendant and the reporters. (*Delaney*, *supra*, at pp. 815-816.)

NBCUniversal contended that appellant cannot make a showing that the tapes would materially aid the defense, because appellant's counsel stated she does not know that she will use the videotapes, which she has not seen. (Opp., p. 5, at 42 CT 9353.) *Delaney* itself is clear that a defendant is not required to show beforehand that the evidence sought will go to the heart of the case. (*Delaney*, *supra*, at p. 808.) A defendant also need not show there is no alternate source for the information. (*Delaney*, *supra*, at pp. 811-812.)

As set forth more fully below, appellant has substantial constitutional rights, including but certainly not limited to the right to meaningful postconviction review of his capital conviction and sentence. There is indeed a reasonable possibility that the videotapes will materially aid the defense. At the least, review of the tapes will enable appellate counsel to evaluate and possibly raise a claim of error in the trial court's decision to not disclose them at trial. There is also a reasonable possibility that the statements of prosecutors, the stars of these tapes, will support legal arguments about their misconduct at trial, either on direct appeal or on

habeas corpus. Moreover, since the withheld evidence bears on the capital charging decision, it may demonstrate that unconstitutional factors led to that decision, and/or the constitutional overbreadth and vagueness of the statutory scheme.

Once the threshold showing of materiality is made — and that showing "need not be detailed or specific" and "need show only a reasonable possibility that the information will materially *assist his defense*" (*Delaney*, *supra*, at p. 809, emphasis in original) — *Delaney* requires a review and balancing of interests. (*Delaney*, *supra*, at p. 813.) The factors for the court to consider are:

1. Whether the unpublished information is confidential or sensitive. (*Delaney, supra*, at p. 810.)

2. The interests sought to be protected by the shield law. (*Delaney*, *supra*, at pp. 810-811.)

3. The importance to the criminal defendant. (*Delaney*, *supra*, at p. 811.)

4. Whether there is an alternative source for the unpublished information. (*Delaney*, *supra*, at pp. 811-812.)

C. The Trial Court Based Its Ruling on Law That Was Not Briefed.

The trial court, hearing this motion below during record correction proceedings, considered *Delaney* not to be dispositive since it deals with protection from contempt, which was not the issue here, and offered the following analysis:

> However, Penal Code § 1326 et. seq. provides for a motion to quash subpoenas duces tecum, granting of which is apparently left to the sound discretion of the trial court. (*Pitchess v. Superior Court* (1974) 11 Cal.3d 531, 535.) While Penal Code § 1054 et. seq.

> have statutorily superseded much of California's common law on discovery, and much of *Pitchess* with it, it does not regulate discovery from uninvolved third parties. (*Teal v. Superior Court* (2004) 117 Cal.App.4th 488, 491.) So, with regard to subpoena's [sic] duces tecum to third parties, it appears that the legal aversion to "fishing expeditions" expressed in *Pitchess* (*supra*, at 538) is still applicable. (see, *Barnett v. Superior Court* (2010) 50 Cal.4th 890, 894.) Further, it seems to this court that the factors outlined in Delaney are a reasonable way to weigh the materiality of materials sought in such subpoenas.
>
> Viewing appellant's argument in support of unsealing the tapes by these standards the court finds them wholly speculative, constituting little more than a "fishing expedition".

(42 CT 9493-9494.)[160]

The trial court's *sua sponte* analysis deprived appellant of notice and an opportunity to be heard on the basis for the post-trial ruling denying these tapes, and thus his right to due process of law. In any event, the trial court's analysis is incorrect, and appellant respectfully requests that this Court provide limited access to the sealed court exhibits.

Pitchess v. Superior Court, *supra,* 11 Cal.3d at p. 535, is apparently cited by the trial court for the unremarkable proposition that a motion to

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[160] This analysis was not presented in the Opposition filed by NBCUniversal (42 CT 9348 et seq.), nor in its predecessor's briefs filed pretrial (3 CT 519 et seq., duplicated in Opp., Exh. B, 42 CT 9367 et seq.; 3 CT 606-636, duplicated in Opp., Exh. D, 42 CT 9409 et seq.), nor was it addressed by appellant's trial counsel in their pretrial brief. (Opp., Exh. C, 42 CT 9396 et seq.) The court's analysis pretrial rested on *Delaney v. Superior Court*, *supra*, 50 Cal.3d 785, only. (Ex Parte Oder, 2/7/02, 3 CT 650, duplicated in Opp., Exh. E, 42 CT 9441; see hearing, 2/6/02, 12 RT 884-914, 934-940, 959-974.)

quash may be filed in response to a subpoena duces tecum. That is in fact what happened pretrial.

Teal v. Superior Court, *supra*, 117 Cal.App.4th at p. 491, states that Cal. Pen. Code § 1054 et. seq., governing pretrial discovery, does not apply to materials held by a third party. Appellant did not seek pretrial "discovery" of these videotapes, which were instead subpoenaed by defense counsel.

Barnett v. Superior Court, *supra*, 50 Cal.4th 890, deals with a motion for post-conviction discovery pursuant to section 1054.9, a wholly different circumstance than permitting post-conviction counsel limited access to sealed materials that are part of the record on appeal. In *Barnett*, this Court held that post-conviction defendants who seek discovery beyond trial file reconstruction must show a reasonable basis to believe that other specific materials actually exist; that defendants who seek discovery beyond trial file reconstruction do not have to show that the items are "material" within the meaning of *Brady v. Maryland* (1963) 373 U.S. 83, and its progeny; and that section 1054.9 did not govern materials in the possession of out-of-state law enforcement agencies that merely provided the prosecution with information or assistance. Appellant here seeks only limited access to materials that exist in the court record, not some broad-ranging "fishing expedition," and believes them relevant because they are contemporaneous documentation of actions of the prosecution in this very case, including the decision to pursue capital punishment.

D. Appellant's Constitutional Rights Are Paramount.

The denial of access to the videotapes requested violates not only appellant's state law rights, but his federal constitutional rights to due process, a fair trial, meaningful appellate review, and the Eighth

Amendment requirement of reliable and non-arbitrary procedures in capital cases. (*Gardner v. Florida* (1977) 430 U.S. 349, 360-362).

The record is the basis for an appeal; a party cannot intelligently prepare a brief until the character of the record on appeal is known. (*Peebler v. Olds* (1945) 26 Cal.2d 656, 658.) The existence of such state procedural rights gives appellant a "substantial and legitimate expectation that he will be deprived of his liberty only to the extent determined by" such rights; i.e., any violation of these state-defined procedural rights also constitutes a federal constitutional due process violation under the Fourteenth Amendment. (*Hicks v. Oklahoma, supra,* 447 U.S. at pp. 346-347.)

The United States Supreme Court has "emphasized before the importance of reviewing capital sentences on a complete record." (*Dobbs v. Zant* (1993) 506 U.S.357, 358, citing *Gardner v. Florida, supra,* 430 U.S. at p. 361.) This is so because a panoply of constitutional rights are specifically involved when the accuracy and completeness of a capital case record is at issue.

The Fifth and Fourteenth Amendments guarantee the right to due process in an appeal's consideration (see *Frank v. Mangum* (1914) 237 U.S. 309, 327-328; *Cole v. Arkansas* (1948) 333 U.S. 196, 201), e.g., in the resolution of the record's accuracy and completeness. This is so because "[u]nder the Fourteenth Amendment, the record of the proceedings must be sufficient to permit adequate and effective appellate review." (*People v. Howard, supra,* 1 Cal.4th at p. 1166; see also *Griffin v. Illinois* (1956) 351 U.S 12, 20, 76 S.Ct. 585; *Draper v. Washington* (1963) 372 U.S. 487, 496-499; see *People v. Barton* (1978) 21 Cal.3d 513, 517-518.)

Additionally, appellant has the Fifth and Fourteenth Amendment due process "right not to be denied an appeal for arbitrary or capricious

reasons" (*Griffin v. Illinois, supra,* 351 U.S. at p. 37 (Harlan, J., diss.)); the right to an accurate record on appeal (*People v. Gloria* (1975) 47 Cal.App.3d 1, 7); the right to a review of all legally admissible evidence (*People v. Johnson* (1980) 26 Cal.3d 557, 576-577); and the right to review on a record settled in accordance with procedural due process (*Chessman v. Teets* (1957) 354 U.S. 156, 162- 165 and fn. 12).

The Sixth Amendment, through the Fourteenth, guarantees competent counsel on appeal, which in turn imposes on that counsel both the obligation to brief all arguable issues, citing the appellate record and appropriate authority, and the preliminary obligation to insure that there is an adequate record before the appellate court to resolve those issues. (*People v. Barton, supra,* 21 Cal.3d at pp. 518-520.) When the record is missing or incomplete, "counsel must see that the defect is remedied, "or counsel will fail to provide a competent level of advocacy. (*Id.* at p. 520.) Unless appellate counsel can ensure a complete record on appeal, appellant will be deprived of a meaningful, full, and fair review of his trial.

Due process of law requires that a criminal defendant be given notice and an opportunity to be heard on the charges against him. (*In re Oliver* (1948) 333 U.S. 257, 273; *People v. West* (1970) 3 Cal.3d 595, 612.) In the context of a capital sentencing proceeding, the heightened need for reliability requires that the defendant receive fair warning of a sentencing procedure that will be used against him. (*Woodson v. North Carolina, supra,* 428 U.S. at p. 305.) The vital importance of notice as a component of due process at the penalty phase has been reiterated and confirmed by the High Court:

> If notice is not given, and the adversary process is not permitted to function properly, there is an increased chance of error [citation omitted], and with that, the possibility of an incorrect result.. [Citation omitted.]

(*Lankford v. Idaho* (1991) 500 U.S. 110, 127.)

In this case, notice under Penal Code section 190.3 was not provided until after the subpoena duces tecum issued, and even then, it did not fully inform the defense of the aggravating evidence that the state would seek to admit at the penalty phase of trial. Trial counsel were at a disadvantage: the producers of these tapes knew more than they did about why and how the prosecution intended to proceed.

Gideon v. Wainwright (1963) 372 U.S. 335, established that indigent criminal defendants have a right to counsel to aid and assist them in defending against charges, under the Sixth Amendment right to counsel and the Fourteenth Amendment due process clause, which requires the states to provide those guarantees of the Bill of Rights essential to a fair trial.

> That government hires lawyers to prosecute and defendants who have the money hire lawyers to defend are the strongest indications of the widespread belief that lawyers in criminal courts are necessities, not luxuries. The right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours. From the very beginning, our state and national constitutions and laws have laid great emphasis on procedural and substantive safeguards designed to assure fair trials before impartial tribunals in which every defendant stands equal before the law.

(*Gideon v. Wainwright*, *supra*, 372 U.S. at p. 344.) The provision of counsel is critical to the fairness of a criminal trial:

> Thus, a fair trial is one in which evidence subject to adversarial testing is presented to an impartial tribunal for resolution of issues defined in advance of the proceeding. The right to counsel plays a crucial role in the adversarial system embodied in the Sixth Amendment, since access to counsel's skill and knowledge is necessary to accord defendants the

> "ample opportunity to meet the case of the prosecution" to which they are entitled.

(*Strickland v. Washington, supra,* 466 U.S. at p. 685.) The High Court recognizes the critical role of counsel in ensuring a fair trial:

> The Sixth Amendment recognizes the right to the assistance of counsel because it envisions counsel's playing a role that is critical to the ability of the adversarial system to produce just results. An accused is entitled to be assisted by an attorney, whether retained or appointed, who plays the role necessary to ensure that the trial is fair.

(*Ibid.*)

The right to counsel continues past the trial itself. In this instance, appellant will be deprived of his right to counsel in post-conviction proceedings, as well as meaningful post-conviction review, if his counsel is not permitted access to these videotapes which are part of the record, under seal. Respondent, by contrast, is privy to the content of these tapes because the trial prosecutors were featured in them. The adversarial system is meant to engage the parties on more or less a level field; it is not meant to deprive those facing criminal, much less capital, charges of information bearing on the charges brought against them, the evidence at the prosecution's disposal, or the chance to litigate potentially meritorious issues on appeal.

Finally, the Eighth Amendment requires that the record be sufficient "to ensure that there is no substantial risk that the death sentence has been arbitrarily imposed." (*People v. Howard, supra,* 1 Cal.4th at p. 1166.) This is particularly so as to errors involving the appellate record: "it is important that the record on appeal disclose to the reviewing court the considerations which motivated the death sentence in every case in which it is imposed." (*Gardner v. Florida, supra,* 430 U.S. at p. 361.) Otherwise, the "capital-

sentencing procedure would be subject to the defects which resulted in the holding of unconstitutionality in *Furman v. Georgia*, [(1972) 408 U.S. 238]." (*Gardner v. Florida, supra*, 430 U.S. at p. 361.)

Each of the federal constitutional protections underlying the requirement of an adequate record is also magnified by the Eighth Amendment's requirement of heightened reliability in capital cases. (*Furman v. Georgia, supra,* 408 U.S. 238; see *Beck v. Alabama, supra,* 447 U.S. at p. 638 and fn. 13; see also *McElroy v. United States Ex Rel. Guagliardo* (1960) 361 U.S. 234 (Harlan, J., diss.).) All the same rights are also guaranteed under the state constitution's parallel provisions. (Art. I, sections 1, 7, 15, 16, 17 and 24.)

E. Appellant's Posture Following His Conviction and Sentence is Different From His Posture at Trial.

When the trial court conducted an *in camera* review of the videotapes at issue during trial proceedings, it endeavored to ascertain whether the defendant's trial rights overcame NBCUniversal's asserted rights under the reporter's shield. In the case of Court Exhibit 1, a videotaped interview of the victim's mother (who was a key prosecution witness), the trial court concluded that appellant's due process rights prevailed, and the tape was released to the defense with the reasonable limitation that it only be used "for purposes of preparing and presenting this trial." (Opposition at pp. 2-3, CT 41 9250-9251.) The trial court's review and balancing of the *Delaney* factors was guided by whether there was a "reasonable possibility" that the information in the tapes would "materially *assist his defense*" at trial. (*Delaney, supra,* at p. 768; emphasis in original.)

Appellant's undersigned appellate counsel is given to understand that the remaining three videotapes (Court Exhibits 2, 3, and 4) consist of

"day in the life" style documentation of members of the District Attorney's office talking about this case. The trial court indicated during a telephonic status conference during record correction — and trial counsel's Brief in Support of Disclosure of Network TV Videotapes dated 1/21/02 (3 CT 56 et seq.) confirms[161] — that one of the videotapes is of the trial prosecutor's presentation at the meeting to decide whether or not this case was to be capitally charged. (See 42 CT 9338.)

Appellant's counsel is charged with raising all potentially meritorious issues on his automatic appeal. The most obvious of these, relating to the disputed videotapes, is whether or not this Court's decision to withhold them from the defense attorneys at trial was an abuse of discretion. Because appellate counsel does not know the content of these videotapes — and because they involve the conduct of the prosecution, which consented to a production company taping their thoughts and activities — it is reasonably possible that the tapes will reveal or support appellate arguments regarding prosecution misconduct, including but not limited to the withholding of potentially exculpatory evidence (*Brady v. Maryland, supra,* 373 U.S. 83), and that they might reveal or support appellate arguments regarding other potentially meritorious allegations of trial error.

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[161] One of the issues addressed in the defense filing of 1/21/02 was the prosecution's claim of a "work product" privilege with regard to the tapes made with the District Attorney Office's full cooperation. That was not a persuasive argument. At the time the tapes were sought, however, the District Attorney had not provided defense counsel with the required notice of evidence in aggravation under Penal Code section 190.3. (See, Notice filed 1/31/02, 3 CT 637; cf. Notice of Motion and Motion to Quash, filed 1/22/02, 3 CT 519.)

This was not a case known for amicable relations between opposing counsel at trial. There were a great many motions and objections made, from long before the actual trial through sentencing, and many complaints that the defense was not provided adequate discovery or notice. Quantities of very unusual evidence — from alleged pornography through alleged "tool mark" evidence from an odontologist[162] — were admitted over objection from the defense. It is reasonably probable that prosecutors preparing this case spoke of some of these matters in the videotapes, since they were important to the prosecution's case at trial.

F. Appellant Meets the Criteria for Disclosure Under Seal to His Postconviction Counsel.

Delaney sets forth the factors below for a court to consider once a defendant has met the low threshold showing. A balancing of these factors requires that appellant Parker's counsel be permitted to have the tapes, under seal, only for purposes of postconviction review, as this Court has previously opined was correct.

The initial consideration is whether a defendant — the appellant in this instance — has met the threshold showing, of "a *reasonable possibility* the information will materially assist his defense." (*Delaney*, *supra*, at p. 808, emphasis in original.) There is no question here: appellant has a potentially viable appellate issue about whether it was error to refuse to disclose to his trial counsel the three videotapes of prosecutors, but this argument cannot be properly pursued or developed without allowing post-

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[162] The "tool mark" evidence did not involve teeth. (See, Argument 3.) The odontologist testified that marks on the victim's back may have been made by handcuffs. He arrived at that theory by examining the body in the morgue and using a random pair of handcuffs obtained from the evidence room. The forensic pathologist who conducted the autopsy had no such opinions.

conviction counsel access to the tapes. In addition, there were contentions before and during the trial that the prosecutors in this case committed misconduct; these contemporaneously-prepared videotapes are essential evidence of some of the conduct of prosecutors, and may well support claims for relief either on direct appeal or on habeas corpus.

1. Whether the Unpublished Information is Confidential or Sensitive. (*Delaney, supra*, at p. 810.)

This unpublished information was not confidential: the prosecution cooperated fully with the filming of its thoughts and actions. It does not appear to be sensitive, since the prosecution fully believed at the time that the tapes would be published. There is no cause for concern here about protecting future sources.

2. The Interests Sought to be Protected by the Shield Law. (*Delaney, supra*, at pp. 810-811.)

The policy of the shield law will not be thwarted by disclosure under seal to appellant's counsel for purposes of pursuing post-conviction relief. Whereas in *Delaney* the source of information was the defendant who sought disclosure (at pp. 810-811), the sources in this case were members of the prosecutor's office. These sources were fully informed and were attorneys, and they expected release of the taped information. As noted, the defunct production company and its newsgathering colleagues need not fear losing future news sources on these facts. Moreover, appellant's counsel seeks disclosure under seal, and with conditions; there is no danger that this now-dated material will be released broadly. It is only sought to permit post-conviction counsel to prepare the direct appeal and habeas corpus petition.

3. The Importance to the Criminal Defendant. (*Delaney, supra*, at p. 811.)

Appellant/defendant Parker's counsel cannot pursue and develop potentially meritorious appellate claims (and his future habeas corpus counsel cannot evaluate the usefulness of the tapes for habeas corpus claims) without access with conditions to these videotapes. There is a reasonable possibility that these tapes will support an appellate claim that the trial court erred in not disclosing the tapes to trial counsel, and that the tapes will disclose contemporaneously-recorded and previously undisclosed conduct of the trial prosecutors, particularly regarding the disclosure of discovery and *Brady* evidence, and regarding the charging decision.

4. Whether there is an Alternative Source for the Unpublished Information. (*Delaney, supra*, at pp. 811-812.)

There is no alternative source for this contemporaneously recorded information. These tapes are part of the trial record, as Court Exhibits filed under seal. It is not anticipated that the District Attorney personnel involved in these videotapes would consent to interviews by post-conviction defense counsel, nor that their recollections would be an adequate substitute for the videotapes themselves; certainly such interviews would not do for the direct appeal, which consists of arguments based on the trial record.

G. Conclusion.

For the above reasons, reversal is required because the trial court erred in refusing to provide trial counsel with these critical tapes, depriving trial counsel of the ability to fully present his case and litigate issues at the trial level. Alternatively, post-conviction counsel for Mr. Parker respectfully requests that this Court order that these videotapes, part of the record before this Court on automatic review, be copied and provided to

counsel under seal, with instructions that they may not be released to persons other than members of the post-conviction defense team, and may only be used for purposes of pursuing post-conviction review of appellant's conviction and sentence; and that this Court further permit appellant an opportunity to present additional briefing on issues contained in this part of the record that has not been disclosed.

5. GRUESOME PHOTOS SHOULD NOT HAVE BEEN ADMITTED, AS THEY SERVED ONLY TO INFLAME THE PASSIONS OF JURORS.

A. Procedural History.

On February 25, 2002, appellant filed a motion in limine to exclude or limit photographs[163], arguing that photographs should only be admitted if relevant (Evidence Code sections 210, 350, 351), and that the trial court should exclude photographs if the probative value is substantially outweighed by the danger of undue prejudice, confusion, or misleading the jury (Evidence Code section 352). (3 CT 685-697.)

Noting that the defense had thus far been provided 607 photographs falling into the categories addressed, the motion argued that these photographs were unduly gruesome or inflammatory, and would appeal

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[163] The motion addresses photographs identified by groups, as follows: [1] Calsbad scene — discovery of the body; [2] PetSmart — discovery of fingertips; [3] Bonita Mesa Road — discovery of mattress; [4] 1266 Benecia Street, #2 — the apartment shared by Defendant and the victim; [5] autopsy photographs taken August 15, 2000, including close ups of the hands and fingers; [6] Autopsy photograpsh with the scalp and skull rmoved; [7] X ray photographs of the skull and hands with fingertips in place at the end; [8] Dr. Sperber slides taken August 24, 2000; [9] Defendant arrest photos. (3 CT 685-686.)

solely to the motions of the jury. (3 CT 687, citing *People v. Crittendon* (1994) 9 Cal.4th 83, 133; *People v. Smith* (1952) 109 Cal.App.2d 524; See also, *People v. Burns* (1952) 109 Cal.App. 524; *People v. Marsh* (1985) 175 Cal.App.3d 987, 997, citing *People v. Cavanaugh* (1955) 44 Cal.2d 268-269.) The prosecution responded that the prosecution is not required to rely solely upon verbal descriptions for proof, and that gruesome photographs have been admitted in other cases as circumstantial evidence of malice. (4 CT 806-808.)

The photographs proposed to be offered by the prosecution were discussed at hearings on April 3, 2002. (15 RT 1218-1324.) Counsel objected to the multiple photographs of severed fingers, as these reflected an uncontested fact and were particularly inflammatory; additionally, counsel objected that various photographs taken near the PetSmart store and of items found in the dumpster did not accurately reflect the scene; items were disturbed and moved. (15 RT 1243-1249, 1254-1255, 1258-1259.) Counsel objected to autopsy photographs highlighting severed fingers, showing a shaved pubic area (15 RT 1279-1280), showing post-mortem injuries (15 RT 1299-1300); inflammatory photos of the head injury and exposure of underlying tissue during autopsy (15 RT 1302-1305); additional gruesome photos of the severed fingers (15 RT 1306-1311); and photographs of the breast area in which it is unclear whether the images depict decomposition or the aftermath of cosmetic surgery (15 RT 1314-1315).

Additional discussion of the photographs occurred on June 13, 2002. (32 RT 3792-3914.) The trial court permitted a closeup photograph of the severed fingers. (32 RT 3872-3876.)

Appellant also refers to and incorporates herein by reference Argument 3, regarding unreliable and inadmissible "tool mark" evidence of

Dr. Sperber, which included highly inflammatory and gruesome photographs taken when this forensic dentist endeavored to "match" a random pair of handcuffs with marks on the victim's body, one of which had been opened during the actual autopsy.

Photographs admitted despite the defense objections included: Exh. 1 (photoboard of the victim); Exhs. 5-9 (photos, Petsmart location and dumpsters); Exh. 6 (3 photos, large trash can); Exh. 8 (2 autopsy photos, bruised left wrist + ruler); Exh. 9 (2 photos, "handcuff mark comparison"); Exh. 10 (2 photos, handcuff mark comparison with overlay, see 33RT 3915-4099); Exh. 15 (3 photos of trash can and body in bag); Exh.16 (2 autopsy photos, head and neck); Exh. 17 (autopsy photo, full body); Exh. 18 (autopsy photo, 4 severed fingertips); Exh. 22 (3 autopsy photos, head and skull, see 34 RT 4100-4295); Exh. 61 (autopsy photo, victim's back; Exh. 62 (victim's back and handcuffs on wrists); Exh. 74 (photoboard, closeups of items 83, 85, 87, 98, 99; see 37 RT 4681-4902); Exh. 112 (photo depicting wrist area, see 41 RT 5399-5625); Exh. 115 (3 autopsy photos, victim's face and hands, see 51 RT 6962-6961, 6973-7148).

B. The Photographs are Prejudicial.

The trial court abused its discretion by admitting gory, gruesome and inflammatory photographs, which were irrelevant and cumulative because the matters depicted therein were not at issue, and were well-described otherwise. (*People v. Gallego* (1990) 52 Cal.3d 115, 197.)

The prosecutor further aggravated the prejudice from the horrific photographs, claiming they demonstrated that appellant did not kill in an out-of-control explosion of emotion, but rather, that the killing was pre-planned, cold and calculating. The photographs showed nothing of the sort; instead, they left vivid visual impressions of the outcome — including

damage to the victim's body after her death — designed to overcome the evidence weighing against premeditation.

In short, the prosecution used the gruesomeness of the photographs as part of an effort to urge jurors to ignore the defense of heat of passion. The prosecutor hoped that the grisly outcome would be sufficient to persuade jurors to find guilt of first degree murder and the special circumstances, regardless of the evidence supporting a heat of passion defense; and then at penalty phase, to inflame the passions of jurors in order to secure a death sentence despite the significant mitigating evidence.

C. The Photographs are not Relevant to a Disputed, Material Issue.

This court has held, in conformance with Evidence Code section 350, that a trial court "... has no discretion to admit irrelevant evidence." (*People v. Turner* (1984) 37 Cal.3d 302, 321; *see People v. Anderson* (1987) 43 Cal.3d 1104, 1137, overruled on other grounds *People v. Adcox* (1988) 47 Cal.3d 207, 233.) The photographs at issue served no evidentiary purpose; they worked only to inflame the jury. Here, as in *Turner*, "[n]either the court nor the prosecution articulated the relevance of the position of the bodies or the manner of the infliction of the wounds to the issues presented." (*People v. Turner, supra*, 37 Cal.3d at p. 321.)

Photos which "... go only to the issue whether a human being had been killed ... should not have been received into evidence." (*People v. Anderson, supra*, 43 Cal.3d at p. 1137.) Witnesses testified to the appearance of the crime scenes in detail, and provided diagrams. Witnesses also testified to the victim's appearance and injuries, including post-mortem injuries such as removal of her fingertips. The exhibits did not document disputed issues. (*Ferrier v. Duckworth* (7th Cir. 1990) 902 F.2d 545, 548.) These horrifying photographs were irrelevant and unnecessary.

D. The Photographs are Cumulative.

Even assuming, *arguendo*, that there was some issue at stake, there was no need to inundate the jury with repetitious, prejudicial photos, particularly concerning post-mortem events. The pictures admitted over appellant's objection duplicated other admitted evidence and matters adequately described in witnesses' testimony. This court has expressed "serious doubt" about the admissibility of photographs that reveal "... how the victims were killed.., but.., are also largely cumulative of expert and lay testimony regarding the cause of death, the crime scene, and the position of the bodies." (*People v. Anderson, supra*, 43 Cal.3d at p. 1137.) Without providing any probative value, the photos improperly provoked the jury's emotions. (*See*, e.g., *People v. Smith* (1973) 33 Cal.App.3d 51, 69.)

E. The Trial Court Failed to Conduct a Proper Balancing Under Evidence Code Section 352.

The trial court's conclusory decision to admit this large quantity of grisly photographic evidence as to issues not in dispute falls far short of the individualized consideration of each challenged piece of evidence mandated by Evidence Code section 352. Nor did the court evaluate the necessity of admitting each prejudicial photograph. (*People v. Allen* (1986) 42 Cal.3d 1222, 1257.)

In *People v. Crittendon, supra,* 9 Cal.4th 83, this Court found specific reasons why the disputed photographs were necessary to advance the state's case, including the "planning and deliberation with which the offenses were executed;" for example, the defendant even brought a pillowcase from his own home with which to bind the victims, bound them with "thoroughness," and separated them. (*People v. Crittendon, supra*, 9 Cal.4th at p. 134.) By contrast, the photographs in this case did not

advance the state's case factually. The purpose served by these photographs was meant to be, and was, inflammatory.

F. The Trial Court's Erroneous Admission of the Photographs Violated the Fifth, Sixth, Eighth and Fourteenth Amendments, Mandating Reversal.

The trial court's admission and the prosecutor's use of gruesome post-mortem photographs violated appellant's rights to fair trial, impartial jury, due process of law and capital case heightened due process guaranteed by the Fifth, Sixth, Eighth and Fourteenth Amendments.

These photos did nothing to resolve disputed issues in the case, including whether or not premeditation existed. Acts after death plainly do not demonstrate an advance plan to kill. Instead, they served to focus the jury's attention on the horror of the event, to the extent that the identity of the actual killer became irrelevant.

The irrelevant, gut-wrenching photographs admitted into evidence so inflamed appellant's jury against him as violate his right to an impartial jury, per the Sixth Amendment. This error also infected his trial with fundamental unfairness (*Ferrier v. Duckworth*, *supra*, 902 F.2d at p. 548) resulting in an unconstitutional deprivation of liberty, in violation of the Fifth and Fourteenth Amendments. (See *Hicks v. Oklahoma*, *supra*, 447 U.S. at p. 346.) The repetitious, gruesome images served no evidentiary purpose, biased the jury against appellant and improperly encouraged it to punish him for the horror it saw, completely apart from whether he had been proven guilty of the crimes alleged beyond a reasonable doubt.

Furthermore, the horror the photos evoked in the jury prevented it from making a rational decision based on relevant evidence, violating the Eighth Amendment's guarantee of heightened capital case due process. (*Beck v. Alabama, supra,* 447 U.S. at p. 638 and fn. 13.) Because of their

gruesomely pervasive quantity and qualitative emotional impact on the jury, the erroneously admitted and used photographs, measured either individually and cumulatively, were not harmless beyond a reasonable doubt and reversal is mandated.

6. THE TRIAL COURT ERRED IN FAILING TO PRECLUDE PROSECUTION ARGUMENT IN OPENING STATEMENT.

Appellant Parker's death sentence and confinement are unlawful and unconstitutional, because the trial court erred in failing to preclude prosecution argument during opening statement; opening statement is to permit the parties to outline the evidence they expect to present, not editorialize and push jurors toward a conclusion before the evidence has even been presented. This error violated Mr. Parker's rights to due process of law, equal protection of law, to be convicted only upon proof beyond a reasonable doubt, to adequate assistance of counsel, and to reliable and non-arbitrary determinations of guilt, special circumstances, and penalty, under the constitutions of the United States and of California.

On February 25, 2002, appellant's counsel filed Motion, No. 23, a Motion in Limine to Preclude Argument in Opening. (4 CT 797-800.) Citing *People v. Jones* (1964) 225 Cal.App.2d 598, 609, the motion specifically requested that — due to the lack of evidence supporting the following — the prosecutor be prohibited from characterizing the victim's loss of blood as "draining blood"; that the prosecutor be precluded from describing the victim as "gagged" by a scarf found loosely tied around her neck; and that the prosecutor not be allowed to describe the victim as "tortured," particularly since the torture allegation was dismissed. (4 CT 797-800.)

On April 5, 2002, the parties and the trial court discussed Motion No. 23. (17 RT 1594-1607.) The trial court immediately stated that there is a "broader latitude" because it is a chance for the prosecutor to help the jury accept and understand the prosecution theories. (17 RT 1594.)

The court believed that because the victim had little blood left in her body, the "draining" of her blood by the defendant was a fair statement; and the trial court would only step in if the prosecution embellished by, for example, claiming the victim had been hung like a slaughtered farm animal. (17 RT 1594-1595.) The defense noted that use of the word "drained," as opposed to saying the defendant's actions led to loss of blood, created a vivid and inflammatory picture for jurors of this defendant taking specific actions that are not demonstrated by the evidence — and indeed, before any evidence was received. (17 RT 1596-1597.)

Despite the looseness of the scarf around the victim's neck, the trial court felt that "gagging" was a legitimate inference. (17 RT 1595.) The defense noted that the word "gag" or "gagging" was likewise speculative and inflammatory, not supported by evidence from the medical examiner, or evidence that saliva was found on the scarf. Nor is there evidence the scarf could have been used as a ligature. (17 RT 1598-1600, 1605.) Curiously, the prosecutor posited that the lack of forensic evidence does not mean it did not happen that way. The prosecution affirmatively argued that gagging occurred because appellant "could" have gagged the victim to muffle her screams. (17 RT1602-1603.)

Although the court had stricken the torture allegations for lack of evidence, he assumed that the prosecution meant to use "torture" in a colloquial or "live" sense. (17 RT 1595-1596.) Defense counsel noted that "torture" might properly be used in closing argument, but that in the

context of an opening statement, it is improper and argumentative. (17 RT 1600-1601.)

The trial court refused to preclude prosecution argument during opening statement, on the above points. (17 RT 1607.) In her opening statement, the prosecutor argued that the victim lost her hopes and dreams as the defendant "drained" the life from her. (33 RT 3932-3933.)[164] She advised jurors that all the victim's blood had been "drained" out. (33 RT 3940, 3943.) The prosecutor argued that we "know" the victim was raped, "gagged," and handcuffed, and that a "gag" was found around her neck. (33 RT 3931, 3936, 3940, 3942.) In addition, the prosecutor argued that the victim was raped and "tortured." (33 RT 3942.)

In *People v. Carr* (1958) 163 Cal.App.2d 568, 578, the court reversed appellant's conviction because of the cumulative prejudicial effect of the prosecutor's misstatements, both in opening statement and in closing argument. (*People v. Carr, supra,* 163 Cal.App.2d at p. 578.) This Court cited Carr with approval in *People v. Love*, noting that in closing argument, a prosecutor ... may state matters not in evidence that are common knowledge, or are illustrations drawn from common experience, history, or literature. [Citations omitted.] He may not, however, under the guise of argument, assert as facts matters not in evidence or excluded because inadmissible. [Citations omitted.] He may not ... argue his own belief of guilt based upon evidence not produced in court. (*People v. Love* (1961) 56 Cal.2d 720, 730-731 [overruled on other grounds in *People v. Morse* (1964) 60 Cal.2d 631].)

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[164] The victim had a massive neck wound inflicted by a sharp object, which would have bled copiously and resulted in her death within a short time. (34 RT 4183.)

In Mr. Parker's case, the error in permitting the prosecutor to argue highly inflammatory facts that would not and could not be proven was egregious. It predisposed the jurors, at the very outset and before any evidence was before them, to assume that even more had been done than could be proven. This in turn unconstitutionally lightened the prosecution's burden of proving that Mr. Parker was guilty of the charges, based on the evidence presented.

Mr. Parker had the right to be convicted only if the State proved beyond a reasonable doubt every fact necessary to constitute the alleged crime and special circumstances. (*In re Winship, supra,* 397 U.S. at p. 364.) The admission of wholly irrelevant and inflammatory information that was not even connected factually to the crime impermissibly lightened the state's burden of proof (*Sandstrom v. Montana, supra,* 442 U.S. at pp. 520-24), and cannot be reconciled with the constitutional protections to which he is entitled even in an ordinary criminal trial.

Reversal is required.

7. THE TRIAL COURT ERRED IN ADMITTING IRRELEVANT AND INFLAMMATORY EVIDENCE THAT A SINGLE SPERM CELL WAS FOUND ON THE INSIDE OF A BANANA PEEL.

The trial court erred in admitting irrelevant and inflammatory evidence that a single sperm cell was found on a banana peel, in a bag of garbage left by Mr. Parker in a dumpster. This violated appellant Parker's rights under the 5th, 6th, 8th and 14th Amendments to the United Stated Constitution by undermining his rights to due process of law, a fair trial, the assistance of counsel, and reliable and non-arbitrary determinations of guilt, capital eligibility, and sentence. The trial court's error also impermissibly

lessened the prosecution's burden of proof, by inviting jurors to speculate that a banana was used for the purposes of sexual assault.

The prosecutor acknowledged that nobody knew who contributed the single sperm cell found. (23 RT 2478.) She contended that on the so-called "to do" list, there was a reference to a cucumber, but no cucumber was found. (23 RT 2478.) Trial counsel objected under Evidence Code sectopm 352, and argued not only was the evidence not relevant, but there was no foundation under Evidence Code section 402 to connect the sperm to Mr. Parker or to any crime. (23 RT 2479, 2251, 2255.)

The trial court opined that this was circumstantial evidence, and that he expected the prosecution to argue that the banana could have been used in the way a cucumber might have been used. (23 RT 2251.) Trial counsel argued that in human experience, body fluids might transfer amongst items in a garbage bag; there is no evidence indicating how investigators determined which items in the bag were relevant, or what was done to explore the possibility of transfer from another source. (25 RT 2552-2253, 2557.) Counsel urged that this item was not only irrelevant, but inflammatory; that jurors would have a visceral reaction, and be prone to believe that the victim was sexually assaulted, and that then Mr. Parker ate the banana. (25:2553.)

The trial court decided that nonetheless, the banana peel added to the evidentiary weight of planning, that it would not be confusing or absorb undue time. (25 RT 2560-2561.)

In this case, there was no evidence that Mr. Parker was the source of the solitary sperm, or of how it came to rest on a banana peel. The criminalist testified that 100 sperm cells are needed to have a sufficient quantity for DNA testing. (39 RT 5081.) A normal male ejaculation, he testified, contains three billion sperm cells. (40 RT5150.) The presence of

a single sperm of unknown origin on a piece of garbage, in a bag full of mixed garbage, was irrelevant and had no probative value whatsoever. Instead, it was egregiously inflammatory and encouraged jurors to speculate.

The trial court erred in finding this evidence relevant. Assuming it had some relevance, its prejudicial effect far outweighed any relevance. Under California Evidence Code section 352, a trial court "may exclude evidence if its probative value is substantially outweighed" by the probability that it will "create substantial danger of undue prejudice, of confusing the issues, or misleading the jury." In this case, the item was sought to be admitted to create the inference that even more bad conduct occurred than could be proven.

In recognition of the severely biasing effect of bad character and irrelevant bad conduct evidence, California Evidence Code section 1101 prohibits admission of evidence of bad character and conduct to prove conduct on a specific occasion. (See, e.g., *People v. James, supra,* 81 Cal.App.4th at p. 1354 [noting that "three hundred years of jurisprudence recognizes" the biasing effect of propensity evidence on unguided jurors; see also, *Garceau v. Woodford, supra,* 275 F.3d at p. 776 (reversed on other grounds, *Woodford v. Garceau, supra,* 538 U.S. 202).) The arbitrary deprivation of the state law protections of Evidence Code section 1101 amounts to an independent federal due process violation. (*Hicks v. Oklahoma, supra,* 447 U.S. at pp. 346-347.)

Such "propensity" conduct is prohibited independently on federal constitutional grounds, as it creates an undue danger of prejudice in contravention of the right to due process of law. (*Michelson v. United States, supra,* 335 U.S. at pp. 475-76.)

Mr. Parker had the right to be convicted only if the State proved beyond a reasonable doubt every fact necessary to constitute the alleged crime and special circumstances. (*In re Winship, supra,* 397 U.S. at p. 364.) The admission of wholly irrelevant and inflammatory information that was not even connected factually to the crime impermissibly lightened the state's burden of proof (*Sandstrom v. Montana, supra,* 442 U.S. at pp. 520-24), and cannot be reconciled with the constitutional protections to which he is entitled even in an ordinary criminal trial.

This was no ordinary criminal trial, however. Appellant Parker was on trial for his life. The Eighth Amendment absolutely requires that "any decision to impose the death sentence [must] be, and appear to be, based on reason, rather than caprice and emotion." (*Gardner v. Florida, supra,* 430 U.S. at p. 358.)

The trial court abused its discretion in permitting the prosecutor to introduce this evidence possessing no evidentiary value. One single sperm on a piece of rubbish in a trash bag sheds no light whatsoever on the crimes charged; but it was extraordinarily inflammatory in that it invited jurors to speculate about sexual assault with an object, a matter not proven or capable of proof. Reversal is required.

8. THE TRIAL COURT ERRED IN ADMITTING AT THE GUILT PHASE A PHOTOGRAPH OF THE VICTIM AND HER DOG.

At an in limine hearing on the admissibility of photographs, defense counsel objected to the prosecutor's plan to introduce a photograph of Ms. Gallego in life, holding her dog, arguing that it was irrelevant and inappropriate. (32 RT 3876-3877.) Counsel noted that Ms. Gallego's body had been identified using an identification card and a fingerprint, not this

photograph. (32 RT 3879.) The prosecutor said the photograph had been supplied by the victim's mother, and that she selected this one in order to humanize the victim, and because the photographs used earlier to identify Ms. Gallego did not enlarge well. (32 RT 3878.) The trial court permitted the prosecutor to use this photograph at the guilt phase. (32 RT 3880.)

The sympathetic power of the photograph — and therefore its prejudicial effect — is evident from the transcript of the exchange between counsel and the court. The trial court immediately noted that it was a nice looking dog, and asked what happened to it after Gallego's death. (32 RT 3876.)[165] In ruling, the trial court noted that it was a nice dog, and that he likes dogs. (32 RT 3880.)

This Court has held that a trial court errs when it admits a photograph of a murder victim while she was alive if the photograph "... has no bearing on any contested issue in the case." (*People v. Hendricks* (1987) 43 Cal.3d 584, 594; *People v. Ramos* (1982) 30 Cal.3d 553, 578.) Here, as in *Hendricks* and *Ramos*, the victim's identity was not in dispute; and this photograph was not used to establish her identity.

Under Evidence Code section 350, a trial court "has no discretion to admit irrelevant evidence." (*People v. Turner, supra,* 37 Cal.3d at p. 321; see *People v. Anderson, supra,* 43 Cal.3d at p. 1137, overruled on other grounds, *People v. Adcox, supra,* 47 Cal.3d at p. 233.) The enlarged photograph including Ms. Gallego's dog was unnecessary to identify her and should have been excluded on that basis alone.

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[165] The photograph was taken in Brazil, where the dog remained after she came to the United States. The prosecutor believed the dog to be deceased by the time of trial. (32 RT 3876.)

This court has also recognized that pictures of victims while alive tend to arouse sympathy for the victims. (*People v. Kelly* (1990) 51 Cal.3d 931, 964.) The sentimental picture chosen here — depicting the victim with her beloved dog — was calculated to improperly appeal to the jurors' sympathies and induce them to return a verdict based on emotion, rather than reason and an understanding of the law.

Because the trial exhibit was not relevant to any contested issue, and because any probative value it might have had was outweighed by the prejudicial effect of its appeal to the sentiments of the jurors, its admission was erroneous, and the trial court abused its discretion in allowing the prosecutor to present it. (*People v. Cooper* (1991) 53 Cal.3d 771, 821.) Moreover, the admission and use of this irrelevant exhibit, calculated to "inflame" and "enrage" the jury against Parker, violated appellant's constitutional rights to a fair trial, impartial jury, and due process under the Fifth, Sixth, Eighth and Fourteenth Amendments, and to the heightened due process required in capital cases under the Eighth Amendment. (*Ferrier v. Duckworth, supra,* 902 F.2d at p. 548; see *Hicks v. Oklahoma, supra,* 447 U.S. at p. 346; *Godfrey v. Georgia* (1980) 446 U.S. 420, 428-429; *Stringer v. Black* (1992) 503 U.S. 222; *Beck v. Alabama, supra,* 447 U.S. at p. 638 and fn. 13.)

The prosecutor's calculated use of the photo to appeal to the jury's passions and prejudices also constituted prosecutorial misconduct. Prosecutorial misconduct is defined as the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury. (*People v. Hill* (1998) 17 Cal.4th 800, 819; *People v. Espinosa* (1992) 3 Cal.4th 806, 820; *People v. Pitts* (1990) 223 Cal.App.3d 606, 691.) Additionally, "an appeal for sympathy for the victim is out of place during an objective determination of guilt." (*People v. Stansbury* (1993) 4 Cal.4th 1017, 1057,

revd. on other grounds sub nom. *Stansbury v. California* (1994) 511 U.S. 318 [114 S.Ct. 1526; 128 L.Ed.2d 293].) This misconduct violated appellant's constitutional rights to a fair trial, impartial jury, and due process under the Fifth, Sixth, Eighth and Fourteenth Amendments. (See *People v. Pitts*, *supra*, 223 Cal.App.3d 606; *Hicks v. Oklahoma*, *supra*, 447 U.S. at p. 346; *Godfrey v. Georgia*, *supra*, 446 U.S. at pp. 428-429; *Stringer v. Black*, *supra*, 503 U.S. 222; *Beck v. Alabama*, *supra*, 447 U.S. at p. 638 and fn. 13.)

Because the error resulted in a violation of appellant's constitutional rights, reversal is required unless respondent can demonstrate that the error is harmless beyond a reasonable doubt. (*Chapman v. California, supra,* 386 U.S. at p. 24.) In this case, the jury returned the most severe possible verdicts as to guilt and penalty against Mr. Parker, a man with no prior criminal record and a deeply sympathetic past history, for the killing of his roommate. Under these circumstances, it cannot reasonably be said that the erroneous presentation of evidence inciting the sympathies of the jurors against Mr. Parker was harmless under any standard.

9. THE TRIAL COURT IMPROPERLY LIMITED IMPEACHMENT THAT THE DEFENSE COULD OFFER REGARDING THE RELIABILITY OF STATEMENTS TO WHICH JAILHOUSE INFORMANT EDWARD LEE TESTIFIED.

Appellant's confinement and sentence are illegal, unconstitutional, and void under the Sixth, Eighth and Fourteenth Amendments to the United States Constitution, under Article I, sections 1, 7, 13, 15, 16, and 17 of the California Constitution, and the statutory and decisional law of the State of California, because the trial court unreasonably placed limitations on the cross-examination and impeachment evidence that defense counsel

proffered regarding the unreliability of a jailhouse snitch. This error deprived Mr. Parker of his rights to due process of law, effective assistance of counsel, confrontation and cross-examination, a fair trial by an unbiased jury, and the Eighth Amendment guarantee of reliability in capital determinations of guilt, death eligibility, and sentencing.

Appellant Parker refers to and incorporates herein the allegations of Argument 11, regarding the trial court's error in precluding cross-examination of Det. Ott regarding deviations from standard police practices in three other cases, bearing on his credibility and reliability, and also bearing on the reliability of jailhouse informant Edward Lee's testimony regarding alleged statements attributed to appellant Parker.

Appellant also refers to and incorporates herein the allegations of Argument 20, regarding an overwhelming pattern of prosecution misconduct in Mr. Parker's case. The conduct of police officers, particularly a lead investigator, is part of that pattern.

A. Factual And Procedural Background.

At the preliminary hearing, Det. Ott testified about an interview he had conducted of Edward Lee, a jail inmate. Lee said he was in the same cell as appellant Parker for a couple of days, and Lee alleged that Parker admitted killing someone; that he did it for the girl's money; that he was going to marry her so she could obtain citizenship, and she was going to give him money. Lee said that she was going to move money out of her bank account and into Parker's bank account. According to Lee, Parker talked about cutting off the victim's fingertips, having tried to burn them. (Preliminary hearing at 121.) Lee said that Parker killed Ms. Gallego because he wanted all of her money; he was to be paid $2,000, but felt she might have $11,000-12,000 in her savings account. (Preliminary hearing at 122.)

Pretrial proceedings addressed issues of Mr. Lee's lengthy rap sheet, stretching over 35 years, which included convictions for robbery, burglary, felony possession of narcotics, using false identification, lying to an officer, among other events. (38 RT 4934-4936.) A restraining order was issued after Lee abused and threatened to kill his elderly mother; yet Lee claimed not to be a violent guy. (38 RT 4937-4939.) In addition, Lee was under the influence and in possession of drugs when arrested, a couple of days before Mr. Parker allegedly made admissions to Lee. (38 RT 4940.)

The trial court ruled that a misdemeanor conviction could be proven by the court record, and that impeachment would be allowed if Lee denied the underlying conduct. (38 RT 4946-4947.) There was no conviction for the incident where Mr. Lee's mother was abused, along with her boyfriend, although a temporary restraining order was issued. (38 RT 4948-4950.) However, Lee violated the restraining order, issued another threat to kill his mother, and was convicted of violating the order. (38 RT 4951-4953.)

The trial court recognized that the credibility of Mr. Lee's testimony was critical, because that testimony provided evidence of both murder and the financial gain special circumstance. (38 RT 4958.)

The trial court was inclined to admit the 1990 possession for sale conviction, but less sure about misdemeanors and older crimes. (38 RT 4960-4961.) Defense counsel argued that these are relevant because Lee admitted to them in court in 2002, and at time was very aware of the three strikes law; he began his conversation with Det. Ott by noting how much time his current crimes carried, and Ott said he could not promise anything. (38 RT 4962.) Lee brought that up two weeks ago, while speaking with the prosecutors in Mr. Parker's case, and told the prosecutors what he was looking for. (38 RT 4963-4964.) As noted by the defense, Mr. Lee's statements have included more detail over time; and he repeatedly

expressed concern about how much time he would be serving for his own crimes. (38 RT 4966-4968.)

The trial court ruled that Mr. Lee's felony convictions for robbery and burglary were too old, and would not be admitted. (38 RT 4972.)

The defense noted that Det. Ott was the supplier of Lee's reports on Mr. Parker; and asserts that Lee was briefed by Det. Ott before his recorded statements. Moreover, Lee was housed in an area where he had access to newspapers and television, and thus had sources of information about the state's theory of the case. The defense stated its intention to introduce evidence of Det. Ott's deviations from standard police practices in other cases. (38 RT 4974-4975; see Argument 11.)

Mr. Lee recounted on direct examination his allegations that Mr. Parker had confessed to this crime in the jail. (40 RT 5330-5347.) On cross-examination, appellant Parker's counsel was precluded from exploring the following:

> Prior violent criminal activity, including Lee's convictions for robbery and burglary. (38 RT 4972.)
>
> The full extent of Mr. Lee's drug history and related arrests.
>
> The specifics of Mr. Lee's arrest for violating a restraining order obtained by Mr. Lee's mother. Lee testified that he was home with his mother all the time since that arrest. (40 RT 5352.) Lee violated the restraining order, issued another threat to kill his mother, and was convicted of violating the order. (38 RT 4951-4953.)
>
> Counsel were not permitted to inquire about Lee's representation on a different matter. (40 RT 5366.)

In addition, as set forth more fully in Argument 11, trial counsel were prevented from fully exploring the credibility of Det. Ott, who contacted Lee and reported on that contact.

B. Legal Principles.

The Sixth Amendment to the United States Constitution, made applicable to the states through the Fourteenth Amendment (*Pointer v. Texas* (1965) 380 U.S. 400, 403-405) provides that a defendant in a criminal case has a right to confront the witnesses who testify against him, and to cross-examine them. (*California v. Green* (1970) 399 U.S. 149; *Ohio v. Roberts* (1980) 448 U.S. 56.)

> "The substance of the constitutional protection is preserved to the prisoner in the advantage he has once had of seeing the witness face to face, and of subjecting him to the ordeal of a cross-examination. This, the law says, he shall under no circumstances be deprived of ...." (*Id.* at 124 S.Ct. p. 1367, citing *Mattox v. United States* (1895) 156 U.S. 237, 244 [39 L.Ed. 409; 15 S.Ct. 337].)

(*Crawford v. Washington* (2004) 541 U.S. 36 [124 S.Ct. 1354; 158 L.Ed.2d 177].) Cross examination is critical to the ability of an accused to subject evidence to adversarial testing. (See, e.g., *Strickland v. Washington, supra,* 466 U.S. at p. 685.)

The United States Supreme Court, in *Gideon v. Wainwright, supra,* 372 U.S. 335, established that indigent criminal defendants have a right to counsel to aid and assist them in defending against charges, under the Sixth Amendment right to counsel and the Fourteenth Amendment due process clause, which requires the states to provide those guarantees of the Bill of Rights essential to a fair trial.

> That government hires lawyers to prosecute and defendants who have the money hire lawyers to defend are the strongest indications of the widespread belief

> that lawyers in criminal courts are necessities, not luxuries. The right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours. From the very beginning, our state and national constitutions and laws have laid great emphasis on procedural and substantive safeguards designed to assure fair trials before impartial tribunals in which every defendant stands equal before the law.

(*Gideon v. Wainwright*, *supra*, 372 U.S. at p. 344.) The provision of counsel is critical to the fairness of a criminal trial:

> Thus, a fair trial is one in which evidence subject to adversarial testing is presented to an impartial tribunal for resolution of issues defined in advance of the proceeding. The right to counsel plays a crucial role in the adversarial system embodied in the Sixth Amendment, since access to counsel's skill and knowledge is necessary to accord defendants the "ample opportunity to meet the case of the prosecution" to which they are entitled.

(*Strickland v. Washington*, *supra*, 466 U.S. at p. 685.) The High Court recognizes the critical role of counsel in ensuring a fair trial:

> The Sixth Amendment recognizes the right to the assistance of counsel because it envisions counsel's playing a role that is critical to the ability of the adversarial system to produce just results. An accused is entitled to be assisted by an attorney, whether retained or appointed, who plays the role necessary to ensure that the trial is fair.

(*Ibid.*) In this instance, it was not trial counsel's failure to recognize the necessity of cross-examination of the jailhouse informant; rather, the trial court's restriction of that cross-examination impaired counsel's ability to properly defend.

The refusal to permit cross-examination of jailhouse snitch Edward Lee unconstitutionally and impermissibly lightened the state's burden of

proof, by artificially inflating his credibility and reliability. (See, e.g., *Francis v. Franklin* (1985) 471 U.S. 307, 317-318; *Sandstrom v. Montana, supra,* 442 U.S. at pp. 523-524.)

There is the requirement of heightened reliability of verdicts in capital cases. Thus, in capital cases "the Eighth Amendment requires a greater degree of accuracy and fact finding than would be true in a non-capital case." (*Gilmore v. Taylor* (1993) 508 U.S. 333, 342.) Further, under the Eighth Amendment and its application to the states through the due process clause of the Fourteenth Amendment, this heightened reliability requirement applies to both the guilt and sentencing phases of a capital trial. (*Beck v. Alabama, supra,* 447 U.S. at pp. 637-638.)

C. Conclusion.

Reversal is required. The state cannot show beyond a reasonable doubt that the errors were harmless. (*Chapman v. California, supra,* 386 U.S. at p. 23.)

10. THE TRIAL COURT ERRED IN PERMITTING THE PROSECUTION TO SHOW A WITNESS A HIGHLY INFLAMMATORY PHOTOGRAPH TAKEN DURING DR. SPERBER'S EXPERIMENT WITH THE VICTIM'S BODY, SUPPOSEDLY AS A MEANS OF HAVING THE WITNESS IDENTIFY THE RANDOM HANDCUFFS USED IN THAT EXPERIMENT.

Appellant's confinement and sentence are illegal, unconstitutional, and void under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution, under Article I, sections 1, 7, 13, 15, 16, and 17 of the California Constitution, and the statutory and decisional law of the State of California, because the trial court unreasonably permitted the prosecution to show witness Marilyn Powell a photograph of the victim's

body arranged with random handcuffs, taken during the experiment by forensic dentist Norman Sperber, DDS. This error violated appellant Parker's rights to due process of law, equal protection of law, confrontation, and the Eighth Amendment requirement of reliability in the determination of guilt, death eligibility, and punishment.

This display to the juror was supposedly for the purpose of having her identify the handcuffs that she had seen Mr. Parker used years earlier. The handcuffs used in this display were random handcuffs taken from a box of spares in the evidence room; no handcuffs were recovered from Mr. Parker or the scene. The use of this highly inflammatory photograph was, moreover, designed to inflame both the jurors and the witness.

Appellant Parker refers to and incorporates Argument 3, regarding the trial court's error in allowing the testimony of Dr. Sperber and admission of the photographs taken during his experiment. Appellant also refers to and incorporates herein Argument 5, regarding the erroneous admission of gruesome photographs.

On June 28, 2002, the trial court considered the defense objection to the prosecution showing witness Marilyn Powell a pair of handcuffs arranged on the victim's body by Dr. Sperber. Defense counsel argued that no handcuffs were found, that Mr. Parker did not handcuff Ms. Gallego, and an objection was interposed on grounds of relevance and Evidence Code section 352. (41 RT 5402-5403.) The prosecution stated that witness Powell had described Mr. Parker locking his bicycle using heavy handcuffs joined with a metal chain. (41 RT 5403-5404.) Defense counsel suggested using the bailiff's handcuffs as a demonstrative aid instead, arguing that it was unnecessary to show an emotional witness such a prejudicial photograph, and one with such tenuous relevance. (41 RT 5404-5406.)

Trial counsel also submitted that this was just another attempt to get gratuitous and prejudicial material before the jury. (41 RT 5410.) The trial court ruled that the photo was not a problem because it had already been shown to the jury, and that this photograph was the least offensive of those prepared by Dr. Sperber. (41 RT 5409-5410.)

Thereafter, witness Powell testified that during her previous relationship with Mr. Parker over a few months in 1998, he used handcuffs to lock his bicycle. She described them as like the ones that police officers use: heavy, strong, silver, the two cuffs connected with links. (41 RT 5459-5460.) Trial counsel objected for lack of foundation, when the witness added that she had not seen many handcuffs, but the objection was overruled, and Ms. Powell testified that the handcuffs in the inflammatory photograph appeared to be the ones that Mr. Parker had used. (41 RT 5460.)

The trial court abused its discretion by admitting this gruesome and inflammatory photograph, which was irrelevant and cumulative because the matters depicted therein were not at issue, and were well-described otherwise. (*People v. Gallego, supra,* 52 Cal.3d at p. 197.)

This Court has held, in conformance with Evidence Code section 350, that a trial court "... has no discretion to admit irrelevant evidence." (*People v. Turner, supra,* 37 Cal.3d at p. 321; *see People v. Anderson, supra,* 43 Cal.3d at p. 1137, overruled on other grounds *People v. Adcox, supra,* 47 Cal.3d at p. 233.) The photographs at issue served no evidentiary purpose; they worked only to inflame the jury. Here, as in *Turner*, "[n]either the court nor the prosecution articulated the relevance of the position of the bodies or the manner of the infliction of the wounds to the issues presented." (*People v. Turner, supra*, 37 Cal.3d at p. 321.)

In *People v. Crittendon, supra,* 9 Cal.4th 83, this Court found specific reasons why the disputed photographs were necessary to advance the state's case.. (*People v. Crittendon, supra,* 9 Cal.4th at p. 134.) By contrast, the photograph shown to witness Powell advanced no legitimate purpose in the state's case. The witness was not a witness to the homicide or the autopsy or Dr. Sperber's experiment with the victim's body. The handcuffs did not belong to Mr. Parker, nor were any handcuffs found during the investigation of this case.

If it was truly necessary to provide a set of handcuffs for demonstration purposes, to see if they looked similar to handcuffs that Mr. Parker had owned some years earlier, a set of handcuffs could easily have been provided. The only conceivable purpose in showing this witness the photograph of the victim's body with handcuffs arranged on it was to again inflame the jurors, and to horrify the witness on the stand.[166] That is an illegitimate purpose.

Reversal is required.

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[166] Marilyn Powell had an intimate relationship with Mr. Parker for several months in 1998. (41 RT 5451.) The obvious but unspoken point that the prosecutor wished to convey was that Ms. Powell herself could have ended up dead and mutilated, despite the lack of any evidence of prior violent acts on the part of Mr. Parker. As set forth more fully in Arguments 2, 5, 20, and 22, this was part of a pattern of misconduct and overreaching on the part of the prosecutor in this case.

11. THE TRIAL COURT ERRONEOUSLY PRECLUDED DEFENSE COUNSEL FROM QUESTIONING DET. OTT ABOUT HIS RECORD OF DEVIATIONS FROM STANDARD POLICE PRACTICE, PREVENTING JURORS FROM ASSESSING HIS CREDIBILITY AND COMPETENCE.

The trial court unreasonably and erroneously prevented appellant's trial counsel from cross-examining the lead investigator, Det. Ott, about deviations in his record from standard police practices, precluding a full and fair evaluation by jurors of the detective's credibility and competence. These errors violated appellant Parker's rights under the 5th, 6th, 8th and 14th Amendments to the United Stated Constitution, and corollary provisions of the California Constitution, by undermining his rights to due process of law, a fair trial, the right to confrontation and cross-examination, effective assistance of counsel, and reliable and non-arbitrary determinations of guilt, capital eligibility, and sentence. The error impermissibly lessened the prosecution's burden of proof by inviting jurors to assume, although evidence existed to the contrary, that the detective was particularly trustworthy and well-trained.

A. Factual Background.

During the defense case in chief at the guilt phase, the trial court took up an issue about the scope of cross-examination of Det. Ott, the lead investigator in this case, and three instances of his deviations from standard police practices in other cases. (42 RT 5735 et seq.) The three instances involved (1) the *Westerfield* case, which was then being tried in the same courthouse, right down the hallway[167]; (2) the *Reginald Curry* case, in

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[167] *People v. Westerfield* (*David Alan*) is currently pending before this Court on automatic appeal. (S112691.) At the time of appellant Parker's trial, Mr. Westerfield's trial was also occurring in the same San Diego courthouse. (SCD 165805.)

which an arrest warrant affidavit prepared by Ott overplayed the certainty of the alleged eyewitness identification; and (3) the *Zavala* case [in which a suspect interview was not videotaped in its entirety, but Ott's police report said that it was]. (42 RT 5735- 5737.)

The defense in this case contended that Mr. Parker denied making statements to the jailhouse informant Ed Lee, who already seemed to know certain facts in Mr. Parker's case. (42 RT 5737.)[168] Parker's counsel also asserted that there are gaps in the recorded interview of Mr. Parker by Det. Ott, who had already interviewed jailhouse snitch Lee alone, before conducting an interview with Parker accompanied by another detective. (42 RT 5738-5739.) There is reason to suspect that Ott "briefed" jailhouse informant Lee before the formal recorded interview of Lee as a witness in this case. (42 RT 5740-5741.)

In the *Curry* case, the defense stated that Det. Ott instructed another police officer, Keyser, to sign an affidavit stating that a witness gave a positive identification, when the third police officer who conducted the lineup in fact reported that there were similarities, and when confronted with differences between an alleged positive identification and the report from the officer conducting the lineup, Ott reportedly said, "We do this all the time. (42 RT 5742-5743.)

Ott and Keyser were also involved with the *Westerfield* case. (42 RT 5744.) Det. Ott was to be called to answer questions about deviations from protocol in the Westerfield case the next day. (42 RT 5750.)

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[168] Appellant Parker refers to and incorporates herein the allegations of Argument 9, concerning the admission of Mr. Lee's questionable testimony about alleged admissions by appellant.

Regarding the Zavala case, the trial court felt it was irrelevant since that case was settled before trial. However, when the defense lawyer in Zavala reviewed the tape, the Miranda portion of the interrogation was not on the tape. (42 RT 5744-5745.) The prosecutor in Mr. Parker's case suggested that was not relevant here, since the prosecution did not intend to introduce Mr. Parker's statement at the guilt phase. (42 RT 5745.) Parker's trial counsel stated he wanted the jury to know that as with the 45 minute gap in the recording in Zavala's case, there was a gap in Mr. Parker's tape. (42 RT 5746-5747.)

The prosecution argued that the issues with the tapes are not relevant, since the defendant's statements were not being offered against him. (42 RT 5749.) The prosecutor argued that the issues with the tapes are not relevant, because the defendant's statements were not being offered against him. (42 RT 5749.) The prosecutor further argued that there should be a prima facie showing that Ott did something wrong in this case before the defense should be allowed to question him about anomalies in other cases, for impeachment purposes. (42 RT 5752.) She argued relevance and Evidence Code section 352 as the basis for precluding this cross-examination. (42 RT 5753.)

The defense noted that jailhouse snitch Ed Lee made a statement to prosecutor Bowman that Det. Ott came and told him about Mr. Parker's case. (42 RT 5755.) Jailhouse informant Lee was controlling the flow of interviews of himself. (42 RT 5756.) It is reasonable to assume, the defense argued, that Det. Ott was saving the taping for after he got a "hit"; after all, Det. Ott also contacted another witness, Leilani Kaloha (initially a defense witness), and tried to get a statement directly from her. (42 RT 5757.)

Lee was the only one interviewed and taped by Ott; others in the module were not. (42 RT 5758-5759.) Defense counsel argued that the idea of the videotape malfunctioning is disingenuous; that Mr. Parker was a victim of Det. Ott's practices, as illustrated by other cases. (42 RT 5760.) The defense submitted that anomalies with Det. Ott's interview of jailhouse informant Lee make the issue of his practices "not speculative. (42 RT 5763.) In the tape, Lee was focused on the amount of his own jail time, so his informing was not altruistic in nature. Lee is in criminal trouble a lot, and had already picked up a third strike case. (42 RT 5764.) Even Lee's probation officer could not believe that Lee got probation. (42 RT 5765.)

The trial court equated the cross-examination of the detective on instances of misconduct or error in other cases to prior conduct being used to prove a crime, concluding that the jury shouldn't be invited to speculate. (42 RT 5776.)[169] The trial court therefore barred cross-examination as to all three instances of misconduct. (42 RT 5778-5779.) The trial court stated that it would need more than just a "passing statement" from jailhouse informant Lee that Ott came to see him and told him about the case to permit questioning pointing to Ott's moral turpitude. (42 RT 5780-5781.)[170]

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[169] To be clear — Det. Ott was not accused of a crime. He was not on trial; as a witness, he had no trial rights at stake. Mr. Parker was accused of a capital offense, and he had everything at stake. The heart of the matter is that there were reasons to question Det. Ott's practices, and Mr. Parker's jury never heard of them. They were therefore encouraged to *assume* that all of the detective's work in this case was unassailable.

[170] Appellant cannot help but note that by contrast, this trial court permitted every kind of horrible insinuation against Mr. Parker, despite a lack of evidence that the prosecution's theories ever occurred. A forensic dentist was allowed to claim that marks on the victim's body were caused by handcuffs, even though no handcuffs were found. (See Arg. 3.) A single
(footnote continued on next page)

B. Legal Principles.

The Sixth Amendment right to confrontation, made applicable to the states through the Fourteenth Amendment (*Pointer v. Texas, supra,* 380 U.S. at pp. 403-405) provides that a defendant in a criminal case has a right to be confronted with the witnesses against him, and to cross-examine them. (*California v. Green, supra,* 399 U.S. 149; *Ohio v. Roberts, supra,* 448 U.S. 56; see also, *Davis v. Alaska* (1974) 415 U.S. 308, and *United States v. Bagley* (1985) 473 U.S. 667.)

> "The substance of the constitutional protection is preserved to the prisoner in the advantage he has once had of seeing the witness face to face, and of subjecting him to the ordeal of a cross-examination. This, the law says, he shall under no circumstances be deprived of...." (*Id.* at 124 S.Ct. p. 1367, citing *Mattox v. United States* (1895) 156 U.S. 237, 244 [39 L.Ed. 409; 15 S.Ct. 337].)

(*Crawford v. Washington, supra,* 541 U.S. 36.) Cross examination is critical to the ability of an accused to subject evidence to adversarial testing. (See, e.g., *Strickland v. Washington, supra,* 466 U.S. at p. 685.)

Gideon v. Wainwright, supra, 372 U.S. 335, established that indigent criminal defendants have a right to counsel to aid and assist them in defending against charges, under the Sixth Amendment right to counsel and the Fourteenth Amendment due process clause, which requires the states to provide those guarantees of the Bill of Rights essential to a fair trial.

> That government hires lawyers to prosecute and defendants who have the money hire lawyers to defend are the strongest indications of the widespread belief

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(footnote from previous page)
sperm cell on a discarded banana peel was admitted, on the theory that rape with an object had occurred. The prosecutor was allowed to argue torture, though there was no evidence that occurred. (See Arg. 7.)

> that lawyers in criminal courts are necessities, not luxuries. The right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours. From the very beginning, our state and national constitutions and laws have laid great emphasis on procedural and substantive safeguards designed to assure fair trials before impartial tribunals in which every defendant stands equal before the law.

(*Gideon v. Wainwright*, *supra*, 372 U.S. at p. 344.) The provision of counsel is critical to the fairness of a criminal trial:

> Thus, a fair trial is one in which evidence subject to adversarial testing is presented to an impartial tribunal for resolution of issues defined in advance of the proceeding. The right to counsel plays a crucial role in the adversarial system embodied in the Sixth Amendment, since access to counsel's skill and knowledge is necessary to accord defendants the "ample opportunity to meet the case of the prosecution" to which they are entitled.

(*Strickland v. Washington*, *supra*, 466 U.S. at p. 685.) The High Court recognizes the critical role of counsel in ensuring a fair trial:

> The Sixth Amendment recognizes the right to the assistance of counsel because it envisions counsel's playing a role that is critical to the ability of the adversarial system to produce just results. An accused is entitled to be assisted by an attorney, whether retained or appointed, who plays the role necessary to ensure that the trial is fair.

(*Ibid.*) In this instance, it was not trial counsel's failure to recognize the necessity of cross-examination of Det. Ott in order to expose his pattern of practices outside the norm for professional police officers; rather, the trial court's preclusion of that cross-examination impaired counsel's ability to properly defend.

The refusal to permit cross-examination of Det. Ott about other instances in his record of improper actions unconstitutionally and impermissibly lightened the state's burden of proof, by artificially inflating his credibility and reliability. (See, e.g., *Francis v. Franklin, supra,* 471 U.S. at pp. 317-318; *Sandstrom v. Montana, supra,* 442 U.S. at pp. 523-524.)

There is the requirement of heightened reliability of verdicts in capital cases. Thus, in capital cases "the Eighth Amendment requires a greater degree of accuracy and fact finding than would be true in a non-capital case." (*Gilmore v. Taylor, supra,* 508 U.S. at p. 342.) Further, under the Eighth Amendment and its application to the states through the due process clause of the Fourteenth Amendment, this heightened reliability requirement applies to both the guilt and sentencing phases of a capital trial. (*Beck v. Alabama, supra,* 447 U.S. at pp. 637-638.)

C. Conclusion.

Reversal is required. The state cannot show beyond a reasonable doubt that the errors were harmless. (*Chapman v. California, supra,* 386 U.S. at p. 23.)

12. THERE IS INSUFFICIENT EVIDENCE TO SUPPORT THE LYING IN WAIT MURDER CHARGE AND LYING IN WAIT SPECIAL CIRCUMSTANCE, AND THAT SPECIAL CIRCUMSTANCE IS UNCONSTITUTIONALLY VAGUE AND OVERBROAD.

A. Factual and Procedural Background.

A felony complaint was filed on August 17, 2000, charging him with the murder of Patricia Gallego on or about August 12, 2000, in violation of Penal Code section 187 (a), and the following special circumstances: by

means of lying in wait (Pen. Code, § 190.2 (a)(15)); while engaged in the commission and attempted commission of rape (Pen. Code, § 190.2 (a)(17)); while engaged in the commission and attempted commission of sodomy (Pen. Code, § 190.2 (a)(17)); and that the murder was intentional and involved the infliction of torture (Pen. Code, § 190.2 (a)(18)). (1 CT 1-3.)

On May 29, 2001, the defense filed a Motion to Set Aside the Information Pursuant to PC 995. (1 CT 59-77.) On December 17, 2001, the District Attorney responded with the People's Opposition to Defense Motion to Dismiss Under PC 995; Points and Authorities in Support Thereof. (2 CT 275-290.) The defendant's Motion to Set Aside the Information Pursuant to PC 995 was amended with a handwritten notation stating, "Granted as to PC 190.2 (a)(18) torture spec. alleg [sic] only." (1 CT 59.) On January 23, 2002, the defense filed a Supplemental Argument in Support of Defendant's Motion to Dismiss. (PD motion 1; 3 CT 589-591.)

As to the lying in wait special circumstance (Pen. Code, § 190.2 (a)(15)), appellant argued in his PC 995 motion that the evidence was insufficient to support the allegation. (1 CT 69-71.) Citing *Domino v. Superior Court* (1982) 129 Cal.App.3d 1000, 1011, counsel's motion argued that there was no evidence that appellant concealed his purpose and spent a substantial period waiting for the victim, and then immediately began any lethal acts. (1 CT 70.) On the other hand, there was evidence of "cognizable interruptions: between an period of lying in wait and the period when lethal acts occurred. Appellant Parker requested time off from work from August 7 through August 12; Ms. Gallego continued to work through August 10, meaning she came and went for at least four days of the alleged waiting period. There is no evidence of lethal acts flowing from a period of

watchful waiting. The next documented action of Mr. Parker was on August 12, when he endeavored to cash a check for $350. (Ibid.)

At the hearing, the trial court noted that there remained no difference between the lying in wait special circumstance and the lying in wait theory of first degree murder, after February, 2000. (10 RT 807.) Appellant's counsel argued that the change in the law brought the special circumstance into consonance with Domino, which discusses a cognizable interruption separating the lying in wait from the action (10 RT 808.)

An interruption may show abandonment of the lying in wait, which may have been superseded by a later plan or actions. (10 RT 810.) Moreover, intent to kill is required, during the period of lying in wait. (10 RT 810-811.) All that is presented by the state is the letter requesting time off; circumstantial evidence contained in other writings, such as the alleged to do list, is undated. (10 RT 811.) There is no evidence of concealment of purpose until August 12, presumably after the lethal events. (10 RT 812.)

B. There is Insufficient Evidence to Support a True Finding on the Lying-in-Wait Special Circumstance.

A defendant may not be convicted of a crime if the evidence presented at trial is insufficient to persuade a *rational* factfinder beyond a reasonable doubt that the defendant is guilty. (*Jackson v. Virginia* (1979) 443 U.S. 307, 319, emphasis added.)

The Eighth and Fourteenth Amendments to the federal constitution require heightened standards of reliability in capital cases. (*Woodson v. North Carolina, supra,* 428 U.S. at p. 305.) As stated by Justice Mosk in his concurring opinion in *People v. Jones, supra,* 17 Cal.4th 279:

> ... [B]ecause the death penalty, once exacted, is irrevocable, the need for the most reliable possible determination of guilt and penalty is paramount as a matter of policy. It is also constitutionally compelled:

> "[T]he Eighth Amendment imposes heightened reliability standards for both guilt and penalty determinations in capital cases ...."

(*Id.* at p. 321, quoting *People v. Cudjo, supra,* 6 Cal.4th at p. 623, conc. opn. of Mosk, J.) *See also Beck v. Alabama, supra,* 447 U.S. at p. 638 [the heightened reliability required by the Eighth and Fourteenth Amendments in capital cases applies to both the guilt and penalty determinations].)

In this case, the defendant and victim were roommates. The evidence that appellant Parker requested time off work does not demonstrate that he used this time to wait and watch, with the intent of killing Ms. Gallego; clearly, Ms. Gallego continued to come and go, working through the evening of August 10, 2000; there was thus a substantial interruption in the alleged period of watching and waiting. That Mr. Parker later undertook to conceal the crime does not demonstrate a concealment of purpose beforehand; such actions might be undertaken when a killing has arisen from a sudden heat of passion.

To apply the lying in wait special circumstance under these facts is to render it so broad that it is meaningless. Co-habitants are expected to occupy the same living space. Persons requesting time off from work cannot rationally be presumed to have murderous intentions. Concealment of bad acts after they are performed is not, and cannot be, proof that the acts were planned and that an intent to kill was concealed before those acts occurred.

C. The Lying-In-Wait Special Circumstance, as Applied, is Unconstitutionally Vague and Overbroad.

The lying in wait circumstance provision set forth in former California Penal Code section 190.2, subd. (a)(15), which provided one of the statutory bases for petitioner's being deemed death-eligible, violates the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States

Constitution and article I, sections 1, 7, 15, 17 and 24 of the California Constitution, in that the special circumstance provision, which applies to a substantial portion of all premeditated murders, fails to adequately narrow the class of persons eligible for the death penalty or to provide a meaningful basis for distinguishing between those who are subject to that penalty and those who are not.

Appellant's death-eligibility rests in part upon the finding of a lying in wait special circumstance alleged pursuant to former California Penal Code section 190.2, subd. (a)(15) [Initiative adopted November 7, 1978; re-enacted by Initiative adopted June 6, 1990].[171] This provision read as follows:

> (15) The defendant intentionally killed the victim while lying in wait.

As construed by the California Supreme Court, this special circumstance provision does not require proof of the defendant's physical concealment from, or an actual ambush of, the victim. It is satisfied by proof of a concealment of purpose, over a substantial period of watching and waiting for an opportune time to act, followed by a surprise attack on the unsuspecting victim. (*People v. Morales* (1989) 48 Cal.3d 527, 554-557.) As so construed, the special circumstance provision applies to almost all premeditated killings. As explained by Justice Mosk in his dissent in *Morales*:

> this special circumstance does not distinguish the few cases in which the death penalty is imposed from the many in which it is not. Indeed, it is so broad in scope as to embrace virtually all intentional killings. Almost always the perpetrator waits, watches, and conceals his

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[171] The predecessor statute did not include a lying in wait special circumstance. (Former California Penal Code section 190.2 [Stats 1977, ch. 316].)

> true purpose and intent before attacking his victim; almost never does he happen on his victim and immediately mount his attack with a declaration of his bloody aim.

(*People v. Morales, supra*, 48 Cal.3d at p. 575 (Mosk, J., dissenting).)

As Justice Mosk notes in his *Morales* dissent, there is a second reason why this special circumstance provision, in addition to its failure to narrow, is unconstitutional. It also fails to provide, as required by the Eighth Amendment, a meaningful basis for distinguishing between those who are subjected to the death penalty and those who are not. (*Godfrey v. Georgia, supra,* 446 U.S. at p. 427; *Lowenfield v. Phelps* (1988) 484 U.S. 231, 244; *Zant v. Stephens*, *supra,* 462 U.S. at p. 877) As Justice Mosk put it, "the killer who waits, watches, and conceals is no more worthy of blame or sensitive to deterrence than the killer who attacks immediately and openly." (*People v. Morales*, *supra*, 48 Cal.3d at p. 575 (Mosk, J., dissenting).)

In general, due process requires that a criminal statute "must be definite enough to provide a standard of conduct for those whose activities are proscribed as well as a standard for the ascertainment of guilt by the courts called upon to apply it." (*People v. McCauqhan* (1957) 49 Cal.2d 409, 414; *People v. Superior Court* (*Engert*) (1982) 31 Cal.3d 797, 801 (emphasis omitted).) Where the statute defines capital eligibility, the Eighth Amendment provides additional requirements: (1) the death eligibility criterion — the special circumstance under the California system — must provide a principled means of distinguishing those who receive the death penalty from those who do not, and (2) must adequately inform the jury of what it must find to impose the death penalty. (*Maynard v. Cartwright* (1988) 486 U.S. 356.) The lying-in-wait special circumstance fails to provide notice, guidance or any principled method to identify a class of

murderers who are more deserving of death. The misuse in this case provides a striking example of how this ill-defined special circumstance is merely a vehicle for arbitrariness and capriciousness.

California's capital sentencing scheme, far from narrowing the circumstances under which capital punishment may be imposed, instead is exceptionally broad in scope, encompassing many special circumstances permitting capital eligibility. The "lying in wait" special circumstance has been construed "lying in wait" broadly.

The application of the "lying in wait" special circumstance in this case stretches this already extraordinarily broad statutory factor beyond all recognition. First, the instructions invited a true finding on the special circumstance without regard to personal culpability, by stating it must be proven only that "a" defendant intentionally killed the victim, and that the homicide occurred while "a" defendant was lying in wait. (9 CT 2031.)

Second, the instructions required no causal *or* intentional nexus between the homicide and the lying in wait, only that the murder was committed "while" "a" defendant was lying in wait. (9 CT 2031.)

Thus, as applied to appellant Parker under the circumstances of this case, the lying in wait special circumstance instruction violated both major aspects of Eighth Amendment jurisprudence in its overbreadth: the requirement of individualized sentencing, and the requirement that death eligibility be adequately narrowed and channeled to avoid arbitrary and capricious application of capital punishment. (*Woodson v. North Carolina, supra,* 428 U.S. at p. 304; *Zant v. Stephens, supra,* 462 U.S. at p. 879.)

The application of the lying in wait special circumstance to appellant Parker amounts to strict liability for being responsible for the death of his roommate, catapulting an act in the heat of passion into capital eligibility.

As the United States Supreme Court observed in *In re Winship, supra,* 397 U.S. at p. 364, "the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." Federal due process principles require the state to shoulder the burden of proving beyond a reasonable doubt every fact necessary to the crime charged. (*Sandstrom v. Montana, supra,* 442 U.S. 510 [conclusive presumption of intent]; see also, *Connecticut v. Johnson* (1983) 460 U.S. 73.) The failure of a court to instruct the jury on an essential element of the crime charged (or in this case, that the culpability of each defendant was to be considered separately) is the legal equivalent of directing a verdict for the prosecution on that issue. It is not subject to a harmless error analysis. It is error per se. (*Rose v. Clark* (1986) 478 U.S. 570, *Connecticut v. Johnson*, supra, 460 U.S. 73; *Jackson v. Virginia, supra,* 443 U.S. 307.)

A statutory "narrowing" factor which fails to genuinely narrow the class of persons on whom a death sentence may be imposed permits an even greater risk of arbitrariness than the statutes considered as a whole in *Furman*, and, like those statutes, is unconstitutional. As was true for those sentenced to die in pre-*Furman* Georgia, being sentenced to die in California upon conviction of murder with a lying in wait special circumstance is "cruel and unusual in the same way that being struck by lightning is cruel and unusual." (*Furman v. Georgia, supra,* 408 U.S. at pp. 309-310 (Stewart, J., concurring).) Accordingly, the lying in wait special circumstance finding and petitioner's death sentence, which rests in part upon that constitutionally inadequate narrowing factor, must be set aside.

D. Reversal is Required.

The trial court erred in failing to grant the motion to dismiss the lying in wait special circumstance, and allowing a true finding by the jury

to stand. For the reasons set forth above and throughout other arguments set forth in this brief, all of which are incorporated herein, reversal of the true finding on the lying in wait special circumstance and the penalty phase verdict are required.

13. THE JURY WAS MISLED AS TO LYING IN WAIT BY THE INSTRUCTIONS AND ARGUMENT.

The court's instructions and the prosecutor's argument misled the jury as to the lying in wait theory of murder, and the lying in wait special circumstance. In essence, the prosecution was permitted to use a factually unsupported and uniquely crafted theory of lying in wait to support a charge of both as a theory of first degree murder, and as a special circumstance elevating that murder charge to a capital charge. These errors violated appellant Parker's rights under the 6th, 8th and 14th Amendments to the United Stated Constitution, and corollary provisions of the California Constitution, by undermining his rights to due process of law, a fair trial, effective assistance of counsel, and reliable and non-arbitrary determinations of guilt, capital eligibility, and sentence.

Appellant Parker refers to and incorporates herein Argument 12, regarding the unconstitutional overbreadth and vagueness of the lying in wait special circumstance. Appellant also refers to and incorporates herein Argument 20, regarding the overwhelming pattern of prosecution misconduct in this case.

During pretrial motions, defense counsel argued that the prosecution chose to use the lying in wait theory twice: to elevate murder to first degree, and then as a death-qualifying special circumstance. Neither theory is supported by the evidence in Mr. Parker's case. (44 RT 6053.)

Defense counsel noted that prior to Proposition 18, there was a meaningful difference between the theory of first degree murder and the special circumstance; with the murder charge, lying-in-wait was meant to be an equivalent to premeditation. (44 RT 6054; See, *People v. Ceja* (1996) 4 cal.4th 1134.) Under Penal Code section 189, murder must be *by means of* lying in wait, whereas the special circumstance specified *while* lying in wait. (44 RT 6054.) That distinction was eliminated by Prop. 18. (44 RT 6055.)

Counsel moved that the trial court to dismiss the lying in wait special circumstance, as it was not supported by evidence. Alternatively, trial counsel argued that there was no meaningful way to differentiate between what is required for the theory of first degree murder and what is required for the special circumstance; therefore, a finding of guilty on the murder charge means an automatic finding of guilty on the special circumstance. (44 RT 6056.) With no distinction, it is possible for the prosecution to argue that ALL domestic killings that were not absolutely spontaneous — husband/wife, boyfriend/girlfriend, roommate (such as in this case) — are both lying in wait murder and an automatic special circumstance. There are no distinctions for the jury to draw on. (44 RT 6056.)

The trial court noted that if there is not difference, it is essentially a dual use, which should be impermissible; *Furman v. Georgia, supra,* 408 U.S. 238 requires a principled way to distinguish capital cases from others. (44 RT 6057-6058.) The trial court nonetheless noted that this Court has frequently found no constitutional difficulty with the use of a felony not

only to support a felony-murder theory, but also to supply a special circumstance based on that felony. (44 RT 6058-6059.)[172]

Trial counsel noted that with a felony murder involving an alleged rape, the acts are clearly defined, and the jury knows what it must find. (44 RT 6060.) Lying-in-wait is left intentionally vague, providing no guidance to the jury at all. A defendant "never knows what the fact is that he needed to argue or state or present to the jury in order to dissuade [jurors] from finding either" premeditated murder on a lying in wait theory, or the lying in wait special circumstance. (44 RT 6061.) Additionally, there is no meaningful distinction between the theory of murder and the special circumstance since Prop. 18. (44:6062-6064.)

The trial court found that constitutional vagueness is not a traditional basis for the 1118.1 motion. Trial counsel countered that constitutionality can be considered at any time. (44 RT 6065.) The court denied the motion. (44 RT 6073.)

The trial prosecutor exploited this constitutional infirmity. In her opening statement, the prosecutor argued that jurors could only come to one conclusion, that appellant Parker was not only guilty of murder, but of methodically planning to take Gallego by surprise, lying in wait; that he did this to rape her and get all her money. (33 RT 3953.)

The jury was instructed as follows on the lying in wait theory of first degree murder:

> Murder which is immediately preceded by lying in wait is murder of the first degree.

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[172] As set forth more fully in Argument 27 regarding the unconstitutionality of the California statutory scheme, incorporated herein, the widespread use of felony murder theories by prosecutors does indeed lead to unreliable and unconstitutional results.

> The term "lying in wait" is defined as a waiting and watching fro an opportune time to act, together with a concealment by ambush or by some other secret design to take the other person by surprise even though the victim is aware of the murderer's presence. The lying in wait need not continue for any particular period of time provided that its duration is such as to show a state of mind equivalent to premeditation or deliberation.
>
> The work "premeditation" means considered beforehand.
>
> The word "deliberation" means formed or arrived at or determined upon as a result of careful thought and weighing of considerations before and against the proposed course of conduct.

(8 CT 1813; 45 RT 5276; CALJIC No. 8.25.)

The jury was also instructed as follows regarding the lying in wait special circumstance:

> To find that the special circumstance, referred to in these instructions as murder by means of lying in wait, is true, each of the following facts must be proved;
>
> 1. The defendant intentionally killed the victim; and
>
> 2. The murder was committed by means of lying in wait
>
> Murder which is immediately preceded by lying in wait is a murder committed by means of lying in wait.
>
> The term "lying in wait" is defined as a waiting and watching for an opportune time to act, together with a concealment by ambush or by some other secret design to take the other person by surprise even though the victim is aware of the murderer's presence. The lying in wait need not continue for any particular period of time provided that its duration is such as to show a state of mind equivalent to premeditation or deliberation.

> The terms "premeditation" and "deliberation" have been defined for you previously.

(8 CT 1833; 45 RT 6287-6288; CALJIC No. 8.81.15.1 (2000 New).)

During closing argument, the prosecutor urged that lying in wait is waiting and watching for an opportune time to act, together with concealment by ambush or other design to take the person by surprise, *even though the victim is aware of murderer's presence*. She further urged that the alleged lying in wait need not continue for any particular length of time. (45 RT 6275.)

The application of the lying in wait murder theory and special circumstance to appellant Parker amounts to strict liability for being present prior to the offense, *in the apartment that he shared with the victim*. The lying in wait theory of murder is supposed to be a substitute for and equivalent to premeditation and deliberation; yet extending it this far, to all who reside with someone who is killed, in no way demonstrates something akin to that mental state.

Indeed, counsel is aware of only one other domestic killing in California — where the victim(s) and defendant lived together in the home where the death(s) occurred — in which this theory of first degree murder has been applied.[173] It is unclear from the briefing in *People v. Nieves* (S092410), in which a mother was accused and convicted of killing her children by arson, whether the prosecutor also employed lying in wait as a theory of first degree murder.

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[173] Counsel has identified all the cases in which a lying in wait special circumstance was charged and found true, then reviewed briefing in the approximately 75 other cases where briefing is available to determine any reasonably similar circumstances. While a few others involve intimate or family relationships, those homicides did not occur in a home the victim and defendant shared (but for one, the *Nieves* case, noted above).

As the United States Supreme Court observed in *In re Winship, supra,* 397 U.S. at p. 364, "the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." Federal due process principles require the state to shoulder the burden of proving beyond a reasonable doubt every fact necessary to the crime charged. (*Sandstrom v. Montana, supra,* 442 U.S. 510 [conclusive presumption of intent]; see also, *Connecticut v. Johnson, supra,* 460 U.S. 73.)

This Court observed in *People v. Sandoval* (2015) 62 Cal.4th 394 that:

> Lying-in-wait murder serves two functions in our criminal law. First, it is a means of proving first degree murder. "Lying in wait is the functional equivalent of proof of premeditation, deliberation, and intent to kill." (*People v. Stanley* (1995) 10 Cal.4th 764, 794-795.) Proof of lying in wait " 'distinguish[es] those cases in which a defendant acts insidiously from those in which he acts out of rash impulse. [Citation.] This period need not continue for any particular length " 'of time provided that its duration is such as to show a state of mind equivalent to premeditation or deliberation.' " ' " (*People v. Mendoza* (2011) 52 Cal.4th 1056, 1073.) Once a sufficient period of watching and waiting is established, together with the other elements of lying-in-wait murder, no further evidence of premeditation and deliberation is required in order to convict the defendant of first degree murder. (*People v. Thomas* (1953) 41 Cal.2d 470, 474.)
>
> Second, lying in wait is also a special circumstance that fulfills the constitutional mandate that " 'a capital sentencing scheme ... "genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder." ' " (*Romano v. Oklahoma* (1994) 512 U.S. 1, 7.) We have held that the lying-in-wait

> special circumstance performs this function because it "has been 'anciently regarded ... as a particularly heinous and repugnant crime.' " (*People v. Edelbacher* (1989) 47 Cal.3d 983, 1023.) A substantial period of watching and waiting is one characteristic that helps distinguish lying-in-wait murder from ordinary murder. Concealment of purpose is not by itself "sufficient to establish lying in wait" because "many 'routine' murders are accomplished by such means." (*People v. Morales* (1989) 48 Cal.3d 527, 557.) But "an intentional murder, committed under circumstances which include (1) a concealment of purpose, (2) a substantial period of watching and waiting for an opportune time to act, and (3) immediately thereafter, a surprise attack on an unsuspecting victim from a position of advantage, presents a factual matrix sufficiently distinct from 'ordinary' premeditated murder to justify treating it as a special circumstance." (*Ibid.*; see *People v. Hajek and Vo* (2014) 58 Cal.4th 1144, 1183 (*Hajek and Vo*).)

(*People v. Sandoval, supra*, 62 Cal.4th at p. 416.) The instructional questions, this Court found, turned on whether lying in wait depended on circumstantial evidence (*id.* at pp. 415-416), which this case surely did. However, as more fully set forth in Argument 15, incorporated herein, the circumstantial evidence instructions given served to relieve the prosecution of its proper burden of proof.

In this case, the application of a lying in wait theory of murder — augmented by the erroneous lying in wait special circumstance allegations — merely gave the prosecution a gift in the form of permitting the jury to skip the requisite mental state for first degree murder. This is constitutionally intolerable.

Reversal is required. The state cannot show beyond a reasonable doubt that the errors were harmless. (*Chapman* v. *California, supra,* 386 U.S. at p. 23.)

14. THE TRIAL COURT ERRED IN PERMITTING THE JURY TO CONSIDER THE FINANCIAL GAIN SPECIAL CIRCUMSTANCE.

Appellant's confinement and sentence are illegal, unconstitutional, and void under the Sixth, Eighth and Fourteenth Amendments to the United States Constitution, under Article I, sections 1, 7, 13, 15, 16, and 17 of the California Constitution, and the statutory and decisional law of the State of California, because the trial court unreasonably permitted the jury to consider the special circumstance of intentional murder carried out for financial gain (§ 190.2, subd. (a)(1)), thus violating appellant's rights to due process of law, a fair trial, equal protection of law, effective assistance of counsel, and the heightened reliability required in capital cases under the Eight Amendment.

The evidence showed that appellant obtained identity and banking information belonging to the victim, cashed one check and attempted to cash another, and submitted credit card applications using variations on the victim's name. On August 12, 2000, Parker cashed a check for $300 written to him from Ms. Gallego's checking account. (36RT 4599, 4603.) On August 14, Parker tried to cash another check from Gallego's checking account at a Wells Fargo bank branch, but computer problems prevented the transaction from completing, and Parker left without cashing the check. (36 RT 4569-4572, 4577.) On August 15, by a telephone transfer using Gallego's account password, the entire balance of Gallego's savings account, $4,670.02, was transferred to his checking account. (40 RT 5195-5197.)

Following Parker's arrest, the police made an exhaustive search of the apartment he and Gallego had shared. The apartment appeared to be

clean. (37 RT 4762.) Evidence from the search showed that Parker lived simply. He had a bicycle, but no car, and possessed no expensive electronics or showy jewelry. (39 RT 5009.) In the living room, the police found a white laundry basket with cleaning supplies. (37 RT 4767-68.) There was a manila envelope containing identification, papers, and photos of Ms. Gallego. (37 RT 4768-69.)

The underlying crime in this case was essentially theft or identity theft. It was not akin to murder for life insurance proceeds, or murder for hire, where the homicide is essential to gain access to a financial reward. There was nothing to preclude appellant from taking these actions while the victim was alive.

In *People v. Adcox, supra,* 47 Cal.3d 207, this Court construed the financial gain special circumstance to exclude murder in the course of a robbery, stating:

> The jury found true two special circumstances: felony-murder-robbery (§ 190.2, subd. (a)(17)(I)) and that "[t]he murder was intentional and carried out for financial gain" (§ 190.2, subd. (a)(1)). Defendant correctly contends that the latter special circumstance finding is invalid on these facts.
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> In *People v. Bigelow* [(1984)], *supra*, 37 Cal.3d 731, "We adopt[ed] a limiting construction under which the financial gain special circumstance applies only when the victim's death is the consideration for, or an essential prerequisite to, the financial gain sought by the defendant." (*Id.*, at p. 751.)
>
> The present case does not fall within the financial-gain special circumstance as so limited. Orozco was robbed of his wallet and car and murdered in the course of the robbery. It cannot be said that the murder was an "essential prerequisite" to the robbery. The financial-gain special circumstance must therefore be set aside.

(*People v. Adcox, supra*, 47 Cal.3d at p. 246; see also, *People v. Mickey* (1991) 56 Cal.3d 612.)

The trial court has a sua sponte obligation to permit the jury to consider only those criminal charges and special circumstances that are supported by substantial evidence. (*Jackson v. Virginia, supra,* 443 U.S. at p. 313.) Evidence cannot be sufficient when it does not support a clear limitation on the use of a particular special circumstance. Insufficiency of evidence issues are not forfeited by any failure of counsel to object on that ground. (*People v. Butler* (2003) 31 Cal.4th 1119, 1126.)

The Eighth and Fourteenth Amendments to the federal Constitution require heightened standards of reliability in capital cases. (*Woodson v. North Carolina, supra,* 428 U.S. at p. 305.) A true finding on a special circumstance that is patently invalid is the very definition of unreliability in this context.

Reversal of the alleged financial gain special circumstance is required. Reversal of penalty is also required, because the jury's consideration of this alleged special circumstance was clearly prejudicial.

15. JURY INSTRUCTIONS IMPROPERLY RELIEVED THE PROSECUTION OF ITS BURDEN TO PROVE ALL CHARGES BEYOND A REASONABLE DOUBT.

In Mr. Parker's trial, the defense presented was that the crime was manslaughter, not capital murder. The basic evidence truly was susceptible of different interpretations[174], but the prosecution pressed heavily and

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[174] The defense presented was that the homicide occurred in the heat of passion. (See, e.g., 45 RT 6407.)

vociferously for the most incriminating interpretation of the actual facts, and weighted its presentation with as much irrelevant information and sheer speculation as possible.

As we will show, the prosecution was aided in its efforts by repeated instructions requiring them to accept as true the more "reasonable" interpretation of the facts, a standard far below proof beyond a reasonable doubt. These multiple errors deprived Mr. Parker of his rights to due process and a fair trial, to be convicted only upon proof beyond a reasonable doubt of every element of the charges, to have the prosecution carry the burden of proof, to adequate assistance of counsel, and to reliable and non-arbitrary determinations of guilt, death eligibility, and sentence, in violation of the 5th, 6th, 8th, and 14th Amendments of the United States Constitution and corollary provisions of the California Constitution.

A. The Instructions Given At Trial.

The jury was repeatedly instructed regarding the concept of reasonable doubt. The trial court read CALJIC No. 2.90 (1979 Rev.), regarding the general presumption of innocence and reasonable doubt.[175] (8 CT 1798.)[176]

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[175] This Court has rejected related, but distinct, arguments in many cases. (See, e.g., *People v. Jennings* (1991) 53 Cal.3d 334, 385-386.) The instant case presents a stronger factual showing on different issues and therefore mandates reversal. However, to the extent that this Court finds *Jennings* and similar cases applicable, appellant very respectfully asks that it reconsider its holdings therein.

[176] The instruction given to the jury provided as follows:

> A defendant in a criminal action is presumed to be innocent until the contrary is proved, and in a case of a reasonable doubt whether his guilt is satisfactorily shown, he is entitled to a verdict of not guilty. This presumption places upon the State the burden of proving

(footnote continued on next page)

The trial court also gave four related instructions, two of which discussed reasonable doubt's relation to circumstantial evidence, and the other two of which addressed proof of specific intent or mental state. (CALJIC No. 2.01 (8 CT 1774) & 8.83 (8 CT 1838) [re circumstantial evidence], and 2.02 (8 CT 1801) and 8.83.1 (8 CT 1839) [re specific intent/mental state].) Although each of the four addressed different evidentiary points, they all identically stated that if one interpretation of the evidence "appears to you to be reasonable" and another interpretation unreasonable, it would be the jury's duty to accept the reasonable.

The instructions promoted repeatedly the concept that the jurors were bound to accept a "reasonable" appearing interpretation of the evidence, which is fundamentally at odds with the core constitutional requirement that the state bear the burden of proving its case beyond a reasonable doubt. Jurors were instructed pursuant to CALJIC No. 2.01, regarding the sufficiency of circumstantial evidence to show guilt, that "if the circumstantial evidence as to any particular count or special circumstance permits two reasonable interpretations" and "one interpretation of this evidence appears to you to be reasonable and the other

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(footnote from previous page)

> him guilty beyond a reasonable doubt. [¶] Reasonable doubt is defined as follows: It is not a mere possible doubt; because every thing relating to human affairs, and depending on moral evidence, is open to some possible or imaginary doubt. It is that state of the case which, after the entire comparison and consideration of all the evidence, leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction, to a moral certainty, of the truth of the charge.

(8 CT 1798.)

interpretation to be unreasonable, you must accept the reasonable interpretation and reject the unreasonable." (8 CT 1774.)

Although these instructions were not specifically repeated at the penalty phase, the jury was instructed to "be guided by the instructions given you in the first phase of this case ...." (8 CT 1916.) Since jurors were not instructed to use circumstantial evidence in a different way at penalty phase, it must be assumed that they remained affected by the repeated admonition at the guilt phase to accept the "reasonable" interpretation.

CAI.JIC No. 2.90 is incomprehensible to a modern jury. Furthermore, this deficiency was greatly exacerbated by the quadruple reiteration of the directive in the instructions telling the jury that the beyond-a-reasonable-doubt standard is actually satisfied by an interpretation of proof the evidence that merely "appears reasonable," rather than convinces the jurors proof beyond a reasonable doubt.

These shortcomings were particularly significant in appellant Parker's case, where he did in fact kill, but the circumstances under which this occurred — including the order of events, the nature of events, and his mental state — were contested. Appellant refers to and incorporates herein the other arguments in this brief concerning these errors, which, together with the erroneous instructions concerning proof beyond a reasonable doubt, stripped him of a fair trial.

B. CALJIC No. 2.90 Is Confusing and Misleading.

Due process requires proof of guilt beyond a reasonable doubt for a criminal conviction to occur. (*In re Winship, supra,* 397 U.S. at pp. 361-364; *Jackson v. Virginia, supra,* 443 U.S. at pp. 318-319.) In *Eversole v. Superior Court* (1983) 148 Cal.App.3d 188, 199, the California Court of

Appeal cited the concurring opinion of Justice Mosk in *People v. Brigham* (1979) 25 Cal.3d 283, concerning the manner in which "... legal definitions sometimes obscure rather than illuminate their subjects ...." (*Eversole, supra*, 148 Cal.App.3d at p. 199, fn. 6.)

The United States Supreme Court voiced a similar criticism in *Cage v. Louisiana* (1990) 498 U.S. 39, in reversing a death sentence due to an instruction allowing equating reasonable doubt with "a grave uncertainty" or "an actual substantial doubt." (*Id.* at p. 40.) The unanimous opinion found the instruction violated the due process clause, which "'protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.'" (*Id.* at pp. 39-40, quoting citing *In re Winship*, *supra*, 397 U.S. at p. 363.)

CALJIC No. 2.90 was later found constitutional, in and of itself, by the Supreme Court. (*Victor v. Nebraska* (1994) 511 U.S. 6, 11.) In appellant Parker's case, though, in conjunction with the instructions discussed below which repeatedly undermined the requirement of proof beyond a reasonable doubt, there is a reasonable likelihood that the jury was misled as to the standard required for conviction. (*Estelle v. McGuire, supra,* 502 U.S. at p. 72, fn. 4.)

The use of these instructions violated appellant's rights to due process of law and to heightened due process in a capital ease, as well as his rights to a jury trial, fundamental fairness at trial, and a reliable determination of guilt and penalty, in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments.

C. The Instructions Undermined The Constitutional Requirement Of Proof Beyond A Reasonable Doubt.

As we have noted, jurors were instructed that, if one interpretation of the evidence "appears reasonable" and another "unreasonable," it would be

the jury's duty to accept the reasonable interpretation, contrary to the due process requirement that appellant may be convicted only on proof of guilt beyond a reasonable doubt. (*In re Winship*, *supra*, 397 U.S. at pp. 361-364; *Jackson v. Virginia*, *supra*, 443 U.S. at pp. 318-319.)

These instructions required that the jury accept an inference that the evidence was incriminatory if it merely "appeared reasonable," a standard substantially below proof beyond a reasonable doubt. (But see *People v. Jennings*, *supra*, 53 Cal.3d at p. 386.) In *Cage v. Louisiana*, *supra*, the United States Supreme Court addressed a similar problem, concerning instructions that equated reasonable doubt with "a grave uncertainty" or "an actual substantial doubt" and that therefore unconstitutionally allowed a finding of guilt to be based on a degree of proof below that required[177] by the due process clause. (*Cage v. Louisiana*, *supra*, 498 U.S. at p. 40.)

If due process is violated by jury instructions requiring a reasonable doubt to be grave or substantial, as in *Cage*, then the instant jury instructions are also violative of the Fifth, Sixth, Eighth and Fourteenth Amendments, as they negated reasonable doubt if evidence of guilt merely "appeared reasonable." Reversal is required if there is a reasonable likelihood that the jury was misled as to the standard required for conviction. (*Estelle v. McGuire*, *supra*, 502 U.S. at p. 72, fn. 4.)

Furthermore, these instructions also constituted an impermissible mandatory, conclusive presumption of guilt upon a finding that evidence of

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[177] See *United States v. Indorato* (1st Cir. 1980) 628 F2d 711, 721, fn. 8; *State v. Manning* (S.C. 1991) 409 S.E.2d 372, 374 [reversing capital murder conviction because of due process deficiencies in "moral certainty" reasonable doubt instruction]; *People v. Hewlett* (N.Y. App. Div. 1987) 519 N.Y.S. 555, 557; *Dunn v. Perrin* (1st Cir. 1978) 570 F.2d 21, 24; *United States v. Nolasco* (9th Cir. 1992) 926 F.2d 829 (en banc).

guilt merely "appears reasonable." Such a presumption violates not only due process, but also appellant's right to a jury trial by removing fundamental questions from the jury. (*Carella v. California* (1989) 491 U.S. 263, 265.)

These instructions told jurors four times in modern language that they were required follow a guilt-favoring interpretation of the evidence that "appears reasonable." Even if the jury was trained in archaic English and found CALJIC No. 2.90 to merely be in conflict with the four other instructions, those instructions' failure to resolve this constitutional question does not "... absolve the infirmity." (*Francis v. Franklin, supra,* 471 U.S. at p. 322.)

This was a case extensively based on circumstantial evidence, insofar as appellant's intent, mental state, and homicidal acts were concerned, and therefore the jurors were urged and indeed directed by these instructions to determine the level of Mr. Parker's culpability based on a standard other than proof beyond a reasonable doubt.

These instructional errors — particularly in conjunction with the multiple other errors in this case — involved the basic standard to be applied at trial, undermined the accuracy of the verdicts and operated as a mandatory, conclusive presumption, here violating the Fifth, Sixth, Eighth and Fourteenth Amendments. Therefore, reversal is subject to a special harmless error analysis, which is "... wholly unlike the typical form ...." (*Carella v. California, supra*, 491 U.S. at pp. 267-273 (Scalia, J., conc.).) The use of conclusive presumptions, such as those used here, can be held harmless "... only in those 'rare situations' when the reviewing court can be confident that [such an] error did not play any role in the jury's verdict," such as an instruction regarding a charge on which the defendant was acquitted or an element of a crime that the defendant admitted. (*Id.*, 491

U.S. at pp. 269-270, quoting *Connecticut v. Johnson, supra,* 460 U.S. at p. 87 (Scalia, J., conc.).) This is not such a "rare situation." Therefore, reversal is mandated.

Assuming, arguendo, even the lesser, traditional harmless beyond a reasonable doubt test (*Chapman v. California*, *supra*, 386 U.S. at p. 23), however, reversal is mandated. The improper instructions were read four times and were relied upon by the prosecutor regarding key elements of his case. The prosecution strongly urged the jury to accept its theories — many spun from the thinnest circumstantial information — as the basis for finding appellant Parker guilty of the charges and special circumstances.

The state cannot establish, beyond all reasonable doubt, that the multiple, repeated instructions emphasizing the jury's duty to accept apparently reasonable interpretations of evidence that pointed toward guilt made no contribution to the jury's verdicts of first-degree murder and/or of the special circumstances. A reasonable juror may well have held doubts about appellant's guilt of murder and his culpability for alleged special circumstances, but for the multiple, repeated instructions emphasizing the jury's duty to accept apparently reasonable interpretations of evidence that pointed toward guilt. When the wrong standard is used to assess guilt, the deference normally given the factfinder's judgment is inappropriate. (*Gray v. Mississippi* (1987) 481 U.S. 648, 661, n. 10; *In re Carmaleta B.* (1978) 21 Cal.3d 482, 496.) Reversal is required.

16. THE TRIAL COURT IMPROPERLY DENIED A DEFENSE REQUEST FOR INSTRUCTION THAT THE PROSECUTION HAS THE BURDEN OF PROVING, BEYOND A REASONABLE DOUBT, THAT EVIDENCE WAS NOT TAMPERED WITH OR CONTAMINATED.

Appellant Parker's trial counsel submitted a proposed instruction reading as follows:

> The prosecution has the burden of proving to you beyond a reasonable doubt that none of the evidence they have presented was tampered with or contaminated. You may consider any breaks in the chain of custody of any of the evidence collected, transported and thereafter evaluated in determining whether the prosecution has met their burden.

The trial court refused to give this proposed instruction on July 8, 2002. (7 CT 1748.)

In discussing why this instruction regarding the chain of custody was necessary, defense counsel noted that criminalist Montpetit was asked about certain items — a vaginal swab, the banana peel, and the scarf loosely around the victim's neck — and he was unable to identify how items got from one point to the next. (44 RT 6098-6099.) There were discrepancies between Det. Hergenroeather's report and the evidence list prepared by evidence technician Tom Washington. (44 RT 6099.)

Regarding the swab, trial counsel noted that the medical examiner found no sperm on the smear taken from the swab, and later the prosecution contended it found enough on the swab to test for Mr. Parker's DNA. (44 RT 6103.) There was no sperm, and sometime later there was sperm, raising the question of how that happened. (44 RT 6104.)

The defense cited *People v. Lucas* (1995) 12 Cal.4th 415[178], in support of this requested instruction. (44 RT 6100.) The trial court disagreed that the state has such a burden of proof. (*Id.*) The prosecution posited that this was a matter for argument, not instruction. (44 RT 6102.) The trial court agreed, and denied the request. (44 RT 6105.)

In *People v. Lucas,* this Court stated:

> The rules for establishing chain of custody are as follows: " 'The burden on the party offering the evidence is to show to the satisfaction of the trial court that, taking all the circumstances into account including the ease or difficulty with which the particular evidence could have been altered, it is reasonably certain that there was no alteration. [¶] **The requirement of reasonable certainty is not met when some vital link in the chain of possession is not accounted for, because then it is as likely as not that the evidence analyzed was not the evidence originally received. Left to such speculation the court must exclude the evidence.** [Citations.] Conversely, when it is the barest speculation that there was tampering, it is proper to admit the evidence and let what doubt remains go to its weight.' " *(People v. Diaz* (1992) 3 Cal.4th 495, 559 [11 Cal.Rptr.2d 353, 834 P.2d 1171], quoting *People v. Riser* (1956) 47 Cal.2d 566, 580-581 [305 P.2d 1]; see also *People v. Williams* (1989) 48 Cal.3d 1112, 1134 [259 Cal.Rptr. 473, 774 P.2d 146].)

(*People v. Lucas*, *supra*, 12 Cal.4th at p. 444; emphasis added.)

It is, of course, a foundational principle of criminal law that the burden of proof of criminal charges is on the prosecution. (*In re Winship, supra,* 397 U.S. 358; *Patterson v. New York* (1977) 432 U.S. 197.) As this

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[178] Counsel mis-cited the *Lucas* case as 4 Cal.4th 414, but correctly pointed to its discussion of the chain of custody.

Court noted in *Lucas* and other cases, the chain of custody may be absolutely critical to the reliability of evidence that the jury is to consider.

Here, there was significant reason to suspect that tampering or contamination occurred — evidence does not generally appear where none was found on an earlier careful examination The alleged evidence of sperm on a vaginal swab was important to the prosecution theory of sexual assault. As noted elsewhere in this brief, the prosecution proceeded with a notable lack of restraint, of which there are many other examples. (See, e.g., Arguments 3, 10, 13, 20, and 22, incorporated herein by reference.)

While the trial court here may have been persuaded there was sufficient reliability to admit the evidence[179], it was error to refuse the instruction that would have informed jurors that they must determine that the prosecution showed the chain of custody was intact. Reversal is required.

17. THE TRIAL COURT ERRONEOUSLY REFUSED TO MODIFY CALJIC NO. 2.70 TO ELIMINATE REFERENCES TO "CONFESSION" IN A CASE WHERE THERE WAS NO CONFESSION.

The trial court erroneously refused to modify CALJIC No. 2.70 to eliminate references to a confession, in a case where there was no confession. This error suggested to jurors that they could regard other statements as a confession, and violated appellant Parker's rights under the 5th, 6th, 8th and 14th Amendments to the United Stated Constitution, and

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[179] It is unclear that the trial court actually considered the law applicable to the chain of custody issue; instead, it appears he mistakenly assumed that reliability was solely a matter for arguments of counsel. (44 RT 6100.-6105.)

corollary provisions of the California Constitution, by undermining his rights to due process of law, a fair trial, the right to confrontation and cross-examination, effective assistance of counsel, and reliable and non-arbitrary determinations of guilt, capital eligibility, and sentence

At issue were statements that appellant Parker allegedly made to a jailhouse snitch, whose reliability was suspect, and who was groomed and interviewed by Detective Ott, who in turn had a pattern of deviating from police practices designed to ensure reliability of evidence. Appellant refers to and incorporates herein Argument 9, regarding the limitations on impeachment of jailhouse informant Ed Lee, and Argument 11, regarding the trial court's refusal to permit full examination of Det. Ott regarding his deviations from standard police practices.

The alleged statements that Parker supposedly made to the jailhouse snitch were, even if reliable, only admissions. The gist of this information was that there had been a contract for Mr. Parker to marry Ms. Gallego; he thought he could get more money if she died; and he allegedly discussed matters occurring after the death.

The trial court erred in deciding, during discussions of jury instructions, that Mr. Parker's alleged statements "could be taken" as a confession. (44 RT 6124.) Trial counsel requested that the first paragraph of CALJIC No. 2.70 be deleted, as the statements were not a confession. (44 RT 6124-6126.) The request for modification was denied. (44 RT 6124.)

CALJIC No. 2.70 was given to the jury (8 CT 1792), as follows:

> A confession is a statement made by a defendant in which he has acknowledged his guilt of the crime for which he is on trial. In order to constitute a confession, the statement must acknowledge

> participation in the crime as well as the required criminal intent or state of mind.
>
> An admission is a statement made by a defendant which does not by itself acknowledge his guilt of the crime for which the defendant is on trial, but which statement tends to prove his guilt when considered with the rest of the evidence.
>
> You are the exclusive judges s to whether the defendant made a confession or an admission, and if so, whether that statement is true in whole or in part.
>
> Evidence of an oral confession or an oral admission of the defendant not made in court should be viewed with caution.

Instructing the jury with the unmodified version of CALJIC No. 2.70 erroneously advised the jury that a confession existed and had been submitted for their consideration. In a case as reliant on circumstantial evidence as this on was[180], impermissibly relieving the prosecution of its burden of proof on substantive charges. (See *Francis v. Franklin, supra,* 471 U.S. at pp. 317-318; *Sandstrom v. Montana, supra,* 442 U.S. at pp. 523-524.)

In addition, there is the requirement of heightened reliability of verdicts in capital cases. Thus, in capital cases "the Eighth Amendment requires a greater degree of accuracy and fact finding than would be true in a non-capital case." (*Gilmore v. Taylor, supra,* 508 U.S. at p. 342.) Further, under the Eighth Amendment and its application to the states through the due process clause of the Fourteenth Amendment, this heightened reliability requirement applies to both the guilt and sentencing phases of a capital trial. (*Beck v. Alabama, supra,* 447 U.S. at pp. 637-

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[180] Appellant refers to and incorporates herein Argument 15, regarding the circumstantial evidence instructions.

638.) Suggesting that a confession existed when none was admitted undercut that guarantee of reliability.

Reversal is required. The state cannot show beyond a reasonable doubt that the errors were harmless. (*Chapman v. California, supra,* 386 U.S. at p. 23.)

18. THE JURY WAS ERRONEOUSLY INSTRUCTED WITH CALJIC NO. 2.15, WHICH PERMITTED THE JURY TO FIND GUILT OF FIRST DEGREE MURDER IF IT FOUND POSSESSION OF STOLEN PROPERTY.

Mr. Parker was charged with first degree murder. The jury was told it could convict Mr. Parker of murder if the state proved that (1) Mr. Parker had been in possession of recently stolen property and (2) there was "corroborating evidence" which "need only be slight, and need not by itself be sufficient to warrant an inference of guilt.." (8 CT 1778; 45 RT 6254-6255.)

This theory of culpability was based on standard CALJIC instruction 2.15

According to the use note which accompanies that instruction, it is supposed to be used only as to theft-related offenses. (See CALJIC No. 2.15, Use Note.) Nevertheless, in this case it was given *not* just in connection with burglary or robbery charges, but was directly linked to the murder charge. Thus; at the state's request, the jury was told that if the state proved possession of stolen property with slight corroboration, that was "sufficient to permit an inference that *the defendant is guilty of the crime of murder.*" (45 RT 6255, emphasis added.)

As more fully discussed below, this possession-of-stolen-property theory of culpability was fundamentally improper and violated a number of Mr. Parker's constitutional rights. Although the trial court may have intended to limit its possession-of-stolen-property theory to the theft-related charges contained in counts three, four and five, it never informed the jury of any such limitation. To the contrary, as noted, the court affirmatively told the jury it could rely on this theory to determine Mr. Parker's guilt of murder. (45 RT 6255.) Under this theory, the jury was permitted to find Mr. Parker guilty of first degree murder solely from (1) possession of recently stolen property and (2) slight corroborating evidence, which would otherwise be insufficient to warrant an inference of guilt. This was error; it gave the jury an unconstitutional shortcut to conviction, it constituted an improper evidentiary presumption as to the elements of murder, and it improperly lightened the state's burden of proof. Reversal is required.

A. The Court Erred In Instructing The Jury It Could Convict Mr. Parker Of Murder If It Found (1) Possession Of Stolen Property And (2) Slight Corroborating Evidence.

In theft cases, CALJIC No. 2.15 permits a jury to infer guilt from the fact that a defendant "is in possession of recently stolen property when coupled with slight corroboration by other inculpatory circumstances." (*People v. Barker* (2001) 91 Cal.App.4th 1166, 1173.) The premise behind CALJIC No. 2.15 is that there is a rational connection between guilt of a theft-related offense and the combination of (1) possession of stolen property and (2) other inculpatory circumstances. Accordingly, state cases hold it proper to permit a jury to infer guilt of theft in such circumstances. (*Id.* at pp. 1173-1174.)

The courts have repeatedly held, however, that there is no similar connection which would permit a jury to infer guilt of *murder* based merely

on (1) a defendant's possession of stolen property and (2) other inculpatory circumstances. Thus, it error to tell a jury it may find a defendant guilty of murder based on these two elements. (*People v. Barker, supra,* 91 Cal.App.4th at p. 1176. *Accord People v. Coffman* (2004) 34 Cal.4th 1, 101-102; *People v. Prieto* (2003) 30 Cal.4th 226, 248-249.) Pursuant to *Barker, Coffman* and *Prieto,* the trial court erred in instructing the jury it could convict Mr. Parker of first degree murder by finding possession of stolen property along with slight corroborating evidence.

B. The Erroneous Provision Of A Possession-Of-Stolen-Property Theory Of First Degree Murder Requires Reversal.

The question then becomes whether this error requires reversal of Mr. Parker's murder conviction. As more fully discussed below, there are three distinct ways of looking at the error in this case. Under any of these three approaches, the murder conviction must be reversed.

1. Because The Jury Was Given A Fundamentally Incorrect Theory Of Culpability As To The Murder Charge, And Because It Is Impossible To Determine If The Jury Relied On That Theory In Convicting Mr. Parker, Reversal Is Required.

Where a jury is given both proper and improper theories of culpability in a criminal case, and the jury verdicts do not indicate the jury relied on the proper theory in convicting a defendant, reversal is required. (See, e.g., *People v. Smith* (1984) 35 Cal.3d 798, 808 [trial court instructs jury on both proper and improper theories of murder; held, reversal is required because "the People cannot show that no juror relied on the erroneous instruction as the sole basis for finding defendant guilty of murder. In these circumstances it is settled that the error must be deemed prejudicial."]; *accord People v. Guiton* (1993) 4 Cal.4th 1116, 1120; *see*

also People v. Morris (1988) 46 Cal.3d 1, 24; *People v. Boyd, supra,* 38 Cal.3d at p. 770; *People v. Cantrell* (1973) 8 Cal.3d 672, 686; *People v. Robinson* (1964) 61 Cal.2d 373, 406.) As one appellate court has correctly concluded, "[w]here the reviewing court cannot determine upon which theory the jury convicted defendant and one of the theories is an improper basis for conviction, 'it must find the error to have been prejudicial.'" (*People v. Macedo* (1989) 213 Cal.App.3d 554, 561-562.)

That is exactly what happened here. On the one hand, the jury was told it could convict of first degree murder if the state proved felony murder based on robbery or burglary. On the other hand, the jury was also told it could convict of first degree murder simply by finding possession of stolen property with corroborating circumstances. This latter theory had no basis in state law. As a consequence, of course, provision of this theory to the jury plainly violated Due Process. (See *Suniga v. Bunnell* (9th Cir. 1994) 998 F .2d 664 [defendant charged with murder, jury presented with two theories of culpability only one of which had a basis in state law; held, Due Process was violated]; *Ho v. Carey* (9th Cir. 2003) 332 F.3d 587 [same].) But because the jury returned a general verdict, it is impossible to determine if the jury relied on this patently improper theory of first degree murder. Pursuant to the authorities discussed above, reversal of the murder conviction is therefore required.

2. Because The Jury Instructions Permitted The Jury To Infer The Elements Of First Degree Murder Solely From Proof That Mr. Parker Possessed Stolen Property Along With Slight Corroboration, Reversal Is Required.

There is a second way to characterize the trial court's error in providing CALJIC No. 2.15 as to the murder charge. This instruction operated as an improper permissive instruction which allowed the jury to

infer all elements of murder (and therefore convict of murder) from proof that defendant possessed stolen property. Because the state cannot establish that the jury did not do exactly what it was told it could do — that is, convict of murder by relying solely on the predicate facts of possession of stolen property plus slight corroboration — reversal is required.

The starting point for this analysis is the Fifth Amendment requirement that in criminal cases the state prove beyond a reasonable doubt all of the elements included in the definition of the offense of which the defendant is charged. (*In re Winship, supra,* 397 U.S. 358; *Patterson v. New York, supra,* 432 U.S. 197.) In turn, the Sixth Amendment requires that the jury make the determination that the state has proven the elements of the charged offense beyond a reasonable doubt. (*Sullivan v. Louisiana* (1993) 508 U.S. 275, 278.) Together, these rights require a jury determination, based upon proof by the state beyond a reasonable doubt, of every factual element of the crime charged. (*Sandstrom v. Montana, supra,* 442 U.S. at pp. 512-514; *In re Winship, supra,* 397 U.S. at pp. 363-364.)

Jury instructions violate these constitutional principles when they relieve the state of the burden of proof beyond a reasonable doubt of every element of the crime charged. (*See Sandstrom v. Montana, supra,* 442 U.S. at p. 520-524. *Accord, Carella v. California, supra,* 491 U.S. at p. 265; *Francis v. Franklin, supra,* 471 U.S. at p. 313.) A state may not make certain facts elements of a criminal offense and then impose a presumption as to the existence of these facts based on proof of other, predicate facts. (*Carella v. California, supra,* 491 U.S. at p. 265; *Francis v. Franklin, supra,* 471 U.S. at p. 313; *Sandstrom v. Montana, supra,* 442 U.S. at p. 515.) "Such directions subvert the presumption of innocence accorded to accused persons and also invade the truth-finding task assigned solely to juries in criminal cases." (*Carella v. California, supra,* 491 U.S. at p. 265.)

There are two types of presumptions. A mandatory presumption requires the jury to infer an ultimate fact from proof of a predicate fact. (*Ulster County Court v. Allen* (1979) 442 U.S. 140, 157.) A permissive presumption permits, but does not require, the jury to infer the ultimate fact from the predicate fact. (*Francis v. Franklin, supra,* 471 U.S. at p. 314.) In both situations, the vice is identical; presumptions which permit or require a jury to presume an element of the offense from proof of certain predicate facts "render[] irrelevant the evidence on that issue" and make it impossible to determine "[i]f the jury may have failed to consider evidence" on the issue by relying on the presumption. (*Connecticut v. Johnson, supra,* 460 U.S. at pp. 85-86.)

Here, Mr. Parker was charged with first degree murder. Once the prosecutor here elected a felony murder theory of liability, this required the prosecution to prove an unlawful killing during the course of a felony enumerated in Penal Code section 189.

As given in this case, CALJIC No. 2.15 directly told the jury that it could convict Mr. Parker of first degree murder if it found (1) he was in conscious possession of recently stolen property, and (2) slight corroborating evidence. Once these two predicate facts were established, then "guilt [of murder] may be inferred." (6 RT 1618.) In other words, the court's instruction allowed the jury to use a permissive inference not just to infer a single element of murder, but to infer every element of a first degree murder charge.

While permissive inferences (or presumptions) are less intrusive than mandatory presumptions, they are nevertheless disfavored because they "tend to take the focus away from the elements that must be proved." (*United States v. Warren* (9th Cir. 1994) 25 F.3d 890, 900 [Rymer, J. concurring].) Permissive presumptions are constitutional only if can be

said "with substantial assurance" that the inferred fact is "more likely than not to flow from the proved fact on which it is made to depend." (*Ulster County v. Allen, supra,* 442 U.S. at p. 166, fn. 28.) A permissive inference violates Due Process whenever "the suggested conclusion is not one that reason and common sense justify in light of the proven facts before the jury." (*Francis v. Franklin, supra,* 471 U.S. at p. 316.)

In *Schwendeman v. Wallenstein* (9th Cir. 1992) 971 F.2d 313, the Ninth Circuit Court of Appeal applied these principles in a case analogous to this one. There defendant was charged with vehicular assault. Under Washington state law, one element the state had to prove to obtain a conviction was that defendant drove in a reckless manner. As to this element, however, the jury was given a permissive presumption and told that it could (but was not required to) infer the defendant had driven in a reckless manner solely from evidence that he was speeding. The court found that even though "it is certainly true that excessive speed is probative of a jury's determination of recklessness, here we cannot say with substantial assurance that the inferred fact of reckless driving more likely than not flowed from the proved fact of excessive speed." (*Id.* at p. 316.) Thus, the instruction was constitutionally deficient and defendant's conviction was reversed. (*Id.*)

Schwendeman is virtually identical to this case. With respect to the felony murder charge, it cannot be said with "substantial assurance that the inferred fact of[an unlawful killing during commission of an enumerated felony]. more likely than not flowed from the proved fact of [possession of recently stolen property]." As one court has concluded on this very subject, "[p]roof a defendant was in conscious possession of stolen property simply does not lead naturally and logically to the conclusion that the defendant

committed a murder to obtain the property." (*People v. Barker, supra,* 91 Cal.App.4th at p. 1176.)

In short, the permissive presumption given to the jury in this case violates the Due Process Clause precisely because the suggested conclusion (that defendant is guilty of first degree murder) "is not one that reason and common sense justify" in light of the predicate facts on which the presumption is based (possession of stolen property plus slight corroboration). (*Francis v. Franklin, supra,* 471 U.S. at p. 316.) Because of the federal constitutional dimension to this error, the *Chapman* standard applies, requiring the state "to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." (*Chapman v. California, supra,* 386 U.S. at p. 24; see *Schwendeman v. Wallenstein, supra,* 971 F.2d at p. 316 [applying *Chapman* to improper permissive presumption]; *Hanna v. Riveland* (9th Cir. 1996) 87 F.3d 1034, 1038 [same].)

In assessing whether the error was harmless, the question is not whether there is sufficient evidence from which the jury could have found the ultimate fact under other instructions. (*See, e.g., Hanna v. Riveland, supra,* 87 F.3d at p. 1039; *Schwendeman v. Wallenstein, supra,* 971 F.2d at p. 316.) Instead, the question is whether the state can prove beyond a reasonable doubt that the jury did not rely solely on the predicate fact — thereby ignoring all other evidence — in deciding the ultimate fact. (*Schwendeman v. Wallenstein, supra,* 971 F.2d at p. 316.)

Here, as to the murder charge, the jury was effectively told it could infer every element of a first degree murder charge from the predicate facts of possession of recently stolen property with slight corroboration. As in *Schwendeman,* "[b]y focusing the jury on the evidence of [possession of stolen property] alone, the challenged instruction erroneously permitted the

jury to find an element of the crime of which [Mr. Parker] was convicted without considering all the evidence presented at trial." (*Schwendeman v. Wallenstein, supra,* 971 F.2d at p. 316; *see Yates v. Evatt* (1991) 500 U.S. 391, 405-406 ["[S]ome presumptions so narrow the jury's focus as to leave it questionable that a reasonable juror would look to anything but the evidence establishing the predicate fact in order to infer the fact presumed."].)

Mr. Parker recognizes that in light of the deferential standards of appellate review, there was sufficient evidence from which a jury could have found the presumed facts supporting felony murder. The fact remains, however, that the improper presumptions provided by CALJIC No. 2.15 "permitted the jury to find [all] element[s] of the crime of which [Mr. Parker] was convicted without considering all the evidence presented at trial." Accordingly, the state will be unable to prove there was "no reasonable probability that the instruction did not materially affect the verdict." (*Schwendeman v. Wallenstein, supra,* 971 F.2d at p. 316.) Reversal of the murder conviction is required.

3. Telling The Jury That It Could Convict Mr. Parker Of Murder If It Found Possession Of Stolen Property Along With "Slight" Corroboration Undercut The Presumption Of Innocence And Improperly Lightened The State's Burden Of Proof Beyond A Reasonable Doubt.

Reversal is also required because this instruction permitted a conviction for murder based on proof less than reasonable doubt. As discussed above, jury instructions are unconstitutional if they relieve the state of the burden to prove every element of the offense beyond a reasonable doubt. (*See Sandstrom v. Montana, supra,* 442 U.S. at p. 521.)

Here, the jury was told that possession of recently stolen property is not alone sufficient to prove the charged crime of murder. (6 RT 1618.) This statement of the law is manifestly correct since (as discussed above) the charged offense of first degree murder contains elements that cannot logically be proven by mere possession of stolen property. But the jury was then told that "guilt could be inferred" so long as the state provided "corroborating evidence tending to prove defendant's guilt." (6 RT 1618.) This corroborating evidence "need only be slight." (6 RT 1618.) In other words, the jury was told that it could convict of murder on proof of a fact which is alone insufficient to prove murder (possession of stolen property), so long as the state also introduced some other "slight" evidence.

Several courts have considered similar instructions permitting a conviction on the basis of proof of some fact that is insufficient to establish guilt plus other "slight" evidence. These courts have found such instructions violate due process. Thus, the Fifth Circuit has repeatedly held that it violates due process to instruct the jury that a defendant may be convicted of conspiracy upon proof of the existence of the conspiracy plus "slight evidence" connecting the defendant to it. (*United States v. Partin* (5th Cir. 1977) 552 F.2d 621, 628-629, *cert. denied,* 434 U.S. 903; *United States v. Hall* (5th Cir. 1976) 525 F.2d 1254, 1256; *United States v. Gray* (5th Cir. 1980) 626 F.2d 494, 500-501.) The Fifth Circuit explained in *Partin* that the "slight evidence" instruction "reduced the level of proof necessary for the government to carry its burden by possibly confusing the jury members that a defendant's participation in the conspiracy need not be proved beyond a reasonable doubt." (*United States v. Partin, supra,* 552 F.2d at p. 629. *See United States v. Durrive* (7th Cir. 1990) 902 F.2d 1221, 1228, *quoting United States v. Martinez de Ortiz* (7th Cir. 1989) 883 F.2d 515, 524-525[conc. opn. of Easterbrook, J.]; *United States v. Dunn* (9th Cir. 1977)

564 F.2d 348, 356-357.) Similarly, the trial court's use of a "slight evidence" standard in this case plainly undercut the state's burden of proof beyond a reasonable doubt.

It is true, of course, that the trial court gave a general instruction which correctly described the state's burden of proof. But as the Supreme Court has held, a correct instruction does not remedy a constitutionally infirm instruction if the jury could apply either instruction to arrive at a verdict. (*Francis v. Franklin, supra,* 471 U.S. at pp. 319-320.) That is just the situation here; this court has no way of knowing whether Mr. Parker was convicted on the basis of CALJIC No. 2.15.

A similar analysis has resulted in reversals in the conspiracy context described above. Thus in *United States v. Hall,* the Fifth Circuit rejected the government's argument that the error was cured by other, proper instructions on reasonable doubt:

> "Despite the lack of provable prejudice to defendant's case because of other instructions giving the reasonable doubt standard, however, the erroneous instruction reduced the level of proof necessary for the government to carry its burden by possibly confusing the jury about the proper standard or even convincing the jury members that a defendant's participation in the conspiracy need not be proved beyond a reasonable doubt."

(*United States v. Hall, supra,* 525 F.2d at p. 1256.) Such reduction of the government's burden of proof "is impermissibly inconsistent with the 'constitutionally rooted presumption of innocence.'" (*Id.* at p. 1256, fn. 2, *quoting Cool v. United States* (1972) 409 U.S. 100. *Accord United States v. Partin, supra,* 552 F.2d 621.) Put another way, an error which lessens the prosecution's burden is structural and requires automatic reversal. (*Sullivan v. Louisiana, supra,* 508 U.S. at p. 279.) This is because, when the jury receives instructions which permit it to convict without applying the

reasonable doubt burden of proof, "there has been no jury verdict within the meaning of the Sixth Amendment [and] the entire premise of [a *Chapman* harmless error] review is simply absent." (*Id.* at p. 280.) Reversal is therefore required.

19. THE TRIAL COURT ERRONEOUSLY GAVE CALJIC INSTRUCTIONS ON VOLUNTARY MANSLAUGHTER SUGGESTING THAT CERTAIN MENTAL STATES CAN "REDUCE" A MURDER TO MANSLAUGHTER AND "EXCUSE" MALICE, IMPLYING THAT MURDER IS THE DEFAULT AND THAT THE DEFENSE HAS A BURDEN OF PRODUCING EVIDENCE OF THE LESSER CRIME.

Instructions on voluntary manslaughter suggested that certain mental states can "reduce" a murder to voluntary manslaughter and "excuse" malice, implying that murder is the default offense and that the defense has the burden of producing evidence of the lesser crime. These errors violated appellant Parker's rights under the 5th, 6th, 8th and 14th Amendments to the United Stated Constitution, and corollary provisions of the California Constitution, by undermining his rights to due process of law, a fair trial, the right to confrontation and cross-examination, effective assistance of counsel, and reliable and non-arbitrary determinations of guilt, capital eligibility, and sentence, and by impermissibly and unconstitutionally lightening the state's burden of proof.

Appellant Parker refers to and incorporates herein Argument 15, asserting that the instructions regarding circumstantial evidence undercut the requirement that the state prove its case beyond a reasonable doubt, by suggesting that jurors instead needed only to adopt a "reasonable" interpretation of the evidence. That erroneous set of instructions amplified the error with the instructions on voluntary manslaughter.

As set forth more fully in the statement of facts, the circumstances in this case were unusual. Appellant Parker and the victim were roommates. There was evidence that the two had agreed to marry, in order for Ms. Gallego to become a United States citizen. (See, e.g., 36 RT 4638; 42 RT 5637-39.) Mr. Parker had romantic feelings for Ms. Gallego (see, e.g., 41 RT 5430), reflected in some of the writings introduced at trial, but the feelings evidently were not mutual; other writings reflect Mr. Parker's feeling of hurt and loss. (See, e.g., Exhibit 58.) The defense at trial was that there was a final falling out, and that Mr. Parker acted in the heat of passion.

The trial court instructed jurors with CALJIC No. 8.40, Voluntary Manslaughter — Defined (8 CT 1820-1821), as follows:

> A lesser included offense to Count 1 is the crime of voluntary manslaughter, a violation of section 192, subdivision (a) of the Penal Code.
>
> Every person who unlawfully kills another human being without malice aforethought but either with an intent to kill, or in conscious disregard for human life, is guilty of voluntary manslaughter in violation of Penal Code section 192, subdivision (a).
>
> There is no malice aforethought if the killing occurred upon a sudden quarrel or heat of passion.
>
> "Conscious disregard for life," as used in this instruction, means that a killing results from the doing of an intentional act, the natural consequences of which are dangerous to life, which act was deliberately performed by a person who knows that his or her conduct endangers the life of another and who acts with conscious disregard for life.
>
> In order to prove this crime, each of the following elements must be proved:
>
> 1. A human being was killed;
>
> 2. The killing was unlawful; and

3. The perpetrator of the killing either intended to kill the alleged victim, or acted in conscious disregard for life; and

4. The perpetrator's conduct resulted in the unlawful killing.

Jurors were additionally instructed with CALJIC No. 8.42, Sudden Quarrel or Heat of Passion and Provocation Explained (8 CT 1822-1823), as follows:

To **reduce an unlawful killing from murder to manslaughter** upon the ground of sudden quarrel or heat of passion, the provocation must be of the character and degree as naturally would excite and arouse the passion, and the assailant must act under the influence of that sudden quarrel or heat of passion.

The heat of passion which will **reduce a homicide to manslaughter** must be such a passion as naturally would be aroused in the mind of an ordinarily reasonable person in the same circumstances. A defendant is not permitted to set up his own standard of conduct and to justify or excuse himself because his passions were aroused unless the circumstances in which the defendant was placed and the facts that confronted him were such as also would have aroused the passion of the ordinarily reasonable person faced with the same situation. Legally adequate provocation may occur in a short, or over a considerable, period of time.

The question to be answered is whether or not, at the time of the killing, the reason of the accused was obscured or disturbed by passion to such an extent as would cause the ordinarily reasonable person of average disposition to act rashly and without deliberation and reflection, and from passion rather than judgment.

If there was provocation, whether of short or long duration, but of a nature not normally sufficient to arouse passion, or if sufficient time elapsed between the provocation and the fatal blow for passion to

> subside and reason to return, and if an unlawful killing of a human being followed the provocation and had all the elements of murder, as I have defined it, there mere fact of slight or remote provocation will not **reduce the offense** to manslaughter.

Jurors may reasonably have understood these instructions regarding manslaughter, and particularly CALJIC No. 8.42, to make murder the default level of offense, unless the defendant proved he did not commit murder, but instead committed a lesser offense. Such an understanding, even if reasonable to lay jurors unversed in the law, would fall outside the constitutional requirements of a presumption of innocence and that the burden is on the state to prove the allegations beyond a reasonable doubt.

The first sentence of article 1, section 16 of the California Constitution provides: "Trial by jury is an inviolate right and shall be secured to all, but in a civil cause three-fourths of the jury may render a verdict." (See *People v. Wheeler* (1978) 22 Cal.3d 258, 265 [confirming the inviolability of the unanimity requirement in criminal trials].)

Petitioner's jury was not required to make unanimous findings about either the existence or the scope of the alleged conspiracy. It was instead free to use that evidence, relevant or not, true or not, applicable to appellant Vo or not, in any way it chose.

As the United States Supreme Court has acknowledged,

> While juries ordinarily are presumed to follow the court's instructions [citation], we have recognized that in some circumstances "the risk that the jury will not, or cannot, follow instructions is so great, and the consequences of failure so vital to the defendant, that the practical and human limitations of the jury system cannot be ignored."

(*Simmons v. South Carolina* (1994) 512 U.S. 154, 171, quoting *Bruton v. United States* (1968) 391 U.S. 123, 135.) The trial court's instructions

failed to make clear that the prosecution alone bore a burden of proof, or to permit jurors to begin deliberations with an open mind as to guilt or innocence of each charge, impermissibly relieving the prosecution of its burden of proof on substantive charges. (See, *Francis v. Franklin, supra,* 471 U.S. at pp. 317-318; *Sandstrom v. Montana, supra,* 442 U.S. at pp. 523-524.) There can be no confidence in the verdicts thus acquired, and reversal is necessary.

Even if these instructions were merely be in conflict with other instructions, those instructions' failure to resolve this constitutional question does not "... absolve the infirmity." (*Francis v. Franklin, supra,* 471 U.S. at p. 322.) A conflict does not provide the clarity required constitutionally.

Reversal is required. The state cannot show beyond a reasonable doubt that the errors were harmless. (*Chapman v. California, supra,* 386 U.S. at p. 23.)

20. THE PROSECUTOR COMMITTED MISCONDUCT THROUGHOUT THE GUILT PHASE OF MR. PARKER'S CAPITAL TRIAL.

Mr. Parker's was convicted and sentenced to death in violation of his rights to due process; to a fair, reliable, rational, nonarbitrary, and accurate determination of guilt and penalty based on the jury's consideration and weighing only of materially accurate, nonprejudicial, relevant record evidence presented during the trial and as to which Mr. Parker had notice and a fair opportunity to test and refute; to a trial free from false and misleading evidence; to an opportunity to confront and refute adverse evidence; to compulsory process; to a fair, reliable, rational and individualized determination of penalty; to have the jury give full effect to all evidence in mitigation of penalty; to the disclosure of all material.

exculpatory evidence; to present a defense; and to the effective assistance of counsel as guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and Article I, Sections 1, 7, 9, 12, 13, 14, 15, 16, 17, 24, 27, and 28 of the California Constitution and Penal Code Section 1473 because the prosecution engaged in a pervasive, purposeful, intentionally improper, and consistent pattern of misconduct at the guilt phase of his trial that was designed to and did in fact prejudicially deprive Mr. Parker of the foregoing constitutional rights. The constitutional error is both clear and fundamental, and strikes at the heart of the trial process.

A prosecutor can be a forceful advocate, but "while [a prosecutor] may strike hard blows, he is not at liberty to strike foul ones." (*United States v. Young* (1985) 470 U.S. 1, 7, 105 S.Ct. 1038, quoting *Berger v. United States* (1935) 295 U.S. 78, 88, 55 S.Ct. 629; see also *People v. Talle* (1952) 111 Cal.App.2d 650, 678, 245 P.2d 633.) A prosecutor commits misconduct by referring to facts not in evidence. (*People v. Bolton* (1979) 23 Cal.3d 208, 212, 152 Cal.Rptr. 141.) It is equally well-settled that the prosecutor may not misstate the facts that are in the record. (*Darden v. Wainwright* (1986) 477 U.S. 168, 181-2, 106 S.Ct. 2464.) Indeed, the prosecution has "a 'special duty not to mislead,' and should not deliberately misstate the evidence." (*United States v. Richter* (2d Cir. 1987) 826 F.2d 206, 209 [quotations and citations omitted]; see also *People v. Talle*, *supra*, 111 Cal.App.2d at p. 677 ["It is [the prosecutors'] duty to see to it that those accused of crime are afforded a fair trial."].) Of course, a prosecutor cannot make up facts. (*People v. Bolton*, *supra*, 23 Cal.3d at p. 212.)

The rules of professional conduct applicable to public prosecutors are not only required as a matter of professional responsibility (see *United States v. Young*, *supra*, 470 U.S. at p. 8 ["It is unprofessional conduct for

the prosecutor intentionally to misstate the evidence or mislead the jury as to the inferences it may draw" (quoting ABA Standards for Criminal Justice 3-5.8 (2d Ed. 1980)]); they are also required as a matter of due process. As the U.S. Supreme Court emphasized in *Berger v. United States*, *supra*, 295 U.S. at pp. 88, due process dictates that a prosecutor's "interest" may not be that he "win a case, but that justice shall be done." (See also *People v. McCracken* (1952) 39 Cal.2d 376, 349, 246 P.2d 913.)

In a capital case, prosecutorial misconduct is all the more egregious, because the Eighth Amendment to the United States Constitution requires heightened reliability, and due process to ensure that reliability, whenever death is a possible outcome. (*Woodson v. North Carolina*, *supra*, 428 U.S. at pp. 288-301.)

In any capital case penalty phase proceeding, skewing the scales of justice in favor of death creates a constitutionally impermissible risk that the death penalty will be imposed in spite of factors calling for a less severe penalty. (*Lockett v. Ohio* (1978) 438 U.S. 586, 605.) Therefore, penalty phase prosecutorial misconduct is particularly egregious in effect. (See *Caldwell v. Mississippi* (1985) 472 U.S. 320, 326-334.) A prosecutor's position is such that any improper acts "... are apt to carry much weight against the accused when they should properly carry none." (*Berger v. United States*, *supra*, 295 U.S. at p. 88.)

It is firmly established that the prosecutor "is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is *not that it shall win a case, but that justice shall be done.*" (*Viereck v. United States* (1942) 318 U.S. 236, 248; emphasis added.)

> The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all, and whose interest therefore in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is, in a peculiar and very definite sense, the servant of the law, the two-fold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor — indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.

(*Berger v. United States, supra,* 295 U.S. at p. 88.)

In the course of faithfully executing his or her duty to respect the Constitution, the prosecutor must admittedly walk a fine line between overzealous and provincial to strike at some of the most fundamental human emotions. Accordingly, the suggestion that mercy is inappropriate is not only a "misrepresentation of the law, but it [withdraws] from the jury one of the most central sentencing considerations, the one most likely to tilt the decision in favor of life." (*Drake v. Kemp* (11th Cir. 1985) 762 F.2d 1449, 1460, cert. denied, 478 U.S. 1020 (1986).)

Likewise, coloring the criminally accused - already standing trial in front of a jury drawn from the community the accused has wronged in some manner - in a light that is considerably reprehensible is egregious. "Although prosecutor's statements suggesting it was jurors' duty to uphold justice system by punishing defendant - whom prosecutor argued lied - did not amount to plain error, they were nevertheless improper." (*United States v. Leon-Reyes* (9th Cir. 1999) 177 F.3d 816, 823.)

Considering the cumulative impact of such inflammatory and disparaging remarks on a fair trial, "[i]f, in a particular case ... a prosecutor's remark so infects the sentencing proceeding as to render it fundamentally unfair, the defendant may seek appropriate relief under the Due Process Clause of the Fourteenth Amendment." (*Payne v. Tennessee* (1991) 501 U.S. 808, 831 [J. O'Connor, concurring].)

The following instances, among others to be referenced elsewhere in this appeal, illustrate the pattern of prosecution and police misconduct that pervaded Mr. Parker's case, and rendered his trial unconstitutional.

A. Improper Prosecution Conduct In Opening Statement.

In an opening statement, it is the duty of counsel to state the facts fairly and to refrain from referring to facts which he cannot or will not be permitted to prove. (*People v. Planagan* (1944) 65 Cal.App.2d 371, 406-407; *People v. Chester* (1956) 142 Cal.App.2d 567, 574.) In a criminal case, the sole purpose of an opening statement by the prosecution is to outline what the prosecution *intends to prove*. (*People v. Stoll* (1904) 143 Cal. 689, 693, 77 P. 818; *People v. Planagan, supra.*) The prosecution must use actual reliable evidence to prove any fact and cannot mention unfounded musings. "It is the substance and implication of a statement, or the effect of an act which determines what the law recognizes as prejudicial misconduct." (*People v. Planagan, supra*, 65 Cal.App.2d at p. 407.) The state has an expansive freedom in advocating for the people, and "[n]othing prevents the statement from being presented in a story-like manner that holds the attention of lay jurors and ties the facts and governing law together in an understandable way." Although it is generally improper to ask jurors to step into the victim's shoes and imagine his or her suffering [citation], the prosecutor is not prohibited from identifying traits that made the victim particularly vulnerable to attack where such facts bear on the

charged crimes and are not otherwise inadmissible on their face" (*People v. Farnam* (2002) 28 Cal.4th 107, 168.)

The prosecutor improperly made arguments during her opening statement. Appellant Parker refers to and incorporates herein the allegations of Argument 7, regarding the trial court's refusal to preclude argument in the opening statements.

On February 25, 2002, appellant's counsel filed Motion, No. 23, a Motion in Limine to Preclude Argument in Opening. (4 CT 797-800.) Citing *People v. Jones, supra,* 225 Cal.App.2d at p. 609, the motion specifically requested that — due to the lack of evidence supporting the following — the prosecutor be prohibited from characterizing the victim's loss of blood as "draining blood"; that the prosecutor be precluded from describing the victim as "gagged" by a scarf found loosely tied around her neck; and that the prosecutor not be allowed to describe the victim as "tortured," particularly since the torture allegation was dismissed. (4 CT 797-800.) The motion was denied, and the prosecutor proceeded to argue facts that could not be proven during the opening statement at guilt phase.

Among other instances, the prosecutor argued that the victim was struck by a hammer-like or rock-like object that cracked her skull. (33 RT 3931.) There was no evidence that either type of object was used, merely that the trauma was caused by a blunt instrument.

The prosecutor argued repeatedly that the victim was handcuffed and gagged, and that appellant had disposed of the alleged handcuffs, despite a lack of reliable evidence as to either point. (See, e.g., 33 RT 3931, 3941, 3944.)

The prosecutor argued that the victim's blood was "drained," although there was no evidence of intentional draining. (33 RT 3943.)[181]

The prosecutor argued that the presence of what she termed "pornography" in the home — the vast majority of which had no connection whatsoever to the victim — was somehow evidence of "planning." (33 RT 3947-3948.)

B. The Prosecutor Wrongly Introduced A Large Quantity Of Allegedly Pornographic Material, Irrelevant To The Charges, Which Served Only To Inflame And Prejudice Jurors.

Appellant Parker refers to and incorporates herein the allegations of Argument 3, regarding quantities of material repeatedly referenced (erroneously) as "pornographic."

The prosecution introduced, at both guilt and penalty phases, graphic materials of a sexual nature, and permitted the prosecution to repeatedly refer to those materials as "porn" or "pornography" suggesting they sufficed as proof of premeditation and deliberation as well as intent to commit rape. This evidence was irrelevant to the issues at both the guilt and penalty phases, and highly inflammatory and prejudicial. The allegations of "porn" permeated the case, and egregiously inflamed the factfinders against appellant Parker.

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[181] During the examination of the medical examiner, the prosecutor characterized the victim's loss of blood as "bloodletting," drawing objections that were sustained — but after the bell had been rung. (34 RT 4170-4172.) During examination of a prosecution witness, the prosecutor again returned to the unsubstantiated theory that the victim's blood was "drained," again drawing a sustained objection that came too late to unring the bell. (41 RT 5600.)

All of this evidence and these inferences amounted to an assault on Mr. Parker's character, rather than providing evidence regarding the crimes with which he was charged. The graphic materials were not, in fact, punishable by obscenity laws. They were expression protected under the First Amendment, and never disseminated at all until seized by the police and introduced in court. The prosecutor's clear purpose in introducing them, and arguing about them extensively, was to reprehensibly and irresponsibly tar Mr. Parker's character in the minds of jurors.

C. The Prosecutor Wrongly Introduced The Junk Evidence Of A Forensic Dentist, Asserting It Was "Proof" That Appellant Parker Had Used Handcuffs Upon The Victim, Despite The Fact That No Handcuffs Were Found, And That The Medical Examiner Refused To Endorse This Theory.

Appellant Parker refers to and incorporates herein the allegations of Argument 4, regarding the use of a thoroughly unreliable opinion of an unqualified prosecution "expert" — a forensic dentist — regarding alleged handcuffs, using random handcuffs taken from the police evidence locker and place upon the dead body of the victim.

There were no witnesses to the homicide. No handcuffs were found; an investigator selected a random pair of handcuffs from a box in the evidence room. The medical examiner did not opine that handcuffs created the marks. Dr. Sperber was recruited to perform an examination some time after autopsy. The forensic discipline of bite mark identification by forensic dentists has been debunked and rejected by the scientific community.[182] Dr. Sperber's technique in purporting to identify "tool

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[182] See National Academy of Sciences, Committee on Identifying the Needs of the Forensic Sciences Community, *Strengthening Forensic Science In The United States: A Path Forward* (2009) (NAS Report).
(footnote continued on next page)

marks" on the body is even less reliable, and was only introduced to shore up the prosecution's otherwise unsupported theory that handcuffs might have been used to restrain the victim. The use of such thoroughly unreliable evidence — from a thoroughly unqualified "expert" who was retained after the medical examiner declined to support the prosecutor's theory — is prosecution misconduct. This Court should take the opportunity to instruct prosecutors that their duties preclude such outrageous steps to secure convictions.

D. The Prosecutor Egregiously Endeavored To Sway The Public — And Potential Jurors — By Agreeing To Participate In A "Reality Show" About This Very Case, Demonstrating Her Devotion To Win By Any Means.

Appellant Parker refers to and incorporates herein the allegations of Argument 4, regarding the refusal of the trial court to disclose videotapes in sealed court files about the prosecutor and other prosecution staff discussing this very case. While those tapes were never broadcast, they also never have been revealed to defense counsel, including the tape regarding the meeting in which it was decided that Mr. Parker would be capitally prosecuted.

Appellant Parker submits that the prosecutor's agreement to work with a broadcasting company on a "reality" television program based on this very case demonstrates a deep lack of respect for the need for fairness

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(footnote from previous page)
Congress authorized and funded "the National Academy of Sciences to conduct a study on forensic science" and directed that the committee tasked with assessing and identifying the needs of the forensic sciences to "include members of the forensics community representing operational crime laboratories, medical examiners, and coroners; legal experts; and other scientists as determined appropriate." *Id.* at p. 1.

in criminal proceedings, which is all the more striking since this case was a capital proceeding. Among the tapes never disclosed to the defense — but which presumably would have been broadcast to the public, but for the production company's own decision not to proceed with broadcast — was the District Attorney Office meeting at which it was decided to seek death for Mr. Parker.

Appellant submits that any "work product" privilege was waived by the prosecution when it allowed a film crew to observe that meeting and other conduct surrounding this case, and further, that the proprietary interests of the production company cannot possibly outweigh Mr. Parker's interest in discovery of materials concerning his own capital case.

While appellant Parker is obviously unable to demonstrate prejudice from actions of the prosecutor's office depicted in these videotapes, he nonetheless insists that the prosecutor's aim for fame illustrates a distinct lack of devotion to dignity and constitutional fairness, before and during his capital trial.

At a minimum, this Court must clarify that such conduct on the part of prosecutors is unacceptable, and afford appellant Parker the opportunity to review these tapes (which are part of the trial court's file) and file claims based upon their contents.

E. The Prosecutor Improperly Introduced Gruesome Photographs, Which Were Not Required For The Jury To Decide The Underlying Facts, And Improperly Argued They Demonstrated That Appellant's Trial Defense Was Untrue.

Appellant Parker refers to and incorporates herein the allegations of Argument 6, regarding the improper admission of gruesome phonographs. Appellant also refers to and incorporates herein by reference Argument 3, regarding unreliable and inadmissible "tool mark" evidence of Dr. Sperber,

which included highly inflammatory and gruesome photographs taken when this forensic dentist endeavored to "match" a random pair of handcuffs with marks on the victim's body, one of which had been opened during the actual autopsy.

The trial court abused its discretion by admitting gory, gruesome and inflammatory photographs, which were irrelevant and cumulative because the matters depicted therein were not at issue, and were well-described otherwise. (*People v. Gallego, supra,* 52 Cal.3d at p. 197.) The prosecutor further aggravated the prejudice from the horrific photographs, claiming they demonstrated that appellant did not kill in an out-of-control explosion of emotion, but rather, that the killing was pre-planned, cold and calculating. The photographs showed nothing of the sort; instead, they left vivid visual impressions of the outcome — including damage to the victim's body after her death — designed to overcome the evidence weighing against premeditation.

In short, the prosecution used the gruesomeness of the photographs as part of an effort to urge jurors to ignore the defense of heat of passion. The prosecutor hoped that the grisly outcome would be sufficient to persuade jurors to find guilt of first degree murder and the special circumstances, regardless of the evidence supporting a heat of passion defense; and then at penalty phase, to inflame the passions of jurors in order to secure a death sentence despite the significant mitigating evidence.

F. The Prosecutor Improperly Presented Evidence Of A Single Sperm Cell Found On A Banana Peel In A Trash Sack Of Garbage, Using It To Imply Rape By An Object.

Appellant Parker refers to and incorporates herein the allegations of Argument 8, regarding the refusal of the trial court to exclude the utterly

improper and factually worthless evidence of one single sperm cell found on a banana peel in a bag of trash.

The prosecutor improperly used the single sperm cell on a banana peel in the trash to suggest — without factual foundation — that Mr. Parker had committed rape with an object, and then ate the object. In this case, there was no evidence that Mr. Parker was the source of the solitary sperm, or of how it came to rest on a banana peel. The criminalist testified that 100 sperm cells are needed to have a sufficient quantity for DNA testing. (39 RT 5081.) A normal male ejaculation, he testified, contains three billion sperm cells. (40 RT5150.) The presence of a single sperm of unknown origin on a piece of garbage, in a bag full of mixed garbage, was irrelevant and had no probative value whatsoever. Instead, it was egregiously inflammatory and encouraged jurors to speculate.

G. The Prosecutor Improperly Referred To Facts Not In Evidence To Suggest More Evidence Existed Than Was Presented To The Jury.

Appellant Parker's trial prosecutor committed misconduct by introducing unfounded evidence to the jury against Mr. Parker. Among other instances, the prosecutor asked Det. Hergenroeather a question that elicited his opinion that Ms. Gallego was gagged and handcuffed. In a sidebar discussion after the defense objected, the trial court reminded the prosecutor that he had ruled that opinion testimony that the victim was gagged was inadmissible, and the trial court scolded her for eliciting it in the face of his clear ruling. The trial court struck the answer regarding gagging, and admonished jurors to disregard it. (Testimony, 39 RT 5022; sustaining of objection and sidebar, 39 RT 5023.) Appellant asserts that the admonition was insufficient and did not un-ring the bell.

Argument that refers to facts not in evidence is improper when it is neither based on the evidence nor related to a matter of common knowledge. (*People v. Bell* (1989) 49 Cal.3d 502, 539 [262 Cal.Rptr. 1, 778 P.2d 129]; *People v. Heishman* (1988) 45 Cal.3d 147, 195-196 [246 Cal.Rptr. 673, 753 P.2d 629]; *People v. Fosselman* (1983) 33 Cal.3d 572, 579-581 [189 Cal.Rptr. 855, 659 P.2d 1144]; *People v. Kirkes* (1952) 39 Cal.2d 724; *People v. Evans* (1952) 39 Cal.2d 242, 251 [246 P.2d 636].)

By asking questions that assumed facts not in evidence, the prosecutor created an opportunity for the jury to assume that there was additional evidence at his command on which he based his conclusion. (*See People v. Pitts*, *supra*, 223 Cal.App.3d at p. 705.)

"'The deliberate asking of questions calling for inadmissible and prejudicial answers is misconduct.' [Citation.]" (*People v. Bell, supra,* 49 Cal.3d at p. 532.)

> The rule is well established that the prosecuting attorney may not interrogate witnesses solely "for the purpose of getting before the jury the facts inferred therein, together with the insinuations and suggestions they inevitably contained, rather than for the answers which might be given." [Citations.]

(*People v. Wagner, supra,* 13 Cal.3d at p. 619; see also, *People v. Bonin* (1988) 46 Cal.3d 659, 689 [intentionally eliciting inadmissible testimony]; *People v. Warren* (1988) 45 Cal.3d 471, 480-481 [asking questions suggesting facts harmful to defendant without good faith belief in existence of said facts]; *People v. Perez* (1962) 58 Cal.2d 229, 241 [asking questions suggesting facts harmful to defendant without belief facts could be proved and purpose to prove them]; *People v. Evans*, *supra*, 39 Cal.2d at p. 251 [repeated asking of questions relative to objectionable and prejudicial matter involving appeals to passions and prejudices of jury; in § 288 prosecution, crime charged is sufficient to inflame mind of average person

so there must be "rigorous insistence" upon observance of rules of admission of evidence and conduct of trial]; *People v. Pitts*, *supra*, 223 Cal.App.3d at p. 734).

In many instances, through the line of questioning, the prosecutor acted as an unsworn witness. This is prosecutorial misconduct because the DA is essentially testifying for the jury. "'The deliberate asking of questions calling for inadmissible and prejudicial answers is misconduct.' [Citation.]" (*People v. Bell*, *supra*, 49 Cal.3d at p. 532.)

> The rule is well established that the prosecuting attorney may not interrogate witnesses solely "for the purpose of getting before the jury the facts inferred therein, together with the insinuations and suggestions they inevitably contained, rather than for the answers which might be given." [Citations.]

(*People v. Wagner, supra,* 13 Cal.3d at p. 619.)

The prosecutor's clear misconduct, together with the entire pattern of misconduct and over-reaching in this case, requires reversal.

H. The Prosecutor Wrongly Showed The Jury A Photograph Of The Victim In Life, With Her Dog, A Matter Having Nothing To Do With Her Death Or The Proof Regarding The Charges.

Appellant Parker refers to and incorporates herein the allegations of Argument 9, regarding the refusal of the trial court to exclude evidence of a photograph of the victim while alive, with the dog she had earlier in life. The dog was so attractive that the trial court itself commented that it was a nice-looking dog, and inquired what happened to the dog. (32 RT 3876.)

This Court has held that a trial court errs when it admits a photograph of a murder victim while she was alive if the photograph "... has no bearing on any contested issue in the case." (*People v. Hendricks, supra,* 43 Cal.3d at p. 594; *People v. Ramos, supra,* 30 Cal.3d at p. 578.)

Here, as in *Hendricks* and *Ramos*, the victim's identity was not in dispute; and this photograph was not used to establish her identity.

The only purpose for introducing this photograph was to gain the sympathy of jurors, as the prosecutor admitted when she explained that she selected this one in order to humanize the victim. (32 RT 3878.) Emphasizing the appearance and qualities of the victim in life lends nothing to the reliable finding of facts by the jury, and instead is calculated to inflame jurors and encourage the jury to act on emotion, rather than facts and reason.

I. The Prosecutor Wrongly Introduced The Testimony Of And Insisted On Limitations On The Impeachment Of The Jailhouse Snitch, Edward Lee, Despite Knowing There Were Reasons To Doubt The Accuracy Of His Statements.

Appellant Parker refers to and incorporates herein the allegations of Argument 10, regarding the unreliability of snitch Edward Lee, and the trial court's refusal to permit full cross examination; and Argument 12, regarding the preclusion of cross-examination of Det. Ott, whose multiple deviations from standard police practices called into question the reliability of Det. Ott's reports of his contacts with jailhouse informant Lee.

The prosecutor wrongly introduced the testimony of and insisted on limitations on the impeachment of the jailhouse snitch, Edward Lee, despite knowing there were reasons to doubt the accuracy of his statements.

The testimony of the jailhouse informant was critical to the prosecution case presented at trial, as it purported to fill an evidentiary gap regarding Mr. Parker's alleged "financial gain" motive, as well as elaborating on aspects of the killing itself (such as efforts after the killing to disguise the identity of the body). But Mr. Lee himself had a motive to curry favor in sentencing on his own charges; he had the opportunity to

learn details of the case from sources other than Mr. Parker; and the detective who conducted interviews with Mr. Lee had on several other occasions deviated from standard practices in order to tilt the scales in favor of conviction, rather than justice. The jury never heard the full story about either Mr. Lee or Det. Ott.

The defense in this case contended that Mr. Parker denied making statements to the jailhouse informant Ed Lee, who already seemed to know certain facts in Mr. Parker's case. (42 RT 5737.)[183] Parker's counsel also asserted that there are gaps in the recorded interview of Mr. Parker by Det. Ott, who had already interviewed jailhouse snitch Lee alone, before conducting an interview with Parker accompanied by another detective. (42 RT 5738-5739.) There is reason to suspect that Ott "briefed" jailhouse informant Lee before the formal recorded interview of Lee as a witness in this case. (42 RT 5740-5741.)

The prosecutor committed misconduct by presenting this unreliable evidence, and failing to present the evidence demonstrating its unreliability; and furthermore, the prosecutor used the gaps in information to press for both conviction and a death sentence. By itself, and as part of the pattern of misconduct and over-reaching, this conduct requires reversal.

J. The Prosecutor Improperly Insisted On Not Disclosing To The Jury Reasons To Mistrust Investigating Officer Det. Ott, Despite Multiple Instances Of Misconduct In Other Cases, And Information Suggesting Misconduct In This Case.

Appellant Parker refers to and incorporates herein the allegations of Argument 12, regarding the trial court's ruling that Det. Ott could not be

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[183] Appellant Parker refers to and incorporates herein the allegations of Argument 9, limiting impeachment of Mr. Lee's questionable testimony about alleged admissions by appellant.

questioned about prior instances of misconduct; and Argument 9, regarding the unreliability of evidence from the jailhouse snitch groomed by Det. Ott.

As noted above, the prosecutor's insistence on not permitting jurors to consider Det. Ott's pattern and practice of misconduct in other cases tilted the scales of justice improperly toward conviction, and lightened the prosecutions' constitutional burden of proof.

As lead investigator, Det. Ott also testified to myriad other matters regarding the investigation of the case against Mr. Parker. His reliability was unreasonably and unconstitutionally bolstered by the omission of evidence of his misconduct in the past.

K. The Prosecutor Improperly Inflamed The Jury By Showing Them Photographs, During The Examination Of Background Witness Marilyn Powell, Of Random Handcuffs Placed On The Body Of The Victim, In An Effort To Demonstrate That Handcuffs Were Used Although None Were Found, And Despite The Fact That The Medical Examiner Did Not Hold The Opinion That Any Handcuffs Had Been Used.

Appellant Parker refers to and incorporates herein the allegations of Argument 3, regarding the trial court's erroneous admission of evidence from an unqualified "tool mark" expert; and Argument 11, regarding the egregious and inflammatory display of photographs during the arrangement of random handcuffs on the victim's dead body.

There were no witnesses to the homicide. No handcuffs were found; an investigator selected a random pair of handcuffs from a box in the evidence room. The medical examiner did not opine that handcuffs created the marks. Dr. Sperber was recruited to perform an examination some time after autopsy. The forensic discipline of bite mark identification by forensic dentists has been debunked and rejected by the scientific community; Dr. Sperber's technique in purporting to identify "tool marks"

on the body is even less reliable, and an ethical prosecutor would not have pressed this inflammatory and scientifically unfounded evidence to the jury.

Compounding that error, the prosecutor egregiously elected to present a lay witness to background information, Marilyn Powell, with some of the photographs depicting a staged scene: random handcuffs placed upon the dead body of the victim. Witness Powell testified that during her previous relationship with Mr. Parker over a few months in 1998, he used handcuffs to lock his bicycle. She described them as like the ones that police officers use: heavy, strong, silver, the two cuffs connected with links. (41 RT 5459-5460.) Shown the inflammatory and staged photographs, Ms. Powell testified that the handcuffs in the inflammatory photograph appeared to be the ones that Mr. Parker had used. (41 RT 5460.)

The only possible purposes of presenting a lay witness with the photographs involving a dead body and a random set of handcuffs were to horrify both the witness and the jurors. There was no evidentiary purpose, as no handcuffs had been found; a set of random handcuffs could easily have been used to indicate they were similar to handcuffs she had seen in the past; and this witness was not a witness to the crime or its aftermath.

Preying on the fears and emotions of witnesses and jurors is far outside the bounds of ethical prosecution behavior, and reversal is required.

L. The Prosecutor Improperly Misled The Jury As To Lying In Wait.

Appellant Parker refers to and incorporates herein the allegations of Argument 13, regarding the improper instructions and argument about lying in wait murder, and Argument 12, regarding the unconstitutional overbreadth of lying in wait special circumstances.

Counsel moved that the trial court to dismiss the lying in wait special circumstance, as it was not supported by evidence. Alternatively, trial counsel argued that there was no meaningful way to differentiate between what is required for the theory of first degree murder and what is required for the special circumstance; therefore, a finding of guilty on the murder charge means an automatic finding of guilty on the special circumstance. (44 RT 6056.) With no distinction, it is possible for the prosecution to argue that ALL domestic killings that were not absolutely spontaneous — husband/wife, boyfriend/girlfriend, roommate (such as in this case) — are both lying in wait murder and an automatic special circumstance. There are no distinctions for the jury to draw on. (44 RT 6056.)

The trial prosecutor exploited this constitutional infirmity. In her opening statement, the prosecutor argued that jurors could only come to one conclusion, that appellant Parker was not only guilty of murder, but of methodically planning to take Gallego by surprise, lying in wait; that he did this to rape her and get all her money. (33 RT 3953.)

During closing argument, the prosecutor urged that lying in wait is waiting and watching for an opportune time to act, together with concealment by ambush or other design to take the person by surprise, *even though the victim is aware of murderer's presence*. She further urged that the alleged lying in wait need not continue for any particular length of time. (45 RT 6275.)

The application of the lying in wait murder theory and special circumstance to appellant Parker amounts to strict liability for being present prior to the offense, *in the apartment that he shared with the victim.* The lying in wait theory of murder is supposed to be a substitute for and equivalent to premeditation and deliberation; yet extending it this far, to all

who reside with someone who is killed, in no way demonstrates something akin to that mental state.

The prosecutor's actions under these circumstances reinforce the prosecution's pattern of over-reaching throughout the case.

M. The Prosecutor Wrongly Pressed That Murder Was The Default Finding, When Voluntary Manslaughter Was The Defense, Erroneously Placing The Burden Of Proof On The Defendant To "Reduce" The Charge.

Appellant Parker refers to and incorporates herein the allegations of Argument 20, regarding the improper framing of voluntary manslaughter as a "reduction" from the murder charge, suggesting that the burden of proof was on the defense to prove the lesser offense.

The prosecutor improperly urged jurors to relieve the prosecution of its burden of proof, and to place a burden of proof upon the defendant to "reduce" the murder charge to manslaughter.

N. Improper Prosecution Conduct In Closing Argument.

During closing argument, the prosecutor pressed many of the erroneous themes noted above. Together, these instances of misconduct skewed the jury's decision, which was made on the basis of passion, and not on the basis of reliable facts and appropriate legal instructions.

In pressing that the homicide was planned, the prosecutor stressed the alleged "porn" — cut and paste images apparently created by Mr. Parker. (45 RT 6303.) She discussed sexual fantasies attributed to Mr. Parker. (45 RT 6304.) From these, the prosecutor urged that this was a brutal, sadistic murder committed for sexual pleasure, and stressed her unproven theory that the victim had been handcuffed and gagged as well as raped. (45 RT 6307-6308.)

Perhaps because her allegations lacked proof, the prosecutor then urged jurors that they did not need an expert to tell them that — oddly commenting that the jurors did not need an expert to tell them that the judge probably has bad eyesight, and probably needs glasses. (45 RT 6308.) In the prosecutor's view, it takes no more than common sense to accept the (thoroughly unreliable) testimony of Dr. Sperber. (45 RT 6308.) In rebuttal, the prosecutor again returned to her emphasis on alleged "porn" as proof that appellant Parker had premeditated and deliberated a murder of his roommate. (46 RT 6454.)

According to the prosecutor, the fact that Mr. Parker had handcuffs at some time in the past, which he used to lock his bike, was proof he had used them on this occasion. (45 RT 6309.) Once again, the prosecutor stressed that the body was "drained" of blood, despite the lack of proof of any intentional draining, and the court's prior admonitions on that subject. (45 RT 6309.) The prosecutor speculated that Mr. Parker had disposed of the alleged handcuffs and other evidence, and was able to "get away" with that. (45 RT 6310.)

Developing her theme of draining the victim's body of blood, the prosecutor asked jurors to imagine themselves bleeding to death over the course of five or ten minutes — in effect, asking them to place themselves in the position of the victim, and to identify with her. (45 RT 6311.) Immediately after an objection to that line of argument was sustained, the prosecutor repeated it, again drawing an objection that was sustained. (45 RT 6311-6312.)

In discussing the homicide charges, the prosecutor dismissed manslaughter outright, arguing that a manslaughter verdict would be unacceptable, and that "The root of the word is '**Man's Laughter.**'" (45 RT 6319.) The suggestion that the defendant was laughing over the death

of the victim was unfounded and outrageous. The prosecutor then stressed that the murder charge must be "reduced" for a manslaughter verdict. (45 RT 6319-6320.)

Once again endeavoring to lighten the state's own burden of proof, the prosecutor stressed that jurors need not agree on the underlying theory of first degree murder. (45 RT 6325.) A problem with this approach, obviously, is that jurors need not accept any one set of events, and in this case, the prosecutor pressed many pieces of unreliable information, and theories that were unsupported by reliable facts.

In the rebuttal argument, the prosecutor again returned to the factually unsupported themes of handcuffing and gagging, arguing that she did not have to prove the order in which things occurred. (46 RT 6458, 6460-6461.) Those allegations, however, were not reliably proven at all.

Endeavoring to rebut the defense argument that the absence of evidence is not evidence, the prosecutor countered by arguing that just because something cannot be scientifically proven doesn't mean it didn't happen. (46 RT 6463.) This argument is not only a logical fallacy, asking jurors to infer facts that are not present. It also severely undermines the prosecution's constitutionally mandated burden of proof beyond a reasonable doubt.

O. Conclusion.

For all these reasons, appellant Parker's conviction and sentence of death must be reversed. Considered individually, and certainly cumulatively, these acts violated appellant's Fifth, Sixth, Eighth and Fourteenth Amendment rights to liberty, a fair trial, notice, unbiased jury, cross-examination and confrontation, due process, heightened capital case due process, reliable guilt determination and individualized and reliable

penalty determination. (See *Hicks v. Oklahoma*, *supra*, 447 U.S. at p. 346; *Godfrey v. Georgia*, *supra*, 446 U.S. at pp. 428-429; *Stringer v. Black*, *supra*, 503 U.S. 222; *Zant v. Stephens*, *supra*, 462 U.S. at p. 865.)

21. THE PENALTY OF DEATH AND EXECUTION IN CALIFORNIA IS ARBITRARILY AND CAPRICIOUSLY IMPOSED DEPENDING ON THE COUNTY IN WHICH THE DEFENDANT IS CHARGED, IN VIOLATION OF THE RIGHT TO EQUAL PROTECTION OF THE LAW.

Appellant's death sentence and confinement are unlawful and unconstitutional. They were obtained in violation of the Eighth and Fourteenth Amendments to the United States Constitution and article I, section 7 (b) and article IV, section 16 (a) of the California Constitution, because the death penalty in California is imposed arbitrarily and capriciously depending on the county in which the case is prosecuted.

It is extraordinarily unlikely that Mr. Parker's case would have been capitally charged in the vast majority of other counties in this state. This case involved a single victim, who was neither a child nor a public safety officer; Mr. Parker had no prior criminal record; the victim and Mr. Parker had an ongoing relationship over several years, including an agreement to marry; and the most inflammatory facts pressed by the prosecutor were either irrelevant (e.g., graphic material) or occurred after the crime (e.g., efforts to hide the crime).

Appellant incorporates herein the allegations of Argument 4, concerning a tape regarding the District Attorney's charging decision in this case, which was recorded by a third party but has never been disclosed to the defense.

It is axiomatic that every person in the United States is entitled to equal protection of the law. (U.S. Const., 14th Amend.)

It is also true that since 1976 the Supreme Court of the United States has upheld the death penalty in general against Eighth Amendment challenges and allowed the states to vary in their statutory schemes for putting people to death. (*See Jurek v. Texas* (1976) 428 U.S. 262; *Proffitt v. Florida* (1976) 428 U.S. 242; *Gregg v. Georgia* (1976) 428 U.S. 153. *Cf. McCleskey v. Kemp* (1987) 481 U.S. 279.)

Nonetheless, on December 12, 2000, the Supreme Court recognized that when fundamental rights are at stake, uniformity among the counties within a state, in the application of processes that deprive a person of a fundamental right, are essential. (*Bush v. Gore* (2000) 531 U.S. 98, 105-110.) When a statewide scheme is in effect, there must be sufficient assurance "that the rudimentary requirements of equal treatment and fundamental fairness are satisfied." (*Id.* at p. 109.) This principle must apply to the right to life as well as the right to vote.

In California, the 58 counties, through the respective prosecutors' offices, make their own rules, within the broad parameters of Penal Code sections 190.2 and 190.25, as to who is charged with capital murder and who is not. There are no effective restraints or controls on prosecutorial discretion in California. So long as an alleged crime falls within the statutory criteria of Penal Code sections 190.2 or 190.25, the prosecutor is free to pick and choose which defendants will face potential death and which will face a potential lesser punishment.

This is not uniform treatment within the state. In some California counties a life is worth more than in others, because county prosecutors use different standards, or no standards, in choosing whether to charge a defendant with capital murder. (See, Pierce and Radelet, *The Impact of*

Legally Inappropriate Factors on Death Sentencing for California Homicides, 1990-1999 (2005) 46 Santa Clara L. Rev. 1; *People v. Adcox, supra,* 47 Cal.3d at pp. 275-276 (conc. op. of Broussard, J.).) If different and standardless procedures for counting votes among counties violates equal protection, as in the *Bush* case, then certainly different and standardless procedures for charging and prosecuting capital murder must violate the right to equal protection of the law, as well. Such different and standardless procedures for charging and prosecuting capital murder also violate the Eighth Amendment mandate "that capital punishment be imposed fairly, and with reasonable consistency, or not at all." (*Eddings v. Oklahoma* (1982) 455 U.S. 104, 112.)

This Court must therefore reexamine its prior precedents which hold that prosecutorial discretion as to which defendants will be charged with capital murder does not offend principles of due process, equal protection or cruel and unusual punishment. (See, e.g., *People v. Anderson* (2001) 25 Cal.4th 543, 622-623; *People v. Williams* (1997) 16 Cal.4th 153, 278; *People v. Keenan* (1988) 46 Cal.3d 478, 505.) Instead, this Court should recognize, in accordance with the Constitution and necessary inferences from United States Supreme Court case law, that unequal treatment among the California counties violates the Fourteenth Amendment Equal Protection Clause, *Bush v. Gore, supra,* 531 U.S. at p. 105-110, the Eighth Amendment, and article 1, sections 7 (b) and 17 and article IV, section 16 (a) of the California Constitution. It also violates the Eighth Amendment and article 1, section 17 of the California constitution.

22. THE PROSECUTOR COMMITTED PREJUDICIAL MISCONDUCT AT THE PENALTY PHASE OF TRIAL.

Mr. Parker's death sentence was rendered in violation of his rights to due process; to a fair, reliable, rational, nonarbitrary, and accurate determination of guilt and penalty as guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and Article I, Sections 1, 7, 9, 12, 13, 14, 15, 16, 17, 24, 27, and 28 of the California Constitution and Penal Code Section 1473 because the prosecution engaged in a pervasive, purposeful, intentionally improper, and consistent pattern of misconduct at the guilt and penalty phases of his trial that was designed to and did in fact prejudicially deprive Mr. Parker of the foregoing constitutional rights. The constitutional errors are both clear and fundamental, and strike at the heart of the trial process.

A prosecutor can be a forceful advocate, but "[W]hile [a prosecutor] may strike hard blows, he is not at liberty to strike foul ones." (*United States v. Young, supra,* 470 U.S. at p. 7, quoting *Berger v. United States, supra,* 295 U.S. at p. 88; see also *People v. Talle, supra,* 111 Cal.App.2d at p. 678.) A prosecutor commits misconduct by referring to facts not in evidence. (*People v. Bolton, supra,* 23 Cal.3d at pp. 208, 212.) It is equally well-settled that the prosecutor may not misstate the facts that are in the record. (*Darden v. Wainwright, supra,* 477 U.S. at pp. 181-182.) Indeed, the prosecution has "a 'special duty not to mislead,' and should not deliberately misstate the evidence." (*United States v. Richter, supra,* 826 F.2d at p. 209 [quotations and citations omitted]; See also *People v. Talle, supra,* 111 Cal.App.2d at p. 677 ["It is [the prosecutors'] duty to see to it that those accused of crime are afforded a fair trial."]) Of course, a prosecutor cannot make up facts. (*People v. Bolton, supra,* 23 Cal.3d at p. 212.)

The rules of professional conduct applicable to public prosecutors are not only required as a matter of professional responsibility (see *United States v. Young*, *supra*, 470 U.S. at p. 8 ["It is unprofessional conduct for the prosecutor intentionally to misstate the evidence or mislead the jury as to the inferences it may draw," (quoting ABA Standards for Criminal Justice 3-5.8 (2d Ed. 1980)]);, they are also required as a matter of due process. As the U.S. Supreme Court emphasized in *Berger v. United States*, *supra*, 295 U.S. at p. 88, due process dictates that a prosecutor's "interest" may not be that he "win a case, but that justice shall be done." (See also *People v. McCracken, supra,* 39 Cal.2d at p. 349.)

In a capital case, prosecutorial misconduct is all the more egregious, because the Eighth Amendment to the U.S. Constitution requires heightened reliability, and due process to ensure that reliability, whenever death is a possible outcome. (*Woodson v. North Carolina*, *supra*, 428 U.S. at pp. 288-301.)

In any capital case penalty phase proceeding, skewing the scales of justice in favor of death creates a constitutionally impermissible risk that the death penalty will be imposed in spite of factors calling for a less severe penalty. (*Lockett v. Ohio*, *supra*, 438 U.S. at p. 605.) Therefore, the effect of penalty phase prosecutorial misconduct is particularly egregious. (*See Caldwell v. Mississippi*, *supra*, 472 U.S. at pp. 326-334.) A prosecutor's position is such that any improper acts "... are apt to carry much weight against the accused when they should properly carry none." (*Berger v. United States*, *supra*, 295 U.S. at p. 88.)

It is firmly established that the prosecutor "is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is *not that it shall win a*

case, but that justice shall be done." (*Viereck v. United States, supra,* 318 U.S. at p. 248; emphasis added.).

> The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all, and whose interest therefore in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is, in a peculiar and very definite sense, the servant of the law, the two-fold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor — indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.

(*Berger v. United States, supra,* 295 U.S. at p. 88.)

In the course of faithfully executing his or her duty to respect the Constitution, the prosecutor must admittedly walk a fine line to strike at some of the most fundamental human emotions. Accordingly, the suggestion that mercy is inappropriate is not only a "misrepresentation of the law, but it [withdraws] from the jury one of the most central sentencing considerations, the one most likely to tilt the decision in favor of life." (*Drake v. Kemp, supra,* 762 F.2d at p. 1460, cert. denied, 478 U.S. 1020 (1986).)

Likewise, coloring the criminally accused — already standing trial in front of a jury drawn from the community the accused has conceptually wronged in some manner — in a unfair manner is egregious conduct. "Although prosecutor's statements suggesting it was jurors' duty to uphold justice system by punishing defendant - whom prosecutor argued lied - did not amount to plain error, they were nevertheless improper." (*United States v. Leon-Reyes, supra,* 177 F.3d at p. 823.)

Considering the cumulative impact of such inflammatory and disparaging remarks on a fair trial, "[i]f, in a particular case ... a prosecutor's remark so infects the sentencing proceeding as to render it fundamentally unfair, the defendant may seek appropriate relief under the Due Process Clause of the Fourteenth Amendment." (*Payne v. Tennessee, supra,* 501 U.S. at p. 831 [J. O'Connor, concurring)].)

The following instances, among others to be referenced elsewhere in this appeal, illustrate the pattern of prosecution and police misconduct that pervaded Mr. Parker's case, and rendered his trial unconstitutional.

A. Carryover and Cumulative Error from the Guilt Phase.

Appellant refers to and incorporates herein all of the errors raised in this brief, and particularly the misconduct at the guilt phase raised in Argument 20. This case is notable for the overreaching of the prosecution throughout the trial, and the errors at the guilt phase were compounded by additional misconduct at the penalty phase.

B. Prosecutorial Misconduct Noted in the New Trial Motion.

Appellant Parker refers to and incorporates herein the errors noted in the New Trial Motion, Argument 26. While that argument is framed as errors of the trial court, the prosecutor committed misconduct by error was in pursuing these matters which were clearly improper at the penalty phase — but nonetheless approved in error by the trial court.

C. The Prosecutor Improperly Argued Non-Statutory Factors in Aggravation.

Under California law, only statutory factors in aggravation may be considered by the jury at a capital sentencing trial. The prosecutor argued several non-statutory factors in aggravation.

In *People v. Boyd, supra,* 38 Cal.3d at pp. 775-776, this Court established that evidence of non-statutory aggravating factors is not admissible during the penalty phase of a capital trial, and the prosecutor may not argue that any non-statutory factors should be considered in aggravation:

> [T]he prosecution's case for aggravation is limited to evidence relevant to the listed factors exclusive of factor (K) — since that factor encompasses only extenuating circumstances offered as a basis for a sentence less than death — while the defense may present evidence relevant to any listed factor including (K).

The prosecution's argument that evidence other than statutory aggravation — even evidence offered in mitigation — provided a basis for a death sentence was grossly improper and requires reversal. The prosecutor essentially argued that the defendant was not entitled to mercy because he had shown the victim no mercy; and that the defendant himself had caused jurors to suffer because he exercised his right to a jury trial.

The following examples, individually and collectively, urged jurors to sentence Mr. Parker to death for improper reasons:

* The prosecutor argued that the facts of the case make everyone feel bad; that one consequence of Mr. Parker's acts is that the jurors themselves had to come to court, listen to evidence, look at autopsy photos, and hear the pain of the victim's family. (54 RT 7609.) **This argument cast the jurors themselves as victims in this case.** Continuing, the prosecutor argued that jurors have a heart, they care about other humans, care about humanity; that Mr. Parker doesn't have those feelings and compassion; that jurors are only called upon because of what he did, that he deserves death; that he caused all this suffering. That jurors are

called upon to deliver the death penalty because of him. (54 RT 7610.)

* Reinforcing the idea that jurors had a **duty to impose a death judgment**, the prosecutor named citizen witnesses and police officers, who did their duty. (54 RT 7611; *see* section below, argument about a death sentence allegedly being mandatory.)

* Additionally, the prosecutor urged that a sentence of life without possibility of parole would amount to failure. Drawing an analogy to climbing Mt. Everest, he urged jurors to think about reaching the "summit" as delivering complete justice, justice without compromise. (54 RT 7612-7613.) Continuing, he stressed that "we" are within striking distance; that **jurors had to reach a death verdict to serve society, the community, to express our denouncement of crime**. (54 RT 7613.) The prosecutor's urging to make a statement about crime is contrary to the jury's actual duty to decide the appropriate sentence for this individual. Convictions serve to make a statement about crime.

* **The prosecutor improperly urged jurors to put themselves in the place of the victim,** to personally visualize what she went through in her final moments, so as to "experience" the state's allegations about what happened themselves. (54:7626-7631.) This line of argument, carried out at length and with considerable gory and heart-wrenching detail, can only be characterized as appealing to emotions over reason; and furthermore, requiring jurors to **speculate** about the details of what happened and how. It is worth noting that there were no eyewitnesses nor other contemporaneous accounts before the jury; the state's case was largely circumstantial as to the details, but inflamed from the very beginning of trial by the prosecution.

* The prosecutor improperly argued that **post-crime actions**, to hide the crime, were legitimate sentencing factors because they offered a peek into the defendant's soul. (54 RT 7632.) This is not a statutory sentencing factor.

* The prosecutor improperly argued that jurors should **count the aggravating factors** alleged to arrive at a death verdict. (54 RT 7638.) Although the trial court reminded jurors that no weight is to be assigned to any factor, that admonishment did not cure the error in urging counting of aggravators. The prosecutor continued, again urging jurors to "see" what the prosecution alleges happened in terms of special circumstances. (54 RT 7639.)

* The prosecutor went so far with victim impact as to include the fact that the **victim had a beloved dog**. (54 RT 7642.) Canine fellowship is not a statutory factor in aggravation; this was mentioned solely for the purpose of inflaming passions.

* The prosecutor improperly argued that the mitigation evidence presented about appellant's appalling early childhood amounted to **"reverse victimization,"** calling himself a victim and "robbing" the victim of this crime of the emotional response that the prosecutor asserted was rightfully hers. (54 RT 7649.) The prosecutor continued in this vein, accusing appellant of "usurping the passion" because he exercised his right to a trial. (54 RT 7650.) All capital defendants have a right to present mitigating evidence at the penalty phase, and moreover, the jury has a duty to give that evidence meaningful consideration. (See, e.g., *Lockett v. Ohio, supra,* 438 U.S. 586.)

* The prosecution **wrongly urged jurors to use Mr. Parker's lack of a prior criminal record as aggravation**, arguing that his brain couldn't

have been affected since he graduated high school, flourished, had no history of misconduct before this crime. (54 RT 7657.) The lack of a prior record cannot be used as aggravation; it is mitigating only.

* The prosecutor continued, urging that the evidence of severe child abuse should be discarded, because there were 80,000 child abuse reports in one year in San Diego, and that jurors shouldn't give them all an "excuse" to get off the hook for murder. (54:7659.) **Mitigating background evidence is not an "excuse" for murder**; instead, it must be weighed in the decision whether a sentence of LWOP or death is more appropriate.

* The prosecutor wrongly urged that the fact that the victim did not get due process — a jury and judge, an attorney, witnesses to testify before she was killed — weighed against a life sentence. (54 RT 7673.) A defendant's exercise of his constitutional rights cannot be used as aggravation.

These arguments were improper, inflammatory, and highly prejudicial. They advanced non-statutory aggravating factors, which is not permissible under California law (see above), nor does it serve to narrow and channel the jury's discretion at sentencing as required by the United States Constitution. The argument suggested that the exercise of appellant's constitutional rights should be weighed against the fact that the victim was not permitted such rights.

This Court has consistently held that in the penalty phase of a capital case, a jury should properly consider "sympathy or pity for the defendant in determining whether to show mercy and spare the defendant from execution, and that it is error to advise the jury to the contrary." (*People v. Robertson (I)* (1982) 33 Cal.3d 21, 57, citing *People v. Vaughn* (1969) 71

Cal.2d 406, 422, and *People v. Polk* (1965) 63 Cal.2d 443, 451.) Accordingly, it is "erroneous and misleading" for the prosecutor to suggest to the jurors that they should not consider sympathy or pity in reaching their penalty verdict. (*People v. Robertson (I)*, *supra*, at p. 58.)

This Court has held that "[i]t is not only appropriate, but necessary, that the jury weigh the sympathetic elements of defendant's background against those that may offend the conscience." (*People v. Haskett* (1982) 30 Cal.3d 841, 863.) Similarly, the United States Supreme Court has held that the Eighth Amendment requires "consideration of the character and record of the **individual offender** and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death. (*Woodson v. North Carolina*, *supra*, 428 U.S. at p. 304.)

The suggestion that appellant should die because he did not accord his victim due process of law is contrary to the Eight Amendment because in no homicide case, capital or non-capital, will the defendant be able to make such a showing. This proffered basis for the imposition of a death sentence does nothing to channel the juror's discretion, and it operates to preclude consideration of those factors relevant to the determination of sentence in a capital case. (See *Lockett v. Ohio, supra,* 438 U.S. 586 and *Eddings v. Oklahoma, supra,* 455 U.S. 104.)

D. Improper Argument That Jurors "Shall" Impose the Death Penalty.

Appellant refers to and incorporates herein Argument 23, regarding the improper jury instruction indicating that jurors were required to impose capital punishment. The prosecutor exploited that error during closing argument, arguing that the "shall" language was mandatory, and that any

juror who did not feel bound by that language was not following the law. (See 54 RT 7660-7671.)

E. Lack of Remorse Was Improperly Urged as an Aggravating Factor.

In addition, the prosecutor improperly urged lack of remorse as a factor in aggravation. The prosecutor argued that appellant would not feel bad in the least for the pain he caused to those who loved the victim. (54 RT 7666.) Indeed, the prosecutor continued, if he had felt remorse, he would not have mutilated her body or left it in other locations. (54 RT 7667.)

Prosecutorial argument seeking imposition of death based on a defendant's lack of remorse violates a defendant's Fifth, Eighth and Fourteenth Amendment rights, as well as California law. (*People . Coleman* (1969) 71 Cal.2d 1159, 1168; *People v. Fierro* (1991) 1 Cal.4th 173, 244; *Lesko v. Lehman* (3d Cir. 1991) 925 F.2d 1527, 1544-1545.)

Those statements failed to constitutionally channel the jury's discretion during their deliberations of sentence, and failed to provide him with the individualized determination of sentence required by the Eighth Amendment. (See *Lockett v. Ohio, supra,* 438 U.S. 586; *Eddings v. Oklahoma, supra,* 455 U.S. 104; *Woodson v. North Carolina, supra,* 428 U.S. at p. 304.)

F. Conclusion.

For all these reasons, appellant's death sentence must be reversed. Considered individually, and cumulatively, these acts violated appellant's Fifth, Sixth, Eighth and Fourteenth Amendment rights to liberty, a fair trial, notice, unbiased jury, cross-examination and confrontation, due process, heightened capital case due process, reliable guilt determination and individualized and reliable penalty determination. (See *Hicks v. Oklahoma,*

supra, 447 U.S. at p. 346; *Godfrey v. Georgia*, *supra*, 446 U.S. at pp. 428-429; *Stringer v. Black*, *supra*, 503 U.S. 222; *Zant v. Stephens*, *supra*, 462 U.S. at p. 865.)

23. THE TRIAL COURT'S INSTRUCTION THAT THE JURY "SHALL" IMPOSE DEATH IF THE AGGRAVATING FACTORS OUTWEIGHED THE MITIGATING IS CONTRARY TO THIS COURT'S RULINGS, AND REVERSAL IS REQUIRED.

The modified instruction given at appellant's trial violated his rights under the Sixth, Eighth and Fourteenth Amendments to the federal Constitution and the corresponding sections of the state Constitution. The instruction was vague and imprecise, failed to accurately describe the weighing process the jury must apply in capital cases, prohibited the jury from fully exercising its broad discretion in determining the appropriate penalty and deprived appellant of the individualized consideration the Eighth Amendment requires. The modified instruction could well have been understood by jurors that they **shall** return a death judgment if the aggravating circumstances outweighed those in mitigation — that a death verdict was mandatory — and indeed, that interpretation was urged by the prosecutor. Reversal is required.

A. Discussion in the Record.

In pre-penalty phase discussions of jury instructions, the defense objected to use of the "shall" language, arguing that it may cause jurors to believe that a death sentence is mandatory. (50 RT 6910.) The court's instruction to the jury retained the "shall" language, stating "If you conclude that the aggravating circumstances are so substantial in comparison to the mitigating circumstances that they warrant death instead

of life without parole, you **shall** return a judgment of death." (8 CT 1908; 54 RT 7606.)[184]

The prosecution argued to the jury that there is no debate about which penalty is worse; the law says that death is worse, and that if aggravation is so substantial in comparison to mitigation, the jury shall impose death even if jurors think that a sentence of life without possibility of parole is worse. (54 RT 7669-7670.) The prosecutor stressed that if any juror thought that aggravation outweighed mitigation but still wanted to impose a verdict of life without possibility of parole, other jurors needed to point to this instruction and tell that juror that he or she is not following the law. (54 RT 7671.) During this argument, the prosecutor used a copy of part of the instruction, in which only the word "shall" was circled. (54 RT 7678.) The defense objected on the ground that urging jurors they had no discretion as to penalty was a misstatement of the law; it took the jurors' task from unfettered discretion to no discretion. (54 RT 7679-7681.) The objection was overruled. (54 RT 7682.)

Jurors asked, inter alia, whether they could consider the consequences of the verdict beyond the consequences to the defendant. (8 CT 1928.) The prosecutor again argued to the trial court that a death sentence is mandatory if jurors conclude that aggravating factors outweigh mitigating. (55 RT 7789.) Rather than addressing jury questions about what they were permitted to consider, the trial court instructed that "In reaching your verdict you may consider only the matters authorized by my instructions to you in this penalty phase." (8 CT 1932.)

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[184] [1] CALJIC No. 8.88 was modified in the Spring of 2010 to delete this mandatory language.

B. Legal Discussion.

The trial court erred in failing to make clear to jurors that the decision of which penalty to impose is fundamentally a moral assessment, and never the automatic or mandatory verdict that the prosecutor wrongly urged.

In *People v. Brown* (1985) 40 Cal.3d 512, this Court observed:

> "Aggravating" and "mitigating" are not defined by statute. However, we see no statutory intent to require death if the jury merely finds more bad than good about the defendant and to permit life without parole only of it finds more good than bad. At a capital penalty trial, defendant has already been convicted of committing, without legal excuse, an intentional first degree murder with at least one "special circumstance" necessary to make him eligible for the death penalty. Often a person in this situation will have a substantial history of criminal and antisocial behavior. It would be rare indeed to find mitigating evidence which would redeem such an offender or excuse his conduct in the abstract. Recognizing this, the statute requires at a minimum that he suffer the penalty of life imprisonment without parole. It permits the jury to decide only whether he should instead incur the law's single more severe penalty — extinction of life itself. (§ 190.3) It follows that the weighing of aggravating and mitigating circumstances must occur within the context of those two punishments; **the balance is not between good and bad but between life and death**. Therefore, to return a judgment of death, the jury must be persuaded that the 'bad' evidence is so substantial in comparison with the 'good' that it warrants death instead of life without parole.

(*People v. Brown, supra*, 40 Cal.3d at pp. 541-542, fn.13 [italics in original; emphasis added]; see also, *People v. Burgener* (1986) 41 Cal.3d 505, 542-543.)

In *Brown*, this Court explained that section 190.3 was, in fact, constitutional but because the terms of this statute could potentially confuse the jury, jurors should also be given additional instructions so that they could personally and properly weigh the aggravating and mitigating factors in the context of the two penalties and arrive at the appropriate penalty. This Court stated:

> By directing that the jury "shall" impose the death penalty if it finds that aggravating factors "outweigh" mitigating, the statute should not be understood to require any juror to vote for the death penalty unless, upon completion of the "weighing" process, he decides that death is appropriate under all the circumstances.

(*People v. Brown, supra,* 40 Cal.3d at p. 541.)

In *People v. Duncan* (1991) 53 Cal.3d 955, this Court observed that section 190.3 and this instruction give the jury "broad discretion to decide the appropriate penalty by weighing all the relevant evidence. The jury may decide, even in the absence of mitigating evidence, that the aggravating evidence is not comparatively substantial enough to warrant death." (*Id.* at p. 979.)

However, the "shall" language given the jury in the present case deprived the jury of the broad discretion described in *Duncan*. Because they were instructed and told in argument that they **must** return a death verdict if aggravation outweighed mitigation, the jury did not know that they could reject a death sentence even in the absence of mitigating evidence, and even if the aggravating evidence was "not comparatively substantial enough to warrant death." (*Ibid.*) In truth, the jury was essentially ordered to return a death verdict simply if it found that aggravation outweighed mitigation by even the slightest amount.

Consequently, the "shall" language of the modified instruction caused the jury to believe that they lacked the discretion to impose life without the possibility of parole, even in the absence of mitigation. "The weighing process is 'merely a metaphor for the juror's personal determination that death is the appropriate penalty under all the circumstances.'" (*People v. Jackson* (1996) 13 Cal.4th 1164, 1243-44, quoting *People v. Johnson* (1992) 3 Cal.4th 1183, 1250.) Thus, this Court has held that the 1978 death penalty statute permits the jury in a capital case to return a verdict of life without possibility of parole even in the complete absence of any mitigating evidence. (See *People v. Duncan*, *supra*, 53 Cal.3d at p. 979; *People v. Brown, supra*, 40 Cal.3d at pp. 538-541 [holding that the jury may return a verdict of life without possibility of parole even if the circumstances in aggravation outweigh those in mitigation].)

Even though there was other language in the instructions stating that the verdict was not mandatory, that conflicting language did not cure the defect, particularly when the prosecutor argued strongly that the instruction mandated the outcome. As the United States Supreme Court held in *Francis v. Franklin*, language that merely contradicts, and does not explain, a constitutionally infirm instruction does not suffice to absolve the infirmity. (*Francis v. Franklin, supra*, 471 U.S. at pp. 318-325.)

It is plain that the jurors were unaware that they had the discretion to impose a sentence of life without possibility of parole even if they concluded that the circumstances in aggravation outweighed those in mitigation, — and even if they found no mitigation whatever. In short, modified CALJIC No. 8.88 improperly directed a verdict should the jury find that aggravation outweighed mitigation to any degree. (See *People v. Peak* (1944) 66 Cal.App.2d 894, 909.)

Moreover, the defect in the instruction deprived appellant of due process of law (see *Hicks v. Oklahoma, supra,* 447 U.S. at p. 346; see also *Hewitt v. Helms* (1983) 459 U.S. 460, 471-472), and rendered the resulting verdict constitutionally unreliable in violation of the Eighth and Fourteenth Amendments (see *Furman v. Georgia, supra,* 408 U.S. 238).

In addition, the modified instruction not only denied appellant his right to due process, it also denied him the right to a jury trial because it effectively directed a verdict as to penalty in his case. (See *Zemina v. Solem* (D.S.D. 1977) 438 F.Supp. 455, 469-470, aff'd and adopted, 573 F.2d 1027, 1028 (8th Cir. 1978); cf. *Cool v. United States, supra,* 409 U.S. 100 [disapproving instruction placing unauthorized burden on defense].) Thus, the defective instruction violated appellant's Sixth Amendment rights as well.

C. Conclusion.

Appellant's death judgment must be reversed because the State cannot prove that the trial court's error was harmless beyond a reasonable doubt. (*Chapman v. California, supra,* 386 U.S. at p. 24.)

24. THE TRIAL COURT ERRED IN APPOINTING SEPARATE COUNSEL TO INVESTIGATE THE DEFENDANT'S ALLEGATIONS OF INEFFECTIVE ASSISTANCE OF COUNSEL WHILE FAILING TO RELIEVE APPOINTED COUNSEL OF THEIR DUTIES; AND IN PERMITTING SIMULTANEOUS SELF-REPRESENTATION.

Appellant's confinement and sentence are illegal, unconstitutional, and void under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution, under Article I, sections 1, 7, 13, 15, 16, and 17 of the California Constitution, and the statutory and decisional law of the

State of California, because the trial court unreasonably appointed alternate counsel for the purpose of investigating appellant's complaints that his trial counsel were ineffective, at the same time refusing to relieve appointed counsel, thus violating appellant's rights to due process of law, a fair trial, equal protection of law, effective assistance of counsel, and the heightened reliability required in capital cases under the Eight Amendment.

A. Background.

On or about August 12, 2002, while the jury was deliberating penalty, appellant Parker sent a letter to the trial judge complaining that his counsel had not performed adequately. (8 CT 1938 et seq.) That day, the jury returned a verdict of death. (8 CT 1936; 11 CT 2615.) Mr. Parker's letter was construed as a motion for new trial based on ineffective assistance of counsel, and the trial court appointed the Alternate Public Defender's Office "for the limited purpose of representation on the New Trial Motion issues only." (11 CT 2616.)

A status conference on the motion for new trial was held on September 11, 2002. Mr. Parker was represented by Mr. Dealy of the Alternate Public Defender for the sole purpose of the new trial motion; his appointed counsel were also present, and were not relieved. (11 CT 2618.) On October 7, 2002, Mr. Parker stated he wished to be heard in lieu of the alternate public defender. The trial court found no conflict with the alternate public defender, and denied the request for self-representation. (11 CT 2620; 57 RT 7855-7871.)

On December 13, 2002, the motion for new trial was set to be heard. (11 CT 2622; 58 RT 7872-7888.) The alternate public defender filed no motion for new trial. Over the objection of the alternate public defender, the trial court was advised that appellant wished to file his own motion for new trial.

The hearing was continued to December 16, 2002. (11 CT 2623; 59 RT 7889-7912.) The alternate public defender filed a declaration stating that they would not file a new trial motion. (8 CT 1973.) The alternate public defender was relieved. (11 CT 2623.) Appellant's personally written new trial motion remained sealed, but a copy was made for his appointed counsel. (*Ibid.*) That motion was unsealed and filed at the appellant's personal request on January 7, 2003. (11 CT 2624.)

The trial court heard the appellant's own handwritten motion on January 13, 2003, and the trial court found no basis for further proceedings. (11 CT 2625.) On February 24, 2003, the trial court heard the defense motion for modification of judgment, denied that motion, and sentenced appellant to death. (11 CT 2625.1-2625.2.)

B. Legal Discussion.

Appellant Parker was clear that he believed his appointed counsel had conflicts of interest and had performed ineffectively. (8 CT 1938.) The trial court found a sufficient basis to appoint the alternate public defender to represent Mr. Parker (55 RT 7832-1836), but it erred in limiting that appointment to representing Mr. Parker on a new trial motion based on ineffective assistance of counsel, and in refusing to relieve trial counsel. (*Ibid.*)

In *People v. Sanchez* (2011) 53 Cal.4th 80, this Court held that

> [I]f a defendant requests substitute counsel and makes a showing during a *Marsden* hearing that the right to counsel has been substantially impaired, substitute counsel must be appointed as attorney of record for all purposes. In so holding, we specifically disapprove of the procedure of appointing substitute or "conflict" counsel solely to evaluate a defendant's complaint that his attorney acted incompetently with respect to advice regarding the entry of a guilty or no contest plea.

(*Id.* at p. 84; emphasis added.) In so deciding, this Court noted its previous decision in *People v. Smith* (1993) 6 Cal.4th 684, stating

> In Smith, we criticized the appointment of a "series of attorneys ... at public expense whose sole job, or at least a major portion of whose job, is to claim the previous attorney was, or previous attorneys were, incompetent" and found no "authority supporting the appointment of simultaneous and independent, but potentially rival, attorneys to represent defendant."

(*People v. Sanchez, supra,* 53 Cal.4th at p. 88, quoting *People v. Smith, supra*, 6 Cal.4th at p. 695.)

This Court noted in *Sanchez* and *Smith* that under *People v. Marsden* (1970) 2 Cal.3d 118, the trial court should appoint new counsel when a showing has been made of the need for substitute counsel. This Court explained:

> "We stress, therefore, that the trial court should appoint substitute counsel when a proper showing has been made at any stage .... [W]hen a defendant satisfies the trial court that adequate grounds exist, substitute counsel should be appointed. Substitute counsel could then investigate a possible motion to withdraw the plea or a motion for new trial based upon alleged ineffective assistance of counsel. Whether, after such appointment, any particular motion should actually be made will, of course, be determined by the new attorney." (*Smith, supra*, 6 Cal.4th at pp. 695-696, 25 Cal.Rptr.2d 122, 863 P.2d 192.)

(*People v. Sanchez, supra,* 53 Cal.4th at pp. 88-89.)

The right to counsel is nowhere more urgent than in a capital case, where the defendant's very life hangs in the balance. *Gideon v. Wainwright, supra,* 372 U.S. 335, established that indigent criminal defendants have a constitutional right to counsel under the Sixth and

Fourteenth Amendments to aid and assist them in defending against charges.

> That government hires lawyers to prosecute and defendants who have the money hire lawyers to defend are the strongest indications of the widespread belief that lawyers in criminal courts are necessities, not luxuries. The right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours. From the very beginning, our state and national constitutions and laws have laid great emphasis on procedural and substantive safeguards designed to assure fair trials before impartial tribunals in which every defendant stands equal before the law.

(*Gideon v. Wainwright, supra*, 372 U.S. at p. 344.) The provision of counsel is critical to the fairness of a criminal trial:

> Thus, a fair trial is one in which evidence subject to adversarial testing is presented to an impartial tribunal for resolution of issues defined in advance of the proceeding. The right to counsel plays a crucial role in the adversarial system embodied in the Sixth Amendment, since access to counsel's skill and knowledge is necessary to accord defendants the "ample opportunity to meet the case of the prosecution" to which they are entitled.

(*Strickland v. Washington, supra,* 466 U.S. at p. 685.) The High Court recognizes the critical role of counsel in ensuring a fair trial:

> The Sixth Amendment recognizes the right to the assistance of counsel because it envisions counsel's playing a role that is critical to the ability of the adversarial system to produce just results. An accused is entitled to be assisted by an attorney, whether retained or appointed, who plays the role necessary to ensure that the trial is fair.

(*Ibid.*)

The United States Supreme Court has long held that reversal is required where trial counsel has an actual conflict of interest. (*Holloway v. Arkansas* (1978) 435 U.S. 475). In appellant Parker's case, trial counsel clearly had a conflict of interest, since the trial court had appointed separate counsel to investigate trial counsel's ineffectiveness.

> Conflict of interest broadly embrace all situations in which an attorney's loyalty to, or efforts on behalf of, a client are threatened by his responsibilities to another client or a third party or by his own interests.

(*Ibid.*) See also, *Government of Virgin Islands v. Zepp* (3d Cir. 1984) 748 F.3d 125, 135 ["personal interests of counsel that were 'inconsistent, diverse, or otherwise discordant' with those of his client and which affected the exercise of his professional judgement on behalf of his client"]. California law differs from federal law in that it does not require an actual conflict of interest; a potential conflict of sufficient seriousness is sufficient for reversal. (*Maxwell v. Superior Court of Los Angeles* (1982) 30 Cal.3d 606, 612.)

The United States Supreme Court has also recognized the critical role of other resources reasonably required by counsel to prepare a defense. In this case, appointment of the alternate public defender *for a limited purpose and without additional resources* failed to provide the robust investigation of appellant's rights and the fairness of his trial which is required when counsel's performance is reviewed. *Ake v. Oklahoma* (1985) 470 U.S. 68 clarified that indigent defendants are also entitled under the due process clause to funding for investigation and expert assistance, to develop evidence relevant to issues in their cases.

> This Court has long recognized that when a State brings its judicial power to bear on an indigent defendant in a criminal proceeding, it must take steps to assure that the defendant has a fair opportunity to

> present his defense. This elementary principle, grounded in significant part on the Fourteenth Amendment's due process guarantee of fundamental fairness, derives from the belief that justice cannot be equal where, simply as a result of his poverty, a defendant is denied the opportunity to participate meaningfully in a judicial proceeding in which his liberty is at stake.

(*Id.* at p. 76.) The Court explained its rationale, which is rooted in the importance of a functioning adversarial system to our fundamental expectations of justice:

> Meaningful access to justice has been the consistent theme of these cases. We recognized long ago that mere access to the courthouse doors does not by itself assure a proper functioning of the adversary process, and that a criminal trial is fundamentally unfair if the State proceeds against an indigent defendant without making certain that he has access to the raw materials integral to the building of an effective defense. Thus, while the Court has not held that a State must purchase for the indigent defendant all the assistance that his wealthier counterpart might buy, see *Ross v. Moffitt*, 417 U.S. 600 (1974), it has often reaffirmed that fundamental fairness entitles indigent defendants to "an adequate opportunity to present their claims fairly within the adversary system," *id.*, at 612. To implement this principle, we have focused on identifying the "basic tools of an adequate defense or appeal," *Britt v. North Carolina*, 404 U.S. 226, 227 (1971), and we have required that such tools be provided to those defendants who cannot afford to pay for them.

(*Id.* at p. 77.) The Court in *Ake* stressed the importance of providing necessary defense funding not only to the adversary system as a whole, but in particular to the liberty interests of the individual defendant:

> The private interest in the accuracy of a criminal proceeding that places an individual's life or liberty at risk is almost uniquely compelling. Indeed, the host of

> safeguards fashioned by this Court over the years to diminish the risk of erroneous conviction stands as a testament to that concern. The interest of the individual in the outcome of the State's effort to overcome the presumption of innocence is obvious and weighs heavily in our analysis.

(*Id.* at p. 78.)

Moreover, capital cases require heightened reliability under the Eighth Amendment. (*Woodson v. North Carolina, supra,* 428 U.S. at p. 305; *Gardner v. Florida, supra,* 430 U.S. at pp. 357-358; *Beck v. Alabama, supra,* 447 U.S. at p. 638.)

Here, appellant was left with no coherent representation, by the actions of the trial court. His appointed counsel were left with their hands tied, while alternate counsel considered allegations of their conflict of interest and ineffective representation. Appointed counsel were in the untenable position of having their integrity attacked, while still bearing responsibility for the overall representation. The alternate public defender, having a limited mandate and limited resources for an undertaking that could potentially compromise Mr. Parker's post-conviction rights, also had their hands tied in respects that could not be fully explored on the record.

Further muddying the waters, Mr. Parker was essentially permitted to act as his own counsel, submitting his own motion for new trial even as the lawyers he accused of malfeasance were left to litigate as best they could the issues they intended to raise on Mr. Parker's behalf. Counsel is unaware of any case approving simultaneous representation by counsel and self-representation by a defendant, particularly where the defendant's position was adverse to his counsel. Instead, this Court has stated that a defendant represented by counsel has no right to co-counsel status. (*People*

v. Bloom (1989) 48 Cal.3d 1194, 1218; *People v. Frierson [III]* (1991) 53 Cal.3d 730, 741.)

C. Conclusion.

The right to counsel has never been interpreted to mean that various sets of simultaneous and conflicting counsel can adequately serve a defendant's interests in a single proceeding. Under this Court's clear precedent, the trial court erred in appointing the alternate public defender for the limited purpose of exploring appointed counsel's ineffectiveness, while also refusing to relieve appointed counsel. Reversal of the conviction and sentence is required.

25. THE TRIAL COURT ERRED BY PLACING IN THE PUBLIC COURT RECORD EXTENSIVE WRITINGS OF A REPRESENTED DEFENDANT, AND BY PERMITTING OR REQUIRING DISCLOSURE OF CONFIDENTIAL MATTERS IN OPEN COURT.

Appellant's confinement and sentence are illegal, unconstitutional, and void under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution, under Article I, sections 1, 7, 13, 15, 16, and 17 of the California Constitution, and the statutory and decisional law of the State of California, because the trial court unreasonably placed, in the public court record, extensive personal writings of the defendant, when counsel neither endorsed the content of those writings nor believed it was in the defendant's legal interest to disclose otherwise confidential material; by permitting the defendant to make statements detrimental to his own legal interest in open court; and by requiring counsel to publicly disclose confidential matters regarding the defense. These errors violated appellant's rights to counsel and confidentiality, due process of law, a fair

trial with decisions made by an impartial judge, meaningful post-conviction review, and reliable and non-arbitrary determinations of guilt, capital eligibility, and penalty.

This set of errors was compounded by the trial court's failure to declare a doubt as to appellant Parker's competence to stand trial, as set forth more fully in Argument 1, and incorporated herein.

Appellant refers to and incorporates herein the facts and legal foundation set forth more fully in Argument 24, regarding the trial court's error in refusing to relieve trial counsel while simultaneously appointed the alternate public defender to investigate allegations of trial counsel's misconduct, and in permitting appellant Parker to file his own pro se motion for new trial (also alleging improprieties of counsel, among others), creating an untenable conflict of interest.

It is beyond question that the trial court was flummoxed by various events in this case, including but not limited to trial counsel's valid complaints about the conduct of the prosecution, and appellant Parker's repeated complaints about virtually everyone involved in the case — the trial court, the prosecution, witnesses, and his own lawyers. As set forth throughout this brief, this was a contentious case that was made death-eligible only with the use of extreme prosecution tactics, over-charging, the use of theories that can at best be described as invented purposefully, and the prosecution's use of the defendant's mental damage as a reason for execution. At the same time, a very highly publicized child killing was being prosecuted in the same county. This case also features a reality show becoming embroiled in the prosecution's own decision-making process, taping prosecutors discussing this very case with the intent of airing those segments — which were never disclosed to the defense (see Arg. 4), and still have not been. These events contributed to a trial devoid of due

process and fairness, let alone the heightened standard of process required for a capital case.

But the trial court's decision to place Mr. Parker's own uncounseled musings in the public record was unprecedented, inexplicable, and one final blow to any pretense of fairness. It is hard to conceive of any reason to make those writings public, when they were not endorsed at all by appointed counsel. The trial court stated, at sentencing, that the writings had not been read. The trial court required counsel, burdened with an undeniable conflict at that point, to proceed.

Undersigned counsel has been unable to find any parallel cases, because no reasonable trial court would have acted this way. Reversal is required.

A. Factual Background.

On or about August 12, 2002, while the jury was deliberating penalty, appellant Parker sent a letter to the trial judge complaining that his counsel had not performed adequately. (8 CT 1938 et seq.) That day, the jury returned a verdict of death. (8 CT 1936; 11 CT 2615.) Mr. Parker's letter was construed as a motion for new trial based on ineffective assistance of counsel, and the trial court appointed the Alternate Public Defender's Office "for the limited purpose of representation on the New Trial Motion issues only." (11 CT 2616.)

A status conference on the motion for new trial was held on September 11, 2002. Mr. Parker was represented by Mr. Dealy of the Alternate Public Defender for the sole purpose of the new trial motion; his appointed counsel were also present, and were not relieved. (11 CT 2618.) On October 7, 2002, Mr. Parker stated he wished to be heard in lieu of the alternate public defender. The trial court found no conflict with the

alternate public defender, and denied the request for self-representation. (11 CT 2620; 57 RT 7855-7871.)

On December 13, 2002, the motion for new trial was set to be heard. (11 CT 2622; 58 RT 7872-7888.) The alternate public defender filed no motion for new trial. Over the objection of the alternate public defender, the trial court was advised that appellant wished to file his own motion for new trial.

The hearing was continued to December 16, 2002. (11 CT 2623; 59 RT 7889-7912.) The alternate public defender filed a declaration stating that they would not file a new trial motion. (8 CT 1973.) The alternate public defender was relieved. (11 CT 2623.) Appellant's personally written new trial motion remained sealed, but a copy was made for his appointed counsel. (*Ibid.*) That motion was unsealed and filed at the appellant's personal request on January 7, 2003. (11 CT 2624.)

The trial court heard the appellant's motion on January 13, 2003, and the trial court found no basis for further proceedings. (11 CT 2625; 61 RT 7921-7953.) The trial court stated that it had read Mr. Parker's pro se motion, an 85 page document. (61 RT 7921.) Trial counsel noted that this motion was filed at the end of proceedings involving the Alternate Public Defender. (61 RT 7930.)

On February 24, 2003, the trial court heard the defense motion for modification of judgment, denied that motion, and sentenced appellant to death. (11 CT 2625.1-2625.2.; 62 RT 7953-8021.) Before the hearing, the trial court received two copies of another lengthy handwritten document from Mr. Parker, which the court ordered served on all parties. (62 RT 7956.) Mr. Parker did not wish to have his counsel relieved. (62 RT 7955.) Mr. Parker asked to address the trial court, and expressed an intention of reading his letter into the record; the trial court noted that it was already in

the record. (62 RT 7960.) Mr. Parker spoke at length (62 RT 7960-7980); upon inquiry by the trial court, Mr. Parker stated that he still had about 150 pages to go. (62 RT 7981.) Mr. Parker — still represented by counsel — stated that he wanted his motion to be placed *unsealed* in the trial record, although the trial court noted that sealed records are available to the reviewing court. (62 RT 7983.) Mr. Parker continued. (62 RT 7984-7988, 7990-7993.) The document was entered in the public record as Sentencing Exhibits 1 and 2. (9 CT 2116-2163.)

B. Legal Errors.

In *People v. Sanchez, supra,* 53 Cal.4th 80, this Court held that

> [I]f a defendant requests substitute counsel and makes a showing during a *Marsden* hearing that the right to counsel has been substantially impaired, substitute counsel must be appointed as attorney of record for all purposes. In so holding, we specifically disapprove of the procedure of appointing substitute or "conflict" counsel solely to evaluate a defendant's complaint that his attorney acted incompetently with respect to advice regarding the entry of a guilty or no contest plea.

(*Id.* at p. 84; emphasis added.) The right to counsel is nowhere more urgent than in a capital case, where the defendant's very life hangs in the balance. *Gideon v. Wainwright, supra,* 372 U.S. 335, established that indigent criminal defendants have a constitutional right to counsel under the Sixth and Fourteenth Amendments to aid and assist them in defending against charges.

In this instance, the trial court's error in permitting a represented defendant to publicly present extensive material not endorsed or presented by his lawyers was adverse to his legal interests. While a complete trial record is necessary for meaningful appellate review, the disclosure to the prosecution and inclusion in the public record of material prepared by a

non-lawyer must be considered irrelevant. (Evidence code sections 350, 352.) This error deprived appellant of due process of law, adequate representation by his counsel, meaningful appellate review, and the reliability required by the Eighth Amendment in capital cases.

In *Ake v. Oklahoma*, the United States Supreme Court explained (in another context) the importance of a functioning adversarial system to our fundamental expectations of justice:

> Meaningful access to justice has been the consistent theme of these cases. We recognized long ago that mere access to the courthouse doors does not by itself assure a proper functioning of the adversary process, and that a criminal trial is fundamentally unfair if the State proceeds against an indigent defendant without making certain that he has access to the raw materials integral to the building of an effective defense. Thus, while the Court has not held that a State must purchase for the indigent defendant all the assistance that his wealthier counterpart might buy, see *Ross v. Moffitt*, 417 U.S. 600 (1974), it has often reaffirmed that fundamental fairness entitles indigent defendants to "an adequate opportunity to present their claims fairly within the adversary system," *id.*, at 612. To implement this principle, we have focused on identifying the "basic tools of an adequate defense or appeal," *Britt v. North Carolina*, 404 U.S. 226, 227 (1971) ....

(*Id.* at p. 77.)

Under ordinary circumstances, a defendant's own writings would be treated as confidential, and if filed, would be filed under seal so as not to provide an unwarranted advantage to the prosecution. Indeed, other such writings in this very case were kept under seal, as this Court can plainly see from the sealed portions of the transcript. The public disclosure of these extensive writings stripped appellant of the protections of the attorney-client privilege. This will continue to disadvantage Mr. Parker in post-

conviction proceedings, particularly the habeas corpus (for which he has yet to receive representation).

C. Conclusion.

For the above reasons and other set forth in this brief, Mr. Parker's conviction and sentence should be reversed. The multiple errors in this case rendered the verdicts and sentence fundamentally unfair.

Alternatively, and at a minimum, this Court must clarify for the lower courts that *pro se* material prepared by a represented defendant must not be publicly filed or disclosed to the prosecution. Furthermore, although this would be a matter of closing the barn door too late, this Court should order the material identified in this argument sealed, and order the district attorney and attorney general offices to return all copies to counsel, and remove all electronic copies from their files.

26. THE TRIAL COURT ERRED IN VARIOUS RULINGS AT THE PENALTY PHASE, AND ERRED IN DENYING THE MOTION FOR NEW TRIAL.

Mr. Parker's sentence of death was rendered in violation of his rights to due process; to a fair, reliable, rational, nonarbitrary, and accurate determination of guilt and penalty, in violation of his rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and Article I, Sections 1, 7, 9, 12, 13, 14, 15, 16, 17, 24, 27, and 28 of the California Constitution, because the trial court erred in denying each of the grounds set forth in his counsel's Motion for New Penalty Phase Trial.

A. Background.

On January 31, 2003, trial counsel filed a Motion for New Penalty Phase Trial. (9 CT 2072-2080.) Under Penal Code section 1181, counsel raised the following grounds for a new trial:

1. Incorrect ruling permitting numerous photographs of the victim while she was alive. (9 CT 2074-2076.)

2. Incorrect ruling permitting additional autopsy photographs of face and mutilated hands. (9 CT 2076.)

3. Incorrect ruling permitting the testimony of Kristina Stepanof and the introduction of the 'thank you' note from Patricia. (9 CT 2077.)

4. Incorrect ruling permitting 'rebuttal' testimony of Brenda Chamberlain and the introduction of additional morphed photographs depicting pornographic images of her. (9 CT 2078-2079.)

5. Pursuant to Penal Code section 1181 (7), the evidence was insufficient to establish that death was the appropriate punishment according to the law and the facts and the court should reduce the punishment to life imprisonment without the possibility of parole. (9 CT 2079.)

Defense counsel submitted the Motion for New Penalty Trial on the pleadings, as did the prosecution. (62 RT 9757.) Argument regarding sentencing was heard that day. (62 RT 7995 et seq.) Between the submission of the new trial motion and the argument regarding sentencing, the trial court permitted Mr. Parker to file and argue his own new trial motion; errors in so doing are addressed in Arguments 24 and 25, incorporated herein by reference.

B. Incorrect Ruling Permitting Numerous Photographs of the Victim While She Was Alive. (9 CT 2074-2076.)

Appellant moved to exclude approximately 76 photographs of the victim, proffered at the penalty phase by the prosecution. Citing *People v.*

Mendoza (2000) 24 Cal.4th 130, *People v. Smithey* (1990) 20 Cal.4th 936, and *People v. Kelly, supra,* 51 Cal.3d at p. 962., all holding that it is permissible to admit one photograph depicting the victim near the time of death, to demonstrate how the defendant saw the victim. (9 CT 2074.) The trial court improperly admitted an entire posterboard and refused to limit the number of photographs. The photographs included several taken years earlier, during her former employment, attending parties, and at the beach with a boyfriend. (9 CT 2074-2076; 51 RT 7022-7023.) The purpose of the display was plainly to appeal to the emotions of jurors, by showing the victim at a variety of times in her life.

C. Incorrect Ruling Permitting Additional Autopsy Photographs of the Victim's Face And Mutilated Hands. (9 Ct 2076.)

The defense objected to the introduction of additional autopsy photographs at the penalty phase, noting that the jury had already seen numerous gruesome photographs at the guilt phase. (9 CT 2076.) Appellant refers to and incorporates herein Arguments 5 and 3, regarding gruesome photographs and the use of a forensic dentist at the guilt phase.

Counsel argued that the additional photographs admitted at the penalty phase had no probative value, were cumulative, unnecessarily graphic, shocking to view, and meant to evoke an emotional response, citing *People v. Allen, supra,* 42 Cal.3d 1222 and *People v. Hovey* (1988) 44 Cal.3d 542. The impact was, furthermore, multiplied as these photographs were shown in stark and horrifying contrast to the improper photographs of the victim in life (9 CT 2076).

D. Incorrect Ruling Permitting the Testimony of Kristina Stepanof and the Introduction of the 'Thank You' Note from Patricia. (9 Ct 2077.)

The defense objected to witness Kristina Stepanof being called to testify as to "victim impact" (51 RT 7031-7036), on the ground that the impact on "friends" is impermissible under state law, and that testimony during the guilt phase indicated that this witness and the victim were not terribly close, in any event. This witness was called to authenticate a thank you note mentioning religious matters (Exh. 114), seeking to portray the victim as "a god loving woman." The subject matter was irrelevant under California's statutory sentencing factors (*People v. Boyd, supra,* 38 Cal.3d 762), did not qualify as permissible "victim impact" evidence, and served only to fan the flames of emotion with the jury. (See, e.g., discussion re letter of witness Stepanof [RT 6899-6902].)

E. Incorrect Ruling Permitting 'Rebuttal' Testimony of Brenda Chamberlain and the Introduction of Additional Morphed Photographs Depicting Pornographic Images of her. (9 Ct 2078-2079.)

Following the defense testimony of Dr. Marilyn Kaufhold regarding difficulties abused children may have in forming meaningful relationships later in life (see, e.g., 53 RT 7480-7481), the prosecution was improperly permitted to call a "rebuttal" witness, Brenda Chamberlain. Ms. Chamberlain testified that she had an intimate relationship over the course of two years with Mr. Parker, and that she never knew of his hobby of making "morphed" images, allegedly "pornographic" in nature. (9 CT 2078.) Appellant refers to and incorporates herein Argument 2, regarding the misuse of alleged "pornography" throughout this trial.

The images shown to Ms. Chamberlain, and the jury, had no relevance to any statutory sentencing factor, nor to any contested issue.

This was a gratuitous display meant only to inflame jurors, immediately before they proceeded to deliberate on the appropriate sentence. (9 CT 2078-2079.) The distastefulness of these images cannot be denied; but neither can their irrelevance to the task before the jury at the penalty phase. Sexual thoughts about a former lover cannot possibly have a proper place in capital sentencing.

F. Pursuant to Penal Code Section 1181 (7) the Evidence was Insufficient to Establish that Death was the Appropriate Punishment According to the Law and the Facts and the Court Should Reduce the Punishment to Life Imprisonment Without the Possibility of Parole. (9 Ct 2079.)

Mr. Parker's counsel referred to and incorporated by reference their motion to modify the verdict of death pursuant to Penal Code section 190.4 (e). (9 CT 2079, referencing 9 CT 2064-2071.) In that motion, counsel noted that the only area of aggravation was Factor A under section 190.4, the circumstances of the crime. (9 CT 2065.) As has been noted elsewhere, Mr. Parker had no prior criminal record. Counsel argued that the prosecution proffered little actual evidence in support of Factor A, and that what was presented was "aimed squarely at the passions of the jury." (9 CT 2065.) Citing *People v. Ramos* (1997) 15 Cal.4th 1133, 1183, and *People v. Jennings* (1988) 46 Cal.3d 963, 995, counsel noted that in ruling on the automatic motion for modification of the verdict, the trial court is "limited to 'only what was before the jury.'" (9 CT 2065.)

Appellant refers to and incorporates herein Argument 24 , the trial court's error in permitting Mr. Parker to present matters *pro se* while he was represented by counsel, an error that placed trial counsel in an untenable position — and left the trial court itself in a position of grappling with inflammatory and uncounseled material that was neither presented to the jury, nor properly before the trial court for consideration. Trial counsel,

too, were unable to effectively advocate when this pro se material implicated even them in some conspiracy against their client.

As noted by trial counsel, there were numerous mitigating factors proffered by the defense, certainly sufficient to justify a sentence of life in prison without parole rather than capital punishment. (9 CT 2067-2070.) Among these were the absence of prior violent activity (9 CT 2067-2068); the absence of any prior felony convictions (9 CT 2068); the age of the defendant, 31 at the time of the crime with no prior criminal violence or felonies (9 CT 2068); and Mr. Parker's miserable, unspeakable childhood history of physical and sexual abuse as well as shocking neglect, all known to have lingering effects. (9 CT 2068-2070.)

Given the errors noted above, and throughout this brief, one cannot state with confidence that the trial court was able to divorce itself sufficiently from extra-record material, or its own antipathy toward the defendant personally, to render a fair and unbiased assessment of whether the death verdict should be set aside.

G. Conclusion.

For all these reasons, appellant's sentence of death must be reversed. Considered individually, and certainly cumulatively, these acts violated appellant's Fifth, Sixth, Eighth and Fourteenth Amendment rights to liberty, a fair trial, heightened capital case due process, and a reliable determination and imposition of penalty.

27. CALIFORNIA'S DEATH PENALTY STATUTE, AS INTERPRETED BY THIS COURT AND APPLIED AT APPELLANT'S TRIAL, VIOLATES THE UNITED STATES CONSTITUTION.

Many features of California's capital sentencing scheme, alone or in combination with each other, violate the United States Constitution. Because challenges to most of these features have been rejected by this Court, appellant presents these arguments here in an abbreviated fashion sufficient to alert the Court to the nature of each claim and its federal constitutional grounds, and to provide a basis for the Court's reconsideration of each claim in the context of California's entire death penalty system.

On February 22, 2002, appellant Parker filed a Motion in Limine to Declare Death Penalty Imposed via PC 190.3 Unconstitutional, raising a number of the contentions set forth below. (3 CT 711 et seq.)[185] That motion was denied.

To date the Court has considered each of the defects identified below in isolation, without considering their cumulative impact or addressing the functioning of California's capital sentencing scheme as a whole. This analytic approach is constitutionally defective. As the U.S. Supreme Court has stated, "[t]he constitutionality of a State's death penalty system turns on review of that system in context." (*Kansas v. Marsh* (2006) 548 U.S. 163,

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[185] The Motion in Limine to Declare Death Penalty Imposed via PC 190.3 unconstitutional raised, inter alia, the following issues: vagueness of aggravating (death eligibility) factors and sentencing factors; the unitary list of aggravating and mitigating factors, which fails to define aggravation and does not distinguish which are aggravating and which are mitigating; and the use of "circumstances of the crime" as an aggravating factor, increasing the risk of arbitrary and capricious imposition of the death penalty. (3 CT 711-719.)

179 fn. 6.[186] See also, *Pulley v. Harris* (1984) 465 U.S. 37, 51 [while comparative proportionality review is not an essential component of every constitutional capital sentencing scheme, a capital sentencing scheme may be so lacking in other checks on arbitrariness that it would not pass constitutional muster without such review].).

When viewed as a whole, California's sentencing scheme is so broad in its definitions of who is eligible for death and so lacking in procedural safeguards that it fails to provide a meaningful or reliable basis for selecting the relatively few offenders subjected to capital punishment. Further, a particular procedural safeguard's absence, while perhaps not constitutionally fatal in the context of sentencing schemes that are narrower or have other safeguarding mechanisms, render California's scheme unconstitutional in that it is a mechanism that might otherwise have enabled California's sentencing scheme to achieve a constitutionally acceptable level of reliability.

As will be discussed in Subsection A, *post*, California's death penalty statute sweeps virtually every murderer into its grasp. It then allows any conceivable circumstance of a crime — even circumstances squarely opposed to each other (e.g., the fact that the victim was young versus the fact that the victim was old, the fact that the victim was killed at home versus the fact that the victim was killed outside the home) — to

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[186] In *Marsh*, the high court considered Kansas's requirement that death be imposed if a jury deemed the aggravating and mitigating circumstances to be in equipoise and on that basis concluded beyond a reasonable doubt that the mitigating circumstances did not outweigh the aggravating circumstances. This was acceptable, in light of the overall structure of "the Kansas capital sentencing system," which, as the court noted, " is dominated by the presumption that life imprisonment is the appropriate sentence for a capital conviction." (*Kansas v. Marsh, supra*, 548 U.S. at p. 178.)

justify the imposition of the death penalty. Judicial interpretations have placed the entire burden of narrowing the class of first degree murderers to those most deserving of death on Penal Code section190.2, the "special circumstances" provision of the death penalty scheme — but that section was specifically passed for the purpose of making every murderer eligible for the death penalty.

There are no safeguards in California during the penalty phase that would ensure the reliability of the trial's outcome, as required by the Eighth Amendment. Instead, factual prerequisites to the imposition of the death penalty are found by jurors who are not instructed on any burden of proof, and who may not agree with each other at all. Paradoxically, the fact that "death is different" has been stood on its head to mean that procedural protections taken for granted in trials for lesser criminal offenses are suspended when the question is a finding that is foundational to the imposition of death. The result is truly a "wanton and freakish" system that randomly chooses among the thousands of murderers in California a few victims of the ultimate sanction.

A. Appellant's Death Penalty Is Invalid Because Penal Code Section 190.2, On Its Face And As Interpreted By This Court, Is Impermissibly Broad.

> To avoid the Eighth Amendment's proscription against cruel and unusual punishment, a death penalty law must provide a "meaningful basis for distinguishing the few cases in which the death penalty is imposed from the many cases in which it is not. (Citations omitted.)"

(*People v. Edelbacher* (1989) 47 Cal.3d 983, 1023.)

In order to meet this constitutional mandate, the states must genuinely narrow, by rational and objective criteria, the class of murderers eligible for the death penalty. According to this Court, the requisite

narrowing in California is accomplished by the "special circumstances" set out in section 190.2. (*People v Bacigalupo* (1993) 6 Cal.4th 857, 868.)

The 1978 death penalty law came into being, however, not to narrow those eligible for the death penalty but to make all murderers eligible. (See 1978 Voter's Pamphlet, p. 34, "Arguments in Favor of Proposition 7.") This initiative statute was enacted into law as Proposition 7 on November 7, 1978. At the time of the offense charged against appellant the statute contained 26 special circumstances.[187] These special circumstances are so numerous and so broad in definition as to encompass nearly every first-degree murder, per the drafters' declared intent.

In California, almost all felony-murders are now special circumstance cases, and include accidental and unforeseeable deaths, as well as acts committed in a panic or under the dominion of a mental breakdown, or acts committed by others. (*People v. Dillon* (1984) 34 Cal.3d 441.) Section 190.2's reach has been extended to virtually all intentional murders by this Court's construction of the lying-in-wait special circumstance, which the Court has construed so broadly as to encompass virtually all such murders. (See *People v. Hillhouse* (2002) 27 Cal.4th 469, 500-501, 512-515.) These categories are joined by so many other categories of special-circumstance murder that the statute now makes virtually every murderer eligible for death.

The U.S. Supreme Court has made it clear that the narrowing function, as opposed to the selection function, is to be accomplished by the Legislature. The electorate in California and the drafters of the 1978

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[187] This figure does not include the "heinous, atrocious, or cruel" special circumstance declared invalid in *People v. Superior Court* (*Engert*), *supra*, 31 Cal.3d 797. The number of special circumstances has continued to grow and is now 33.

Initiative threw down a challenge to the courts by seeking to make every murderer eligible for the death penalty.

This Court should review the death penalty scheme, and strike it down as so all-inclusive as to effectively guarantee the arbitrary imposition of the death penalty in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments to the U.S. Constitution and prevailing international law. (See Section E. of this Argument.).

B. Appellant's Death Penalty Is Invalid Because Penal Code Section 190.3, Subdivision (a), As Applied Allows Arbitrary And Capricious Imposition Of Death In Violation Of The Fifth, Sixth, Eighth, And Fourteenth Amendments To The United States Constitution.

Section 190.3, subdivision (a) violates the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution because this Court has authorized it to be applied in such a wanton and freakish manner that almost all features of every murder, even features squarely at odds with features deemed supportive of death sentences in other cases, can be characterized by prosecutors — and found by jurors to be — "aggravating" within the statute's meaning

Factor (a) directs the jury to consider in aggravation the "circumstances of the crime." This Court has never applied a limiting construction to factor (a) other than to agree that an aggravating factor based on the "circumstances of the crime" must be some fact beyond the elements of the crime itself.[188] The Court has allowed factor (a) to have an extraordinarily expansive sweep, approving reliance upon it to support aggravating factors based upon the defendant's having sought to conceal

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[188] *People v. Dyer* (1988) 45 Cal.3d 26, 78; *People v. Adcox, supra,* 47 Cal.3d at p. 270; see also CALJIC No. 8.88 (2006), paragraph. 3.

evidence three weeks after the crime,[189] or having had a "hatred of religion,"[190] or having threatened witnesses after his arrest,[191] or disposed of the victim's body in a manner that precluded its recovery.[192] Factor (a) also is the basis for admitting evidence under the rubric of "victim impact" that is no more than an inflammatory presentation by the victim's relatives of the prosecution's theory of how the crime was committed. (See, e.g., *People v. Robinson* (2005) 37 Cal.4th 592, 644-652, 656-657.)

The purpose of section 190.3 is to inform the jury of what factors it should consider in assessing the appropriate penalty. Although factor (a) has survived a facial Eighth Amendment challenge (*Tuilaepa v. California* (1994) 512 U.S. 967), it has been used in ways so arbitrary and contradictory as to violate both the federal guarantee of due process of law and the Eighth Amendment.

Prosecutors throughout California have been permitted to argue that the jury could weigh in aggravation almost every conceivable circumstance of the crime, even those that, from case to case, reflect starkly opposite circumstances. (*Tuilaepa, supra*, 512 U.S. at pp. 986-990, dis. opn. of Blackmun, J.) Factor (a) is also used to embrace facts which are inevitably present in every homicide. (*Ibid.*) As a consequence, from case to case, prosecutors have been permitted to turn entirely opposite facts — or facts

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[189] *People v. Walker* (1988) 47 Cal.3d 605, 639, footnote 10, *cert. den.*, 494 U.S. 1038 (1990).

[190] *People v. Nicolaus* (1991) 54 Cal.3d 551, 581-582, *cert. den.*, 505 U.S. 1224 (1992).

[191] *People v. Hardy* (1992) 2 Cal.4th 86, 204, *cert. den.*, 506 U.S. 987.

[192] *People v. Bittaker* (1989) 48 Cal.3d 1046, 1110, fn. 35, *cert. den.* 496 U.S. 931 (1990).

that are inevitable variations of every homicide — into aggravating factors which the jury is urged to weigh on death's side of the scale.

In practice, section 190.3's broad "circumstances of the crime" provision licenses indiscriminate imposition of the death penalty upon no basis other than "that a particular set of facts surrounding a murder ... were enough in themselves, and without some narrowing principles to apply to those facts, to warrant the imposition of the death penalty." (*Maynard v. Cartwright, supra,* 486 U.S. at p. 363 [discussing the holding in *Godfrey v. Georgia, supra,* 446 U.S. 420].) Viewing section 190.3 in context of how it is actually allowed to be used, one sees that every fact without exception that is part of a murder can be an "aggravating circumstance," thus emptying that factor of any meaning, and allowing arbitrary and capricious death sentences, in violation of the federal Constitution.

C. California's Death Penalty Statute Contains No Safeguards To Avoid Arbitrary And Capricious Sentencing And Deprives Defendants Of The Right To A Jury Determination Of Each Factual Prerequisite To A Sentence Of Death; It Therefore Violates The Sixth, Eighth, And Fourteenth Amendments To The United States Constitution.

As shown above, California's death penalty statute does nothing to narrow the pool of murderers to those most deserving of death in either its "special circumstances" section (§ 190.2) or in its sentencing guidelines (§ 190.3). Section 190.3, subdivision (a) allows prosecutors to argue that every feature of a crime that can be articulated is an acceptable aggravating circumstance, even features that are mutually exclusive.

Furthermore, there are none of the safeguards common to other death penalty sentencing schemes to guard against the arbitrary imposition of death. Juries do not have to make written findings or achieve unanimity as to aggravating circumstances. They do not have to find beyond a

reasonable doubt that aggravating circumstances are proved, that aggravating circumstances outweigh the mitigating circumstances, or that death is the appropriate penalty. In fact, except as to the existence of other criminal activity and prior convictions, juries are not instructed on any burden of proof at all. Not only is inter-case proportionality review not required; it is not permitted. Under the rationale that a decision to impose death is "moral" and "normative," the fundamental components of reasoned decision-making that apply to all other parts of the law have been banished from the entire process of making the most consequential decision a juror can make — whether or not to condemn a fellow human to death.

1. California's Death Penalty Scheme Violates the Sixth Amendment Right to Jury Trial Because California Does Not Require the Jury to Find Unanimously and Beyond a Reasonable Doubt That One or More Aggravating Factors Existed and That These Factors Substantially Outweighed Mitigating Factors.

(a) The Sixth Amendment Right to Jury Trial.

Except as to the special circumstances, appellant's jury did not have to find any aggravating factor true beyond a reasonable doubt. The jurors also were not told that they needed to agree at all on the presence of any particular aggravating factor, or that they had to find beyond a reasonable doubt that aggravating factors outweighed mitigating factors before imposing a death sentence.

All this was consistent with this Court's previous interpretations of California's statute. In *People v. Fairbank* (1997) 16 Cal.4th 1223, 1255, this Court said that "neither the federal nor the state Constitution requires the jury to agree unanimously as to aggravating factors, or to find beyond a reasonable doubt that aggravating factors exist, [or] that they outweigh

mitigating factors ...." But this pronouncement is inconsistent with the U.S. Supreme Court's decisions in *Apprendi v. New Jersey* (2000) 530 U.S. 466 [hereinafter *Apprendi*]; *Ring v. Arizona* (2002) 536 U.S. 584 [hereinafter *Ring*]; *Blakely v. Washington* (2004) 542 U.S. 296 [hereinafter *Blakely*]; and *Cunningham v. California* (2007) 549 U.S. 270 [hereinafter *Cunningham*].

In *Apprendi*, the high court held that a state may not impose a sentence greater than that authorized by the jury's simple verdict of guilty unless the facts supporting an increased sentence (other than a prior conviction) are also submitted to the jury and proved beyond a reasonable doubt. (*Id.* at p. 478.)

In *Ring*, the high court struck down Arizona's death penalty scheme, which authorized a judge sitting without a jury to sentence a defendant to death if the judge found at least one aggravating circumstance and no mitigating circumstances sufficiently substantial to call for leniency. (536 U.S. at p. 593.) The court acknowledged that in a prior case reviewing Arizona's capital sentencing law (*Walton v. Arizona* (1990) 497 U.S. 639), it had upheld the law on the basis that aggravating factors were sentencing considerations guiding the choice between life and death, and not elements of the offense. (536 U.S. at p. 598.) The court found that in light of *Apprendi*, *Walton* was no longer good law. Any factual finding which increases the possible penalty is the functional equivalent of an element of the offense, regardless of when it must be found or what nomenclature is attached; the Sixth and Fourteenth Amendments require that it be found by a jury beyond a reasonable doubt.

In *Blakely*, the high court considered the effect of *Apprendi* and *Ring* on in a case where the sentencing judge had been was allowed to impose an "exceptional" sentence outside the normal range upon the finding of

"substantial and compelling reasons." (*Blakely v. Washington, supra*, 542 U.S. at p. 299.) By statute, the state of Washington set forth illustrative factors that included both aggravating and mitigating circumstances; one of the former was whether the defendant's conduct manifested "deliberate cruelty" to the victim. (*Id.* at pp. 299-300.) The Supreme Court ruled that allowing the judge to find the "substantial and compelling reasons" necessary to impose a greater sentence than was authorized by the jury's verdict alone was invalid because it deprived the defendant of his right to a jury trial on the findings necessary to enhance his sentence. (*Id.* at p. 313.)

In reaching this conclusion, the Supreme Court emphasized that the governing rule since *Apprendi* is that other than a prior conviction, *any* fact that increases the penalty for a crime beyond the statutory maximum must be submitted to the jury and found beyond a reasonable doubt; "the relevant 'statutory maximum' is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings." (*Id.* at p. 304; italics in original.)

This line of authority has been consistently reaffirmed by the high court. In *United States v. Booker* (2005) 543 U.S. 220, Justice Stevens, writing for a 5-4 majority, ruled that the United States Sentencing Guidelines were unconstitutional because they set mandatory sentences based on judicial findings made by a preponderance of the evidence. *Booker* reiterated the Sixth Amendment requirement that "[a]ny fact (other than a prior conviction) which is necessary to support a sentence exceeding the maximum authorized by the facts established by a plea of guilty or a jury verdict must be admitted by the defendant or proved to a jury beyond a reasonable doubt." (*United States v. Booker, supra,* 543 U.S. at p. 244.)

In *Cunningham v. California*, the high court rejected this Court's interpretation of *Apprendi*, and held that California's Determinate

Sentencing Law ("DSL") requires a jury finding beyond a reasonable doubt of any fact used to enhance a sentence above the middle range spelled out by the Legislature. (*Cunningham v. California, supra,* 549 U.S. 270.) In so doing, it explicitly rejected the reasoning that underlies this Court's holdings that *Apprendi* and *Ring* have no application to the penalty phase of a capital trial.

2. In the Wake of *Apprendi, Ring, Blakely,* and *Cunningham,* Any Jury Finding Necessary to the Imposition of Death Must Be Found True Beyond a Reasonable Doubt.

California law as interpreted by this Court does not require that a reasonable doubt standard be used during any part of the penalty phase of a defendant's trial. (*People v. Fairbank, supra,* 16 Cal.4th 1224; see also *People v. Hawthorne* (1992) 4 Cal.4th 43, 79 [penalty phase determinations are "moral and ... not factual," and therefore not "susceptible to a burden-of-proof quantification"].)

California statutory law and jury instructions, however, *do* require fact-finding before the decision to impose death or a lesser sentence is finally made. As a prerequisite to the imposition of the death penalty, section 190.3 requires the "trier of fact" to find that at least one aggravating factor exists — which is always the case, because a capital proceeding only reaches the penalty phase when at least one aggravating factor has been found true — and that such aggravating factor (or factors) substantially outweigh any and all mitigating factors.[193] As set forth in California's

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[193] This Court has acknowledged that fact-finding is part of a sentencing jury's responsibility, even if not the greatest part; the jury's role "is not merely to find facts, but also — and most important — to render an individualized, normative determination about the penalty appropriate for the particular defendant ...." (*People v. Brown* (1988) 46 Cal.3d 432, 448.)

"principal sentencing instruction" (*People v. Farnam, supra,* 28 Cal.4th at p. 177), which was read to appellant's jury (RT 6378 et seq.), "an aggravating factor is *any fact, condition or event attending the commission of a crime which increases its guilt or enormity, or adds to its injurious consequences which is above and beyond the elements of the crime itself.*" (RT 6380; CALJIC No. 8.88; emphasis added.)

Thus, before the process of weighing aggravating factors against mitigating factors can begin, one or more aggravating factors must be found by the jury. And before the decision whether or not to impose death can be made, the jury must find that aggravating factors substantially outweigh mitigating factors.[194] These factual determinations are essential prerequisites to death-eligibility, but do not mean that death is the inevitable verdict; the jury can still reject death as the appropriate punishment notwithstanding these factual findings.[195]

This Court has repeatedly rejected the applicability of *Apprendi* and *Ring* by comparing the capital sentencing process in California to "a

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[194] In *Johnson v. State* (Nev. 2002) 59 P.3d 450, the Nevada Supreme Court found that under a statute similar to California's, the requirement that aggravating factors outweigh mitigating factors was a factual determination, and therefore "even though *Ring* expressly abstained from ruling on any 'Sixth Amendment claim with respect to mitigating circumstances,' (fn. omitted) we conclude that *Ring* requires a jury to make this finding as well: 'If a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact — no matter how the State labels it — must be found by a jury beyond a reasonable doubt.'" (*Id.* at p. 460.)

[195] This Court has held that despite the "shall impose" language of section 190.3, even if the jurors determine that aggravating factors outweigh mitigating factors, they may still impose a sentence of life in prison. (*People v. Duncan, supra,* 53 Cal.3d at p. 979; *People v. Allen, supra,* 42 Cal.3d at pp. 1276-1277; *People v. Brown, supra,* 40 Cal.3d at p. 541.)

sentencing court's traditionally discretionary decision to impose one prison sentence rather than another." (*People v. Demetrulias* (2006) 39 Cal.4th 1, 41; *People v. Dickey* (2005) 35 Cal.4th 884, 930; *People v. Snow* (2003) 30 Cal.4th 43, 126, fn. 32; *People v. Prieto, supra,* 30 Cal.4th at p. 275.) But the Court It had applied precisely the same analysis to fend off *Apprendi* and *Blakely* in non-capital cases until the United States Supreme Court explicitly rejected that reasoning in *Cunningham* .

In *People v. Black* (2005) 35 Cal.4th 1238, 1254, this Court had held that notwithstanding *Apprendi, Blakely*, and *Booker*, a defendant has no constitutional right to a jury finding as to the facts relied on by a trial court to impose an aggravated, or upper-term sentence; the DSL "simply authorizes a sentencing court to engage in the type of factfinding that traditionally has been incident to the judge's selection of an appropriate sentence within a statutorily prescribed sentencing range." (35 Cal.4th at p. 1254.)

The U.S. Supreme Court explicitly rejected this reasoning in *Cunningham.*[196] In *Cunningham* the principle that any fact which exposed a defendant to a greater potential sentence must be found by a jury to be true beyond a reasonable doubt was applied to California's Determinate Sentencing Law ("DSL"). The high court examined whether or not the circumstances in aggravation were factual in nature, and concluded they

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[196] *Cunningham* cited with approval Justice Kennard's language in her concurrence and dissent in *Black*: "'Nothing in the high court's majority opinions in *Apprendi, Blakely*, and *Booker* suggests that the constitutionality of a state's sentencing scheme turns on whether, in the words of the majority here, it involves the type of factfinding 'that "traditionally has been performed by a judge."'" (*Cunningham, supra,* 549 U.S. at p. 289 [quoting *Black, supra*, 35 Cal.4th at p. 1253, conc. & dis. opn. of Kennard, J.].).)

were, after a review of the relevant rules of court. (549 U.S. at pp. 276-279.) That "should [have been] the end of the matter:, and the *Black* court should not have proceeded to ask whether finding those facts was traditionally used by sentencing judges. (549 U.S. at p. 289.) *Black's* interpretation of the DSL "violates *Apprendi*'s bright-line rule: Except for a prior conviction, 'any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and found beyond a reasonable doubt.' [citation omitted]." (*Cunningham*, *supra*, 549 U.S. at pp. 288-289.)

Cunningham then examined this Court's explanation of why an interpretation of the DSL that allowed continued judge-based finding of fact and sentencing was reasonable, and concluded that this was "comforting, but beside the point." (*Id.* at p. 293.)

> The *Black* court's examination of the DSL, in short, satisfied it that California's sentencing system does not implicate significantly the concerns underlying the Sixth Amendment's jury-trial guarantee. Our decisions, however, leave no room for such an examination. Asking whether a defendant's basic jury-trial right is preserved, though some facts essential to punishment are reserved for determination by the judge, we have said, is the very inquiry *Apprendi's* "bright-line rule" was designed to exclude. See *Blakely*, 542 U.S., at 307-308, 124 S.Ct. 2531. But see *Black*, 35 Cal.4th, at 1260 (stating, remarkably, that "[t]he high court precedents do not draw a bright line").

(*Cunningham, supra*, at p. 293.)

In the wake of Cunningham, it is crystal-clear that in determining whether or not Ring and Apprendi apply to the penalty phase of a capital case, the sole relevant question is whether or not there is a requirement that any factual findings be made before a death penalty can be imposed.

In its effort to resist the directives of *Apprendi* et al., this Court has held that since the maximum penalty for one convicted of first degree murder with a special circumstance is death (see section 190.2 (a)), *Apprendi* does not apply. (*People v. Anderson, supra,* 25 Cal.4th at p. 589.) "Because any finding of aggravating factors during the penalty phase does not 'increase the penalty for a crime beyond the prescribed statutory maximum' (citation omitted), *Ring* imposes no new constitutional requirements on California's penalty phase proceedings." (*People v. Prieto, supra*, 30 Cal.4th at p. 263.)

Arizona had advanced precisely the same argument in *Ring* as this Court used in *Anderson* and *Prieto*. Arizona It had pointed out that a finding of first degree murder in that state, like a finding of guilt plus one or more special circumstances in California, leads to only two sentencing options: death or life imprisonment, and it argued that Mr. Ring was therefore sentenced within the range of punishment authorized by the jury's verdict. The Supreme Court squarely rejected this contention:

> This argument overlooks *Apprendi*'s instruction that "the relevant inquiry is one not of form, but of effect." 530 U.S., at 494. In effect, "the required finding [of an aggravated circumstance] expose[d] [Ring] to a greater punishment than that authorized by the jury's guilty verdict." *Ibid.*; see 200 Ariz., at 279, 25 P.3d, at 1151.

(*Ring, supra*, 536 U.S. at p. 604.)

Just as when a defendant is convicted of first degree murder in Arizona, a California conviction of first degree murder, even with a finding of one or more special circumstances, "authorizes a maximum penalty of death only in a formal sense." (*Ring, supra*, 536 U.S. at p. 604.) Section 190, subdivision (a) provides that the punishment for such a conviction is life without possibility of parole or death; the penalty to be applied "shall

be determined as provided in Sections 190.1, 190.2, 190.3, 190.4 and 190.5."

Neither LWOP nor death can be imposed unless the jury finds a special circumstance (section 190.2). Death is not an available option unless the jury makes further findings that one or more aggravating circumstances exist, and that the aggravating circumstances substantially outweigh the mitigating circumstances. (§ 190.3; CALJIC No. 8.88.) "If a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact — no matter how the State labels it — must be found by a jury beyond a reasonable doubt." (*Ring, supra*, 536 U.S. at p. 604.) In *Blakely*, the high court made it clear that, as Justice Breyer complained in dissent, "a jury must find, not only the facts that make up the crime of which the offender is charged, but also all (punishment-increasing) facts about the *way* in which the offender carried out that crime." (542 U.S. at p. 328; emphasis in original.) The issue of the Sixth Amendment's applicability hinges on whether as a practical matter, the sentencer must make additional findings during the penalty phase before determining whether or not the death penalty can be imposed. In California, as in Arizona, the answer is "Yes." That, according to *Apprendi* and *Cunningham*, is the end of the inquiry as far as the Sixth Amendment's applicability is concerned. California's failure to require the requisite factfinding in the penalty phase to be found unanimously and beyond a reasonable doubt violates the United States Constitution.

3. Whether Aggravating Factors Outweigh Mitigating Factors Is a Factual Question That Must Be Resolved Beyond a Reasonable Doubt.

A California jury must first decide whether any aggravating circumstances, as defined by section 190.3 and the standard penalty phase instructions, exist in the case before it. If it so finds, the jury then weighs

any such factors against the proffered mitigation. A determination that the aggravating factors substantially outweigh the mitigating factors — a prerequisite to imposition of the death sentence — is the functional equivalent of an element of capital murder, and is therefore subject to the protections of the Sixth Amendment. (See *State v. Ring* (Az. 2003) 65 P.3d 915, 943; accord, *State v. Whitfield* (Mo. 2003) 107 S.W.3d 253; *Woldt v. People* (Colo. 2003) 64 P.3d 256; *Johnson v. State, supra,* 59 P.3d 450.[197])

No greater interest is ever at stake than in the penalty phase of a capital case. (*Monge v. California* (1998) 524 U.S. 721, 732 ["the death penalty is unique in its severity and its finality"].)[198] As the high court stated in *Ring, supra*, 536 U.S. at pages 589, 609:

> Capital defendants, no less than non-capital defendants, we conclude, are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment .... The right to trial by jury guaranteed

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[197] See also Stevenson, *The Ultimate Authority on the Ultimate Punishment: The Requisite Role of the Jury in Capital Sentencing* (2003) 54 Ala L. Rev. 1091, 1126-1127 (noting that all features that the Supreme Court regarded in *Ring* as significant apply not only to the finding that an aggravating circumstance is present but also to whether aggravating circumstances substantially outweigh mitigating circumstances, since both findings are essential predicates for a sentence of death).

[198] In its *Monge* opinion, the U.S. Supreme Court foreshadowed *Ring*, and expressly stated that the *Santosky v. Kramer* (1982) 455 U.S. 745, 755) rationale for the beyond-a-reasonable-doubt burden of proof requirement applied to capital sentencing proceedings: "*[I]n a capital sentencing proceeding*, as in a criminal trial, 'the interests of the defendant [are] of such magnitude that ... they have been protected by standards of proof designed to exclude as nearly as possible the likelihood of an erroneous judgment.' ([*Bullington v. Missouri* (1981)] 451 U.S. [430] at p. 441 (quoting *Addington v. Texas*, 441 U.S. 418, 423-424, 60 L.Ed.2d 323, 99 S.Ct. 1804 (1979).)" (*Monge v. California, supra,* 524 U.S. at p. 732 (emphasis added).)

> by the Sixth Amendment would be senselessly diminished if it encompassed the fact-finding necessary to increase a defendant's sentence by two years, but not the fact-finding necessary to put him to death.

The last step of California's capital sentencing procedure, the decision whether to impose death or life, is a moral and a normative one. This Court errs greatly, however, in using this fact to allow the findings that make one eligible for death to be uncertain, undefined, and subject to dispute not only as to their significance, but as to their accuracy. This Court's refusal to accept the applicability of *Ring* to the eligibility components of California's penalty phase violates the Sixth, Eighth, and Fourteenth Amendments to the U.S. Constitution.

4. The Due Process and the Cruel and Unusual Punishment Clauses of the State and Federal Constitutions Also Require That the Jurors in a Capital Case Be Instructed That They May Impose a Sentence of Death Only If They Are Persuaded Beyond a Reasonable Doubt That the Aggravating Factors Exist and Outweigh the Mitigating Factors and That Death Is the Appropriate Penalty.

a. Burdens of Persuasion.

The outcome of a judicial proceeding necessarily depends on an appraisal of the facts. "[T]he procedures by which the facts of the case are determined assume an importance fully as great as the validity of the substantive rule of law to be applied. And the more important the rights at stake the more important must be the procedural safeguards surrounding those rights." (*Speiser v. Randall* (1958) 357 U.S. 513, 520-521.)

The primary procedural safeguard implanted in the criminal justice system relative to fact assessment is the allocation and degree of the burden of proof. The burden of proof represents the obligation of a party to

establish a particular degree of belief as to the contention sought to be proved. In criminal cases the burden is rooted in the Due Process Clause of the Fifth and Fourteenth Amendment. (*In re Winship, supra,* 397 U.S. at p. 364.) In capital cases "the sentencing process, as well as the trial itself, must satisfy the requirements of the Due Process Clause." (*Gardner v. Florida, supra,* 430 U.S. at p. 358; see also *Presnell v. Georgia* (1978) 439 U.S. 14.) In the preceding subsection, appellant has argued that two specific factual determinations made by a jury at the penalty phase of a trial need to be established beyond a reasonable doubt. In the present subsection, appellant argues that the Due Process Clause of the Fourteenth Amendment and the Eighth Amendment also require those determinations, by the jury and beyond a reasonable doubt. Aside from the question of the applicability of the Sixth Amendment to California's penalty phase proceedings, the burden of proof for factual determinations during the penalty phase of a capital trial, when life is at stake, must be beyond a reasonable doubt.

b. Imposition of Life or Death.

The requirements of due process relative to the burden of persuasion generally depend upon the significance of what interest is at stake and the social goal of reducing the likelihood of erroneous results. (*Winship, supra,* 397 U.S. at pp. 363-364; see also *Addington v. Texas* (1979) 441 U.S. 418, 423; *Santosky v. Kramer* (1982) 455 U.S. 745, 755.)

It is impossible to conceive of an interest more significant than human life. Far less valued interests are protected by the requirement of proof beyond a reasonable doubt before they may be extinguished. (See *Winship, supra,* 397 U.S. 358 [adjudication of juvenile delinquency]; *People v. Feagley* (1975) 14 Cal.3d 338 [commitment as mentally disordered sex offender]; *People v. Burnick* (1975) 14 Cal.3d 306 [same]; *People v. Thomas* (1977) 19 Cal.3d 630 [commitment as narcotic addict];

Conservatorship of Roulet (1979) 23 Cal.3d 219 [appointment of conservator].) The decision to take a person's life must be made under no less demanding a standard.

In *Santosky*, *supra*, the U.S. Supreme Court reasoned:

> [I]n any given proceeding, the minimum standard of proof tolerated by the due process requirement reflects not only the weight of the private and public interests affected, but also a societal judgment about how the risk of error should be distributed between the litigants.... When the State brings a criminal action to deny a defendant liberty or life, ... "the interests of the defendant are of such magnitude that historically and without any explicit constitutional requirement they have been protected by standards of proof designed to exclude as nearly as possible the likelihood of an erroneous judgment." The stringency of the "beyond a reasonable doubt" standard bespeaks the 'weight and gravity' of the private interest affected, society's interest in avoiding erroneous convictions, and a judgment that those interests together require that "society impos[e] almost the entire risk of error upon itself."

(*Santosky v. Kramer, supra*, 455 U.S. at p. 755, citations omitted.)

The penalty proceedings, like the child neglect proceedings dealt with in *Santosky*, involve "imprecise substantive standards that leave determinations unusually open to the subjective values of the [jury]." (*Santosky*, *supra*, 455 U.S. at p. 763.) Imposition of a burden of proof beyond a reasonable doubt can be effective in reducing this risk of subjectivity, since that standard has long proven its worth as "a prime instrument for reducing the risk of convictions resting on factual error." (*Winship*, *supra*, 397 U.S. at p. 363.)

Recognizing a reasonable doubt standard would not deprive the State of the power to impose capital punishment; it would merely serve to

maximize "reliability in the determination that death is the appropriate punishment in a specific case." (*Woodson, supra*, 428 U.S. at p. 305.) The only risk of error suffered by the State under the stricter burden of persuasion would be the possibility that a defendant, otherwise deserving of being put to death, would instead be confined in prison for the rest of his life without possibility of parole.

The U.S. Supreme Court expressly applied the *Santosky* rationale for the beyond-a-reasonable-doubt burden of proof requirement to capital sentencing proceedings: "*[I]n a capital sentencing proceeding*, as in a criminal trial, 'the interests of the defendant [are] of such magnitude that ... they have been protected by standards of proof designed to exclude as nearly as possible the likelihood of an erroneous judgment.' ([*Bullington v. Missouri,*] 451 U.S. at p. 441 (quoting *Addington v. Texas*, 441 U.S. 418, 423-424 (1979).)" (*Monge v. California, supra*, 524 U.S. at p. 732 (emphasis added).) The sentencer of a person facing the death penalty is required by the due process and Eighth Amendment constitutional guarantees to be convinced beyond a reasonable doubt not only that the factual bases for its decision are true, but that death is the appropriate sentence.

5. California Law Violates the Sixth, Eighth and Fourteenth Amendments to the United States Constitution by Failing to Require That the Jury Make Written Findings Regarding Aggravating Factors Upon Which Its Death Verdict Is Based.

The failure to require written or other specific findings by the jury regarding the aggravating factors it relied on deprived appellant of his federal due process and Eighth Amendment rights to meaningful appellate review. (*California v. Brown* (1987) 479 U.S. 538, 543; *Gregg v. Georgia, supra,* 428 U.S. at p. 195.) Especially given that California juries have total

discretion without any guidance on how to weigh potentially aggravating and mitigating circumstances (*People v. Fairbank*, *supra*, 16 Cal.4th at p. 1255), there can be no meaningful appellate review without written findings because it is otherwise impossible to "reconstruct the findings of the state trier of fact." (See *Townsend v. Sain* (1963) 372 U.S. 293, 313-316.)

This Court has held that the absence of written findings by the sentencer does not render the California death penalty scheme unconstitutional. (*People v. Fauber* (1992) 2 Cal.4th 792, 859; *People v. Rogers* (2006) 39 Cal.4th 826, 893.) Ironically, such findings are otherwise considered by this Court to be an element of due process so fundamental that they are even required at parole suitability hearings. A convicted prisoner who believes that he or she was improperly denied parole must proceed via a petition for writ of habeas corpus and is required to allege with particularity the circumstances constituting the State's wrongful conduct and show prejudice flowing from that conduct. (*In re Sturm* (1974) 11 Cal.3d 258.) The parole board is therefore required to state its reasons for denying parole: "It is unlikely that an inmate seeking to establish that his application for parole was arbitrarily denied can make necessary allegations with the requisite specificity unless he has some knowledge of the reasons therefor." (*Id.* at p. 267.)[199] The same analysis applies to the far graver decision to put someone to death.

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[199] A determination of parole suitability shares many characteristics with the decision of whether or not to impose the death penalty. In both cases, the subject has already been convicted of a crime, and the decision-maker must consider questions such as future dangerousness, the presence of remorse, the nature of the crime, etc., in making its decision. (See California Code of Regulations, title 15, section 2280 et seq.)

In a *non*-capital case, the sentencer is required by California law to state on the record the reasons for the sentence choice. (Section 1170, subd. (c).) Capital defendants are entitled to *more* rigorous protections than those afforded non-capital defendants. (*Harmelin v. Michigan* (1991) 501 U.S. 957, 994.) Since providing more protection to a non-capital defendant than a capital defendant would violate the equal protection clause of the Fourteenth Amendment (see generally *Myers v. Ylst* (9th Cir. 1990) 897 F.2d 417, 421; *Ring v. Arizona*, *supra*, 536 U.S. at p. 609; Subsection D, *post*), the sentencer in a capital case is constitutionally required to identify for the record the aggravating circumstances found as the reasons for choosing the death penalty.

Written findings are essential for a meaningful review of the sentence imposed. (See *Mills v. Maryland* (1988) 486 U.S. 367, 383, fn. 15.) Even where the decision to impose death is "normative" (*People v. Demetrulias*, *supra*, 39 Cal.4th at pp. 41-42) and "moral" (*People v. Hawthorne*, *supra*, 4 Cal.4th at p. 79), its basis can be, and should be, articulated.

The importance of written findings is recognized throughout this country; post-*Furman* state capital sentencing systems commonly require them. Further, written findings are essential to ensure that a defendant subjected to a capital penalty trial under section 190.3 is afforded the protections guaranteed by the Sixth Amendment right to trial by jury. (See Section C.1, *ante*.)

There are no other procedural protections in California's death penalty system that would somehow compensate for the unreliability inevitably produced by the failure to require an articulation of the reasons for imposing death. (See *Kansas v. Marsh, supra*, 548 U.S. 163 [statute treating a jury's finding that aggravation and mitigation are in equipoise as

a vote for death held constitutional in light of a system filled with other procedural protections, including requirements that the jury find unanimously and beyond a reasonable doubt the existence of aggravating factors and that such factors are not outweighed by mitigating factors].) California's failure to require written findings thus violates not only federal due process and the Eighth Amendment but also the right to trial by jury guaranteed by the Sixth Amendment.

6. California's Death Penalty Statute as Interpreted by the California Supreme Court Forbids Inter-Case Proportionality Review, Thereby Guaranteeing Arbitrary, Discriminatory, or Disproportionate Impositions of the Death Penalty.

The Eighth Amendment forbids punishments that are cruel and unusual. The jurisprudence that has emerged applying this ban to the imposition of the death penalty has required that death judgments be proportionate and reliable. [Cite(s).] One commonly utilized mechanism for helping to ensure reliability and proportionality in capital sentencing is comparative proportionality review — a procedural safeguard this Court has eschewed. In *Pulley v. Harris, supra,* 465 U.S. 37, the high court, while declining to hold that comparative proportionality review is an essential component of every constitutional capital sentencing scheme, noted the possibility that "there could be a capital sentencing scheme *so lacking in other checks on arbitrariness that it would not pass constitutional muster without comparative proportionality review.*" (*Id.* at p. 51, emphasis added.)

California's death penalty statute, as drafted and as construed by this Court and applied in fact, has become just such a sentencing scheme. The high court in *Harris*, in contrasting the 1978 statute with the 1977 law which the court upheld against a lack-of-comparative-proportionality-

review challenge, itself noted that the 1978 law had "greatly expanded" the list of special circumstances. (*Pulley v. Harris*, 465 U.S. at p. 52, fn. 14.) That number has continued to grow, and expansive judicial interpretations of section 190.2's lying-in-wait special circumstance have made first degree murders that can *not be charged* with a "special circumstance" a rarity.

As we have seen, that greatly expanded list fails to meaningfully narrow the pool of death-eligible defendants and hence permits the same sort of arbitrary sentencing as the death penalty schemes struck down in *Furman v. Georgia*, *supra*, 408 U.S. 238. (See Subsection A of this Argument, *ante*.) The statute lacks numerous other procedural safeguards commonly utilized in other capital sentencing jurisdictions (see Subsection C, *ante*), and the statute's principal penalty phase sentencing factor has itself proved to be an invitation to arbitrary and capricious sentencing (see Subsection B, *ante*). Viewing the lack of comparative proportionality review in the context of the entire California sentencing scheme (see *Kansas v. Marsh*, *supra*, 548 U.S. 163), this absence renders that scheme unconstitutional.

Section 190.3 does not require that either the trial court or this Court undertake a comparison between this and other similar cases regarding the sentence imposed, i.e., inter-case proportionality review. (See *People v. Fierro*, *supra*, 1 Cal.4th at p. 253.) The statute also does not forbid it. The prohibition on the consideration of any evidence showing that death sentences are not being charged or imposed on similarly situated defendants is strictly the creation of this Court. (See, e.g., *People v. Marshall* (1990) 50 Cal.3d 907, 946-947.) This Court's categorical refusal to engage in inter-case proportionality review violates the Eighth Amendment.

7. The Prosecution May Not Rely in the Penalty Phase on Unadjudicated Criminal Activity; Further, Even If It Were Constitutionally Permissible for the Prosecutor to Do So, Such Alleged Criminal Activity Could Not Constitutionally Serve as a Factor in Aggravation Unless Found to Be True Beyond a Reasonable Doubt by a Unanimous Jury.

Any use of unadjudicated criminal activity by the jury as an aggravating circumstance under section 190.3, factor (b), violates due process and the Fifth, Sixth, Eighth, and Fourteenth Amendments, rendering a death sentence unreliable. (See, e.g., *Johnson v. Mississippi* (1988) 486 U.S. 578; *State v. Bobo* (Tenn. 1987) 727 S.W.2d 945.)

The U.S. Supreme Court's recent decisions in *United States v. Booker*, *supra*, *Blakely v. Washington*, *supra*, *Ring v. Arizona*, *supra*, and *Apprendi v. New Jersey*, *supra*, confirm that under the Due Process Clause of the Fourteenth Amendment and the jury trial guarantee of the Sixth Amendment, the findings prerequisite to a sentence of death must be made beyond a reasonable doubt by a jury acting as a collective entity. Thus, even if it were constitutionally permissible to rely upon alleged unadjudicated criminal activity as a factor in aggravation, such alleged criminal activity would have to have been found beyond a reasonable doubt by a unanimous jury. Appellant's jury was not instructed on the need for such a unanimous finding; nor is such an instruction generally provided for under California's sentencing scheme.

8. The Use of Restrictive Adjectives in the List of Potential Mitigating Factors Impermissibly Acted as Barriers to Consideration of Mitigation by Appellant's Jury.

The inclusion in the list of potential mitigating factors of such adjectives as "extreme" (see factors (d) and (g)) and "substantial" (see

factor (g)) acted as barriers to the consideration of mitigation in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments. (*Mills v. Maryland, supra,* 486 U.S. 367; *Lockett v. Ohio, supra,* 438 U.S. 586.)

9. The Failure to Instruct That Statutory Mitigating Factors Were Relevant Solely as Potential Mitigators Precluded a Fair, Reliable, and Evenhanded Administration of the Capital Sanction.

As a matter of state law, most of the factors introduced by a prefatory "whether or not" — factors (d), (e), (f), (g), (h), and (j) — were relevant solely as possible mitigators (*People v. Hamilton* (1989) 48 Cal.3d 1142, 1184; *People v. Edelbacher, supra,* 47 Cal.3d at p. 1034). The jury, however, was left free to conclude that a "not" answer as to any of these "whether or not" sentencing factors could establish an aggravating circumstance, and was thus invited to aggravate the sentence upon the basis of non-existent and/or irrational aggravating factors, thereby precluding the reliable, individualized capital sentencing determination required by the Eighth and Fourteenth Amendments. (*Woodson v. North Carolina, supra,* 428 U.S. at p. 304; *Zant v. Stephens, supra,* 462 U.S. at p. 879.)

Further, the jury was also left free to aggravate a sentence upon the basis of an *affirmative* answer to one of these questions, and thus, to convert mitigating evidence (for example, evidence establishing a defendant's mental illness or defect) into a reason to aggravate a sentence, in violation of both state law and the Eighth and Fourteenth Amendments.

This Court has repeatedly rejected the argument that a jury would apply factors meant to be only mitigating as aggravating factors weighing towards a sentence of death:

> The trial court was not constitutionally required to inform the jury that certain sentencing factors were relevant only in mitigation, and the statutory

> instruction to the jury to consider "whether or not" certain mitigating factors were present did not impermissibly invite the jury to aggravate the sentence upon the basis of nonexistent or irrational aggravating factors. (*People v. Kraft* [(2000)], *supra*, 23 Cal.4th [978] at pp. 1078-1079; see *People v. Memro* (1995) 11 Cal.4th 786, 886-887.) Indeed, "*no reasonable juror could be misled by the language of section 190.3 concerning the relative aggravating or mitigating nature of the various factors.*" (*People v. Arias* [(1996)], *supra,* 13 Cal.4th [92] at p. 188.)

People v. Morrison (2004) 34 Cal.4th 698, 730; emphasis added.)

This assertion is demonstrably false. Within the *Morrison* case itself there lies evidence to the contrary. The trial judge mistakenly believed that section 190.3, factors (e) and (j) constituted aggravation instead of mitigation. (34 Cal.4th at pp. 727-729.) This Court recognized that the trial court so erred, but found the error to be harmless. (*Ibid.*) If a seasoned judge could be misled by the language at issue, how can jurors be expected to avoid making this same mistake? Other trial judges and prosecutors have been misled in the same way. (See, e.g., *People v. Montiel* (1994) 5 Cal.4th 877, 944-945; *People v. Carpenter* (1997) 15 Cal.4th 312, 423-424.)

The very real possibility that appellant's jury aggravated his sentence upon the basis of nonstatutory aggravation deprived appellant of an important state-law generated procedural safeguard and liberty interest — the right not to be sentenced to death except upon the basis of statutory aggravating factors (*People v. Boyd, supra,* 38 Cal.3d at pp. 772-775) — and thereby violated appellant's Fourteenth Amendment right to due process. (See *Hicks v. Oklahoma, supra,* 447 U.S. 343; *Fetterly v. Paskett* (9th Cir. 1993) 997 F.2d 1295, 1300 [holding that Idaho law specifying manner in which aggravating and mitigating circumstances are to be

weighed created a liberty interest protected under the Due Process Clause of the Fourteenth Amendment]; and *Campbell v. Blodgett* (9th Cir. 1993) 997 F.2d 512, 522 [same analysis applied to state of Washington].)

This also violated the Eighth Amendment, for it made it likely that the jury treated appellant "as more deserving of the death penalty than he might otherwise be by relying upon ... illusory circumstance[s]." (*Stringer v. Black, supra,* 503 U.S. at p. 235.)

From case to case, even with no difference in the evidence, sentencing juries will discern dramatically different numbers of aggravating circumstances because of differing constructions of the CALJIC pattern instruction. Different defendants, appearing before different juries, will be sentenced on the basis of different legal standards.

"Capital punishment [must] be imposed fairly, and with reasonable consistency, or not at all." (*Eddings v. Oklahoma, supra,* 455 U.S. at p. 112.) Whether a capital sentence is to be imposed cannot be permitted to vary from case to case according to different juries' understandings of how many factors on a statutory list the law permits them to weigh on death's side of the scale.

D. The California Sentencing Scheme Violates the Equal Protection Clause of the Federal Constitution by Denying Procedural Safeguards to Capital Defendants Which are Afforded to Non-Capital Defendants.

As noted in the preceding arguments, the U.S. Supreme Court has repeatedly held that a greater degree of reliability is required when death is to be imposed and that courts must be vigilant to ensure procedural fairness and accuracy in fact-finding. (See, e.g., *Monge v. California, supra,* 524 U.S. at pp. 731-732.) Despite this directive California's death penalty scheme provides significantly fewer procedural protections for persons

facing a death sentence than are afforded persons charged with non- capital crimes. This differential treatment violates the constitutional guarantee of equal protection of the laws.

Equal protection analysis begins with identifying the interest at stake. "Personal liberty is a fundamental interest, second only to life itself, as an interest protected under both the California and the United States Constitutions." (*People v. Olivas* (1976) 17 Cal.3d 236, 251.) If the interest is "fundamental," then courts have "adopted an attitude of active and critical analysis, subjecting the classification to strict scrutiny." (*Westbrook v. Milahy* (1970) 2 Cal.3d 765, 784-785.) A state may not create a classification scheme which affects a fundamental interest without showing that it has a compelling interest which justifies the classification and that the distinctions drawn are necessary to further that purpose. (*People v. Olivas*, *supra*; *Skinner v. Oklahoma* (1942) 316 U.S. 535, 541.)

Equal protection guarantees must apply with greater force, the scrutiny of the challenged classification be more strict, and any purported justification by the State of the discrepant treatment be even more compelling where the interest at stake is not simply liberty, but life itself.

In *People v. Prieto, supra,* 30 Cal.4th 226,[200] as in *People v. Snow, supra,* 30 Cal.4th 43,[201] this Court analogized the process of determining

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[200] "As explained earlier, the penalty phase determination in California is normative, not factual. It is therefore analogous to a sentencing court's traditionally discretionary decision to impose one prison sentence rather than another." (*Prieto, supra,* at p. 275; emphasis added.)

[201] "The final step in California capital sentencing is a free weighing of all the factors relating to the defendant's culpability, comparable to a sentencing court's traditionally discretionary decision to, for example, impose one prison sentence rather than another." (*Snow, supra,* at p. 126, fn. 3.)

whether to impose death to a sentencing court's traditionally discretionary decision to impose one prison sentence rather than another. (See also, *People v. Demetrulias*, *supra*, 39 Cal.4th at p. 41.) However apt or inapt the analogy, California is in the unique position of giving persons sentenced to death significantly fewer procedural protections than a person being sentenced to prison for receiving stolen property or possessing cocaine.

An enhancing allegation in a California non-capital case must be found true unanimously and beyond a reasonable doubt. (See, e.g., sections 1158, 1158a.) When a California judge is considering which sentence is appropriate in a non-capital case, the decision is governed by court rules. California Rules of Court, rule 4.42 (e) provides: "The reasons for selecting the upper or lower term shall be stated orally on the record, and shall include a concise statement of the ultimate facts which the court deemed to constitute circumstances in aggravation or mitigation justifying the term selected."

In a capital sentencing context, however, there is no burden of proof except as to the special circumstance, and the jurors need not agree on what facts are true, or important, or what aggravating circumstances apply. (See Sections C.1-C.2, *ante*.) And unlike proceedings in most states where death is a sentencing option, or in which persons are sentenced for non-capital crimes in California, no reasons for a death sentence need be provided. (See Section C.3, *ante*.) These discrepancies are skewed against persons subject to loss of life; they violate equal protection of the laws.[202] (*Bush v. Gore, supra,* 531 U.S. 98, 121 S.Ct. 525, 530.)

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[202] Although *Ring* hinged on the court's reading of the Sixth Amendment, its ruling directly addressed the question of comparative procedural protections: "Capital defendants, no less than non-capital defendants, we conclude, are entitled to a jury determination of any fact on which the
(footnote continued on next page)

To provide greater protection to non-capital defendants than to capital defendants violates the due process, equal protection, and cruel and unusual punishment clauses of the Eighth and Fourteenth Amendments. (See, e.g., *Mills v. Maryland, supra*, 486 U.S. at p. 374; *Myers v. Ylst, supra*, 897 F.2d at p. 421; *Ring v. Arizona, supra,* 536 U.S. 584.)

E. California's Use of the Death Penalty as a Regular Form of Punishment Falls Short of International Norms of Humanity and Decency and Violates the Eighth and Fourteenth Amendments; Imposition of the Death Penalty Now Violates the Eighth and Fourteenth Amendments to the United States Constitution.

The United States stands as one of a small number of nations that regularly uses the death penalty as a form of punishment. (*Soering v. United Kingdom*: *Whether the Continued Use of the Death Penalty in the United States Contradicts International Thinking* (1990) 16 Crim. and Civ. Confinement 339, 366.) The nonuse of the death penalty, or its limitation to "exceptional crimes such as treason" — as opposed to its use as regular punishment — is particularly uniform in the nations of Western Europe. (See, e.g., *Stanford v. Kentucky* (1989) 492 U.S. 361, 389 [dis. opn. of Brennan, J.]; *Thompson v. Oklahoma* (1988) 487 U.S. 815, 830 [plur. opn. of Stevens, J.].) Indeed, all nations of Western Europe have now abolished the death penalty. (Amnesty International, "*The Death Penalty: List of Abolitionist and Retentionist Countries*" (Dec. 31, 2008), on Amnesty International's website at

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legislature conditions an increase in their maximum punishment .... The right to trial by jury guaranteed by the Sixth Amendment would be senselessly diminished if it encompassed the factfinding necessary to increase a defendant's sentence by two years, but not the factfinding necessary to put him to death." (*Ring, supra*, 536 U.S. at p. 609.)

<https://www.amnesty.org/download/Documents/44000/act500022009en.pdf> [as of 7/1/2016].)

Although this country is not bound by the laws of any other sovereignty in its administration of our criminal justice system, it has relied from its beginning on the customs and practices of other parts of the world to inform our understanding. "When the United States became an independent nation, they became, to use the language of Chancellor Kent, 'subject to that system of rules which reason, morality, and custom had established among the civilized nations of Europe as their public law.'" (1 Kent's Commentaries 1, quoted in *Miller v. United States* (1871) 78 U.S. 268, 315 [dis. opn. of Field, J.]; *Hilton v. Guyot* (1895) 159 U.S. 113, 227; *Martin v. Waddell's Lessee* (1842) 41 U.S. 367, 409.)

Due process is not a static concept, and neither is the Eighth Amendment. In the course of determining that the Eighth Amendment now bans the execution of mentally retarded persons, the U.S. Supreme Court relied in part on the fact that "within the world community, the imposition of the death penalty for crimes committed by mentally retarded offenders is overwhelmingly disapproved." (*Atkins v. Virginia* (2002) 536 U.S. 304, 316, fn. 21, citing the Brief for The European Union as *Amicus Curiae* in *McCarver v. North Carolina*, O.T. 2001, No. 00-8727, p. 4.)

Thus, assuming *arguendo* that capital punishment itself is not contrary to international norms of human decency, its use as *regular punishment* for substantial numbers of crimes — as opposed to extraordinary punishment for extraordinary crimes — is. Nations in the Western world no longer accept it. The Eighth Amendment does not permit jurisdictions in this nation to lag so far behind. (See *Atkins v. Virginia, supra*, 536 U.S. at p. 316.) Furthermore, inasmuch as the law of nations now recognizes the impropriety of capital punishment as regular

punishment, it is unconstitutional in this country inasmuch as international law is a part of our law. (*Hilton v. Guyot*, *supra*, 159 U.S. at p. 227; see also *Jecker, Torre & Co. v. Montgomery* (1855) 59 U.S. 110, 112.)

Categories of crimes that particularly warrant a close evaluation include the imposition of the death penalty for felony-murders or other non-intentional killings, and single-victim homicides. See Article VI, Section 2 of the International Covenant on Civil and Political Rights, which limits the death penalty to only "the most serious crimes."[203] Categories of criminals that warrant such a comparison include persons suffering from mental illness or developmental disabilities. (Cf. *Ford v. Wainwright* (1986) 477 U.S. 399; *Atkins v. Virginia*, *supra*, 536 U.S. 304.)

Thus, the very broad death scheme in California and death's use as regular punishment violate both international law and the Eighth and Fourteenth Amendments. Appellant's death sentence should be set aside.

* * * * * *

[203] See Kozinski and Gallagher, *Death: The Ultimate Run-On Sentence*, (1995) 46 Case W. Res. L. Rev. 1, 30.

CONCLUSION

For all of the reasons set forth in this brief, appellant Calvin Lamont Parker respectfully requests this Court to reverse the judgment of guilt and sentence of death, and grant him a new trial.

Dated: July 7, 2016

Respectfully submitted,

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CALVIN LAMONT PARKER

CERTIFICATION OF WORD COUNT PURSUANT TO CALIFORNIA RULES OF COURT, RULE 8.630 (B)(1)(A)

I certify that Appellant Parker's Opening Brief consists of **103,710** words.

Dated: July 7, 2016

Respectfully submitted,

KATHRYN K. ANDREWS

Counsel for Appellant
CALVIN LAMONT PARKER

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I am a citizen of the United States. My business address is 3060 El Cerrito Plaza, PMB 356, El Cerrito, California. I am employed in the city of El Cerrito, where this mailing occurs. I am over the age of eighteen years, and not a party to the within cause.

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APPELLANT'S OPENING BRIEF

on the following persons on the date set forth below, by delivering a true copy thereof in a sealed package, with postage fully prepaid, to a United States Post Office facility:

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I declare under penalty of perjury that the foregoing is true and correct.

Executed on July 7, 2016, at El Cerrito, California.

Kathryn K. Andrews