No. S087560

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

v.

GILES ALBERT NADEY, JR.,

Defendant and Appellant.

Automatic Appeal from a Judgment of Death
of the Superior Court of the State of California
County of Alameda
Case No. 129807
Honorable Alfred A. Delucchi

APPELLANT'S OPENING BRIEF

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STATEMENT OF APPEALABILITY

This automatic appeal from a final judgment of conviction and imposition of a sentence of death is authorized by Penal Code section 1239, subdivision (b).[1]

STATEMENT OF CASE

On March 19, 1997, an Indictment was filed in the Superior Court of the State of California, County of Alameda, accusing appellant of murder and sodomy of Terena L. Fermenick.[2] (CT 355-358) Count One of the Indictment charged that on or about January 18, 1996, appellant committed the act of murder in violation of § 187, and further alleged that the crime was committed by use of a deadly weapon, a knife, within the meaning of § 12022(b), thereby causing said crime to become a serious felony pursuant to § 1192.7(c)(23). A special circumstance was also alleged in that the murder was committed while in the commission of sodomy, in violation of § 286, within the meaning of § 190.2(a)(17)(iv). Count Two charged that on January 18, 1996, appellant committed the crime of sodomy as to Terena L. Fermenick, in violation of § 286(c), and further alleged that the crime was committed by use of a deadly weapon, to wit, a knife, within the meaning of § 12022(b). The Indictment also alleged four prior felony convictions: 1) pursuant to §§ 667(a) /1170.12(c)(2)(A), that on October 4, 1993, Appellant was convicted in the Orange County Superior Court of second degree

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[1] All further statutory references are to the Penal Code unless otherwise indicated. "RT" refers to the reporter's transcript; "CT" refers to the Clerk's transcript.

[2] On March 21, 1997, the District Attorney filed a "Death Penalty Notification" advising that the District Attorney was seeking the death penalty. (CT 346, 348, 352, 368)

burglary; 2) pursuant to §§ 667(a) /1170.12(c)(2)(A), that on October 4, 1993, appellant was convicted in the Orange County Superior Court of: petty theft with prior theft convictions; 3) pursuant to §§ 667(a) / 1170.12(c)(2)(A), that on or about November 19, 1985, appellant was convicted in the Los Angeles County Superior Court of first degree burglary, in violation of § 459; 4) pursuant to §§ 667(a)/ 1170.12(c)(2)A), that appellant on or about November 4, 1985, was convicted in the Los Angeles County Superior Court of first degree burglary, in violation of § 459.

On November 12, 1998, appellant's trial began with jury selection. (CT 766-767) On January 26, 1999, the prosecution began to present evidence. (CT 816-819) On February 10, 1999, the defense began to present its case. (CT 859) On February 17, 1999, the jury commenced guilt phase deliberations. (CT 884-885)

On February 23, 1999, the jury found appellant guilty of the charges and found the special circumstance true. (CT 903-906 and CT 898-899)

On March 2, 1999, the first penalty-phase trial commenced with the prosecution presenting evidence. (CT 999-1000) On March 3, 1999, the defense began to present evidence. (CT 1001-1002) On March 10, 1999, the parties presented argument. (CT 1035) On March 11, 1999, the Court instructed the jury. (CT 1041-1042) On March 12, 1999, the jury informed the Court that it had not reached a verdict and that it would not be possible for the jury to reach a verdict. The Court declared a mistrial. (CT 1107-1108) On June 2, 1999, the Court denied appellant's motion for a new trial as to the guilt phase. (CT 1604)

On November 8, 1999, appellant's second penalty-phase trial commenced with the jury selection process. (CT 1611) On January 18,

2000, the prosecution began presenting evidence. (CT 1657-1658) On January 26, 2000, the defense began to present evidence. (CT 1678-1680) On January 31, 2000, the prosecution commenced with presenting rebuttal evidence. (CT 1687-1689) On February 3, 2000, the parties presented argument. (CT 1703) On February 4, 2000, the Court instructed the jury. (CT 1744) On December 7, 2000, the jury returned a verdict of death. (CT 1816-1817) On April 12, 2000, the Court denied appellant's motion for a new trial, pursuant to § 1181.6, and further denied the automatic motion to reduce the death penalty to life without possibility of parole and sentenced appellant to death. (CT 1846-1883)

STATEMENT OF FACTS

I. GUILT PHASE

A. Overview.

On January 18, 1996, Terena L. Fermenick was sexually assaulted and killed in the minister's residence located at 1515 Walnut Street, Alameda, California, adjacent to the Church of Christ church where her husband, Donald Fermenick, was the minister. (CT 355-359, 903-906; RT 3798-3844, 3842-3871, 3872-3880) They had not yet moved into the minister's residence at the time of the homicide, but were residing at the residence of Donald's parents in Pleasanton with their 5-month-old baby, Regan. (RT 4053) Terena contacted Skyline Chem-Dry and arranged to have the carpets cleaned. (RT 4058, 3848-3850) The job was scheduled to commence at 2:00 p.m. and was assigned to appellant as a one-man job. (RT 3852, 3990-3995, 4004) Terena, along with her 5-month-old baby, Regan, traveled from Pleasanton to meet the carpet cleaner. (RT 3846-3849, 3988-3994) According to the owner of Pauline's Antiques in Alameda, Pauline Kelly, Terena was browsing in her shop around 2 o'clock and left at 5 after 2, noting that she was late for a meeting with the carpet cleaner. (RT 3893-3895) Skyline Chem-Dry work order, dated 1/18/96, indicates that the job started at 2:16 and was completed at 3:54, based on the notations made by appellant. (People's Exhibit 37A; RT 3997-3999) The store manager for Lucky Stores in Alameda, Mario Luis Valencia, based on a receipt and a check drawn on the account of Donald and Terena Fermenick, established that Terena had made a purchase from the Lucky Store at 3:32 p.m. (People's Exhibits 21A and 22A; RT 3900-3906) According to appellant's boss, Paul Miller, at Skyline Chem-Dry, Miller was in his office at 4 o'clock that afternoon. (RT 3988-3991, 3995)

Appellant called between 4:15 and 4:30 and spoke with the secretary. (RT 3995-3996, 4018) Appellant apparently had stopped off at Jack In The Box in Oakland, and returned around 4:30 to 10 to 5:00 p.m. (RT 3995-3996, 4016, 4019) When appellant returned he was wearing his company white shirt and white canvas tennis shoes. (RT 4020) Miller did not notice any red spots or marks on the white shirt or his shoes and, moreover, there was nothing unusual about his pants. (RT 4020) However, appellant did not have his old raincoat when he returned from the Fermenick job and noted that he had left it in the restroom at the Jack In The Box. (RT 3995-3996) Appellant did not act out of the ordinary. (RT 4022)

When Terena Fermenick did not return home to Pleasanton, the Fermenick family became concerned. (RT 3852, 4060-4061) Donald Fermenick was the full-time pastor at the Church of Christ church, but had a second job working the graveyard shift at a packaging plant where he was a bag machine operator. (RT 3842-3843, 4053) He had worked the night shift and did not wake up until 4 o'clock in the afternoon on January 18, 1996. (RT 4058-4059) Donald Fermenick had called the residence in Alameda at 4:30 p.m. to see what time Terena would be coming home and received no response. (RT 4060) He tried several times later and became nervous. (RT 4060-4061) At 8 o'clock, he became "very nervous." (RT 4061) He borrowed his father's car and left Pleasanton for Alameda about a quarter to 9:00. (RT 4062-4063) It took about 35 minutes for him to arrive in Alameda. (RT 4063) He estimates that he arrived in Alameda around 9:15-9:20. (RT 4062-4063) As he approached the residence, he saw their gray Saturn, and his daughter, Regan, was inside asleep. (RT 4063-4064) He was able to peer into the kitchen window and saw Terena lying down in the other room, naked. (RT 4064-4065, 4068) Donald Fermenick kicked

through the window of the door and broke the glass to gain entry. (RT 4065-4067) He noted that Terena was lying face down, and was "cold, lifeless." (RT 4068-4069) He ran to the kitchen phone and called 911. (RT 4067) Sergeant Randall Beetle of the Alameda Police Department responded to the call regarding the possible homicide at 1515 Walnut Street and arrived at 9:28 p.m. (RT 4838) A homicide investigation ensued. (RT 4838-4839)

The prosecution theory of the case was that Appellant Nadey both sodomized and killed Terena Fermenick when she returned after the carpets had been cleaned. (RT 4924-4926, 4945-4946) The prosecution relied primarily on DNA evidence to support its theory of the case that appellant was the perpetrator of the crime. (RT 4943 and RT 5146-5159) The prosecution's primary DNA expert, Steven Myers, Senior Criminalist with the California Department of Justice DNA Laboratory, concluded, based on RFLP testing on the semen stains from the jeans and rectal swabs from the victim, the results were a "match" in that the sperm fraction of the jeans from the various stains and swabs, and the profile Myers obtained, "match" the profile of appellant. (RT 4478-4481) Myers concluded further that all of the results comparing appellant to the rectal swabs and denim jeans "are consistent within this match criteria of being from the same person," e.g., Mr. Nadey. (RT 4495) However, Myers conceded there had been contamination in the DNA testing, noting that there had been "some typing contamination" as a consequence of a spillover when he was handling one of the trays. (RT 4690 and 4704) He also admitted other instances of contamination on four prior cases. (RT 4692-4696) Myers further acknowledged that in doing PCR testing with respect to the vulva swab of the victim, he detected "an additional donor" that was neither Mr. Nadey

nor Mr. Fermenick. (RT 4498-4500 and RT 4558-4559)

The defense theory of the case as to the DNA evidence was that the DNA evidence was unreliable based on admitted contamination (RT 4686-4689, 4691-4692), and further, the DNA testing revealed an additional donor, neither Mr. Fermenick nor Mr. Nadey (RT 4558-4559), and hence, there is evidence of a third man, also referred to as "Mr. Unknown," who may have been responsible for the crime and, at a minimum, establishes that there was reasonable doubt as to the guilt of Mr. Nadey. (RT 5097-5098, 5100, 5116-5120)

The Court read from the Indictment to the jury as follows:

> Count One: Nadey's charged with murder in violation of Penal Code section 187 in that on or about January 18, 1996, he murdered Terena L. Fermenick, and there was a use clause, in that he personally used a deadly and dangerous weapon, to wit, a knife, and a special circumstance, the murder was committed in connection with the felony of sodomy, a violation of Penal Code section 286; as to Count Two, a felony violation of sodomy, in violation of Penal Code section 286(c) as to Terena Fermenick is alleged, and further, that during the commission of the crime, the defendant, Nadey, used a deadly and dangerous weapon, to wit, a knife.

(RT 3769-3771) Of note, the prosecution conceded that it was proceeding on a naked felony murder theory. (RT 4891)

For the sake of clarity, the Statement of Facts as to the guilt phase will focus on the case presented by the prosecution and the challenge to the prosecution evidence by way of cross-examination and the rebuttal case presented by the defense.

B. The Prosecution's Case

1. Timeline

(a) Paul Mark Miller

On January 18, 1996, Paul Miller was the general manager of Skyline Chem-Dry, located in Emeryville, California.. (RT 3988-3989) Appellant Nadey was working as a carpet cleaner for Skyline at that time and had been employed with them since July of 1995. (RT 3989-3990) On the morning of January 18, 1996, Miller and appellant did a job together at 8:30 or 9:00 a.m. at the Southern Pacific Railroad Station, which took approximately 3½ hours; they both returned to the Emeryville plant at 1:30 in the afternoon. (RT 3991-3992)

Appellant had another job in Alameda at 1515 Walnut to clean rugs for Terena Fermenick . (RT 3992) Ms. Fermenick had called it in and spoken with the secretary, Louisa, to book the job for Tuesday at around 2 o'clock, and the job was randomly assigned to appellant. (RT 3992-3994, 4002-4004). Appellant left Emeryville for the job in Alameda at quarter to 2:00, which given the size of the space would generally take anywhere from and hour to an hour-and-a-half to complete. (RT 3993-3995) Appellant was wearing white canvas shoes, blue pants like Bigge work pants, a white work shirt that Skyline provided, and "an old yellow raggedy raincoat, falling apart." (RT 3994)

When an employee completes a job, the procedure is to do a walk through with the customer and explain what did not come out of the carpet, and then you call the office and let them know you are done and you are on your way back. (RT 3995) Miller was in his office at 4 o'clock that afternoon. (RT 3995) Appellant called the office at 4:30 and spoke with the secretary, Louisa. Miller saw appellant approximately 15-20 minutes

later. Appellant returned to the office around a quarter to 5:00 or ten to 5:00. Miller noticed he did not have his raincoat with him, and Miller never saw the raincoat again. Appellant stated that he had left the raincoat at the Jack In The Box restroom in Oakland. (RT 3995-3996)

Miller identified the Skyline Chem-Dry work order, bearing number 1600128, dated 1/18/96, People's Exhibit No. 37A. Miller also identified a copy of a check drawn on the Don and Terena Fermenick's account, dated 1/18/96, for a total of $184.80, People's Exhibit 37B. (RT 3997) Miller confirmed that the work order was given to appellant upon his departure for 1515 Walnut Street, that the handwriting on the work order is appellant's, and that there is a signature on the document which says "Terena Fermenick" which is not in appellant's handwriting. The work order (Exhibit 37A) indicates the job began at 2:16 and was completed at 3:54. (RT 3998-3999) The check (Exhibit 37B) bears the signature of "Terena Fermenick" and appears to be the same signature of Terena Fermenick as that on the work order. (RT 3999-4000)

The following day, Miller and appellant were summoned to the Alameda Police Department by Sergeant James Taranto. Miller drove appellant to the Police Department. On the way, appellant noted that "she was a nice lady," referring to Terena Fermenick, and that her daughter had a cold and was sick. (RT 4000) Miller asked appellant about his raincoat and appellant noted that he had lost it at the Jack In The Box on East 14th when he went to use the restroom and left it hanging on a hook. (RT 4000) Miller noted that the Jack In The Box where appellant stated he had left his raincoat was not the most direct route back to Emeryville. (RT 4000-4001) Appellant indicated that he left the job at 3:54. (RT 4001) Miller noted that he "knew for a fact" why it took a little time to get back to the office, as

appellant called at 4:25 to 4:30, and the secretary asked him to pick up a pack of cigarettes for her, and he did that as well and then came back. (RT 4001) When he called the office at 4:30 or so, he called from the Jack In The Box where he had used the restroom. (RT 4001-4002)

All Skyline employees are provided a kind of uniform that they wear when they go out on jobs, including a white shirt bearing the company logo. Appellant regularly wore that shirt. Employees were required be neat and clean each and every day they are working. (RT 4006) Appellant always was neat and clean, including on the day in question and the following day when they went to the police station. (RT 4007)

The procedure generally followed by the employees was that they would measure out the carpet, explain what the cost would be to the customer, proceed with the job if they got approval, finish the job, and get paid and leave. (RT 4008-4009). The job on Walnut originally was going to be a living room, dining room, and hallway, which should take a little over an hour. As it turned out, appellant cleaned more of the residence, that is, the living room, dining room, and master bedroom (the largest areas), so the job took longer than was originally contemplated. (RT 4009-4010).

Mrs. Fermenick signed the work order (RT 4010) which indicated that the job started at 2:16 p.m. and that the job finished at 3:54 p.m. (RT 4011) This was not an unusual length of time for a job that size; it was "about average". (RT 4011) The work order indicated that the job was a little more complicated, because there was a lot of urine over 75% of the carpeting. (RT 4011-4012)

When appellant went to the job in Alameda, he went in his truck, number 5, which had been assigned to him. The company office in Emeryville is located at 4076 Halleck Street. (RT 4014) The time that it

would take to go to Alameda from the office in Emeryville would depend on the way you go, the traffic, whether it was a rainy day, it could take up to 25 minutes. On January 18, the weather was not very good. (RT 4015)

Once a job is finished, the worker is supposed to call in. (RT 4015) They do not have phones in the trucks. (RT 4016) Generally, they have to stop someplace and use the phone to call in when they are done. The company does not want them using the customer's phone, but on occasion they could. However, if they do not feel comfortable, they recommend they go to a payphone. This is particularly true if the customer is there. Moreover, they do not have rules against the employee stopping to get something to eat before they come back to the office. The fact that Albert may have gone and stopped at Jack In The Box before he came back to the office was not a big violation of regulations or anything. From what Miller observed, appellant had not had much to eat that day, so it would not be that unusual for him to stop and grab a bite to eat. (RT 4016)

Miller was back in his office at 4 o'clock. Appellant had not arrived back yet. Miller had Louisa page him, and at the same time she was paging him, he called in. (RT 4017) This was a few minutes after Miller had gotten back. (RT 4018)

Miller and appellant went to the Alameda Police Department on January 19, the next day. Miller spoke with Detective Miller. Based on a refreshed recollection, he recalled telling Detective Miller that it was about 4:15 that appellant called and said that he was at the Jack In The Box and was done with the job. Appellant actually got back to the office at 4:30, 4:35. (RT 4018-4019)

When appellant returned to the office, he was still wearing the company white shirt. Miller did not notice any blood or anything unusual

about the shirt. (RT 4020) He was also wearing white canvas tennis shoes. Miller did not notice any red spots or marks or what you might think would be blood on the tennis shoes. (RT 4020) Miller also saw him in his pants. There was nothing unusual about the pants, that is, it did not have any red stains or what might be blood on his pants or anything like that. (RT 4020)

Although he was going to drop appellant off at the BART, because it was raining he decided to take appellant home that evening. They stayed at the office until 5:20 and left at that time. (RT 4020) Miller noted that appellant had commented about the job that the woman there had a small child and was a very nice lady. (RT 4021-4022) As to appellant's demeanor, Miller observed that appellant did not act out of the ordinary. He was handing out Twinkies, being nice, his normal self. There was "[n]othing out of the ordinary." (RT 4022)

(b) Lori Fermenick

Lori Fermenick is the mother of Donald Fermenick, Terena's husband. (RT 3842) On January 18, 1996, Donald Fermenick was a minister in training and also worked a night job at a plastics plant. Lori's father was the minister who had been training Donald at the Church of Christ in Alameda, which is located at Walnut and Santa Clara Avenue. As of January 18, 1996, Donald Fermenick was going to take over the congregation as a minister. (RT 3843-3844)

January 18, 1996, Lori Fermenick lived in Pleasanton with her husband and children, as well as Don and Terena Fermenick and their five-month-old daughter Regan. (RT 3845-3847) Lori Fermenick saw Terena on the morning of January 18 at approximately 9:00 to 9:30 a.m.; Donald was asleep and got up somewhere around 4 o'clock in the afternoon. (RT 3847) He worked graveyard at a plastics company, and was being partially

supported by the Church while he was in training. (RT 3848)

Terena Fermenick left Pleasanton that day sometime after lunch – 12:00 or 12:30 – with Regan in her silver Saturn. (RT 3848) Terena was going to the house to wait for the carpet cleaner. (RT 3848-3849) While Lori Fermenick was at her home in Pleasanton, she received a telephone call from Terena at approximately 1:30 p.m. Terena Fermenick told her that she had gotten to the house in Alameda safely and that the carpet cleaner was not there yet. (RT 3849-3850) Terena was concerned about being alone in the house with somebody she did not know. Lori told Terena that she did not have to be alone in the house with somebody she did not know, that she could just let him in, go downtown, come back and pay him, and that it was fine for her not to be there. (RT 3850) She saw her son, Donald Fermenick, later that afternoon when he woke up, sometime around 4:00 o'clock. (RT 3850-3851)

The carpet cleaner was supposed to be there between 2:00 and 4:00 p.m. and Lori Fermenick expected Terena to return after that. By 4:30 or 5:00, she had not returned. (RT 3851-3852) Donald Fermenick called the house in Alameda several times to see if Terena was there. By 6:00 or 7:00, Terena had still not returned. (RT 3852)

She talked to her son, Don, about 5:00 or 6:00. (RT 3865) She noted that Terena should have been back and that she was worried about the weather. Don said you never know what time she left and she was probably stuck in traffic; he did not appear to be worried. (RT 3865-3866)

(c) Pauline Kelly

On January 18, 1996, Pauline Kelly was the owner of Pauline's Antiques, located at 1427 Park Street, Alameda, California. (RT 3893-3894) In the early afternoon, about 2:00, a young woman with a baby

entered her antique store. She spoke with her for about 3 to 5 minutes. The young woman introduced herself and said that her husband was the minister who would be taking over the church on Santa Clara near her shop. She noted that she had a little bit of time to kill before meeting the carpet cleaner to let them in. (RT 3893-3894) She browsed through the antique shop, and left at 2:05, indicating that she was late for a meeting with the carpet cleaner, and noting that she was sorry to leave. (RT 3894-3896) She identified People's Exhibit No. 1 as a photograph of that woman and her baby. (CT 3895)

As the young woman was leaving, a street vendor came into her store. She shushed him out and he left less than a minute after the young woman did. (RT 3897) After briefly answering the phone, she went outside and did not see either the young woman or the street vendor. (RT 3898)

(d) Mario Valencia

On January 18, 1996, Mario Valencia was the store manager for Lucky Stores in Alameda, South Shore. (RT 3900) Valencia identified Exhibit 21A as a check written to Lucky Stores in the amount of $7.18. (RT 3902) In fact, the check was written to Lucky Store #57, which is the Lucky Store in South Shore where Valencia was the manager. (RT 3903) Valencia noted that the check was run through the register or the MICR at 15:19 military time, which is 3:19 in the afternoon or p.m. (RT 3903) This was on January 18, 1996. (RT 3903)

(e) Donald Fermenick

In January 1996, Donald Fermenick was living in Pleasanton, California, with his parents and his wife, Terena Fermenick, and 5-month-old child, Regan, as well as his sister. At the time, he was working two

jobs, a graveyard shift at a packaging plant where he was a bag machine operator, and as a minister at the Church of Christ church in Alameda. (RT 4053) He had been working at the Church of Christ located in Alameda in some capacity for about 2½ years. After he had returned from Florida College, his "grandpa," the full-time minister, offered him training there at the Church and he began as a part-time trainee. (RT 4054)) In October of 1995, his grandfather, the then-pastor of the Church of Christ in Alameda, unexpectedly passed away, and he assumed full-time work at the Church. (RT 4056)

Terena called the carpet cleaning service and scheduled the appointment. The carpet cleaner was to be there somewhere between 2:00 and 4:00 p.m. (RT 4058)

On January 17, he worked his other job from 10:00 p.m. until 6:00 a.m., and returned to Pleasanton some time after 6:00. (RT 4058) He was asleep around 8:00 a.m. and woke up about 4:00 in the afternoon. He noted that Terena would not leave the baby in a car unattended. (RT 4059) Around 4:30, he called the house in Alameda to see what time Terena would be home but received no response. He tried again an hour or so later. (RT 4060) Around 5:30, he started to get a little concerned; at 6:30 he became increasing nervous. (RT 4060-4061) By 8:00, she had not returned home. He had made other calls to the church house. He was very nervous at the time. (RT 4061) At 8:30 she had not returned. (RT 4061-4062) Around 8:15 to 8:30, he asked his dad if he could use his car to drive to Alameda to look for Terena. (RT 4062) He left Pleasanton around a quarter to nine. (RT 4062-4063) It took 35 minutes to get there because he had to stop for gas. (RT 4063)

Upon arrival at the church house, he stopped the car in the middle of

the parking lot and jumped out because he noticed her Saturn was still sitting in the parking lot, about 10, 15 feet away from the back door. Regan was asleep inside the Saturn and looked as if she had been there for a while. (RT 4063-4064) He grabbed Regan out of the car and was looking for Terena and calling her name. (RT 4064) He peered into the kitchen window, and through the kitchen into the family room he could seen Terena lying down in the other room and could tell that she had no clothing on. (RT 4064-4065) They only had one key, and Terena had it for the day. The side door was locked. He kicked through the window in the door and broke the glass. (RT 4065) He went inside and saw Terena in the family room. She did not have any clothing on and there was blood all over the walls. (RT 4066). As he entered the family room, he screamed, fell backwards out of the room, and ran to the kitchen phone and called 911. (RT 4067) He explained to 911 what he had discovered and hung up the phone. (RT 4067) He called his dad and stated "Dad, I'm at the house. I found her. She's naked." (RT 4068)

He still had Regan in his hands when he went back into the room where Terena was. The phone rang; it was the 911 operator and then 3 seconds later a police officer was there. Don Fermenick noted that he put his hand on Terena's back, who was lying face down. (RT 4068) He felt that she was "cold, lifeless." The police officer arrived at that point along with several other officers. (RT 4069) As to the question of whether they were treating him "as a suspect" at that point, Don Fermenick stated "I think they were being very cautious." Later, a police officer took him to the hospital and they did what they call "a rape examination" of him. (RT 4069) They did pubic hair combings and withdrew blood. (RT 4069-4070) They then took him back to the police department. (RT 4070)

Prior to having the carpets cleaned, he and Terena had been going over to the Church and removing items that belonged to his grandmother. He found a "dagger type" thing in the guest bedroom. He identified People's Exhibit No. 26 as the "kind of a dagger" hunting knife in a sheath. (RT 4070-4071) He is now aware that the knife belonged to his cousin, Joshua. On January 18, 1996, when he found the knife in the church house, he placed it on the windowsill of the master bedroom right below the window. (RT 4071) When he saw Terena in the house, she was dead. (RT 4072)

On cross-examination, Don Fermenick reaffirmed that he woke up at 4:00 on the day in question. (RT 4074) He acknowledged that he was involved in a civil lawsuit where he and others sued Mr. Nadey, Pacific Shellback, Skyline Chem-Dry, Harris Research, Inc., Paul Miller, and some others. He was questioned under oath on March 7, 1998 at a lawyer's office in the presence of a court reporter. (RT 4074-4075) In his deposition testimony, he testified that he woke up between 3:00 and 4:00 o'clock in the afternoon. (RT 4075-4076)

As to whether he had been a suspect, Mr. Fermenick conceded that the police took his daughter out of his arms, put him on the floor, and handcuffed him in his house. He also acknowledged that they took him to the hospital, took him to the Alameda Police station, and he gave a statement to the police. (RT 4080-4081)

In response to the inquiry as to whether he had an interest in establishing that Mr. Nadey was responsible for his wife's death financially with respect to the civil lawsuit, Mr. Fermenick stated that he was not "trying to establish anything. I just wanted to make that the person who killed my wife is brought to justice." (RT 4084-4085). The following

exchange regarding the settlement of the civil lawsuit then ensued:

> MR. HOROWITZ: Q. But in fact you received a million dollars or so in settlement of your civil lawsuit against Skyline Chem Dry, against Paul Harris (sic), and the various entities having financial relationships with the Chem Dry company; isn't that correct?
>
> A. [MR. FERMENICK] That's correct.
>
> Q. And, in fact, you could have not won that lawsuit if Mr. Nadey was not responsible for your wife's death; right?
>
> A. That's correct.
>
> . . .
>
> Q. [MR. HOROWITZ]: Part of your deposition also related to what happened in the incident; isn't that right?
>
> A. That's correct.

(RT 4085-4086)

Mr. Fermenick denied that all the jobs that he held, both before and after the incident until he received his million dollar settlement, were jobs in which he was paid $5.50 an hour and, at most, $10 an hour. (RT 4090) He acknowledged that he was paid $5.50 an hour at Copeland Sports. In response to the inquiry as to whether he was making $10 an hour as a bag catcher at the time of the incident in January of 1996, he noted that he had received a raise of $2 to $3 an hour. (RT 4090).

(f) Officer Paul Erny

Police Officer Paul Erny had been employed with the Alameda Police Department for 21 years. On January 18, 1996, at around 9:26 that evening, he received a radio dispatch to go to the 2200 block of Santa Clara

Avenue. The dispatch indicated that a man had found his wife dead and raped on the floor of the house. (RT 3872-3873) He gained access to 1515 Walnut Street and was the first officer there. Other officers joined him shortly thereafter. (RT 3875) When he entered the side door, he noticed that the top half of the door was basically destroyed and that the door was pushed open. (RT 3875-3876) He entered the door on the north side, side door, right in front of the area where the Saturn was parked. (RT 3876) He observed a male squatting down in an empty living room area over a nude woman, with a small child in his arms. (RT 3876) The male adult was handcuffed and escorted out of the residence, and the scene was then preserved for evidence technicians and other investigation. Somebody took the baby from the gentleman. (RT 3877-3879) The person who was handcuffed in the residence was Don Fermenick. (RT 3877-3878)

There was no blood on Donald, nor was there any blood on the child. (RT 3878-3879) A search of the home was performed and nothing was removed. (RT 3879) He did not see any weapons in the house, and he never saw a knife in the house anywhere. (RT 3880)

(g) Theresa May Morrow

On January 18, 1996, Theresa May Morrow was a dispatcher with the Alameda Police Department and was working in the Communications Center in the evening. (RT 3984-3985) Officer Sanchez brought a child to the Communications Center around 21:55 hours. (RT 3985) She picked the child up and noticed that the child was very wet, the clothes were soiled. She got diapers and changed the child's diaper, which was completely soiled. She noted that when you put a child down for rest at night, they get up in the morning and the diaper is usually pretty well soiled, but this diaper was more than "just soiled," it was "very soiled" and "full." (RT 3986)

2. Crime Scene

(a) Officer Eileen Bartosz

Eileen Bartosz is a police officer with the City of Alameda and was assigned to the patrol division. (RT 3880-3881) On January 18, 1996, she was requested to respond to 1515 Walnut to re-create a crime scene. (RT 3882-3883) People's Exhibit 19 is the re-creation of the crime scene that Bartosz had constructed. (RT 3884-3885) She identified the various rooms and areas of the house as Numbers 1 through 12. (People's Exhibit 19, RT 3885-3887) The victim's body was located in the family room (number 9) below a window at the south side of the room. (RT 3887) At the direction of the Court, she made a stick figure of the body showing the attitude of the body when she saw it. (RT 3887) The body was face down. People's Exhibit number 20 is a blow-up of the bedroom area, bathroom area, and family room. (RT 3887-3888) The red blotch on the bed in Exhibit 20 is blood that she observed. The little check marks or slashes on Exhibit 20 were red spots on the floor which appeared to be blood, reflecting a blood trail which led from the bed, through the hallway, down and leading up to the location where the body was found under the window. (RT 3888) A straight heavy line on People's Exhibit 20 reflects where the body was located as well as a pool of suspected blood in that area. (RT 3888)

Bartosz did not notice any knives or cutting instruments at any time in the house. (RT 3891) She did not notice blood on anyone while she was in the house besides the victim. (RT 3891) She did observe on the carpet blood in a pattern as if footprints had spread it. (RT 3892)

(b) Elizabeth Nice

Elizabeth Nice is an identification officer for the Alameda Police Department. She is a criminalist who does felony crime scene

investigations. Her major responsibilities are death and trauma investigations. She collects all physical evidence pertaining to any felony crime scene. (RT 3911)

On January 18, 1996, she was detailed to the crime scene located at 1515 Walnut Street in the City of Alameda. (RT 3912) When she arrived at the crime scene at 1515 Walnut Street, she noted that the weather was damp, it had been raining, and was misty. (RT 3912-3913) She took a series of photographs to memorialize the crime scene, including photographs of a trail of blood in the hallway and the pool of blood in the outline of the victim. (RT 3914-3923, 3929-3930)

She also examined the comforter and thermal blanket that were on the bed in the master bedroom, noting that both blood and possible human feces were present. (RT 3932)

Ms. Nice notes she collected the hair and fibers from the bedding. (RT 3965) Those were packaged for examination. (RT 3966) She also found cut hairs in blood in the quilt. (RT 3966)

The dagger was located on the windowsill in the master bedroom, above the bed, behind the mini-blinds. She was present when the dagger was found. (RT 3967) Fingerprint tests were run on the knife and the "results were negative." (RT 3968) She did not perform any tests on the dagger to determine if it had blood on it and did not know of any tests being performed on the dagger to see if there was blood on it. A paring knife was also found at the scene (RT 3971) atop stacked items in a storage bedroom. The blade of the paring knife was 3 inches. She does not know if the paring knife was ever dusted for prints. (RT 3972-3973)

She also recovered hairs from the exterior surface of the white knit shirt, which were preserved. She does not know if the hairs were ever

examined. She did not take any pubic hair combings from the body of Mrs. Fermenick; it is the coroner's responsibility to take any pubic hairs. (RT 3976-3977)

The hunting knife was found on a ledge of the window behind the bed in which the blood was contained, behind the mini-blinds, and one had to pull up the mini-blinds to observe the knife and retrieve it. When she examined the knife, it did not appear to have any bloodstains or any moisture or dampness on it. (RT 3981) The paring knife was recovered in the storage area. The blade was 3 inches in length and the knife had a serrated blade, not a straight cutting edge. (RT 3982) She noted that if a knife has been wiped clean, it is possible that the sophisticated FBI lab tests can show the blood. (RT 3983)

3. The Investigation

(a) Nurse Steven J. Wilson

Steven J. Wilson is an emergency room nurse at Highland Hospital in the Emergency Room, and a manager at the Kaiser Hayward ICU. (RT 4045) On the evening of January 20 and the early morning of January 21, 1996, he was working as a nurse at Highland Hospital, which is a county hospital. (RT 4045-4046) He performs "suspect exams or 261 exams on male suspects," which means he collects the evidence on sexual assault cases from males. (RT 4046) At about 1:30 in the morning on January 21, 1996, appellant was brought to him. Wilson performed the usual routine procedures of examination and collecting evidence. (RT 4047) He also withdrew two vials of blood. (RT 4048) In his examination, Wilson noted that the "area around the penis and scrotum was crusty, unkempt" and "there was no hygiene." (RT 4048) He observed that appellant had a generally, "filthy, unkempt" appearance, and was not wearing any

underwear. (RT 4048-4049)

On cross-examination, based on a refreshed recollection from a medical record, Wilson noted that "he probably had underwear." (RT 4049-4051) In response to the question of how long appellant had had this almost bum-like appearance, Wilson noted three or four days. An alcohol and drug profile were sought from appellant as well. Blood was taken and sent to the lab for analysis. (RT 4051)

(b) James Taranto

James Taranto is a police sergeant with the City of Alameda Police Department(RT 4145- 4146) On January 18, 1996, he was the lead investigator into the homicide of Terena Fermenick. (RT 4146) On January 19, 1996, he talked to appellant at the Alameda Police Department. Appellant came there with Paul Miller. He noted that appellant voluntarily agreed to talk to him. (RT 4195) Sgt. Taranto took a tape-recorded statement from appellant; he was not under arrest or a suspect in the case at the time. (RT 4148) A tape-recording of that interview (Exhibit 38) was played for the jury and copies of the transcripts of the interview (Exhibit 38A) were provided to the jury (RT 4148-4151). Pertinent portions of the statement[3] provided as follows:

> Q. [SGT. TARANTO] Ok. Can you start with the beginning of your day from the time you arrived at work and in your own words, just basically tell me what you did?
>
> A [GILES ALBERT NADEY]. . . . Left the shop about 8:30 in the morning to do my first job. Went and did it. I mean my second job was 10 or 11. Did it. That's pretty much what - I

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[3] The pertinent portions of text of the statement is taken from the transcript of the cassette tape statement, Exhibit 38A, which Sgt. Taranto confirmed corresponded with the cassette tape (Exhibit 38) that was played to the jury. (RT 4149-4151)

had three jobs I think, four jobs that day.

. . .

Q. Ok. Do you remember what time you arrived in Alameda?
A. Ah, no, I'm not sure.

Q. What's your best estimate?
A. Well, 2, 2:30.

. . .

Q. Ok. So you met a woman there who said she was Terena?
A. A woman, yeah, and she had her small child with her.

. . .

Q. Ok, how old was the child, do you know?
A. I would guess younger than a year, but I couldn't tell you.

Q. All right. Do you know if it was a little boy or a little girl?
A. Little girl. She was sick. We talked about that for a minute, because she asked me questions about what I was using on the carpet, if it would effect the child at all in any way.

Q. Ok.
A. I told her no. Everything we use is non-toxic. She could put the child on the carpet right afer I was done cleaning it. Unless the baby was allergic to it, then she - there was nothing she had to worry about.

. . .

Q. All right. And then what happened?
A. And then I walked in and I said hi, my name is Albert. I'm from Skyline. She said, how ya doing? I says, oh, you got some carpets for me to clean. She says, yes. I said, well, can you show me around, show what's been done. So we walked through the he *[sic]* place and I pointed out, well actually I pointed out her whole carpet. It was pretty trashed - I mean it was urine. . . . I says, this is urine. I says, these stains might not come out. And I says, if they do, they'll, going to leave bleach spots. And she says, just do the best you can. And I said, ok. And at that point she gathered up the kid and left

and I just went ahead and did what I had to do.

Q. Ok. Did she happen to say where she was going?
A. . . . She asked how long it would take and I told her anywhere from an hour to two hours, depending on how much I had to put into the stains. And so she came back. And by the time she came back, I was probably halfway done loading the truck. I had finished the job. With the excepts spraying the deodorizer in there. Just in case, and to kill any bacteria that might be there.

Q. Ok. How long do you estimate that you were there?
A. Probably close to a hour and a half. In and around there.

Q. And you think you arrived around 2?
A. 2 to 3, I mean 2 to 2:30.

Q. Ok.
A. I know it was scheduled for 2. But I was running late that day.

. . .

Q. Ok. So was the Alameda job your last job of the day?
A. Yes.

Q. All right. What time was it when you think you left there?
A. When I left there?

Q. Um-huh.
A. Probably, 3:55, 3:56, according to this [work order], and it says 3:54.

Q. And you pretty much believe that's accurate, right?
A. Yes.

. . .

Q. All right. So she was gone then for the whole - just almost the whole time?
A. Pretty much the whole job, yeah. She got out of the car. Left the kid in the car. Came in and paid me and -

Q. Did you ever see anybody else around the area at the time?
A. A couple of kids hanging out in front but they left, I don't know, I really wasn't paying attention - I just - they were just - they looked like boyfriend/girlfriend from what I could see.

Q. A guy and a girl?
A. Yeah.

Q. And how old were they?
A. Early 20's, late teens, kind of around there.

. . .

Q. Ok. Do you carry a knife?
A. No, no. Well, I carry a leatherman's tool.

Q. Ok.
A. It's got a little 3" blade on it. The blade is on this side. It cuts better than my scissors do. They're all rusted out and everything.

Q. Ok. When you left the Walnut Street address.
A. Yes.

Q. Where was the lady?
A. She was standing in the kitchen.

Q. Ok.
A. Cause that's where she paid me at. And I walked out and I said, do you want me to close the doors? She says, no, my kid is in the car. And I said, ok. And walked out. Got into the truck and left.

Q. And where did you go from there?
A. I went to the pay phone. Ah, where was it? 23rd, I think. I'm not sure. It's on E.14th in front of Jack-in-the-Box. And, ah, when and took, ah, did my duty. And called the office and then I went to a Quick Stop on 14th. I think it is. By Highland Hospital. Picked up the cigarettes and then went to the shop.

Q. Ok. What time do you think you went back to the shop?
A. About 4:35 or so, because I clocked out at 4:40.

Q. And when you clocked out at 4:40, um, where did you go then?
A. I had to wait for Paul to give me a ride home.

. . .

Q. Ok. What time do you think it was when you got home? On Royal Street, do you live alone?
A. No, I live with my mom and my brother.

Q. And they were home when you got home?
A. No, I paged my mom when I got home. And cause - she thought, she was under the impression I was going to be going to the BART station so she was going to pick me up. So I paged her to let her know I was home. She was at my grandma's, visiting out-of-state relatives. She said, ok, what are you going to do? I said, what, TV, eat and go to bed.

Q. And you did that?
A. That's exactly what I did.

Q. Was there anybody else home?
A. No.

Q. What time did you go to bed
A. Between 8:30 and 9 o'clock.

. . .

Q. Ok, so you never went back to Walnut Street?
A. No.

. . .

(People's Exhibit 38A; RT 4149-4151)

On January 18th-19th, Sgt. Taranto caused Donald Fermenick to go to Highland Hospital, where a rape kit examination was taken from him. (RT 4151)

Sgt. Taranto assembled a team of police officers and responded to Mr. Nadey's residence and executed the search warrant on Royal Avenue in the city of Hayward around 10:30 p.m. (RT 4156) Sgt. Taranto took appellant to Highland Hospital for the purpose of collecting a sexual assault exam on him pursuant to the warrant. Sgt. Taranto described the genital area of appellant as "somewhat dirty." The pubic hair was encrusted with flaky material and lint as was the exterior surface of his penis. (RT 4165) Sgt. Taranto noted that the doctor pointed out an abrasion on the top of appellant's penis. (RT 4166) It was a small, reddened abrasion right near the opening to the head of the penis. (RT 4166)

A knife, also referred to as a dagger, was found in the bedroom at the crime scene on Walnut Street. (RT 4175) It looked like it had been there for some time. To this day, the knife has not been processed for either blood or fingerprints. (RT 4176-4177)

Another knife was also found in the house. This knife was never processed for blood or fingerprints. (RT 4177) None of the hairs that were seen on Mrs. Fermenick's sweatshirt or shirt were sent to the lab. (RT 4179) As to the blood that was on the door knobs, none of the blood was checked, to his knowledge. (RT 4179) When he arrived at the house, Mrs. Fermenick was still lying face down on the floor in one of the rooms. He had an opportunity to observe when she was turned over by the Coroner's deputies. (RT 4179) There appeared to be fibers underneath some fingernails which were gathered by Dr. Herrmann. They were sealed and placed in evidence. He does not believe they were ever sent to the lab, thus, they were never checked. (RT 4180-4181)

Sgt. Taranto served the warrant on appellant for the sexual assault kit. He did the same kind of thing with Donald Fermenick. He took

appellant to Highland Hospital, pursuant to the search warrant. (RT 4188) He took the sexual assault kit, including the whole blood, with him. (RT 4189-4191)

As to his testimony regarding appellant's unkempt appearance, he again acknowledged that in his testimony to the Grand Jury, he did not mention any red mark or abrasion that he observed on his penis. (RT 4192-4193) He also conceded that he could not tell how old the red mark or abrasion was. (RT 4193)

He was also involved in the taking of the statement from Donald Fermenick. (RT 4194) His statement started at 4:41 in the morning of January 19, 1996 and was concluded at 5:23 a.m. (RT 4194) At that juncture, he noticed that Donald Fermenick still had his shoes on. (RT 4194) He also acknowledged that he did not understand why the officers had not asked him for his shoes, and then he collected Mr. Fermenick's shoes. (RT 4195) He never had these shoes examined for blood or anything else. (RT 4195)

The FBI, pursuant to Taranto's request, conducted tests in the house and also in the van, van number 5, that was used by appellant. Searches with an alternative light source for evidence, including trace evidence, was utilized. (RT 4202) The FBI response team searched both the van and the house. (RT 4203)

On January 26, 1996, at 1:10 in the afternoon, Taranto picked up 5 sealed envelopes and transported them directly to the CAL DNA Lab in Berkeley and turned them over to Steven Myers. (RT 4203-4204) At this point, appellant had not been arrested. (RT 4204-4205) On January 30th, he had a conversation with Mr. Myers. (RT 4205) Myers told Taranto that there was a chance of 1 in 130 that appellant was the donor. (RT 4205) He

also conducted two PCR tests. (RT 4206) Based on that information, he then arrested appellant. (RT 4206) Sgt. Taranto confirmed that in his written notes he has as to the vulva swabs, "the majority" is consistent with appellant. However, he did not ask Myers whether there was a minor donor. (RT 4207)

(c) Officer Steven Rodekohr

On January 25, 1996, Officer Rodekohr was on duty as a police officer for the Alameda Police Department. (RT 4032) He was performing 24-hour surveillance on appellant. (RT 4032-4033) Rodekohr followed appellant to Harvey Avenue, which is in the unincorporated area of Hayward, and is kind of a gravel road. Rodekohr followed him down the roadway to an address located at 28087 Harvey Avenue. (RT 4034-4035) He was driving 5 feet behind appellant, who was on foot. (RT 4034-4035) He was not hiding the fact that he was tailing appellant. Rodekohr observed appellant enter the address of 28087 Harvey Avenue and also noticed him exit several times. (RT 4035) At one point, appellant approached him and initiated a conversation while Rodekohr was sitting in the car. (RT 4035) Appellant informed him that he was going to cooperate with them as much as he could, letting them know where he was going to drive to so that they could easily follow him around. (RT 4035) Appellant stated that when they arrested him, if they could do it at his place of work, instead of his house, so as not to embarrass his mother. (RT 4035-4036) Rodekohr did not initiate the conversation. Further, appellant stated that he had bad shoulders, and he asked Rodekohr when they arrested him or if they arrested him, could they double cuff him so that it wouldn't be so much strain on his shoulders. (RT 4036)

He saw appellant later that evening, again at the same location on

Harvey Avenue. Appellant initiated another conversation and said that he was going to see an attorney the following day in Livermore with his mother at 10:30. (RT 4036) Appellant also looked at him kind of quizzically and asked: "I must be the lead suspect in the case because I was the last one at the house." (RT 4037)

Rodekohr saw appellant again the following day on January 26th. He picked up the surveillance as appellant was returning from Livermore in the early afternoon on the 26th and followed him back down Harvey Road. (RT 4037) Appellant was with his mother and another subject by the name of John Karpe, who lived on Harvey Avenue, and his mother let them off at the end of the road and Rodekohr followed them both back down. Appellant again spoke to him, stating that he had spoken to an attorney and that he was advised not to speak to them. Rodekohr noted that this was "fine." Karpe and appellant then went into the house. Appellant came back out as Rodekohr was sitting in his car and told him as follows: "I'm starting to feel the weight of this, all this on my shoulders." This was the last conversation Rodekohr had with appellant. (RT 4037) Rodekohr noted that he did not initiate any of the conversations and, in fact, advised appellant several times "you don't have to talk to me." (RT 4038)

The surveillance began on January 21st and Rodekohr became involved around the 23rd or 24th of January. (RT 4038) Members of the Unit were following appellant every place he went in the 24-hour period each and every day from January 21st. (RT 4038-4039) Usually, 5 separate cars were involved in the surveillance. As appellant would walk down the street, generally one car would be following him and the others would be within a block or two. Each car was a solo car, that is, a solo individual was in the car. It was quite obvious to appellant that he was being followed

wherever he went. The surveillance unit did not try to hide it. (RT 4039) So when appellant went to work, home, every place, for several days, they were there. (RT 4039-4040)

On January 25th, when his mother gave him a ride to Harvey Avenue, she dropped him off and as appellant walked down the gravel roadway to get to the house, Rodekohr was driving 5 feet behind him as he was walking. (RT 4040-4041) As appellant was walking to the house, Rodekohr was "pretty close." He then just sat there while appellant was inside the house. (RT 4041) The house belonged to John Karpe. It was obvious that Rodekohr was following appellant at the times that appellant came over and chatted with him. (RT 4042) On January 25, appellant informed Rodekohr that he was going to see an attorney with his mom on the morning of the 26th. What appellant actually told Rodekohr after the officers had been following him morning, noon, and night, was that he felt he was the lead suspect in the case because the police thought he was the last one at the apartment, to which Rodekohr responded, "that's accurate." (RT 4043)

(d) Detective Ron Miller

Ron Miller is a police detective with the City of Alameda Police Department. (RT 4218) On January 18, 1996, he was one of the detectives assigned to the investigation of the homicide involving Terena Fermenick. The next morning, he went to the Jack In The Box restaurant at 2424 East 14th Street in the city of Oakland, looking for the raincoat that appellant had been wearing when he went to the carpet cleaning job at the Walnut Street address The raincoat was not there. (RT 4220) He spoke to the manager and inquired whether any of his employees or the janitorial staff had found the raincoat, and they had not. (RT 4220)

On January 20, 1996, the following day, he accompanied Sgt. Taranto and the other officers to the 20975 Royal Avenue in the city of Hayward, the Nadey residence, to serve the search warrant on the residence. (RT 4220-4221) Detective Miller conducted a search pursuant to the search warrant. (RT 4221)

Detective Miller identified a number of items that were seized pursuant to the search warrant. People's Exhibits 14A and 14B were a leatherman's tool and a case. They also located a writing tablet, People's Exhibit 41A, from the chest of drawers in appellant's bedroom. (RT 4224-4226) On a certain page of the writing table, Exhibit 41A, starting at the end of the fourth line from the bottom to the bottom line, after the word "head," Det. Miller read the following passage: "I also like to endure anal sex, which by the way is one of my specialities - - you will come so hard your eyes will roll back in your head." People's Exhibit 42A was identified as a book entitled "Deep Thrills," which Det. Miller noted he observed in appellant's bedroom and was located in the middle drawer of the dresser. (RT 4227-4228) There were other items found in the drawer that were sexually oriented, which included magazines and handwritten articles, as well as videos/cassette tapes. (RT 4228-4229) As to People's Exhibit 42A, this particular book contained short stories, and at page 72, the title of that particular article was "Back Door Lovers, Sliding Up the Old Dirt Road." (RT 4229)

Det. Miller also obtained a search warrant from Judge Jeff Allen for the telephone records for 1515 Walnut Street regarding calls coming in and going out on January 18, 1996. (RT 4230-4231) He received four pages of phone records for that phone number. He noted that two telephone calls to 900 numbers that had been made the afternoon of January 18, 1996, one at

3:00 and on at 3:08. (RT 4231-4233) He dialed the two phone numbers; the first one was for "Real Swingers Hotline" and the second phone number was for "Info Service Entertainment Line." (RT 4234) As to the telephone calls to the 900 numbers reflected on the telephone bill, People 's Exhibit 43, the length of the call at 3:07 p.m. is four-tenths of a minute and the call at 3:08 p.m. is five-tenths of a minute. (RT 4243)

He found two tools in the bedroom; one was on the dresser and the other was on another dresser. (RT 4237-4238) There were two beds in the room. (RT 4238)

When he went into the bedroom, he saw appellant. He also saw appellant's brother at the house that night. (RT 4239) In the letter, People's Exhibit 41A, before the comment regarding anal sex, the writer states "I am not violent in any way." (RT 4241)

4. <u>The Autopsy</u>

(a) Dr. Thomas Rogers

Dr. Thomas Rogers is employed by the Institute of Forensic Sciences in Oakland, California. (RT 3797-3798) The Institute is a group of pathologists who perform autopsies for the Coroner's Office of Alameda County. (RT 3798) Dr. Rogers is as an expert in forensic pathology. (RT 3799-3800)

Dr. Rogers is acquainted with Dr. Paul Herrmann, who is also a doctor of pathology and is an associate of his, who is also a member of the Institute of Forensic Sciences. (RT 3800) Dr. Rogers reviewed the record and photographs and other details and writing performed by Dr. Herrmann relative to the autopsy that Dr. Herrmann did on January 19, 1996 upon Terena Fermenick. The principal document produced in connection with the autopsy is an autopsy protocol. (RT 3801) The autopsy protocol of

Terena Fermenick which Dr. Rogers reviewed, was identified as People's Exhibit 3. Dr. Rogers testified as an expert in the area of forensic pathology based on the findings made by Dr. Herrmann, who was unavailable. (RT 3802)

There were two types of injuries visible on the body based upon initial observation – (1) incised wounds, and (2) blunt injuries. (RT 3804-3805) Incised wounds are caused by a sharp cutting-type instrument. (RT 3805) Blunt injuries are caused by blunt force trauma, which includes bruises or contusions, as well as scrapes or abrasions. (RT 3805) There were some incised wounds present in the neck area, an incised wound to the right hand, some incised wounds to the left hand, and there was some incised wounds to the right side of the torso. (RT 3805) Dr. Rogers noted that defensive wounds are wounds that are incurred typically on arms or hands when an individual is lifting up arms or hands in order to ward off an incoming weapon or force of some type. Dr. Rogers opined that the injuries to the hand of Terena Fermenick, as reflected in People's Exhibit no. 7 are consistent with defensive injuries. (RT 3806-3807) In response to the question of whether the hand with the defensive wounds, as reflected in People's Exhibit No. 7, is consistent with a person fighting off a knife from a person coming in the front of them and grabbing the knife or pushing the knife away, Dr. Rogers noted "[t]hat is one possibility, yes." Dr. Rogers noted further that when he says things like "this is consistent with," he is really saying that this is one logical possibility among others, to wit, "yes. I think a synonym to 'consistent with' is 'also a possibility.' That is, one of - - one of multiple things." (RT 3835)

Dr. Rogers testified that there was a bruise on the buttocks consistent with a "monkey bite" or a "hickey." (RT 3810) Dr. Rogers also noted that

Dr. Herrmann advised him that a forensic dentist looked at the lesion depicted in People's Exhibit No. 10, and that the dentist, according to Dr. Herrmann, said that this was not a bite, but beyond that the conclusions were inconclusive. (RT 3832-3833) As to the alleged hickey on the leg depicted in People's Exhibit No. 10, Dr. Rogers noted that it was consistent with a hickey on the leg, but is also consistent with bruising from other sources. The bottom line, according to Dr. Rogers, is that it "is a bruise. It's coming from some sort of blunt force trauma." (RT 3936)

Dr. Rogers noted that there were some injuries around the rectum and these injuries are "lacerations or breaks in the skin" which would be caused by a blunt force trauma of some type. This would include the insertion of a male sexual organ into the orifice that was larger than the anal opening. Dr. Rogers noted that there were five lacerations on the anus of Terena Fermenick. (RT 3811) In response to the hypothetical question – if somebody were to insert an object larger than the anal opening itself and caused the lacerations, would there be resulting pain as a result of the object being inserted – Dr. Rogers opined "[t]here can be, yes." (RT 3812)

Dr. Rogers opined that one of the incised wounds to the neck extended down into the muscle of the neck. It caused an incised defect, "total severance to a major blood vessel in the neck." The blood vessel is called the internal jugular vein. There was one large, deep incised defect, and there were also surrounding it some other incised defects, but these were superficial, totaling seven in number. (RT 3814) As a consequence of the injury to the neck, Dr. Rogers opined that "most people are going to die within a three- to a five-minute period after sustaining an injury of this nature." (RT 3818) Dr. Rogers opined that the cause of death of Terena Fermenick was "[i]ncised wound to the neck." (RT 3827)

As to the other incised wounds to the flank of the body, one of them extended half an inch beneath the surface of the skin and the other one extended an inch and a half to two inches beneath the surface of the skin. Hence, the length of the cutting instrument that caused those wounds "may be an inch and a half long or longer." (RT 3885-3886) As to the lacerations of the anus, Dr. Rogers concluded they were done premortem. That is, the individual was living at the time the lacerations occurred in the anus. (RT 3816-3817) Dr. Rogers noted that when the body was first observed on the guerney, there was fecal matter around the anus. He opined, in response to the inquiry as to whether one of the explanations for that fecal matter being there was the result of the woman being sodomized, "[t]hat is a possibility." Dr. Rogers reasoned that a penis and the rectum can come into contact with fecal matter, and hence, "it is possible for the feces to be deposited around the rectum during an act of sodomy." (RT 3818)

Dr. Rogers noted that rectal, vaginal, and anal swabs were taken from the body cavities of Mrs. Fermenick. (RT 3818) Dr. Rogers identified People Exhibit 12A as one vial containing rectal swabs obtained by Dr. Herrmann during the autopsy. (RT 3819-3821) People's Exhibit 13A is two vials containing vaginal and vulva swabs obtained by Dr. Herrmann during the autopsy. (RT 3820-3823) Dr. Rogers also reviewed People's Exhibit no. 14B, which was identified as a tool and also described as a Pliers Plus. As to the wounds contained on the neck and flank of Ms. Fermenick, Dr. Rogers opined that it would be "consistent" that this type of object could produce those particular wounds. (RT 3825)

Dr. Rogers opined that the food in the stomach could have been ingested by the victim less than a half-hour prior to her death. (RT 3826)

In reviewing People's Exhibit No. 4, the photograph depicting the face of Ms. Fermenick, Dr. Rogers could not say if blunt force trauma was applied to the face, but he did not see blunt injuries about the mouth, the nose, or the eyes. (RT 3834) The discoloration reflected in the picture, People's Exhibit No. 4, looks red, but does not represent blunt injuries in this area of the body and may be some postmortem, after death, reddening of the skin. (RT 3834)

Dr. Rogers also noted that anything that has that size blade or longer would also be "consistent," that is, "[t]hose are other possibilities." (RT 3837) Dr. Rogers concluded that "literally thousands or millions" of knives in the world are not excluded from being the potential instrument that caused the injuries. (RT 3837-3838)

The body of Terena Fermenick was found at 9:26 in the evening on January 18 and the autopsy was performed the next morning on January 19th at 9:00 a.m. (RT 3838-3839)

5. The DNA Evidence

(a) Sharon Anne Smith

Sharon Smith is a supervising criminalist with the Alameda County Sheriff's Office Crime Laboratory. A criminalist is an individual who has scientific education and specialized training in the area of examining physical evidence that is collected during the investigation of an alleged crime, which includes fingerprints, hair and fiber analysis, blood analysis, and things of that nature. (RT 4264-4265) Ms. Smith was qualified as an expert in the field of serology. (RT 4266)

On January 22, 1996, while working at the Sheriff's crime lab, Sharon Smith received evidence from Sgt. Taranto, including whole blood samples from Giles Nadey and Terena Fermenick. (RT 4267-4268) On January 24, 1996, she also received a whole blood sample from Donald Fermenick. On January 22, 1996, she also received two coroner's envelopes containing various items, including swabs taken during the autopsy, i.e., rectal, vaginal and vulva swabs. (RT 4267-4268, and 3819) She also received blue jeans from Sgt. Taranto. (RT 4269)

She notes that the exams of the whole blood of Giles Nadey and Terena Fermenick, as well as the rectal, vaginal, and vulva swabs, began on January 24, 1996. (RT 4268-4274, 3819) She examined the swabs for the presence of seminal fluid stains in this case. (RT 4271) She discovered seminal fluid on the anal swabs (People's Exhibit 12A; RT 4271) Her examination of the vaginal swabs for the presence of semen was inconclusive (People's Exh. 13A; RT 4273) She could not confirm the presence of semen on the vaginal swab. (RT 4273-4274) As to the vulva swab, the result was positive for the presence of semen. (People's Exh. 13A; RT 4274)

Sharon Smith also examined the blue jeans that Sgt. Taranto delivered for the presence of foreign substance. On visual examination, she noted the presence of numerous reddish-brown stains that appeared to be bloodstains. She also noted the presence of a light yellow, light yellow-brown stains that were located on the back of the jeans near the waistband in several areas. (RT 4275) In addition, she used an alternate light source, which produced specific wave bands of light that can be used as a searching tool to help find potential body fluid stains. (RT 4275-4276) She observed various stains on the jeans and began to test some of the stains. She tested two of the yellow-brown stains that were on the back of the jeans around the waistband area and found semen at both of those stains. (RT 4276) Upon discovery of the presence of semen, she prepared items of evidence for delivery to Sgt. Taranto. (RT 4276-4283)

Ms. Smith uses gloves and wears a lab coat to prevent contamination of the items that she examines. (RT 4283-4284) Smith testified at the Grand Jury on March 18 and 19 in 1997. The role of Sharon Smith as a criminalist in this matter was to examine items for the presence of semen, that is, the swabs that were provided to her by Sgt. Taranto from the Coroner's Office, and then to prepare gauze cutouts of the whole blood of the three known people, e.g., Terena Fermenick, Donald Fermenick, and Giles Albert Nadey. (RT 4285)

On cross-examination, Sharon Smith acknowledged that it is important to be precise and accurate in her work, which included her note taking. (RT 4286-4287) She also acknowledged that it is important to follow the procedures exactly when doing tests. (RT 4287-4288)

It is her practice and procedure to write down the times she starts an action, and then do an action, complete it, and then write notes about it next

to the time. (RT 4294) An envelope number 1 has "OPD SAEK" on it. SAEK means sexual assault examination kit, and OPD means Oakland Police Department. Attached to the sexual assault kit was a second envelope which was labeled 1A and called a blood envelope. The envelope was logged into the laboratory. (RT 4297) Smith also noted that it is the custom and practice of the laboratory to log evidence; all incoming evidence in the laboratory gets logged into the laboratory. As to envelope no. 1 and 1A, her notes reflect the following:

> Envelope number 1 is an OPD SAEK with blood envelope attached to outside. I removed the blood envelope and designated it as 1A. Both 1 and 1A are tape sealed. I did not open them at this time.

Smith noted that the custom and practice is that after evidence is logged into the laboratory, then it is stored appropriately, depending on the type of evidence that it is. (RT 4298-4299) However, she conceded that there was nothing in her notes that says what she did with 1 and 1A other than what is in "my notes" referenced above. (RT 4298-4299) She has no independent recollection of what she did with 1 and 1A on 1-22-96. (RT 4299)

On January 23, 1996, she received an evidence envelope number 3, tape sealed, containing 3 manila envelopes. Envelope 3-1 was marked "Slide Rectum Fermenick, Terena"; Envelope 3-2 was marked "Vagina Slide, Fermenick, Terena"; Envelope 3-3 was marked "Slide Mouth Fermenick, Terena." (RT 4301-4302) She knew she needed to examine the slides for the presence of sperm. (RT 4302-4303) As to the rectal slide, she found no sperm. (RT 4303) As to the vaginal slide, Slide 3-2, she saw sperm heads and made notes. (RT 4303-4306) As to the mouth slide, she

found no sperm. (RT 4306) As to the vulva slide, she notes they did not submit one that was labeled "vulva." (RT 4306)

At 9:45 in the morning on January 24, 1996, she informed Sgt. Taranto that she had found a small number of sperm on the vaginal slide and that she was still looking at other specimens. (RT 4306-4307) She notes she can find semen without having sperm present. Semen is a fluid that carry the sperm, so if sperm are present, then semen would have to be present also. (RT 4307) She told the Grand Jury that she could not confirm the presence of semen on the vaginal swabs. (RT 4307-4308)

She examined the whole blood of Mr. Nadey, which means that at some point she had to open envelope 1A. (RT 4308) Based on her notes, when she opened 1A, she found one tube of blood inside which was labeled Nadey, Giles. (RT 4308-4309) As to envelope number 2, she received a vial of blood as to Terena Fermenick. (RT 4309)

On January 24, 1996, she took a vaginal swab out of the test tube and made a new slide with it. (RT 4320) She did not make the first vaginal slide, as this came from the coroner, but she made two slides from the vaginal swabs. (RT 4323-4324) She examined the coroner's slide first and found sperm. Then she made her own slide, and found two sperm heads. (RT 4324) On January 25, she made another slide from the vaginal swabs. She had four swabs in the vaginal test tube. They were labeled 5-2-B, 5-2-C, and 5-2-D. Under the microscope as to 5-2-B, she found no sperm. (RT 4325)

Smith acknowledged that she became aware that Myers was going to do some DNA testing on the same samples that she was working with. However, any decision with respect to whether or not there was enough sperm for DNA testing would have been for Myers to make. (RT 4330)

She packaged all the swabs – the vulva, the vaginal, the rectal swabs – and submitted them for DNA testing. (RT 4330-4331)

Evidence No. 1A, Nadey's blood sample, was opened on January 24, 1996. (RT 4331) She opened up Terena Fermenick's blood for examination on January 24, 1996. (RT 4333) Evidence No. 17, the blood of Donald Fermenick, arrived in the lab on January 24th. (RT 4350) After Donald Fermenick's blood arrived, the vaginal swabs were examined, the vulva swabs were examined, and they were also sampled, and then the mouth and lip swabs were opened, and both of those were sampled and the AP testing was performed. (RT 4352) The first rectal slide made by the coroner that she looked at showed no sperm. (RT 4352) However, after the AP test on January 24, the rectal swab showed that the preparation she made had sperm heads on that slide. (RT 4352) She examined a vulva swab and found one head in several areas and some fields with two or three heads. (RT 4352-4353) Then she looked at the vaginal swab and found heads at different locations. As to the vaginal slide she did at 10:15, she did not find sperm. (RT 4354) After all the testing, she went back and labeled her samples and then prepared dried blood patches from Mr. Nadey's, Ms. Fermenick's, and Mr. Fermenick's blood. (RT 4354-4355)

On January 26, 1996, she got a call from Sgt. Taranto and he advised that they were sending these out for DNA, and thus, she finished her preparation. (RT 4355-4356) At some point Sgt. Taranto came and took the evidence away. (RT 4356)

(b) Steven Myers

Steven Myers is a senior criminalist with the California Department of Justice DNA (Cal DOJ) Laboratory, a laboratory accredited by the American Society of Crime Lab Directors (RT 4458), and has been

employed there since 1991. (RT 4457-4458) He personally performs DNA analysis and the court qualified him as an expert in that field. (RT 4462-4464) Mr. Meyers described the procedures by which DNA profiles were generated and the frequency statistics he believed applied in this case. (RT 4465-4512) He also testified to problems with the evidence, including the presence of a third party donor – that is a person who was not the husband or appellant – in one of the samples (RT 4498-4506, 4719-4720, 4749, 4810); contamination involving the spillage of DNA from one typing tray well into another, and the failure to properly wash the trays used in the typing process. (RT 4689-4691, 4698-4706)

(i) Generating a DNA Profile

Mr. Myers testified that DNA is the code of life; it is the molecules within your body – in fact, within almost every cell of your body – that tell your body how to build itself and how to maintain itself. The basics of DNA is how to build and maintain yourself. (RT 4465)

Most of the DNA is the same between everyone. Thus, the lab concentrates on areas that are different or that can be different between people. (RT 4467)

There are two basic kinds of differences that they look at. One is called length difference and the other is called sequence difference. The RFLP test (restriction fragment length polymorphism) looks at length differences and, in this case, they looked at six different sites on the DNA strand for length differences. (RT 4468) They also look at STRs, or "short tandem repeats," short meaning they are four bases long for each of these repeats. Tandem repeats just mean that the same four bases is repeated next to each other. So he looks at those length differences. The D1S80 test also looks at length difference. (RT 4469)

It is possible to perform DNA testing on evidence that has been collected at the scene of a sexual assault. In particular, you would want to look at the sperm of a DNA donor. In a typical sexual assault sample, there is a vaginal swab, on which you have a mixture of sperm from the sperm donor, the assailant, and a non-sperm fraction. Typically, this is composed of vaginal epithelial cells. The goal is to try and separate the DNA that is found in the sperm from the DNA that is found in the non-sperm. (RT 4471)

You compare the evidence sample DNA with DNA from what they call "reference bloodstains." (RT 4471) This is blood that has been drawn from people. The potential outcomes for DNA comparison tests are exclusion, inconclusive result, and no result; that is, the DNA has been degraded. (RT 4472) There is also the possible inclusion, that is, "match." With regard to the phrase "match," you are simply saying that within the limitations of the system you cannot tell the two profiles apart and they can be from the same person You can exclude someone on a single test, but generally they do multiple tests. (RT 4473) Once you have determined that the evidence samples appear to match a known sample, the next step is to give some weight to the match; that is done by giving a population frequency figure. (RT 4474) (See discussion, *post* in section iii.).

(ii) The Testing in This Case: Samples, Third Party Donor and Contamination

(1) Samples

On January 26, 1996, Myers received from Sgt. James Taranto of the Alameda Police Department various items of evidence, which included: : rectal swabs, vaginal swabs and vulva swabs (People's Exh. 12A and 13A)

(RT 3819); dried reference bloodstains of Terena Fermenick, Donald Fermenick, and Mr. Nadey (People's Exhs. 44A, 45A & 46A) (RT 4476-4478) On April 30, 1996, he received stained and unstained cuttings from the denim jeans. (People's Exhs. 47A & 48A) (RT 4477-4478)

He performed RFLP DNA-typing. (RT 4478) An autorad is the end process of the laboratory part of the work in the RFLP process. Autorads let you have an idea how long that piece of DNA is. (RT 4479) People's Exhibit 49A contain 16 autorads. (RT 4480) People's Exhibits 49B, 49C and 49D are examples of autorads from this case. These autorads contain results for the semen from both the anal swabs and the pant stains. (RT 4481) After the RFLP testing on the semen stains from the jeans and the rectal swabs, the results were declared a "match" in that the DNA profile obtained from the sperm fractions, of the jeans as to the various stains and the rectal swabs, the profile he obtained matched: "the profile of Mr. Nadey." (RT 4481)

As to the sperm from the semen on the stains of the jeans, they obtained results for both stains. Based on his analysis of the two bands from the jeans, he concluded that Donald Fermenick "does not match." As to Mr. Nadey's two bands, within their ability to tell people apart from the test, Myers concluded that "Mr. Nadey is included as a potential donor for this test of the semen from the jeans." (RT 4487)

Myers prepared a chart, People's Exhibit No. 50, showing the RFLP typing and sizing results from his testing. (RT 4490) This was essentially a blow up of a chart that he put in his first report. By using the molecular weight sizing ladders, he testified he inferred a molecular weight for the various bands in the evidence and in the reference samples, and then that molecular weight was used to compare past the visual comparison. This is

used to compare two results. He noted that "there are limitations to the systems." For example, the same DNA from the same person is run numerous times, but the molecular weight "that is going to be assigned ultimately will vary some. It's not going to be exactly the same to the base pair." They work out a "match criteria." So then they make comparisons "to see if a person could be a donor or not." First they do a "visual match" and then they do a "match criteria comparison" to assure that the sizes that they are giving are within the range that they would expect. (RT 4491)

Based on his analysis (RT 4492-4493), Myers concluded that the evidence profiles of Terena Fermenick and Donald Fermenick were significantly different from Mr. Nadey. (RT 4494) With regard to the "range," what they determine is essentially what they call a match – for something to match, things should be within a "match criteria." (RT 4494)

What they found is that DNA coming from the same person the results should be within plus or minus 1.8 percent of the value you had of the true average. Thus, no two bands could be more than 3.6 percent apart and still be called the same person. Myers concluded that "all of these results comparing Mr. Nadey as well as the rectal swabs and the denim jeans all are consistent within this match criteria with being from the same person." (RT 4495)

In addition to RFLP testing, he also did what is known as PCR testing or "polymerase chain reaction testing." The fundamental difference from RFLP testing is that instead of taking the DNA that you got from your sample and cutting it up, this time you take the DNA and make a lot of copies of the specific areas that you are interested in, thus, it is kind of like a molecular xeroxing. (RT 4496) You make a lot of copies, millions and billions of copies of that area alone, and then you will look at those copies

and it is those copies that you ultimately test. (RT 4496-4497) Another difference is that PCR has the advantage of being able to look at small amounts of DNA, smaller than RFLP could, because you are making copies of it. Thus, you can start with a smaller amount than you could have used for RFLP and get results from that. Additionally, it also works on any degraded DNA. (RT 4497)

Myers performed PCR testing on three references; on one of the rectal swabs (a different rectal swab than the jury had seen), the denim jeans stains, and the vulva swab. (RT 4497-4498) As to the results he found through PCR testing on the jeans, the vulva swab, and the rectal swab, he found that the sperm fractions for the rectal swab and the jeans stains were all consistent with being a single donor and all consistent with Mr. Nadey's profile. So within the limits of those tests, Mr. Nadey was included as a potential donor. (RT 4498)

Myers also performed STR testing only for the vulva swab. (RT 4506-4507) The major donor to the sperm fraction of the vulva swab is seen in approximately in 1 in 38 million African Americans and 1 in 1.6 million Caucasians. As to the test done on the STRs, he concluded that with the vulva swab major donor and that of Mr. Nadey, given the "totality of the profile," that "the major donor was all consistent with Mr. Nadey." Myers concluded further "this is strong evidence that Mr. Nadey is the donor - - is the major donor to the sperm fraction of the vulva swab." (RT 4508)

Myers concluded that his results are consistent with Mr. Nadey's sperm being on the evidence that he received. He noted further that his analysis has nothing to do with how the semen got there. He was simply identifying a sample. (RT 4511-4512)

On cross-examination, Steven Myers conceded that he had never testified as a witness on behalf of the defense. (RT 4565-4566) Further, he noted that his employer was a law enforcement agency and that his training in DNA was principally through the law enforcement agency. (RT 4566) Myers noted that he considered himself a "scientist." (RT 4566) He confirmed that scientists like double blind experiments so that there is no chance that the person conducting the experiment can influence the results. (RT 4569) Myers also acknowledged that he was aware of the police version of this case, that there was a sodomy and a throat-cutting. He conceded that his experiments were not "double blind." (RT 4569)

Myers also testified to the numerous manual assists and computer overrides done by his colleagues. (RT 4660-4670, 4685)

Gary Sims was his Myers' supervisor. (RT 4666.) When shown page S30 of the bench notes, Myers explained that they were Sims' notes, who did the second sizing. Sims, in his evaluation, had to override the computer 5 times. (RT 4659-4660) Myers, in doing his sizing, did not have to use the manual override. (RT 4660-4661) Myers acknowledged that the lab policy was to make adjustments only when there was a blatant error. (RT 4662)

Myers explained the difference between manual overrides and manual assists. (RT 4812) A manual override is called "override," where even though you have now told the computer approximately where to look for a band, it still cannot tell it from the background or it is too close to another band, so it will not put the band there. So you actually have to place the band where you want it and you have to say it is definitely there, and put it there. As to a manual assist or auto assist, what you are doing it telling the computer to look in this area for the good candidate bands, and

so it will find the strongest location in that area and mark it. (RT 4812) Myers noted that once you manually adjust, you cannot know how you started. (RT 4816-4817)

Myers identified Defendant's Exhibit B, which was a blow up of page S40 of the bench notes prepared by Gary Sims. (RT 4663-4664) Myers noted that on certain of the ladder bands, whenever there is an "m," this reflects the manual auto assist. He noted that Mr. Sims adjusted the ladder grid seven times. (RT 4664-4665) Myers did not feel that he [Myers] had to manually adjust them. (RT 4665)

Page 86 of the bench notes also reflected the work of Brian Burritt, a co-worker. He sized 4 control bands, 6 reference bands, and the total between the two samples of 4 evidence bands. He did two manual assists on the last ladder but none on the samples. Myers noted that he had 6 total manual assists. (RT 4668) Myers conceded that there are some standards set in the manual for making the determination of whether to manually override a computer result. (RT 4669) He also agreed that there should be a commonness of experience and knowledge that will enable people to get duplicate results. (RT 4669-4670)

As to page S29 of 101 of the bench notes, this pertained to the RFLP test. (RT 4670) Gary Sims was trying to save the image but CODIS did not save the sizing, and hence, he could not write down an image number because there was a computer glitch which did not save the result. (RT 4670) Based on a refreshed recollection, Myers confirmed a computer crash as follows: "[t]hat is usually what happens when you don't get a sizing savings is that the computer has an error and it crashes." (RT 4671-4673)

Myers did nothing to find out if there were problems with his

computer once it crashed. (RT 4674) He notes that for the STR test, he uses a Macintosh computer. For the RFLP computation, he uses a pc-based Windows system. (RT 4674) As to the STR-based Macintosh computer, he does Norton bi-weekly checks to make it unlikely that the computer will crash. However, on August 19, 1997, the Norton Disk Doctor found major problems on the STR-based machine and fixed them. (RT 4675-4676) In the weeks thereafter, various minor problems were found and fixed by the Norton Disk Doctor. Myers notes that the Macintosh runs in conjunction with the actual DNA sequencing electrophoresis unit, and the failure of the Macintosh has much more of a consequence in that he may lose the entire run and have to go through a whole day's worth of reanalysis rather than just simply resizing an autorad, such as with the pc. (RT 4677-4678)

Defense Exhibit I was a blow up chart of Myers' bench notes, R7 of 8, and page 4 of 5 of his report to the Alameda Police Department, which lists all of his DQ-alpha, PM and D1S80 and polymarker results. (RT 4706-4707) Myers noted that this was a presentation of the typeable results and his interpretation in this case. (RT 4707) It includes all of the DQ-alpha, polymarkers, STRs, D1S80, and PCR results, but there are no RFLP on this chart. (RT 4708) Myers concedes that there are some things in the bench notes that he chose, in his discretion, judgment and decision making, not to put on the chart. (RT 4708-4709, 4710-4712)

(2) Third Party Donor

As to the vulva swab, there was a minor donor (RT 4499-4500) The vulva swab showed an incomplete separation of the sperm and non-sperm fractions when Myers extracted the DNA. In the non-sperm fraction, there was mostly a type consistent with the victim as well as some additional types consistent with some carry over of the sperm.

> [B]oth fractions showed an additional donor that was not consistent with any of the people [Terena Fermenick, Don Fermenick, or Mr. Nadey] involved. This additional donor was a very minor donor and was only clearly detected at a few loci. But there was an additional donor to the vulva swab. Again, the - - not the major donor. There still was one sperm fraction major donor, and that was consistent with Mr. Nadey.

(RT 4498-4499) Having a "minor donor" means that there was a mixture of DNAs. (RT 4499) In this particular case, Myers noted that the mixture that they were seeing had at least three people involved. One was consistent in the sperm fraction and was a minor player in the non-sperm fraction with Mr. Nadey; one was consistent as a major donor in the non-sperm fraction and was consistent with Ms. Fermenick; and one was a minor potential contributor in the sperm fraction. As a low-level result in both fractions, there was an additional donor, so the results for that donor were much weaker than the darker results, the major components. (RT 4499-4500)

On the pants stains in the non-sperm fraction, there was also a minor component that was not consistent with Ms. Fermenick detected, and he believes the rest of the people (that is, Mr. Nadey and Donald Fermenick), but he is not sure about Mr. Fermenick. (RT 4500) The sperm fractions for the pants only showed one donor, so the only place where there was an extra donor seen in the sperm fraction was in the vulva swab.

As to how the minor donor could have shown up on the vulva swab, Myers noted that

> [t]he way that it split between two fractions suggests to me that it might be - - you know, it's probably more likely than other options as a minor sperm donor, but I don't know for sure

> and I certainly cannot prove that that is definitely a minor sperm donor.

(RT 4501) As to whether the minor donor on the vulva swab could have occurred through some type of contamination, Myers noted: "[w]ell, if it is sperm, then it would have to be sperm contamination." (RT 4501) Myers noted further that, based on his analysis, this "really suggests to me that this is coming from something cellular and it was on the sample prior to any receipt." (RT 4502) As to the minor donor on the vulva swab being the result of some type of contamination, Myers ruled out contamination within his lab. (RT 4502) As to the question of whether, if Mrs. Fermenick had had unprotected sex with another person, this could explain a minor donor having been the contributor to the vulva swab, Myers responded, "I certainly couldn't eliminate that as a potential. That would be one way to have semen in the vulva." (RT 4502-4503)

He was also asked if a person had unprotected sex with a female and then another person had unprotected sex with the same female and then forcibly sodomized the victim in this case, would it be possible to transfer sperm cells under that scenario to account for the minor donor. Myers responded:

> I certainly couldn't eliminate that scenario. I'm not being really a proponent for any scenario in this. I know that there's an extra donor. I'm not sure how it got there. But I certainly couldn't eliminate that scenario.

(RT 4504)

Myers noted further that he could not absolutely eliminate any particular cellular possibility for the extra donor, but noted "I think results lean towards it being an extra sperm donor." (RT 4505-4506)

On cross-examination, Steven Myers reiterated that he found during his test DNA evidence of an additional donor, neither Donald Fermenick nor Terena Fermenick or Mr. Nadey, as follows:

> Q. [HOROWITZ] So you testified about some DNA markers indicating a person who is not Donald or Terena Fermenick or Mr. Nadey that you found during your tests.
>
> Do you recall that?
>
> A. [MYERS] Yes. In particular, as far as the sperm fractions go, the vulva swab has an indicated additional donor.
>
> Q. Tell me whether there's any other instances in your testing where you found evidence of DNA that belonged to someone other than Donald, Terena Fermenick, and Mr. Nadey?
>
> A. In - - as I mentioned in the non-sperm fractions of the pants stains, as well as the substrate controls from the pants, there was also an additional type seen. So as far as extracted DNAs and additional donors in the extracts, the only places that this was seen were in these pants stained non-sperm fractions as well as the vulva swab.

(RT 4558-4559)

Myers again confirmed that there was a clear, unequivocal finding of a person's DNA sperm that was not Mr. Nadey and was not Donald Fermenick. (RT 4719-4720) This is reflected in his testimony as follows:

> Q. [HOROWITZ] Sir, isn't it true, with all due respect, that both you and Mr. Sims agree that in these results right on this chart, there is the clear, unequivocal, finding of a person's DNA sperm that is not Giles Nadey and is not Donald Fermenick?

A. [MYERS] Yes, but not in this sample.

Q. Okay. But you found another person's sperm on her swabs?

A. Well, I mean I'll say yes with the qualifications that we talked about yesterday, that my best guess is that this is sperm, but I don't - - it hasn't certainly been proven that that was sperm.

Q. For example, going down to your STR tests, I know we haven't discussed STR tests and how they work, but isn't it true that a minor donor to the sperm on the vulva is a 6/7? Do you see that?

A. Yes.

Q. Under the TH01?

A. Although that's not indicating that both 6 and 7 are from one donor; that's not saying that.

Q. Fine. Is there - - are there any 6's in Mr. Nadey's sample up there?

A. No, in fact - -

Q. Are there any 6's in Ms. Fermenick's sample?

A. No.

Q. Are there any 6's in Donald Fermenick's sample?

A. No.

Q. And you don't think that's an aberrant result do you?

A. No. That one we believe is a real extra donor.

(RT 4719-4720)

Myers confirmed that the reference in his bench notes to "1.3" could not be a reference to Terena Fermenick, Donald Fermenick or Giles Nadey if it was from a DNA donor and not cross-hybridization. (RT 4726) At page 73 of the bench notes, as to "5-1-B-S," this is a reference to vulva swab, sperm fraction under DQA1, while the reference to "1.3" is a trace result. (RT 4724) There is also a reference to a trace result under the "4.1" as well as "4.2/4.3." The 4.1 could come from Donald Fermenick. The 4.2/4.3 could come from Terena Fermenick. (RT 4725) However, the 1.3 could not be Terena Fermenick, Donald Fermenick, or Giles Nadey. (RT 4726)

As to page 18 of 211 of the bench notes, under 5-1-B-S, this would be the vulva swab, sperm, there is a reference to "24" which matched Mr. Nadey. (RT 4730-4731) A minor result would be 25/30, that is, a minor 25 and a minor 30. "25" is potentially consistent with Terena Fermenick. However, "30" matches none of the three people (e.g., Donald Fermenick, Terena Fermenick, or Giles Nadey), to which Myers responded "that's correct." There was an additional result which Myers did not include in the report. This was a "trace 18." (RT 4731) Hence, there is a "25," "30," and a "trace" of "18." (RT 4731-4732) The 18 and 25 could be Terena Fermenick, but the 30 does not match any of the three people (e.g., Donald Fermenick, Terena Fermenick, or Giles Nadey). (RT 4732) In the non-sperm, he found Terena Fermenick – 18, 25 – as the major non-sperm person. He also found a trace of 24, which could be one for Mr. Nadey. He also found a 30, which could be no one's, to which Myers responded "correct." (RT 4732)

As to the STR results, with regard to 5-1-B, the vulva swab, they

explored the extra donor that was detected in the sperm fraction of that sample. (RT 4748) The result at the TH01 sperm fraction was 6/7. The "7" was possibly Terena Fermenick's. However, the "6" does not match any of the three people that he had blood of, to wit, Donald Fermenick, Terena Fermenick, or Giles Nadey. (RT 4749) There was also a number "21" that Myers and Mr. Sims decided was not consistent with anyone on the chart. He made this determination as follows:

> The way that was established is because there were a number of markers where even though the 21 is seen in Mr. Fermenick's profile, he was not seen at a number of the other markers at all.
>
> And so, it didn't appear that his DNA was truly present in this mixture. And so since his DNA is not there, then this is part of the profile of an additional donor that is not any of these three people.

(RT 4749)

On re-direct examination, Myers noted that as to the PCR testing, with respect to the rectal swabs, vulva swabs, and the denim jeans, Myers acknowledged that there was a third minor donor detected in those tests, stating that "there was a minor potential sperm donor." That is, a third donor, neither Mr. Fermenick nor Mr. Nadey. He noted further that Mr. Nadey was the major donor. (RT 4810)

(3) <u>Contamination</u>

Myers said that they try to prevent contamination. He acknowledged that it is very important that you make sure you do not have contamination because you can multiply the contaminant with respect to any DNA that goes into the system, which will be amplified. (RT 4557-4558)

As to contamination protocols in the DOJ lab, Myers noted that one of the protocols they use are reagent blanks. (RT 4572) These are samples where there has been no actual DNA-containing product added but they are just reagents in the tubes, and if they give a result, then there is some indication of contamination. If they do not give a result, then it does not prove that there was no contamination, but it helps support that there was no contamination. (RT 4572-4573) That is, they run a test that is a control test to make sure that the control test comes up clean, because if it does not this may indicate that there is contamination. (RT 4573) Moreover, Myers noted that they also look for signs of contamination in the reference blood. (RT 4573)

Myers defines contamination as "[g]etting DNAs into a sample that shouldn't be there, yes, that is contamination." (RT 4686-4687) Moreover, it "involves getting also DNA-containing materials into the sample." (RT 4687) It also involves "actually introducing DNA's." (RT 4689):

> Q. [HOROWITZ] . . . I want to focus on whether or not you now agree that your definition of contamination is quote: "Actually introducing DNA's."
>
> A. [MYERS} That was my definition of contamination in the context of talking about typing, which we were.
>
> Q. Well, sir, actually I was asking you about contaminated trays, and you said "I would have to qualify that, that we have to define contamination. Contamination by my definition involves actually introducing DNA's."
>
> Do you stand by that?
>
> A. Yes, in the context of typing, because those are typing trays.
>
> Q. Isn't that what you're doing in this case, is typing?

A. Not every step is a typing process.

Q. All right. Sir, did you generate any paperwork with respect to this case here today where you indicated that there was contamination?
That's a "yes" or "no" question.

A. Yes.

(RT 4689)

Defendant's Exhibit C was identified as page 107 of 211 of the bench notes of Myers. (RT 4689-4690) Bench notes are notes that Myers makes as he does his work. (RT 4690) Myers concedes that his note, page 107 of 211, Exhibit C, did address the issue of contamination, noting:

> Yes. This is dealing with some typing contamination I had in one particular set of typing for one sample that, as you see from the conclusions, I later - - I assume we'll get into this - - researched and explored.

(RT 4690)

As to his bench notes at page 111 of 211, he indicated that the contamination detected on May 28, 1996, was somehow related to that typing. (RT 4690-4691) Myers acknowledged that there was contamination due to a spillover as follows: "Yes. And in this particular instance, the DNA spilled over from one well into the next due to the way I was handling the tray; which I, of course, later modified how I handled trays so that this wouldn't happen again." (RT 4691)

Defense Exhibit D was a blow up of another page of the bench notes, page 24 of 24 in the T section, which Myers noted was the "formal document" that he prepared when he had an instance of contamination. (RT 4691-4692) Exhibit D is titled "Instance of Contamination, Analyst:

Steven Myers, 2/18/97." (RT 4692) Defense Exhibit D, page T24 of 24, related to page 107 of 211 [Exhibit C]. At the bottom of the page of Exhibit D, page T24 of 24, the bottom states: "Any changes in protocol/policy/per personal habits?," and the response was "reemphasis on sample handling at the typing stage." (RT 4692) This instance of contamination took place on 6-24-96.

Myers acknowledged that from 1993 when he started doing these tests through 1996, in addition to the aforementioned instance of contamination in this case, he had at least four other instances of contamination in his work, reflected in four documents: Defendant's Exhibit E (no. DNA-0029-93); Defendant's Exhibit F (no. DNA-0054-93); Defendant's Exhibit G (no. DNA-0069-93); and Defendant's Exhibit H (no. DNA-0015-95). (RT 4692-4697)[4]

In response to the inquiry with regard to Myers having a problem in sample handling, Myers stated: "I have modified my behavior somewhat because of issues like this." (RT 4697) Myers acknowledged that he learned how to handle samples better, noting as follows: "Certainly I take things into account that I didn't early on." (RT 4697)

Myers acknowledged that it is very important not to cross-contaminate at any stage of his work. (RT 4698) At page 72 of his bench notes, with regard to the Nadey case, he acknowledged that something went wrong with the trays that held his DNA samples as follows:

> In this particular case, what appeared to have happened was that at certain stages of the typing, we use trays that have been used before.

---

[4] Defendant's Exhibits E-H, regarding the four (4) prior instances of contamination, were not admitted into evidence. RT 4863-4864.

> And it appears that the person who had used this tray previous to it had washed it, but had not rinsed it with deionized water. And so because this had ions in it, essentially molecules that were able to interact with the dyes that are subsequently used, the strips, the pieces of paper, got a bluish tinge on them.

(RT 4698-4699) According to Myers, this created a non-DNA result due to the analyst incorrectly washing the tray. (RT 4699) In this particular instance, the "tray contained the reference samples, quality control sample, reagent blanks and a positive control." Myers confirmed that the blue was worse with the tray with the reference samples than the tray with the evidence samples. (RT 4699-4700)

Myers acknowledged cross-contamination during his work on the Nadey case:

> Q. [HOROWITZ] Now, sir, isn't it true that during your tests you spilled one sample into another sample because you carried them both together on an open tray?
>
> A. [MYERS] Well, the tray wasn't open initially.
>
> There is a lid that you actually put on the trays and unfortunately, due to the way I was carrying it, the lid was able to open up slightly. And if I had kept the tray absolutely level, it would not have been a problem. But, I let the tray angle somewhat, so there was some well-to-well spill over.
>
> It was very minor and it was not a typeable result, but it was there.
>
> Q. So, in other words, you - - that's a cross-contamination, isn't it?
>
> A. At a typing stage, yes.

(RT 4704) Myers disclaimed having any bias in his position – working for

a government agency allied with law enforcement – when he determined that instances of contamination were minor. (RT 4706)

(iii) The Frequency Statistics

After a "match" has been declared, the next step is give weight to the match. (RT 4474.) A frequency statistic represents the chance of randomly pulling someone from the population and having the same profile as the person in question. (RT 4508) Databases are used to determine the commonness or rarity of a particular marker's profile; that is, by looking at the profiles of one hundred people, you will get an estimate of what the frequency of these combinations would be in this broader general population. (RT 4475)

As to the range of frequencies for various databases with regard to common or rare in the different ethnicities, Myers noted that the profile for the six RFLP markers that he saw was approximately one in 210 billion African-Americans, one in 32 billion Caucasians, and one in 92 billion Hispanics. (RT 4482) In general, these numbers are very rare, and Myers opined that this is strong evidence that Mr. Nadey is the donor of this semen." (RT 4483)

As to the databases that Myers relied upon in his PCR calculations, he noted that the people came from their laboratory, from the convicted felon database, FBI agents, and some people were from blood banks. (RT 4617-4618) As to the number of people in the PCR database, Myers noted that for the PM DQ-alpha markers, there were 96 for the Southwest Hispanic, 148 for Caucasian, and 145 for African-American. (RT 4619) As to the D1S80, there were 162 for the Southwest Hispanics, 718 for the Caucasians, and 606 for the African-American. (RT 4619)

Myers noted that the frequency statistic "is an estimate" and that

"there is variation" that can occur in their calculations::

> So, for example, in this case we had a number of 32 billion. So the chance, if you used different databases, is that the number really might be somewhere between 3.2 billion and three - - 320 billion. So that, for the large numbers, is about the amount of variation.

(RT 4483, 4620)

Myers concluded further that "for all of these scenarios, this says to me that this is really strong evidence that Mr. Nadey is the donor of those sperm DNAs." (RT 4508-4509)

Myers acknowledged that they have a manual that is called the Quality Assurance Manual. (RT 4631) The manual talks about different ways to do the mathematical calculations that are accepted in their laboratory. (RT 4631-4632) The calculation that he used was the product method, that is, any time you multiply the frequencies for two markers together, it is called the product rule or the product method. (RT 4632) So, "yes," he used the product rule. (RT 4632) However, the Quality Assurance Manual also advises that he is to be prepared in court to give a "ceiling calculation." (RT 4632-4633) Using the ceiling approach, "the calculation becomes one in 15 million." (RT 4634) That is, the calculation goes from one in 32 billion to one in 15 million. (RT 4634) The ceiling principle was a method that had originally been advocated by the NRC Committee on Forensic DNA Testing. (RT 4635) Further, in his lab's manual, the ceiling principle was described as a constructed standard to address the possibility that population substructuring might significantly and prejudicially affect frequency calculations of RFLP profiles. (RT 4636)

C. The Defense Case

1. Mark Fermenick

In January of 1996, Mark Fermenick resided in Pleasanton, California with his wife and two children, as well Don, Terena, and Regan Fermenick. (RT 4818-4819) He worked on January 18, 1996. Apparently, he went to work anywhere from 8:00 to 8:30 and returned home between 5:30 and 6:30. (RT 4819) At the time, he drove a Buick, which was his company car. (RT 4819-4820)

Terena and Don Fermenick were going to move to Alameda after his father-in-law passed away. He had conversations with Terena about the move. (RT 4821) She was "apprehensive" about the move. (RT 4821-4822) Mark Fermenick spoke with the police on the morning of January 19, 1996, and the discussion was tape recorded. (RT 4822-4823) Based on a refreshed recollection, Mark Fermenick noted that he talked to Terena Fermenick several times and she was afraid to move into the house, because she was afraid for her safety, Donald's safety, and her baby's safety. (RT 4823-4824) Thus, she was kind of dragging her feet trying to avoid moving in there. (RT 4824) Again, based on a refreshed recollection, as to the fears of Terena, he told the police that there were a lot of people that came through the area of the house at nighttime and daytime. (RT 4824-4825)

He noted that there was a passageway that ran between the fence and the church building and, occasionally, they would hear people come through there. In fact, he told the police that there were a lot of people that came through the house at nighttime, daytime, which is reflected in the report. (RT 4825) He noted further that on the front of Santa Clara, 2167, there was traffic as there was a sidewalk there and it was a public sidewalk. He

told the police "I was aware of a lot of traffic going through from my personal experience." He meant all around on the sidewalk, the public sidewalk on 1515, the sidewalk on 2167, and, occasionally, there would be people that would come through and run through in between the building and the house. (RT 4825-4826) Further, based on a refreshed recollection, he noted that there were numerous kinds of people that came through the area around the church but they were not people who attended the church. (RT 4826-4827) He notes that on rare occasions people would come through that walkway between the house and the church building. (RT 4827) He recalls one incident a year and a half before his father-in-law passed away, when he was walking in the church building, where there is a separation between the church and the house building. He was walking back to his father-in-law's office and he heard a noise in the building. After opening the door to a classroom by the bathroom, there was a gentleman in there who was cutting either his hair or his beard and there was smoldering in the metal trash can. (RT 4827-4828) Mark Fermenick inquired as to whether the individual belonged there, and he said no, then Fermenick asked him to leave. (RT 4828)

Mark Fermenick came home from work on January 18, 1996 between 5:45 and 6:15 in the evening. (RT 4829) His son, Don, was at home. (RT 4829-4830) He notes that his wife left between 6:45 and 7:15 for a Weight Watcher's meeting. (RT 4830) His son, Donald, was still there. (RT 4830) Don took his car, probably around 8:30 to 8:45. (RT 4830)

On cross-examination, Mark Fermenick noted that it was in March, April of 1993 that he saw a person in the church property cutting his hair or beard. (RT 4831) He noted that there is an apartment complex next to the

church on the Santa Clara side. (RT 4831) While he was living there, he recalls hearing loud arguments coming from the apartment complex approximately three times. It sounded like a husband and wife that were arguing and it was very loud at time. (RT 4832)

2. Sergeant Randall Ray Beetle

Randall Ray Beetle is a sergeant with the Alameda Police Department. (RT 4836-4837) On January 18, 1996, he responded to a call of a possible homicide at 1515 Walnut Street. When he arrived, he saw Donald Fermenick at the residence. As Fermenick was being handcuffed, Beetle noted that he "looked like he was in complete shock." However, based on his police report, Fermenick seemed extremely calm considering the circumstances and appeared to be breathing normally, and offered no resistance to being handcuffed. He wrote the report on 1-19-96. (RT 4837)

On cross-examination, Sgt. Beetle noted that he arrived at 1515 Walnut Street at 9:28 p.m. Officer Erny was already there. He observed that Fermenick was seated on the floor holding his baby and that he was staring ahead blankly. Beetle directed his two officers, Officer Damian and Officer Erny, to handcuff Fermenick for security reasons. He explained to Fermenick that they were in the process of securing the scene. (RT 4838) When he wrote in his police report that Fermenick was "extremely calm," he noted that this being such a traumatic experience, it struck him that Fermenick was in shock and that he was very reluctant to give him much of any response whatsoever. He noted further that Fermenick did not resist being handcuffed and that he was cooperative. (RT 4838-4839)

On re-direct examination, in response to why Sgt. Beetle wrote "Mr. Fermenick seemed extremely calm considering the circumstances" as opposed to saying Mr. Fermenick seemed in shock due to the

circumstances, Sgt. Beetle responded that he was making an observation of Fermenick's condition. He noted that "[t]he man" was obviously in a shock situation and had been through a traumatic situation. He was sitting "kind of catatonic." (RT 4839-4840) Sgt. Beetle again confirmed that Fermenick was breathing normally as opposed to hyperventilating. Sgt. Beetle also confirmed that whenever a spouse is killed, the husband is normally one of the first suspects until ruled out. (RT 4840)

3. David Ellis

On January 19, 1996, at 2:30 a.m., Officer Ellis was on duty with the Alameda Police Department. He took Donald Fermenick to the hospital so that he could undergo a sexual assault examination. (RT 4841) Officer Ellis had casual conversation with Donald Fermenick. He characterized his demeanor as "very quiet and cooperative," and noted that he was "pretty much void of emotion." He was not agitated, but was "just very flat lined" which he recalled as being calm. (RT 4842-4843) Officer Ellis recalls Donald Fermenick making a comment to a nurse that he characterized as almost joking. He recalled that the medical person was doing an examination of his pubic hairs and that they had to pull one or two, and he made a comment, "I'm losing my hair or my hair is thinning on top but I'm not losing it down here." (RT 4843-4844) Officer Ellis noted that the comment struck him as being "a little odd." (RT 4844)

4. Special Agent Suzanne Alford Skeels

Ms. Skeels has been a special agent with the FBI since May 31, 1983. The FBI was asked by the Alameda Police Department if they would use their "alternate light source" in an attempt to look for blood and semen in the Chem-Dry van. (RT 4845) She met with a tech from the police department at the City of Alameda and the examination took place on

January 26, 1996. (RT 4845-4846) She notes that an "alternate light source" is another version of a laser and it works with a visible light spectrum. When they are looking for body fluids, they usually set it between 450 to 550 nanometers. It's a green, blue green, blue color. What happens is certain body fluids such as semen will fluoresce. As to whether she would be able to find traces if the van had been wiped down, she responded "not necessarily." (RT 4846) However, she noted that when looking for semen, if it was not wiped away completely, you might be able to see streaks of the lime-green color. (RT 4846-4847) Blood, on the other hand, is a body fluid that under the light looks like a dark stain. She notes that they "did not see anything that was a dark stain," nor did they see anything "under the white light [that] looked like blood." There was nothing that alerted them that they needed to go further. (RT 4847) As to the interior of the van, she could not say if it had been cleaned or not. However, she did not see anything that positively said that it had been scrubbed clean on the inside. Moreover, she did not smell anything that indicated it had been cleaned. Finally, she did not see any signs that anything had been buffed or washed on the interior of the van. (RT 4848)

D. Juror Question – Closing Argument

In his initial closing argument, the prosecutor argued timeline issues, items of evidence, statements made, trial testimony, and the DNA evidence. (RT 4900-4946) In closing argument, the defense counsel argued the deficiencies in the investigation, physical evidence, statements made, trial testimony, and the DNA evidence, including contamination, cross-contamination, bias, and the veracity of the testing process. (RT 4945-5120)

After defense counsel, Mr. Horowitz, concluded his closing

argument, the Court addressed the jury as follows:

> THE COURT: All right. Thank you, Mr. Horowitz.
>
> All right. Ladies and Gentlemen, we are going to take the noon recess because Mr. Anderson will be arguing at 1:30 this afternoon, and he has to have some time to prepare his response.
>
> Juror Number 7 handed me a question, and I can tell Juror Number 7 that I do believe that that question will be answered for you this afternoon.
>
> JUROR NUMBER SEVEN: Thank you.
>
> THE COURT: Okay. . . .

(RT 5120)

Outside the presence of the jury, the Court read the note from Juror No. 7 as follows:

> Does the defense have access to a DNA expert which it could have had as a defense witness, or is there a limitation of funds to prevent this?
>
> Signed Juror Number 7.

(RT 5121) (Court Exhibit XXV) There was then an extended colloquy; argument, objections, and motions regarding this question. This is the subject of Argument II.

E. <u>Prosecutor Rebuttal Closing Argument</u>

During the rebuttal closing argument, the prosecutor argued the DNA evidence in great detail. (RT 5133-5179) Moreover, the prosecutor argued at length regarding the failure of the defense to call their own DNA expert, Dr. Edward Blake, in pertinent part:

> PROSECUTION: . . . Now, the defense makes all of these allegations regarding DNA: It's contaminated. It's got poor databases. It's got faulty machines. . . .
>
> One thing we do know is that they have hired their own

expert.

Remember the testimony?

One Dr. Edward Blake, and he has access to all of Steve Myers' work, including his notes and the evidence. If Myers is wrong in anything he has done, then they certainly would have picked up on it and retested the evidence to exclude Mr. Nadey.

Wouldn't they? Isn't that right?

You've got your own expert. You have access to all of Myers' lab notes, as Mr. Horowitz had. Certainly they shared them with their expert.

When then didn't we see any defense expert here to say that Steve Myers was wrong or to show by their own expert, the famous Dr. Blake . . . why didn't they call him to say that Myers is wrong and that we've go the wrong guy; Nadey is excluded? . . .

(RT 5151-5155) The prosecutor's argument and conduct in this regard are the subject of Argument II.

F. Jury Deliberations

On the first day of jury deliberations, February 18, 1999, the jury foreperson requested that the testimony of the general manager of Skyline Chem-Dry, Paul Miller, be read. The testimony of Paul Miller was read to the jury, which took approximately 25 minutes. (RT 5212)

On the second day of jury deliberations, February 22, 1999, the jury submitted three questions relating to the physical evidence, to wit: (1) when did Sharon Smith receive the jeans and other evidence (RT 5215); (2) Sharon Smith's testimony regarding rectal and vaginal swabs and the jeans, direct and cross, and (3) Sharon Smith's Grand Jury testimony regarding sperm found on the vaginal-rectal swab slides (RT 5216). The Court and counsel discussed the appropriate response to the interrogatories and agreed on the response to be given. (RT 5215-5217).

In the presence of the defendant and counsel, the Court addressed the questions with the jury as follows:

> THE COURT: . . . Ladies and Gentlemen of the Jury, the Court has reviewed this with the attorneys.
>
> And in response to your first question - -
>
> First, I'll read the question to you:
>
> "When did Sharon Smith receive the jeans and other evidence, the date?"
>
> Well, the record reflects that she received the jeans and the other evidence on January 22nd, 1996, except the blood of Donald Fermenick, which she received on January 24th.
>
> Okay?
>
> The next two questions are Sharon Smith's testimony regarding rectal and vaginal swabs and jeans, the direct and cross, and Sharon Smith's Grand Jury testimony regarding sperm found on the vaginal-rectal swab and slides.
>
> The lawyers have gone through the record, and they've agreed on those portions that they believe address your question.
>
> Okay?
>
> And the court reporter will read that back. It will probably take an hour or less (sic.)
>
> Okay. So go ahead.

(RT 5217-5218) Pertinent portions of the testimony of Sharon Smith was then read to the jury. (RT 5218) The Court then continued as follows:

> THE COURT: All right. . . .
>
> And there was also a question "Where is the microfilm copy of People's Exhibit 21?"
>
> That's the check. It was attached to the exhibit. . . .

(RT 5218-5219) The jury then continued deliberations.

On the third day of jury deliberations, February 23, 1999, the Court received another request from the jury regarding the "Coroner's testimony

on rectal and vaginal assault, both cross and redirect examinations (sic)." The Court noted that this appeared to be a narrow request. (RT 5221) After conferring with counsel, the Court addressed the jury in the presence of counsel and Mr. Nadey as follows:

> THE COURT: . . . [B]efore we begin, Mr. Foreperson, this request talks about coroner's testimony on rectal and vaginal assault, which is sort of a narrow inquiry to the pathologist's testimony.
>
> Is that what you want?
>
> THE FOREPERSON: That's right.
>
> THE COURT: That's what we thought. We weren't sure. We prepared that, and it will take about ten to 15 minutes. . . .

(RT 5222) Pertinent portions of the testimony of Dr. Thomas Wayne Rogers were read to the jury. (RT 5222-5223) The jury then continued their deliberations. (RT 5223)

In the afternoon of February 23, 1999, the Court was advised by note from the jury that they had reached a verdict. (RT 5225) In the presence of counsel and Mr. Nadey, the Court addressed the jury as follows:

> THE COURT: . . . And, Juror Number 12, the foreperson, I've been advised the jury has, in fact, reached a verdict.
>
> Is that correct?
>
> THE FOREPERSON: Yes, Your Honor.

(RT 5225) The verdict set forth the following findings: (1) Giles Albert Nadey, Jr., [was] guilty of the crime of murder of the first degree, a violation of Section 187 of the Penal Code; (2) Giles Albert Nadey, Jr., did personally use a deadly and dangerous weapon, to wit, a knife; (3) the special circumstances were true, that is, pursuant to Section 190.2(a)17) (iv) of the

Penal Code, the killing of Terena L. Fermenick was committed while Giles Albert Nadey, Jr. was engaged in the commission or the immediate flight thereafter of a felony, to wit, unlawful sodomy, in violation of Section 286 of the Penal Code; and (4) Giles Albert Nadey, Jr., [was] guilty of the crime of a felony, to wit, unlawful sodomy, a violation of Section 286(c) of the Penal Code as to Terena L. Fermenick. (RT 5226-5229)

The Court then advised the jury that on Tuesday, March 2nd, 1999, they would begin the penalty phase which would take approximately five days. (RT 5229-5230).

G. Post-Verdict Proceedings – Juror Poems

On the second day of the penalty phase trial, March 3, 1999, the Court advised counsel that two poems written by Juror No. 1 were found in the jury room by the bailiff. (RT 5480) These poems were written by Juror No. 7 during guilt deliberations and circulated among the jurors. (RT 5509-5510, 5511, 5514-5518) The jury's conduct and the court's inquiry related to that conduct is the subject of Argument IV.

III. SECOND PENALTY PHASE TRIAL

A. Introduction

The first penalty phase trial ended in a jury deadlocked at 7-4-1. The evidence presented at the penalty phase retrial was nearly identical to that presented to the original jury, except for the forensic DNA introduced which the second penalty jury did not hear. The trial court's refusal to allow appellant to introduce the forensic DNA evidence is the subject of Argument V.

Unlike the first penalty jury, the second penalty jury was shown the Nazi-related books brought into the courtroom by the prosecutor during closing argument, "The Gestapo and SS Manual" and the "SS Regalia," and which were the source of much of his argument. Those books and that closing are the subject of Argument VII.

Although the evidence before the first penalty jury is relevant to these arguments and others, for the sake of brevity, it will not be set forth in the statement of facts, but rather will be referenced where relevant in the argument section of the brief.

B. The Prosecution's Case

1. Circumstances of the Crime

(a) Paul William Herrmann

Paul William Herrmann is an expert in the field of pathology, qualified to give an opinion as to the cause of death. (RT 8563-8566) Dr. Herrmann performed an autopsy on the body of Terena Fermenick on January 19, 1996. (RT 8566) He identified an eight-and-a-half-by-ten picture of the face of Terena Fermenick (RT 8566; Exh. 2) and a series of photographs (Exhs. 3 through 9) which depicted various injuries she sustained. (RT 8567-8575) He noted some lacerations to the anus which he

opined were caused by something larger than the anal opening. He opined the injuries were consistent with a female being sodomized by a male's organ, and that Ms. Fermenick had been sodomized. The injuries to the anus occurred before she died (RT 8570) and would cause the victim pain. (RT 8578)

As to his examination of the neck, Dr. Herrmann noted that there were seven superficial incised wounds about the neck; the eighth wound went through the muscle of the neck and completely cut through the jugular vein. (RT 8576-8578) Dr. Herrmann opined that the victim would probably die within a few minutes from this, but he could not be exact. (RT 8578) He stated the cause of death was "the incised wound of the neck." (RT 8579)

(b) Officer Paul Erny

Officer Paul Erny (RT 8587-8594) has been employed with the Alameda Police Department for 22 years in the Patrol Division. (RT 8587) Shortly after 9:30 p.m. on January 18, 1996, he received a radio dispatch from headquarters which reported that someone at 1515 Walnut had found his wife dead and that she had been raped. (RT 8588) The first thing that he noticed when he arrived at the scene was that the side door of the residence had the top half of it completely destroyed and pushed out of the door frame. (RT 8589-8590) When Officer Erny approached the residence, he looked through the window and saw a man in a squatting position holding a baby in his arms and was stooped over a nude female who was lying on the floor of the room. (RT 8592) The man was in shock and showed "no emotion." Officer Erny secured the residence as to the interior of the house. The gentleman turned out to be the husband of the woman that was in the house. (RT 8592)

Officer Erny noted that the young child was in good condition. He

commenced to search the house and did not see any knives or anything like that. (RT 8593)

(c) Donald Lee Fermenick

Donald Lee Fermenick (RT 8598-8614) lived in Pleasanton with his wife, Terena, and daughter, Regan, in January of 1996. They were staying in his parents' home. (RT 8599) Regan was then five months old. At the time, he had two jobs. He was working in Union City, graveyard, as a machine operator, and was also training as a minister at the Church of Christ in Alameda. (RT 8600) He met Terena in his freshman year at Florida College, which is a private school in Florida which is principally for religious studies and also serves as a divinity school, and they started dating. (RT 8601) They were married in 1994. (RT 8602) After graduation, he came back from Florida and his grandfather, who was the full-time minister at the church, offered him the training position that he took. He began his training in 1993. (RT 8603). In October 1995 his grandfather had a heart attack and passed away and he became the full-time minister. (RT 8604-8605) They planned on moving into the church house in January of 1996, and decided to have the carpets cleaned. Terena located the carpet cleaning company through the phone book on Tuesday, two days prior to January 18, 1996. (RT 8605-8606)

On the evening of January 17, 1996, he was working the graveyard shift from 10:00 p.m. to 6:00 a.m. (RT 8606) Terena left in the morning to open the door for the carpet cleaner. He expected her back around 4:00 or 4:30, but she did not return at 4:30. (RT 8607) He became nervous, asked his father if he could borrow the car as they had only one vehicle, which Terena had. He took his father's vehicle and headed to Alameda. (RT 8608) As he got to the building, he saw that their car was parked. Regan was still

buckled in her seat and looked as if she had been there for a while. (RT 8609) He unbuckled Regan, held her, and noted that a light was on in the house. He could see through the window into the family room. He could tell that Terena was lying, as he could see her head lying on the floor. They only had one key and Terena had it. (RT 8611) He could not unlock the door. (RT 8610) He kicked the window open and ran to the area where Terena was. (RT 8611) She was lying face down and most of her clothes were off. He "could tell" that she had been raped. He saw a lot of blood. He screamed, ran out of the room, and called 911." (RT 8612) He told 911 something along the lines that he thought his wife had been raped and murdered. An officer showed up shortly thereafter. (RT 8613)

(d) Eileen Bartosz

Eileen Bartosz (RT 8615-8622) is a police officer with the Alameda Police Department. On January 18, she responded to a crime scene at the Church of Christ in Alameda for purposes of diagraming it. (RT 8616) She prepared scene diagrams of the interior of the residence. (RT 8617-8618) People's Exhibit 20 is a diagram of the interior of the Church of Christ home at 1515 Walnut. People's Exhibit 21 is a larger diagram, which shows the bedroom with the bed with the one large reddish stain, which was referenced as a bloodstain on the bed. (RT 8620-8621) The diagram shows puncture-type markings in red going from the bloodstained bed, through a corridor, and into the final position where the decedent was. (RT 8622) Thus, the diagram pertains to the path taken by Mrs. Fermenick from the bedroom through the corridor and into the room where she expired. (RT 8622)

(e) Elizabeth Nice

Elizabeth Nice (RT 8626-8643) worked as a criminalist for the Alameda Police Department in the City of Alameda. She was an

identification officer and senior Police Technician III. (RT 8626-8627) On January 18, 1996, she was sent to the crime scene located at 1515 Walnut in the city of Alameda by the radio dispatcher. (RT 8627) She identified two photographs, People's Exhibits 3 and 18, depicting the body of Mrs. Fermenick as it was located on the carpet adjacent to the south wall in the living room of 1515 Walnut. (RT 8629-8630) She took the two photographs. (RT 8630) She also identified and described multiple other photographs taken at the crime scene, including pictures of personal items of Terena Fermenick and blood spatter in the house in various rooms. (RT 8631-8640)

(f) Paul Miller

Paul Miller (RT 8644-8655) was the general manager of Skyline Chem Dry in January of 1996. Giles Albert Nadey was hired by his company in July of 1995 to clean carpets. (RT 8645-8646) On January 18, 1996, Miller picked appellant up that morning at the Fruitvale BART station between 6:45 and 7:00. Individuals who work for his company are required to wear a white shirt that is supplied by the office, their own blue jeans, and white shoes. Appellant was wearing blue jeans and white canvas shoes as well as a tee shirt; he got a work shirt from the office. He also brought a yellow rain jacket. (RT 8647) Miller and appellant worked together that morning at the Southern Pacific Railroad Station. (RT 8648)

They went back to the office, appellant ate some lunch and then he proceeded to Alameda for his 2:00 o'clock job. (RT 8648) He had his assigned van which came equipped with carpet cleaning equipment. (RT 8649) He was a good employee. (RT 8649) That morning, he appeared normal. He did not appear to be hung over nor did he appear under the influence of any drugs or alcohol. (RT 8649-8650) He worked at a level that

was satisfactory to Miller as the employer. As to customers, they did not have any complaints as to appellant. He would consider appellant a "friend." (RT 8660)

He got to the new assignment a little after 2:00 o'clock. He came back around 4:30 (RT 8650) and he gave Miller the work order and check. (People's Exhs 31A and 31B, respectively) (RT 8650-8651) Nadey brought the work order signed by Terena Fermenick (RT 8652; Exh. 31A) and the payment check (Exh. 31B) back to Miller (RT 8653) On the work order, appellant wrote that he started the carpet cleaning at 2:16 and finished at 3:54. (Exh. 31A) (RT 8653)

Miller saw appellant back at the company at 4:30. (RT 8654) He did not notice any blood of any sort on appellant. There were no red stains or anything. (RT 8659) Appellant did not have his raincoat and said that he left it in the restroom at Jack In The Box. The general company procedure after a job is to call the office for further instructions. (RT 8654) Appellant did call the office from the Jack In The Box in Oakland. After appellant turned in the original work order and check, Miller gave him a ride home as it was raining that day. (RT 8655)

Miller noted that appellant had had no contact with anyone in the Fermenick family prior to being assigned the job. It was based on a random selection. (RT 8657) He did not notice any blood of any sort on appellant. There were no red stains or anything. As far as Miller knew, he did not have some form of cutting tool on his person; that is, Miller never noticed anything like that. (RT 8650-8651)

(g) Sgt. James Taranto

Sgt. Taranto is a police sergeant with the City of Alameda. (RT 8672) He was the lead investigator in Homicide of Terena Fermenick. (RT 8672-

8673) He went to the Nadey residence at 10:00 p.m. on January 20, 1966, and went to the bedroom in the residence where he believed appellant was. (RT 8678) Mr. Nadey was in bed, as well as his brother, Rick. He told them that he had a search warrant for the residence, vehicles, and his (Albert Nadey's) person. (RT 8679) Appellant stood up and "retched" briefly, like he was going to throw up. Appellant went in to the living room where he "retched" again, as if to vomit. (RT 8679) Sgt. Taranto and one other SDU officer took appellant to Highland Hospital. Detective Miller, the team leader, and the remaining search party stayed in the Nadey residence. (RT 8680)

On cross-examination (RT 8680) Sgt. Taranto testified that he went to the house on Walnut Street on the evening of January 18th. At the time, he did not have any suspects. (RT 8681-8682) Criminalist Nice found a knife in the bedroom on the windowsill. (RT 8682) The knife was not processed. (RT 8682-8683) A second knife was found in the house. To his knowledge, the second knife was not processed for fingerprints nor was it processed for blood. (RT 8684)

Sgt. Taranto saw blood in the house in various rooms. (RT 8685) There was "visible blood" on the door knobs, but he did not recall whether the door knobs were ever checked for fingerprints. (RT 8685) Sgt. Taranto noted that there were fibrous materials that may have been hairs on the shirt of Mrs. Fermenick, but those hairs were never sent to the lab for identification purposes. (RT 8686-8687) There were fibrous materials under Mrs. Fermenick's fingernails which were gathered by Dr. Herrmann, but to his knowledge they were never sent to the lab for identification purposes. (RT 8687) There were hairs and blood on the bedding found in the bedroom, but they were never sent to the lab for processing. (RT 8687)

(h) Det. Ron Miller

Detective Ron Miller Ron Miller is employed with the City of Alameda Police Department as a police detective. (RT 8688-8689) He was one of the detectives assigned to the homicide investigation on January 18th and 19th, 1996. (RT 8689) Paul Miller told him that appellant was wearing a raincoat when he went to the Church of Christ to do his carpet cleaning job, but that when he returned he did not have the raincoat. Appellant had called from the Jack In The Box on East 14th Street in Oakland. When appellant returned he did not have the raincoat. Paul Miller inquired about the raincoat and appellant informed him that he had left it in the restroom at the Jack In The Box. (RT 8690) Det. Miller went to the Jack In The Box in east Oakland to attempt to locate the raincoat, but no one at the Jack In The Box had recovered the raincoat. (RT 8690-8691)

On January 20, 1996, Det. Miller went with Sgt. Taranto and other law enforcement agencies to serve the search warrant on the Nadey residence. (RT 8691) Det. Miller searched the premises. (RT 8692) Among the items found were (1) a writing tablet with graphic drawings of male and female anatomy (People's Exh. 36A); (2) a book entitled "Deep Thrills" (Exh. 37A); and (3) a utility man's tool in the sheath (Exhs 35A and 35B). (RT 8692-869).

Det. Miller read a paragraph from the tablet: "I also like to endure anal sex, which by the way is one of my specialties. You will come so hard your eyes will roll back in your head." (RT 8695) Det. Miller also read **that** the title of the short story, from page 72 of the novel, was "Back Door Lovers, Sliding up the Old Dirt Road." (RT 8696; Exh. 37A)

Phone records were obtained to determine if there were any calls made from the house during the time the carpets were being cleaned between

2:00 and 4:00 p.m. At 3:00 o'clock in the afternoon, there was a "900" phone call dialed. Seven minutes later, at 3:07, there was another one made. Detective Miller dialed the phone numbers and determined that one of them was for a swingers hotline, an adult-oriented chat phone service for making sex phone calls or for sex conversations, and the other one was similar. (RT 8700-8701)

The receipt and the work order for the carpet cleaning (People's Exhibit 31A) reflect that appellant started the job at 2:16 and finished the job at 3:54 p.m. on January 18th. (RT 8703-8704) He talked to Paul Miller about the raincoat for the first time at the police department on January 19th. He went to Jack In The Box to check for the raincoat on the afternoon of the 19th, some 24 hours later after 3:54 on the 18th. (RT 8704) As to People's Exhibit 37A, Det. Miller does not know if appellant ever read the book which was found in the bedroom. Det. Miller confirmed that "possibly" his brother stayed in that bedroom. (RT 8705) As to the two phone calls to a "900" number, Det. Miller called both numbers and recorded the telephone calls. (RT 8706) The first call was for 4/10ths of a minute and the second call was for 5/10ths of a minute. In listening to those calls, the first 4/10ths of a minute reflected some advertising and there was no sex talk or anything like that. (RT 8707) The same thing was true for the second telephone call which was for 5/10ths of a minute. (RT 8707-8708)

2. <u>Aggravating Factors</u>

(a) Dirk or Dagger Incident–Officer Mark D. Jacobson

Officer Mark Jacobson is a police officer with the City of Fontana in San Bernardino County. (RT 8711) On April 28, 1990, around 4:30, he stopped appellant for driving with a broken windshield. Appellant's license had been suspended and/or revoked, so the he patted him down in order to

then transport him to the jail. (RT 8712-8713) During the pat down, he found, in the right ankle area, a dirk or dagger, which is a straight-edge knife with a point and it was sharpened on both ends. (RT 8714) The knife was inside a leather sheath, the sheath was tucked inside a portion of the shoe, and the rest was concealed by the socks that he was wearing. (RT 8715) People's Exhibit 39B is a weapon that is similar to the knife that he took off the person of Nadey. (RT 8716-8717)

On cross-examination (RT 8717-8727), Officer Jacobson confirmed that on April 28, 1990 he was on routine patrol with his police dog. (RT 8717) He noticed a cracked windshield. He saw appellant and then a female, as well as children in the back seat. (RT 8718) He pulled appellant over in about 30 seconds. Appellant produced his driver's license upon request. (RT 8719) Appellant got out of the car upon request with no problem. He was wearing a pair of shorts, no shirt, and socks. (RT 8723) Underneath the particular socks, tucked in the shoe area, was the sheath with the knife. (RT 8723-8724) At no point did appellant go towards the knife or threaten him in any manner. There was a little flap over the knife, which was snapped. (RT 8724) Appellant was not causing him any problems. (RT 8725) Based on the inventory of the vehicle, there were miscellaneous hand tools, several articles of clothing, blankets, personal papers in the trunk, and numerous bags of clothing. (RT 8726-8727)

(b) Jail Violation-Regulation 109–Deputy Oscar Rocha

Deputy Oscar Rocha (RT 8728-8733) is employed with the Alameda County Sheriff's Department and was assigned to detentions and corrections at Santa Rita. (RT 8729) Appellant was in housing unit two, C pod, which is the "ad seg" unit, referencing "administrative segregation." They are

separated from the other inmates, kept by themselves in separate cells. They were classified this way for several reasons; that is, violent inmates, history of their case, and other reasons. (RT 8730) The ad seg prisoners are different from the regular inmates at Santa Rita. They are not allowed certain items, such as nail clippers, razors, and certain commissary items, because they can turn these into a weapon. On October 28, 1999, appellant was preparing to go to the library. While searching his legal boxes, they found a razor. The razor was an orange Bic plastic razor (RT 8731), the types of razors you can buy in packs of ten. The razor did have the cover on it; however, it was not visible. Inmates who are classified ad seg are allowed to shave. However, they need to return the razors to a deputy. It is a violation of the rules or the Sheriff's Department not to return the razor, that is, Regulation 109. He has seen such a razor as recovered from appellant's cell used as a weapon. (RT 8732) They break the end of the razor, attach it to an object such as a toothbrush or something, and use it as a slicing weapon. As a result of discovering this unauthorized item, appellant received, as disciplinary action, fifteen days loss of privileges. (RT 8733)

On cross-examination (RT 8733-8741), Officer Rocha noted that they did not keep the razor blade as evidence. (RT 8733) The defense proffered a razor blade that was a Bic razor as Defendant's Exhibit A. The Court described it as a Bic-style or Gillette-style razorblade. As to Defendant's Exhibit A, Deputy Rocha noted that it was not the same brand, but it was a similar style; that is, plastic-like brand. (RT 8734) These particular razor blades are issued by his department in Santa Rita for appellant to use. One of the reasons people are in ad seg (administrative segregation) is because of the history of their case. If someone is charged in a case that possibly involves the death penalty, they would be kept in administrative segregation.

(RT 8735) The non-ad seg prisoners are entitled to have a razorblade in their possession all day long. The blades can be purchased at the commissary. As to an ad seg prisoner, they are issued these razor blades at a particular point in time in order for them to shave. (RT 8736) They no longer have the list available with regard to sign-in and sign-out of razor blades. (RT 8739-8740) He believes that the lists are destroyed. Thus, there was no way of knowing how long appellant had the razor blade. (RT 8740)

Deputy Rocha noted that in his disciplinary interview, appellant admitted that he was guilty. (RT 8741)

(c) The Sarah S. Incident

(i) Sarah S.

Sarah S. (RT 8744-8758) is 19 years old. On May 10, 1994, she was 13 ½ years old, living at the Caravan Motel in Anaheim, California, with her mother, brother and sister, as well as her mother's boyfriend. (RT 8745) She knew Giles Nadey. He and his wife, Ann, had became friends with her mother. Appellant and Ann also lived at the Caravan Motel. (RT 8746) Appellant had three girls who were younger. (RT 8747)

On the evening of May 10, 1994, at appellant's invitation, she went over to his hotel room with her sister Susan, age 11 or 12, as well as her friend Kim, age 11. (RT 8747-8748) Rick Ritchey and his girlfriend, Michelle, were also present. (RT 8749) Appellant offered her methamphetamine, also known as crank or crystal meth. (RT 8749) He offered the powder form that you "snort it." She used the crystal meth in the bathroom with appellant. (RT 8750) She recalls appellant giving her a "normal hug" in the bathroom as friends. She also snorted it a second time in the bathroom. (RT 8751) Michelle and Rick were also using drugs and drinking. They were all drinking, but her 11-year-old sister had left. She

recalls using meth appellant gave her two to five times, maybe more. (RT 8752) After the fifth time, she started feeling dizzy and tired. She also drank, and had about five beers over a 4-hour period. Michelle and her sister had left, so she and Kim were there with appellant and Ritchey.

She laid down on the bed next to her friend, Kim, on her back covered up with sheets. (RT 8753-8754) Appellant was at the end of the bed, next to her, and she eventually passed out. Appellant was laying down next to her, "[w]atching TV and glancing over at" her. She does not recall appellant ever touching her while she was laying down on the bed. (RT 8755) She recalls speaking with the police a few days after the incident and told the police what she could recall at that time. (RT 8755-8756) In response to the question – had she ever told the police officer that Mr. Nadey, Al, "rubbed your breasts" while she was under the covers – she responded: "I could have. I don't really remember because it's been so long." When she woke up, she felt a little hung over and appellant was lying next to her. Appellant and Ritchey dropped her off over at her friend Kim's house. (RT 8756) She never saw appellant after that. (RT 8758)

During the course of that evening, she has no recollection of appellant ever having any sexual contact with her, to which she noted: "[n]ot that I can really remember." (RT 8768) As far as she knows, appellant never touched her private parts, he never touched her breasts, or anything else, while in the bathroom or on the bed. (RT 8768) As to Rick Ritchey, she notes that "[h]e wasn't really like all there." (RT 8768-8769) He looked like he was pretty high on meth and alcohol or whatever else he was taking. She notes that Michelle was in the same condition, but she left. (RT 8769-8770)

(ii) Rick Ray Ritchey

Rick Ritchey (RT 8778-8790) is 34 years old. (RT 8778) As of May 10, 1994, he had known appellant for about nine months. They did meth together. (RT 8779-8780) On May 10, 1994, appellant was renting a room at the Little Boy Blue and had been living there for a day or two. (RT 8781) At 11:00 o'clock at night, Sarah and Kim were present. (RT 8782) He and appellant were doing drugs. After Sarah and Kim arrived, they started partying, that is, playing cards and shooting the breeze. They were also drinking "a little beer." (RT 8784) He saw Sarah go into the bathroom once with appellant. He did not know what they were doing in the bathroom. (RT 8785)

Kim and Sarah laid down on the bed; appellant laid down next to Sarah. She was under the cover, as was appellant. (RT 8785-8786) He saw appellant's hand feeling her breast area and her pelvic area for a couple of minutes, five minutes, under the covers. Sarah was not awake; she did not move. (RT 8786-8787) At that time, Ritchey was on the opposite bed. At one point, he left the motel to get cigarettes and was gone approximately 15-20 minutes. When he returned, he saw Sarah and Nadey coming out of the bathroom. (RT 8787-8788) Appellant told him that he took Sarah into the bathroom and tried to penetrate her, but could not, too young, so he penetrated her with his finger. (RT 8788) Later on the next morning, the two girls left the room. A couple of days later he spoke with Officer J.J. Imperial of the Anaheim Police Department. He told Officer Imperial essentially what he testified to before the jury. (RT 8789-8790)

On cross-examination (RT 8790-8816), Ritchey testified that he had known appellant for about nine months at that time. (RT 8790) They were neighbors and friends.(RT 8790-8791) "They snorted meth together." He

bought meth for himself and his girlfriend four to five times a week; in a week's time they would buy a "16th" of meth. (RT 8792)

With regard to his mental health, at the time "it was cloudy." As to short-term memory, he notes that he has a disability from using drugs. (RT 8795) He does have short-term memory, but his long-term memory, that is, memory from his childhood, is gone. He has become disabled because of the long-term use of meth. In April it will be two years that he has been clean, but he is still feeling the repercussions of all the years of doing drugs. (RT 8796)

On May 10th he was living at the Caravan. (RT 8796) Earlier in the day, before the girls came, Ritchey and appellant had taken meth. They had probably taken about half a gram by the time the girls arrived. (RT 8798) They had "some beer," but "very little." The meth was on a glass mirror, and you had to go up to the desk and snort a line on the desk. (RT 8800) "[E]very so often, you just go up there, roll out a line, and snort it." (RT 8801) This was done while the young girls were there. He took meth until the next morning, probably "a gram" through the night. He ended up being pretty tired. His mind was "slowing down," that is, he was coming down. (RT 8802)

(iii) Officer Jeffrey Jay Imperial

Officer Imperial (RT 8819-8831) is a police officer with the City of Anaheim. (RT 8819) On May 13, 1994, he was working patrol in uniform in a radio car. He received a dispatch to talk to a woman by the name of Keneen S., at 130 West Katella. (RT 8820) She is the mother of Sarah S. He also contacted a man by the name of Rick Ritchey, and also Sarah S. (RT 8821-8822) The victim told him that she was at the Little Boy Blue in Anaheim with her sister and a girl named Kim. A man by the name of Albert

Nadey and a man by the name of Rick Ritchey were present. She said that about 3:00 o'clock in the morning on Wednesday morning, the night of the party, which was May 11, 1994, she and Kim went up and laid down on the bed. Just before she dozed off, appellant had come in and got into bed with her and the other young lady and apparently started fondling her breasts under the covers. (RT 8823-8824) She had no recollection of any other sexual activity. She only remembered him fondling her breasts and was unsure if it was under the clothes or on top of the clothes. When Officer Imperial talked to Rick Ritchey, he told him that he saw appellant go in and get in bed with the victim Sarah S., and the other young lady. He saw him lay down with them, and then he saw appellant put his hands under the covers and was fondling the victim, Sarah S.'s breasts and vaginal area. Appellant told Ritchey later that they went inside the bathroom, and when they were in the bathroom, he digitally penetrated her. (RT 8824)

(d) Billy Club Incident - Matthew Dean Huddleston

On January 5, 1990, Rialto Police Officer Matthew Dean Huddleston (RT 8870-8876) stopped appellant for driving with an unsafe load. (RT 8871-8872) He spotted what appeared to be a club laying between the driver's seat and the driver's door. The object was cylindrical, roughly the size of a baseball bat, and the officer believed it could be used as a weapon. (RT 8873) The thicker end was approximately four inches in diameter, tapered down to a narrow end of about three inches. The total length of the club was approximately 36 inches. Appellant initially stated he had gotten the wood from his grandfather, but later, after he was arrested, said that he got it from a friend. (RT 8874-8875)

Officer Huddleston placed appellant under arrest for possession of a

deadly weapon, which was this particular club. There were no other weapons that he found in the car. Nadey never threatened the officer. (RT 8876)

(e) The Virginia Incident

(i) Virginia Leigh Hendrix

Virginia Leigh Hendrix (RT 8877-8901) lives in a town called Warrenton, Virginia. In 1995 she lived in Casanova, Virginia. On April 17, 1995 around 9:30 in the evening, she was driving home from evening classes on a small, two-lane, curvy, narrow country road with no shoulder. (RT 8878) A vehicle approached her from behind with its high beams on and following too closely. (RT 8879) After she got through a turn, the other vehicle moved beside her, driving on the wrong side of the road. When she looked over, she "saw the gun" that looked like a short-barreled pistol protruding from the window of the passenger side of the car. (RT 8883-8884) She was afraid and slowed down; the vehicle progressed ahead of her. She then heard a gun go off when she was slightly behind the other vehicle. (RT 8885) It was pointing out the window towards her car. She was not struck. There was only one shot and it missed her vehicle altogether. (RT 8886) She saw two figures in the car; she did not know if they were male or female as she only saw a shadow. (RT 8887)

When she arrived at her parents' home, she was basically "hysterical." She was able to say she saw a gun and repeated the license plate number, and they called the police. Someone from the sheriff's department of Fauquier County came out. (RT 8888)

(ii) Lori Sisson

Lori Sisson (RT 8902-8910) is a probation and parole officer with the Virginia Department of Corrections. (RT 8902) In the summer of 1994, she

became the probation or parole officer for appellant, a person on probation from the Orange County Superior Court in California. (RT 8903) She informed appellant of his obligations, which included: maintain a stable home, maintain stable employment, be of good behavior, violate no laws, and remain drug free. (RT 8905) Appellant's adjustment was marginal. There were issues regarding maintaining stable employment, dealing with domestic issues that he was having with his father, and adjusting to life in Virginia. (RT 8906) She learned that appellant's car had been involved in a drive-by shooting the night before.

On April 18, 1995, she did a urine screen on that date and he tested positive for marijuana. She gave him until 4:00 to make arrangements for his three children, and then return to her office to surrender himself. (RT 8907) He was taken into custody for the positive drug usage and his failure to follow through with his treatment requirements. (RT 8908) At the preliminary probation violation hearing, appellant admitted to the hearing officer that he did, indeed, possess the .22 caliber handgun, had fired it, and he knew he was in violation and should not have done it. At the hearing, probable cause was found that appellant had violated probation and he was held until California authorities could decide whether they wanted to proceed with the case. (RT 8910)

Sisson stated she is both a parole officer and probation officer. (RT 8911) Appellant had been placed on probation for what California calls burglary and petty theft, which Virginia calls petty larceny. (RT 8912) The burglary and petty theft were really arising out of the same incident, taking pants from Nordstrom's. (RT 8912-8913) She gave him a urine test. He tested positive for marijuana. Based on that test and previous tests that he had which were positive for marijuana, she decided to violate his probation,

meaning that she was going to put him in custody. (RT 8916)

She contacted Orange County, California, and advised that he had violated the conditions of probation in Virginia and inquired as to what they wanted to do. (RT 8919) They advised that they were not going to extradite appellant; that is, they were not going to come and get him. (RT 8919-8920) The warrant holding appellant was lifted on June 23, 1995 to allow him to return to California to face violation proceedings. (RT 8920) He was released from jail. He obtained a bus ticket and advised that he was headed back to Orange County. (RT 8921) To her knowledge, appellant was never charged with the shooting incident. (RT 8921-8922)

(iii) Karen King

Karen King (RT 8926-8930) lives in Casanova, Virginia. In April 1995 she was married to Jeff King, but the marriage terminated in October of 1996. In April of 1995, she knew a man by the name of Giles Albert Nadey, Jr. (RT 8927) Her ex-husband, Jeff King, was "close friends" with appellant. In September 1995, her ex-husband pled guilty to an incident occurring from an April of 1995 shooting of a gun from a moving vehicle at a woman. When it happened, he did not tell her anything about it. (RT 8929) When he pled guilty, he told her about it. (RT 8929-8930) He told her that "Al was the gunman and that he was taking the rap basically to keep Al from getting in trouble or more trouble." Her husband did not have any prior arrest record with the exception of a DUI. He did plead guilty, and did "a couple of weekends" in jail. (RT 8930)

3. Victim Impact Evidence

(a) Donald Lee Fermenick

Donald Fermenick (RT 8939-8945) was the one who initially found the body of his wife, Terena, on January 18, 1996. As a consequence of learning

that his wife had been sodomized and murdered, his life was in pieces. He could not get out of bed, move, or function. (RT 8939) For three days after the crime, he could not eat or sleep, or care for his 5-month-old baby. (RT 8940) His child at the time, Regan, was 5 months old. She is now 4 ½ years old. (RT 8940)

The murder of Terena changed his life "in every single way." He was preaching at the time and had plans to move out to the midwest, settle down, raise a family. He is no longer in the ministry. He worked at his other job for about 6 months and then quit. For two years he fell apart. (RT 8941) He is now attending a community college in Vancouver, Washington. He and his current wife now operate a coffee shop. He remarried in December, a year ago. He noted it was unfair that his daughter would not know her mother or experience her love. (RT 8942) The seasons that are most difficult are the anniversary of her passing, her birthday, their anniversary, and Regan's birthday. (RT 8943) What he misses most about Terena is that she was so happy and always had a smile on her face." (RT 8944)

On cross-examination (RT 8945-8951), Donald Fermenick noted that after Terena was killed, he went through a bad period of time and felt lost for a time. (RT 8945) As to moving on, he notes "we are working on it." He was getting nowhere in California. Everything he saw reminded him of Terena. He had a sister who had just moved up to Washington, and he knew that if he moved there, he would have day care, as his sister would watch Regan while he worked. . (RT 8946) He moved to Washington and remarried. (RT 8946-8947). He got married just over a year ago in December. The marriage is "going along very well." He noted that she "does an excellent job with Regan" and has become a surrogate mother for Regan. (RT 8948)

At the time his wife Terena was killed, he was working two jobs; one a graveyard job for a package company, and the other as a minister in Alameda. (RT 8948-8949) The packaging job was a fairly low paying job, at 13 to 14 dollars an hour. (RT 8949) As to the ministry, he had been working approximately three months and receiving partial support, that is, $700 a month. (RT 8949-8950) He and Regan sued the carpet people. He received a large settlement in the sum of one million two hundred thousand dollars. The majority of the money went to Regan and is being held in trust. He received between $300,000 and $400,000 for himself. He used some of that money to start up the coffee shop. (RT 8950)

(b) Donna Bryant

Donna Bryant (RT 8952-8958) resides in Seymour, Indiana. (RT 8952) She is 31 years old and Terena was her younger sister. (RT 8953) When she received the phone call about Terena, she started yelling out "my sister, not my sister." After she learned that Terena had been sexually assaulted and how she had been murdered, she could not "even comprehend it." (RT 8953-8954) After the crime, "none of us are the same." Telling her parents was horrible. Her mother could not believe it, and it broke her Dad's heart. Christmas time is the most difficult time because of the memories. (RT 8955)

She noted that she does not feel safe and that she is angry. What she misses the most is their friendship; they were best friends. (RT 8956) Terena was "a good person." She notes that they were "so close." (RT 8957)

(c) Carolene McGurer

Carolene McGurer (RT 8958-8964) lives in Morgantown, Indiana. She had a daughter named Terena. The last time she saw her daughter was in August 1995, right after Regan was born. She and her husband drove to

California to visit her and Donny and the baby. The day she left was the last day she saw her alive. (RT 8959)

On the morning of January 19, 1996, she and her husband were at work. One of the supervisors took her and her husband to a security hearing room. Friends and realtives were present. Her daughters got down on their knees and took their hands, and told them that Terena had been murdered the night before. (RT 8960) She threw her glasses and screamed and tried to run out. (RT 8961) To this day, she gets sick when she thinks that her daughter was hurt. She was so beautiful and she wanted to protect her children. (RT 8962)

She noted that the anniversary of her death is very hard, as well as her birthday. Christmas is also difficult because "a link is gone." Terena always made a big deal out of Mother's Day and Father's Day. (RT 8962) On January 19th, she always takes a flower down to the room at work where she was told about Terena being murdered. What she misses the most about Terena not being here is that Terena would call her "buddy," that is, saying "'I love you, little buddy.'" She misses her smile. When she goes to the cemetery, she always takes a rose because they always said one rose means I love you. (RT 8963)

(d) Robert McGurer

Robert McGurer (RT 8964-8968) lives in Morgantown, Indiana. (RT 8964) He is the father of Terena Fermenick. (RT 8965) He also described being taken to the room and informed of her death. It was as if he "died inside." (RT 8965) The pain was excruciating. When he learned that she had been sexually assaulted prior to her death, he was so angry. (RT 8955)

He and his wife had to take off approximately six months because they could not do anything. They had to go to counseling. They were put on

medication for several months. He is still on medication and probably always will be. He cannot sleep at nights. He has to take medication to sleep and he still doesn't sleep through night. He wakes up thinking about her and what she might have gone through. He thinks of the things they did together; hunting trips, fishing trips, just walking out in the backyard and talking. (RT 8966) What he misses the most is that she would put her arms around his neck and kiss him and say "I love you, daddy." He'll never hear those words again. When he visits the cemetery, the pain, "it all comes back." (RT 8967)

C. Defense Case

1. Douglas Tucker, M.D.

Douglas Tucker, M.D. testified as an expert in the field of psychiatry, specifically in substance abuse and, in particular, the area of addiction and substance abuse of methamphetamine. Dr. Tucker discussed the general characteristics of some of the substances that they see on the streets. (RT 9030) Methamphetamine is an "upper." (RT 9031) It progresses rapidly from a therapeutic treatment to drug abuse. (RT 9031-9032) Since 1980, the people who make and deal drugs have developed more effective ways to synthesize methamphetamine. It is now 100 percent D-methamphetamine, which means it is a much stronger and has less physical side effects so people are able to tolerate it better and take it more. (RT 9034) There are patterns of use, that is, low intensity and high intensity. (RT 9035) For example, people who use methamphetamine for instrumental purposes or in order to function well at work, e.g., the stereotypical truck driver or medstudent, they use methamphetamine to stay awake. (RT 9035-9036) Low intensity, in general, means swallowing pills or snorting meth. High intensity is where the user is injecting or smoking the drug, and hence, it is a much more powerful way to take the drug. The drug goes right into the

bloodstream and all of it goes right into the brain at one time, and you get a very powerful rush. It is also more damaging to the brain, and leads to psychosis much more quickly. People become more obsessed with the feeling and care less about their work, personal experience, relationships, and all other things may tend to deteriorate as their life starts to center only on the drug. (RT 9036) There are binge users and binge abusers, which are considered similar to high intensity. As to people who get into a pattern of binges, this results in sleep deprivation, increases anxiety and restlessness, and then, after the binge, there is the crash phase, where people may sleep for days at a time; then they do it all over again. (RT 9037)

In the beginning, the user would probably feel exhilarated and euphoric and having a good time, running all around and doing all kinds of things. However, the initial pleasure begins to give way at some point in a meth binge to less pleasant feelings. People start getting anxious, suspicious, and wonder what other people are doing, saying and thinking. They start to feel threatened. Often they will arm themselves. This can result in people going out to commit rapes or sexually inappropriate behaviors in public. They can also become suicidal. This is usually as the binge progresses. They generally continue to take the drug often until it runs out. (RT 9039) As the binge continues, the conduct generally comes to the point where their friends will not have anything to do with them. As to the crash phase, this is essentially where the meth leaves their system and, instead of being stimulated, now they are depressed and are actually "psychologically depressed." This is the opposite of the euphoria that they felt earlier, and users can commit suicide at those times and sleep for a very long time. (RT 9040) As to the tweaking phase, where people try to get more meth, getting more desperate, they actually are very dangerous during that time. They may

commit crimes. They note that they need to take some of the downers in order to help them enter the crash phase. Moreover, methamphetamine damages your brain. (RT 9041) Some people develop psychotic episodes in the future. Sometimes just sleep deprivation can precipitate an episode. As the drug leaves the system, they will look more or less normal for a time, until they go back to the next binge. (RT 9042)

In light of the symptoms he outlined, Dr. Tucker noted that the reason people would go back to meth and do it is because it involves an extremely powerful, very rewarding experience, like the rush from methamphetamine. This is particularly true when one's life is not as good to begin with and they do not have other sources of self-esteem, such as a good job, good relationship, comfortable life, and rewards from those things. Generally, you have a person who has a relatively empty life, or you have a depressed kind of person to begin with, and the rush from methamphetamine can be so profound, and so rewarding, that it essentially haunts the person. (RT 9043)

On cross-examination (RT 9044-9055), Dr. Tucker opined that people who do not have a comfortable lifestyle are more vulnerable to becoming heavy meth users. However, he noted that there are doctors, lawyers, judges and professionals who have a very comfortable lifestyles and they get involved with methamphetamine abuse. He does not know appellant. He saw him once when he testified before. He is not testifying that appellant was under the influence of anything as of January of 1996, that is, he is not testifying about appellant, in particular, at all. (RT 9046) He is basically testifying about the effects of methamphetamine on the body, in general, and not with any specific reference to appellant. (RT 9048) He refers to the use of methamphetamine as being "semi-voluntary" as there is an element of compulsion involved. (RT 9051)

2. **Jane Doe**

Jane Doe (RT 9062-9079) is the cousin of appellant.[5] She is married and has a family. (RT 9062) She has two children. Appellant's mother is her aunt. She did not have much contact in growing up with appellant, as she was six years older. (RT 9063) She found out that appellant had been arrested for murder by way of a phone call from a family member. She picked her mother up and went to appellant's mother's house for support. It was a family gathering. (RT 9064) She talked to appellant on the phone. He was in jail at the time. They began communication by way of phone calls and writings; that is, after his arrest, they started to have contact with each other. (RT 9065) In 1996, she would get phone calls and letters on a weekly basis. (RT 9066) In the first year, she received literally hundreds of letters from appellant and she wrote him back about half the amount. (RT 9067) Appellant talked about his day to day things, his family and his kids. (RT 9067). Appellant has three beautiful little girls. (RT 9068) As to his daughters, Jane Doe noted that appellant talked about them; how he communicated with them, that he was missing out on their lives, and trying to raise them in the position that he was in. (RT 9070) They also talked about the kind of problems and difficulties that she had in her own situation. Appellant gave her "advice" and helped counsel her with regard to some of her problems. (RT 9071)

In 1996, she visited appellant about three times in jail, but was unable to do any more because she was self-employed, worked 12 hours a day, as well as was very active with her kids. (RT 9077) As to his feelings about

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[5] Jane Doe is Ms. Matthews (see RT 9022; see also RT 9061)

wanting to live or die, appellant mentioned to her that he does not want to die. (RT 9078) She noted that appellant had expressed concerns about other people if he were to die, such as his mother, who he is very worried about, and their grandmother, who is very ill. He also expressed concern about his children. (RT 9079)

3. James Park

James Park testified as an expert in the field of prison classification and adjustment to prison life. (RT 9094, 9105-9118) Mr. Park reviewed records regarding appellant from the California Department of Corrections, Alameda County Jail, and from the Sheriff's Department in Alameda County. (RT 9105-9106) In addition, he reviewed a report from the Alameda County Sheriff's Department regarding appellant having crossed a yellow line while he was in jail. This was a rule violation. He also reviewed the record of appellant while he was in Santa Rita, where some deputies found a Bic-type razorblade in one of his legal boxes. (RT 9106) He reviewed the prosecutor's opening statement in the previous trial. He learned that appellant was charged and convicted of murder - - felony murder involving sodomy. As a result, he was eligible to receive a sentence of life without possibility of parole or the death penalty. (RT 9107) He interviewed appellant last year for 30 to 45 minutes. He got a general feeling about appellant's attitude if he was granted life without possibility of parole. He noted that appellant's attitude appeared to be positive. (RT 9108) He noted further that appellant is willing to do the best he can to get along in prison if he is given life without possibility of parole. (RT 9108-9109) As to his opinion, if appellant receives a life without possibility of parole sentence, he will automatically be classified as a level four prisoner; that is, maximum custody, maximum security prisoner. (RT 9109) The long sentence, life

without possibility of parole, would result in appellant being classified as a level four prisoner.

There are four levels of prisons: one, two , three, and four. Level one is a forestry camp or a minimum service unit attached to any level prison. Appellant was involved in a level one camp in his previous incarceration and he did very well, excepting one note for a failure to report to work. (RT 9110-9111) A level two prison is a dormitory housing as is level number one. The difference is that level one has no perimeter security, i.e., no guns. Level three is a move up the rung, and you go into cell housing, which has double cells and, under current conditions, a double twelve-foot fence, and a 4500-volt electric fence around the perimeter. (RT 9111)

As to a level four prison, the kind of prison that appellant would be sent to, they are pretty similar to a level three. They both have a double fence, they have a 4500-volt electric fence around the perimeter. They have an impregnable officers' post in each of the housing units where a gun rifle can be brought to bear on prisoners in the exercise area inside. They can cover the outside exercise yard with a rifle as well. (RT 9111) Park stated that assuming a prisoner does not behave himself while he is at a level four, there are two facilities; one at Corcoran and the other at Pelican Bay, which have what is called the Security Housing Unit, or SHU. According to Park, the community outside of the prison is safe from a prisoner who is inside a level four prison. (RT 9112) Appellant's custody level will have a hyphen "R" for "restricted," which means that where he can go in the prison is limited given his status as someone who committed a sexual assault crime. He will not be able to be alone with female employees, whether it be guards or staff. (RT 9113) The kind of prisoners that make up the population in a level four prison are prisoners with very long sentences, that is, life without

possibility of parole or 180 years on consecutive counts. (RT 9114)

Based on his experience in the prison system, he has formed the opinion that appellant "will adjust well, he will be a good prisoner, and that he will - - if given the opportunity, he will work, be a good worker." As far as Park is concerned, a good prisoner stays out of trouble and he works. In his opinion, although this is not necessarily true, he also puts some of his spare time to self-improvement, whether it's religion or schooling or what have you. (RT 9114) Park reiterated that, in his opinion, appellant will make a pretty good prison adjustment. One of the bases for his opinion is the factor of age, as appellant is over 26 years of age, which is the breaking point for behavior in prisons in general. (RT 9115) Thus, he is over the age of being a difficult twenty-year-old. Two, his previous incarceration was very good and he worked well. The county jail incarceration was reasonably good, even though he has had a couple of disciplinary actions. (RT 9116) That is, the two new incidents: (1) crossing a yellow line in the prison setting would be considered a minor offense (RT 9116-9117); and (2) the razor blade incident in the jail setting, this does not affect his opinion. When he is in prison, he is going to be issued a razor blade or he is going to be able to buy them. They will have razor blades available at level four. As a prisoner in the general population, he can have razor blades and pens and pencils. (RT 9117-9118)

On cross-examination (RT 9119-9141) the prosecution inquired as to whether gangs are a problem in the state prison system. (RT 912-9124) Park said "Yes, sir." Park noted there are various kinds of gangs in prison, from Latino Hispanic inmates, the African-Americans have some gangs, some Caucasians have gangs, that is, they are Nazi gangs, so-called Aryan Brothers. He noted there are a variety of gangs (RT 9124), none of which

appear in appellant's record (RT 9145) There are also so-called Nazi gangs in jail. (RT 9124) Of note, if appellant was in a gang in prison, he would expect that to be in the record. (RT 9143) However, Park never saw any reference to gang membership in the record as to appellant. (RT 9145) This issue is the subject of Argument VII.

Park is opposed to the death penalty; has testified about 117 times for the defense in penalty phase trials, and has never testified for the prosecution, noting "The prosecution never asked me to testify." (RT 9128) He acknowledged that, after ten years, an LWOP prisoner could be reclassified to a level three; however, they would need a perfect record and a director's review. As to being reclassified, anything is possible. (RT 9129)

4. Kindra Marie Gregory

Kindra Gregory (RT 9149-9161) has lived with Mary Nadey in San Leandro since October 24th. (RT 9149) She met appellant in '94/'95 at Kragen Automotive. She was introduced to him by his brother, Greg, who was her boss at Kragen. (RT 9150) She moved back to Redding in 1995. They had telephone calls and exchanged letters. She became aware that he got arrested for a crime that occurred in Alameda and that he was in jail. (RT 9152) She initiated the first letter. She was close to the entire family and was getting to know him. (RT 9153) When she was in Redding, she was having problems in her relationship with Richard, who she eventually married. (RT 9153-9154) They had major communication problems. She would write to appellant and he would give her advice on how to handle the particular situation. Sometimes it was helpful and sometimes it was not. (RT 9154) Appellant gave her advice over a period of time. She married Richard in June 1999. (RT 9155) In his correspondence, appellant talked about his girls a lot. She noted that "[h]is children are his life. That is his

world right there in those kids."

On October 24th, she moved to Hayward. (RT 9156) She had married Richard in June but the marriage lasted only 3 months. (RT 9156-9157) During that 3-month period, she continued corresponding with appellant. He had nothing to do with the breakup of her marriage. She moved to the Bay Area to take care of her 2-year-old daughter, and lives with Mary Nadey. (RT 9157) Over a 4-year period, they have written more than a thousand letters. (RT 9157-9158) She considers herself very close friends with appellant. Since October 24th, she has visited appellant at jail every Sunday. (RT 9158) She noted that the relationship had changed from her standpoint. That is, "I fell in love with who he is as an individual." She noted that appellant would talk about issues with his kids that would come up and what to do about them. (RT 9159) She has seen him with his children at the North County Jail. She observed that he "loves his children." The kids miss and appear to love him. (RT 9160) Appellant has never mentioned anything about being in any kind of gang. She has never heard him make a disparaging remark about any people; any African-Americans, any Jewish people, or Hispanic people. (RT 9166)

Gregory indicated that appellant helped her out with a relationship that she was in; that is, he was a sounding board. (RT 9161-9162) The relationship was with Rodney Wise. (RT 9163) She notes that it just kind of happened that she ended up living with Mary Nadey. She moved into the Nadey residence on October 24, 1999, at which time appellant was housed in Santa Rita. (RT 9165) He wrote concerning his children as well as other matters. (RT 9166) Appellant had written her one letter saying he would have liked to see the look on her face if he had dropped his pants in visiting. (RT 9167; People's Exh. 15) Gregory stated that she fell in love with

appellant because of who he is. The prosecution stated he is a convicted murderer and sodomizer. (RT 9168) Gregory noted: "To me, he is not this person. He has not shown me or treated me in any way that would make me feel that he is this way." (RT 9169)

5. John Karpe

John Karpe (RT 9170-9186) and appellant are friends who go back to 1994. They met in the elementary school. (RT 9170-9171) They were good friends, and would drink beer, go fishing, and have fun. (RT 9172) In order to go fishing, they would cut school or go after school. They also, together, dated some sisters from the neighborhood who were a year or two younger. Moreover, they took drugs during this period of time which he describes as "drinking, smoke some pot, things of that nature, you know." They took meth and speed (RT 9173), and they were pretty close friends and more or less inseparable for six or seven years. (RT 9174) Appellant was into cake decorating. He did wedding cakes and birthday cakes. He was a "real artistic person." (RT 9175)

Appellant moved out of the area in'86 or '87. He lost contact with him for a couple of years. (RT 9176) After a while appellant came back. He had a wife or a girlfriend, Ann. (RT 9178) He never saw Ann take drugs, but he did observe her in a condition that, in his opinion, indicated she was taking speed. (RT 9178-9180) Appellant had a concern about the kids when they were with Ann. Appellant stated he was going to try to come back to Hayward and get his life together. (RT 9181)

He returned from Southern California, a second time, but his kids were not with him. Mr. Nadey said he wanted to get his life together and get his kids back. (RT 9182) He wanted to get his kids back because he loved his kids and wanted to get his kids away from the environment that he did

not feel was a very good and healthy environment for them, staying with the mother. Karpe also talked to appellant about his own problems. He noted he had a problem with substance abuse which he had under control, but not his alcoholism. He felt that appellant tried to help him. (RT 9183) He would talk with appellant about his life and family and his substance abuse and alcoholism. They were really tight friends, "damn near brothers." He notes that appellant is a "very feeling person," and that they have "a real strong bond." They were like brothers, and he would miss appellant very much. (RT 9184)

6. Ronald Fisher

Ronald Fisher (RT 9189-9193) is 26 years old and the first cousin of appellant. (RT 9189) He had a serious drug problem a number of years ago. (RT 9189-9190) He was addicted to methamphetamine. He would get letters from his cousin, Albert Nadey, while Nadey lived in Virginia and he was living with his parents in Hayward. (RT 9190-9191) In his letters, appellant attempted to influence him to stay off drugs. He was eventually arrested, got into a probation program, and finished. He was in rehab for 6 months. He is now drug free and works as a carpenter. (RT 9191) When appellant came back from Virginia, he saw him at a family function one Christmas. He had his three girls. In his opinion, appellant was a "loving father." The kids also showed love for him. He would occasionally socialize with appellant. (RT 9192) They would go out drinking and play darts. Appellant would always talk about his children and stated that he wished he had them all the time. (RT 9193)

7. Roy Plant

Reverend Roy Plant (RT 9198-9217) has been an ordained minister for 46 years with the Assembly of God Church. He has been the pastor at the

Lighthouse in Waterford, California for the past seven years, which is a non-denominational church. (RT 9199) In 1957, he accepted Jesus Christ as his personal savior. (RT 9199-9200) Plant has had occasion to do his church work in jails and has seen 75 to a hundred people in jail. (RT 9201)

Appellant is his great-nephew. He started seeing appellant in jail in April of 1996. He was called by his sister-in-law who asked him if he had heard about appellant and told him that he had been incarcerated. She asked for appellant to be in prayer and he told her that he certainly would and that he would go on the prayer list of the church. He advised that if appellant wanted, he would come and visit him. He had to be cleared through the chaplain's office. (RT 9202) He communicated through Chaplain Lynch. He did not see appellant much growing up except for the occasional Thanksgiving dinner. He married appellant's parents. He wrote appellant a letter and placed a little gospel tract in the letter which states the "Four Things God Wants You to Know." (RT 9203) Plant established through Chaplain Lynch a visitation schedule on Fridays. (RT 9204) He saw appellant in the Alameda County Jail on April 26, 1996. They were given a one-hour slot and this was the average time. (RT 9205) He saw appellant on a regular schedule starting in April of 1996 through June of 1998. He observed the tract in appellant's hands. They talked about Jesus Christ and religion. (RT 9206) They talked about the contents of the little tract. He prayed with appellant; appellant repented, acknowledged Jesus Christ as his personal savior. He noted that the Bible tells us we have to believe in our heart and make a confession with our mouth. (RT 9207)

As a born again Christian, a new-born person, there was a 28-day converts program which was, in effect, a lesson plan, and the convert would do one lesson a day for a 28-day period. It was a way of doing away with

old habits and establishing new habits. Appellant completed it. (RT 9208) He received a certification of completion. (RT 9209) Plant had a knee replacement and some other difficulties that prevented him from seeing appellant after June of 1998. (RT 9209) Appellant completed his studies and was accepted as a member into the church. There were things that appellant wrote and sent to him. As a young Christian, his mind was open, and he became very involved in the study of God's word. (RT 9211)

When appellant was baptized, Chaplain Lynch noted that appellant had asked about a water baptism. So they scheduled a baptism in September. There were three ministers to administer the water baptism. (RT 9212) The three ministers were Chaplain Lynch, Roy Plant, and a black minister. The baptism took place in the facilities right there. The prisoners were present, but they were in their cells. (RT 9213) He noted that after the baptism there was "an applause" by the prisoners. (RT 9214)

Exhibit D4 is the "We Build People" seminar which was a basic of setting up for bringing new members into the church. Giles Albert Nadey was included. D1 is the "Covenant of Fellowship." This is the application for church membership from the Lighhouse in Waterford. (RT 9215) This was appellant's application. (RT 9216) D3 is the weekly bulletin of the church, and this was called "Laws of the Lighthouse." It was something that appellant put together, which basically is Psalm 142. (RT 9216) Reverend Plant noted that there are a lot of prisoners who are not sincere with regard to accepting religion or talking about religion. In his opinion, he never got the impression that appellant was trying to scam him or was insincere. (RT 9217)

8. Giles Albert Nadey, Sr.

Giles Albert Nadey, Sr. (Nadey Sr.) (RT 9227-9261) is appellant's father. He lives in Warrenton, Virginia, with his three grandchildren, appellant's children: Krystal, age 9 ½; Lisa, age 11 ½; and Rose, who just turned 14. (RT 9228-9229) Their mother is Ann Marie Yeoman. Nadey Sr. is currently raising the three daughters, with help from appellant, who keeps in touch by phone, as well as from their grandmother, Mary Lou Nadey. (RT 9229)

Appellant was born on May 29, 1966 in Castro Valley, California. He is now 34 years old. Nadey Sr. was married to Mary Nadey when appellant was born. They had a second son three years later. (RT 9230) They lived in Hayward and Nadey Sr. worked as a patrol officer for the City of Hayward. The marriage ended in divorce. (RT 9231) Nadey Sr. moved back to the Sacramento area by himself and ended up working as an arson investigator with the Arden Fire Department. The children remained with their mother. (RT 9232) Appellant was about six and his brother, Greg, was three when they came to live with him. He got remarried. (RT 9233) They did things together as a family, such a Boy Scouts, YMCA things, and hiking trips in the Yosemite Valley. (RT 9234) When appellant was 11 or 12 years old, he worked with the fire rescue department and taught classes in fire rescue to the general public, including high school students. Appellant would be the "body" as the victim to be rescued from the location. (RT 9234-9235)

In 1984, appellant lived with his mother, and Gregory lived with him. (RT 9236) Nadey Sr. then went to work in Holtville, in southern California, south of the Imperial Valley. (RT 9237) He learned that appellant was in southern California with a young lady, and met her; Ann Marie and their 2-year-old daughter, Rosie. (RT 9238-9239) Nadey Sr. lived in the Imperial

Valley until 1999, when he moved to the state of Virginia. (RT 9239) He works for the K-Mart Corporation and serves as a volunteer for the fire rescue operation in his town of Warrenton. As a consequence, he has a special license plate for that type of work on his vehicle. (RT 9241) He is divorced from his third wife.

In May of 1994, appellant called to see if he could come live with him in Virginia. There was a standing offer by Nadey Sr. to Albert that he could come. (RT 9242) Appellant noted that he was having some problems. He had been in prison and had a problem with drugs. Ann, the mother of his children, also had a problem with drugs. (RT 9243) Appellant also had an inability to maintain regular employment because of his past history. Once an employer found out about his history, he would be let go. Appellant came to Virginia in May of 1994. He was on probation from California. (RT 9244) Nadey Sr. took him to Lori Sisson, who was his probation officer, which was a condition of appellant living in Virginia, as well as employment. (RT 9245) In September 1994, two of appellant's girls came to live with them; Rose, the eldest, and Lisa, the middle child. (RT 9246) They had discussed the conditions that the girls were living in and made a group decision to let them come to live with him in Virginia. That is, Rose and Lisa. Krystal joined them around Christmastime. (RT 9247) Ann brought Krystal out at Christmastime and stayed for three weeks. (RT 9247) Ann told appellant that she would come back after she had finished up some affairs in California, but she did not return until three years later. Appellant worked at restaurants, the housekeeping department of a hospital, and then in construction. (RT 9248) Appellant was a very caring and loving father. His children really love their father very much. (RT 9249)

The Kings - - Jeff King, Karen King, and their two girls, were their

next-door neighbors. Appellant formed a friendship with the Kings, particularly Jeff King. (RT 9250) On April 18, 1995, a deputy sheriff came to see him at work regarding his car. He had given permission to appellant to use the car. (RT 9251) The deputy sheriff noted that somebody had shot a gun out the car. He also got a call from appellant's probation officer, Lori Sisson. (RT 9252) Appellant informed him that he was going to get jailed for a violation of probation. (RT 9253) Appellant received notice to return to California. He had a conversation with Nadey Sr. about the shooting, wherein appellant noted that Jeff had been riding down the road and had shot out the car at a couple of birds in a tree. (RT 9254) Appellant advised that, in actuality, he was taking the blame for the situation, because he had been behind the wheel, and it was Jeff who had done the actual firing out the car. However, he did not want Jeff to get into trouble because Jeff had a wife and children and he wanted to go ahead and accept full responsibility for the incident because Jeff had no record. Appellant also knew he would be jailed for a violation of probation. (RT 9255) After he got out of jail, appellant left Virginia to go back to California for the probation violation via a Greyhound bus. (RT 9256) Appellant later called and advised that he was being released because they considered his time served in the Fauquier County Jail as the jail time necessary for the probation violation. (RT 9257)

Nadey Sr. learned at some point that appellant had been arrested for the murder of Terena Fermenick. (RT 9257) He learned of the situation from appellant. (RT 9258) At the last trial, he brought the grandchildren with him. Appellant would call and write his children. He tried to make contact at least every other week. (RT 9258) Appellant wrote the girls on a regular basis, either group letters or individual letters. He would send them hand drawn cards for birthdays, Christmases, and special occasions. (RT

9259) As to the conviction for murder, he noted that appellant "is my son." If he did what he did, "that's his responsibility." However, Nadey Sr. stated: "But I can't stop loving him for it. He's still my son." Further, he needs his son as a support factor with the girls. They are his children. Nadey Sr. took custody of the children to protect those children and to raise them in a manner that was satisfactory to all. Appellant has input and will continue to have input as long as he is around. Nadey Sr. noted: "he is a valuable part of their life." Nadey Sr. has lawful custody of the children. (RT 9261)

On cross-examination (RT 9261-9283), Nadey Sr. noted that appellant was disciplined but never abused. (RT 9262) His brother, Greg, had never been in trouble, excepting some traffic tickets. (RT 9267)

Before he left California for Virginia, Nadey Sr. told appellant that he could come live with him at any point in time, if he thought that he needed to get out of there. He noted that he would find him a job and get him a place to stay. This was an open invitation. (RT 9269) Nadey Sr. noted that appellant took him up on his offer. (RT 9270) He arrived in Virginia by bus in May of 1994. (RT 9272) He was transferred to probation officer Lori Sisson and was to abide by the standard conditions of probation; that is, no drugs, alcohol, weapons, contact with felons, and he was required to report for drug testing. (RT 9273) Appellant was advised by Lori Sisson that he had "tested dirty" on more than one occasion. (RT 9273) When he confronted appellant about using drugs, he admitted that he had. He noted that he had failed to comply with the terms and conditions of probation. (RT 9274) Sisson advised Nadey Sr. that appellant was going to be violated because of the "dirty urine" and that there was a gun situation that had to be investigated. When Nadey Sr. inquired as to why he had not been charged with the gun situation, appellant told him that law enforcement agencies

were still investigating. Nadey Sr. noted that he did not believe the story. Appellant stated: Dad, to tell you the truth, the truth is I'm taking the rap for Jeff. (RT 9275) When appellant was in jail for the probation violation, he noted that when the girls heard it was visitation day, they were chomping at the bit. They cleaned up their rooms, dressed up, and were ready to see him before Nadey Sr. was. (RT 9277)

Of note, the defense presented a certified abstract of the guilty plea by Jeff King in Fauquier County as to brandishing a firearm, which related to the Hendrix case. (RT 9283)

9. Marylou Nadey

Marylou Nadey (RT 9286-9321) is appellant's mother. He was born on May 29, 1966. He is her first born son and they have another son, Gregory Allen Nadey. She was married to Giles Nadey, Sr. (RT 9286) They separated and divorced when appellant was around four years old and Greg was one year old. Mr. Nadey lived in Sacramento and they shared custody of the boys. (RT 9287) She identified appellant's baby book (Defense Exhibit F) and his enrollment in the cradle roll department at their church - First Southern Baptist Church (Defense Exh. G). She also identified a drawing that appellant did for her when he was a few years old. (Defense Exh. H) (RT 9289-9290)

He stayed with his father until he was about fourteen years old, then he returned to her home. They had joint custody and she would see him every other weekend. Appellant came back because he was having problems, sneaking out at night and not obeying curfew, and there was a suspicion of drugs and possibly alcohol. (9291) He went to Bay Elementary in San Lorenzo, and participated in sports, wrestling and football. (RT 9292) She identified a photograph of him in Little League with Mount Eden in

1974. (Defense Exh. I-1) This was before he went to live with his father. (RT 9292-9293) He received an athletic award for sportsmanship and outstanding accomplishment at Jonas Salk School for basketball (Defense Exh. I-3), and received an award for exceptional achievement at Jonas Salk School (Defense Exh. I-2). (RT 9294)

When he returned from his father's, he attended Arroyo High School. (RT 9294) At age fourteen, when he came back from Sacramento, she noted that he was going through "some depression. She would drop him off at Arroyo High School and thought that he was going to school. (RT 9296) However, a few weeks later she learned that he was skipping classes and she received a call from the dean. (RT 9296-9297). The dean advised that he was not going to school at all. It became a problem getting him to school on a regular basis and he went to a continuation school, where he obtained his G.E.D. (RT 9297) She noted that appellant was using methamphetamine and pot. (RT 9298) She had no idea what was happening.

He was also very artistic. He liked cake decorating and he also liked sports. He got a job at a local grocery, Alpha Beta, doing cake decorating. He was sixteen at the time. (RT 9295) Defense Exhibit I-5 is a picture of a 25th wedding anniversary cake that he did for her brother and sister-in-law. (RT 9296)

At seventeen, after receiving his G.E.D., he left for Southern California. He started a relationship with a woman and they were going to try to start their life together as a couple. (RT 9299) The woman's name was Ann Marie Yeoman. She met Ann Yeoman after their first child was born. They would exchange phone calls and letters. (RT 9300) She received a letter from appellant when he was in Folsom Prison. (RT 9300-9301) This was the first time that she was aware that he was in prison. She was

disappointed and upset. (RT 9301) He then informed her of some good news; that is, his first daughter, Rose, was born. (RT 9301-9302) He said she was "a beautiful little girl." A year later, Albert, Rose, and her mother Ann, visited her. Appellant and Ann were never married. (RT 9302) They spent a few nights with each of the families. Rose was a year and a half old. Albert "loved her," and being a father was "very miraculous." When they returned south, she would hear from them by phone once a week or every two weeks. (RT 9303) They had another beautiful little daughter named Lisa. When Rose was two or two and a half, they visited with Lisa, when she was under a year old, at her place. (RT 9304) She observed Albert with his two daughters. Albert was a very caring person, very caring father, and he loves his kids very much. He took care of the children while they were at her house. (RT 9305).

She noted that appellant had a hard time keeping jobs in Southern California. (RT 9306) With several jobs, such as construction, working on a ranch, and daily-type jobs, when the employer became informed that he had a record, he could not keep the job. He did not have "steady employment." He and Ann Yeoman had a third child. (RT 9307) The third child's name was Krystal and she was born in March of 1990. (RT 9308) She never saw appellant act violently towards Ann Yeoman. (RT 9309) She observed appellant and Yeoman and the children during their visits, and noted that Albert was very caring towards the children. However, Ann Yeoman was not caring towards the children. She spent most of the time "on the couch watching TV." However, based on her observations, she noted that Yeoman appeared to love her children very much. (RT 9310)

At some point, appellant came to live with her in Hayward. (RT 9313) In July or August of 1995, he was living at her home. Her son, Greg, also

lived at the home. (RT 9314) They shared a room together. Appellant started working for a temporary agency and on the weekends. (RT 9315) At Christmastime in 1995, his daughters came from Virginia. She had purchased the plane tickets. She arranged with their grandfather that the girls would all come out for Christmas. She observed appellant with his daughters at that time, Christmas of 1995. (RT 9315) Appellant was very loving towards his daughters. She noted that appellant eventually wanted to get custody of the children and start raising them in the Bay Area.
The girls went back to Virginia. She was having bad financial problems and it was best for the children. (RT 9316)

She visits appellant every Sunday and Thursday. (RT 9316) They talk about everything. Appellant expressed to her that he loves his daughters very much and that he misses them. He tells her that he loves her all the time. He also sends her cards. (RT 9317) Defendant's Exhibit J is a hand-painted handkerchief, which is a picture that he drew for his girls. (RT 9318) Defendant's Exhibit I-6 is a Valentine's Day card that he drew for her and mailed to her while he was in custody. Exhibit I-7 is a birthday card that he made for her. Last March, the girls were out here. (RT 9319) She was able to observe the girls with their father. They had a great visit. They were all "I love you, I miss you daddy." (RT 9320) She notes that if Albert receives a sentence of life, she will bring the girls to visit him. If he is executed, she would lose "Pretty much everything. I mean this is my first born son, and I love him a great deal. It would just break my heart to see somebody other than the hand of God killing him. And it would – I know it would break his daughters' hearts, too." (RT 9321)

On cross-examination (RT 9338-9346) Mary Lou Nadey noted that there was a 2 ½ year age difference between appellant and his brother, Greg.

They attended the same schools and Greg had never been in any kind of trouble. (RT 9339) As to his pornography collection, that was a side of him that she never knew anything about. (RT 9345-9346) She noted she had exorbitant phone bills in November and December of 1995 as a consequence of calls to 1-900 type numbers. (RT 9346)

On re-direct (RT 9346-9347), Mary Nadey noted that when she had both boys living with her, friends came over. However, both boys had access to the telephone. (RT 9346-9347)

10. Rose Marie Nadey

Rose Marie Nadey (RT 9322-9329) is fourteen years old and lives in Virginia with her grandfather and two sisters, Krystal and Lisa. (RT 9323) She attends school at Southeastern and is in the seventh grade. She attended the last trial in March, but before that, she had not seen her father in three years, because he was in jail. (RT 9324) She and her sisters talk with their father on the telephone and he writes letters to them. He usually calls every other week. He talks to all three of them separately for a period of time. They talk about school and how she is doing. She talks to her father about the problems she has. (RT 9325) She usually has her books with her when they talk. Sometimes they talk about the situation he is in. She usually asks what is going on and sometimes he tells her. She attends church. (RT 9326) Appellant tells her that she has to have faith and trust in the Lord. He encourages her to go to church. He writes letters to her individually as well as to the girls "all together." Sometimes she writes back to him. She wants to keep receiving letters from him and wants to be able to continue talking to him on the phone. (RT 9327) She loves her daddy and her daddy has told her that he loves her. (RT 9328)

11. Lisa Marie Nadey

Lisa Marie Nadey (RT 9331-9334) is eleven years old. (RT 9331-9332) She lives in Virginia with her grandpa and attends C. Bradley Elementary School. (RT 9332) She lives with her grandfather in Virginia, along with her two sisters. She talks to her dad about once a week. They talk about how she is doing in school and her grades, as well as her homework. (RT 9333) When she has a problem with her homework, he will give her help. (RT 9333-9334) They also talk about church, and she goes to church. He tells her to keep going to church and that she should believe in God. She wants to continue talking to him on the telephone. They write letters and she wants to keep doing that. She loves her daddy and notes that "he loves me." (RT 9334) On cross-examination, she notes that when she sees her daddy in jail, she feels "sad." (RT 9335)

12. Krystal Marie Nadey

Krystal Marie Nadey (RT 9336-9338) is nine years old and in the fourth grade. (RT 9336) She lives in Virginia. She talks to her dad on the phone. She also receives letters. They talk about her school work and grades. On her birthday and Christmas, he sends her like money or candy and presents. (RT 9337) She thinks her daddy loves her and she loves and misses her daddy. (RT 9338)

D. Prosecution Rebuttal Case

1. William Borland

William Borland (RT 9380-9387) is employed with the Alameda County Sheriff's Department. On November 6, 1998, he was assigned as the transport officer at Santa Rita, transporting inmates to and from court. (RT 9380) He had thirteen inmates, including two from administrative segregation, or ad seg, inmates, both who were in chains and leg irons, one

by the name of Gonzalez and the other by the name of MacArthur. They were both on the van. (RT 9381-9382) When they got to the jail facility a struggle ensued between Gonzalez and MacArthur. He observed Gonzalez on top of MacArthur, slashing him back and forth with some kind of object that turned out to be a razor blade. (RT 9383) Gonzalez had the razor blade between his teeth. He had MacArthur pinned down against the left side of the van on the floorboard. Gonzalez was still in his leg irons and waist chains. (RT 9384) After the attack, Borland noted that the facial area of inmate MacArthur was extremely cut up along with some slashes alongside the neck area. A broken portion of the blade was recovered from Gonzalez. MacArthur was then taken to the North County Jail infirmary for medical treatment. (RT 9386)

Under cross-examination (RT 9388-9390), Borland confirmed that the inmates involved in this incident were Gonzalez and MacArthur. (RT 9388) He knew Gonzalez to be a very dangerous person. Gonzalez was using a razor blade and trying to pass his blood to MacArthur, as Gonzalez was an HIV-positive prisoner. In his 22 years in a jail guarding situation, he has seen a lot of items that have been used as weapons by jail inmates. (RT 9389) This includes shanks, or makeshift weapons made out of styrofoam cups as well as wood items, such as pencils and anything metal. He noted that inmates are allowed to have pencils inside their cells to write letters. (RT 9390)

2. <u>Jeff Brosch</u>

Jeff Brosch (RT 9393-9404) is an inspector with the Alameda County District Attorney's office. (RT 9393) He served a court order from the prosecution, Anderson, signed by Judge Delucchi, on the custodian of records at Pac Bell in Oakland. The order was for a certified copy of the

phone records from Mary Nadey at 20975 Royal Avenue in Hayward. (RT 9394) The phone number at issue was (510) 732-0944. On December 9, 1999, he received a certified copy of those particular phone records for the months of November and December 1995. People's Exhibit 52A is the declaration of the custodian; People's Exhibit 52B is a certification page, indicating the records are true and correct copies of the record. (RT 9395) People's Exhibit 52C is a copy of the court order. (RT 9396) People's Exhibit 52D were the records reflecting the subscriber information requested and the total calls. Inspector Brosch reviewed the individual calls listed on the phone records from December 7, 1995. Numerous calls were through Guyana, South America. (RT 9397-9399) He also reviewed phone calls for December 14 to Guyana as well as the phone call to Guyana on December 15. (RT 9400) In addition to the international phone calls to Guyana, there are also international calls during the month of December to Hong Kong as well as Great Britain. (RT 9401) People's Exhibit 53 is a cassette tape reflecting the date of December 14 and two telephone numbers. (RT 9401-9402) These are the numbers that he taped from phone calls to Guyana on December 7th. (RT 9402) A transcript was to be prepared to memorialize the record as to the tape (Exhibit 53). (RT 9402) (CT 17541; Exhibit 53A [transcription]) The Court then instructed the jury that it would admit a portion, just the basic, what the introduction was, and then the jury would hear that and the defense would cross-examine. (RT 9403) The Court noted that it was not going to let the tape in, but stated that it would allow the transcript in. (RT 9404) (CT 17541; Exhibit 53A [transcription]).

On cross-examination (RT 9404-9409), Brosch noted that he informed the prosecution, Anderson, that "these were dirty phone calls." He obtained the numbers from the phone company. The number at issue was

(510) 732-0944, which belonged to Mary L. Nadey, the defendant's mother. (RT 9405) The address at issue was 20975 Royal Avenue in Hayward. This is where the defendant lived when he was arrested. Brosch did not know how many phones there were in the house, nor did he know who, in addition to appellant, lived in the house. Further, he does not know the person who actually made the phone calls. He made the recording on December 14, 1999. However, the phone calls they were talking about took place in 1995. (RT 9406) The phone numbers to Hong Kong and Great Britain were not good anymore. (RT 9407)

3. Christopher John Giles

Christopher John Giles (RT 9414-9420) is 19 years old. On December 26, 1992, he was living in Costa Mesa in Orange County with his family, along with other families, in a shelter home. He was eleven years old at the time. (RT 9414) He is from the south, Alabama. He knew a man by the name of Giles Nadey. Mr. Nadey was also living at the shelter with his girlfriend and a couple of kids. They were friendly, as they used to go to the movies together on the weekend. (RT 9415)

On one occasion, they were getting ready to go to the movies and were in the car. He was with his sister, who was 12 at the time. Mr. Nadey was coming up to the car with his girlfriend. (RT 9416) He tried to get in, but was unsuccessful. (RT 9416-9417) Giles noted they played games with Mr. Nadey and "messed around" with him. The reason they played games was that Mr. Nadey "was always cool with us," he would tell them jokes. Mr. Nadey and Annie were their friends. "So we are just messing around with them. Oh, we'll lock them out." They were laughing about it. At some point, Mr. Nadey pulled down his pants and he saw his penis. (RT 9422) Giles said Mr. Nadey put it up against the window of the car. Giles "flipped

out" and turned away. His sister said it was "disgusting." (RT 9417) Mr. Nadey and the woman were laughing. (RT 9422)

A week later, he told his mother and she called the police. He did not remember an incident where Mr. Nadey asked him to come into his bedroom and take a look at his boxer shorts. (RT 9418) However, after a while, he did tell the police what had happened on December 26, 1992. He believes that he told the police officer the truth. He also acknowledged that last year he had been convicted in Orange County Superior Court of assault with a deadly weapon. (RT 9419) He received county jail time, but was placed on probation, and is still on probation. (RT 9420)

4. Martin Patrick Carver

Martin Carver (RT 9424-9428) is a sergeant with the Costa Mesa Police Department. (RT 9424) On January 5, 1993, he interviewed Christopher Giles. (RT 9425-9426) Giles told him that appellant had exposed himself to Giles while they were getting ready to attend a movie the day after Christmas. On a second occasion on the same day, he had asked Christopher if he wanted to go to his bedroom and look at some new boxer shorts he had gotten, at which time he took off his pants in order to retrieve those boxer shorts. (RT 9427)

On cross-examination (RT 9428-9429), he testified that Giles did not inform him that his sister was in the car with him. Christopher Giles also told him that appellant's penis was not erect. He noted further that appellant and the woman, Ann Yeoman, were laughing. (RT 9428) As to the second incident, where appellant took off his clothes and went to fetch something in the closet, appellant did not make any gestures toward Giles or anything like that. Moreover, when he went over to the closet to get some shorts down from the closet, his penis was not erect. (RT 9428-9429)

ARGUMENT

I. THE JUDGMENT MUST BE REVERSED DUE TO *BATSON/WHEELER* ERROR

A. Introduction.

"[R]acial discrimination in the selection of jurors 'casts doubt on the integrity of the judicial process,' and places the fairness of a criminal proceeding in doubt. [¶] The jury acts as a vital check against the wrongful exercise of power by the State and its prosecutors. The intrusion of racial discrimination into the jury selection process damages both the fact and the perception of this guarantee." *Powers v. Ohio* (1991) 499 U.S . 400, 411 (citations omitted).

When a prosecutor removes members of a racial, religious, or ethnic group from a jury based on group bias, this action violates the defendant's right under Article 1, section 16 of the California Constitution to a trial by a jury drawn from a representative cross-section of the community. *People v. Wheeler* (1978) 22 Cal.3d 258; *People v. Turner* (1986) 42 Cal.3d 711, 715-716. The prosecutor's action also violates the equal protection clause of the Fourteenth Amendment to the United States Constitution. *Id.* at 716; *Batson v. Kentucky* (1986) 476 U.S. 79, 89; *Miller-El v. Cockrell* (2003) 537 U.S. 322.[6] "The exclusion by peremptory challenge of a single juror on the basis of race or ethnicity is an error of constitutional magnitude requiring reversal." *People v. Silva* (2001) 25 Cal.4th 345, 386.

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[6] In addition to contravening the Equal Protection Clause, discrimination in jury selection during a capital trial such as this violates the defendant's right to a fundamentally fair and reliable trial under the Eight Amendment and the Due Process Clause of the Fourteenth Amendment.

Nadey is a Caucasian male.[7] The prosecutor used peremptory challenges to remove five African-American jurors from the panel. Nadey made timely *Batson/Wheeler* motions, and the trial court expressly found a prima facie case of discrimination as to the five prospective African-American jurors: Doris Cornist, Harriet Davis, Lorraine Dokes, Victoria Esoimeme, and Alice Faye Soard. After requiring the prosecutor to justify the challenges, the trial court concluded that the proffered "excuses are facially and racially neutral," and concluded further as follows: "I don't believe that any of these jurors are excused because of their race, and there is justification and cause for the excuse of each juror." (RT 3723). The Court stated further that "[i]n the Court's opinion, there is no showing of any exclusion of these jurors because they were black females," and denied the *Wheeler* motion. (RT 3723) As to the subsequent *Batson/Wheeler* motion regarding Doris Cornist, the Court determined that the stated reasons for exclusion by the prosecution were "genuine and facially neutral" and denied the motion. (RT 3753-3754) The Court failed to perform a comparative juror analysis. (RT 3723, 3753-3754)

This Court is obliged to perform a comparative juror analysis to determine whether the prosecutor's stated reasons for the exclusion of the five African-American female jurors were a pretext for racial discrimination under both the state and federal Constitutions. *See People v. Vines* (2011) 51 Cal.4th 830, 848 ("'[b]oth the state and federal Constitutions prohibit the use of peremptory challenges to remove prospective jurors based solely on group bias,'" citing and quoting from *People v. Stanley* (2006) 39 Cal.4th

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[7] A Caucasian male may challenge the exclusion of minority jurors on the basis of race or ethnicity. *Holland v. Illinois* (1990) 493 U.S. 474, 476-477.

913, 936); *People v. Lenix* (2008) 44 Cal.4th 602 at 607; *Miller-El v. Dretke* (2005) 545 U.S. 231, 241; *Boyd v. Newland* (9th Cir. 2006) 467 F.3d. 1139, 1150. In *Vines*, this Court reiterated *Batson*'s three-step process to determine whether the striking of a juror is the result of purposeful racial discrimination in violation of both the state and federal Constitutions. *Vines*, 51 Cal.4th at 848.

The United States Court of Appeals for the Ninth Circuit has held "that, under the clearly established Supreme Court precedent of *Batson*, comparative juror analysis is an important tool that courts should utilize on appeal. . . ." *Boyd v. Newland*, 467 F.3d at 1150. The comparative jury analysis is a centerpiece of the *Batson* analysis. *Boyd*, 467 F.3d at 1150. The correct comparison is between the struck jurors and the jurors who were "permitted to serve." *Miller-El v. Dretke*, 545 U.S. at 241; see also, *Boyd*, 467 F.3d at 1147-1148 (a court must "compare the prospective juror who was stricken with the other prospective jurors who were not").

The comparative juror analysis necessarily involves an evaluation of the voir dire transcript and juror questionnaires to determine whether the prosecutor's stated nonracial grounds are, in fact, a pretext for striking the juror because of his or her race. *Kesser v. Cambra* (9th Cir. 2006) 465 F.3d 351, 360 (where the court concluded that "an evaluation of the voir dire transcript and juror questionnaires clearly and convincingly refutes each of the prosecutor's nonracial grounds, compelling the conclusion that his actual and only reason for striking [the juror] was her race." (footnote omitted)). It is well settled that a "[c]omparative juror analysis is an established tool at step three of the *Batson* analysis for determining whether facially race-neutral reasons are a pretext for discrimination." *Crittenden v. Ayers* (9th Cir. 2010) 624 F.3d 943, 956. In order for the defendant to show

"'purposeful discrimination' at *Batson*'s third step," the test is "whether race was a substantial motivating factor" in the prosecutor's exercise of the challenge. *Cook v. LaMarque* (9th Cir. 2010) 593 F.3d 810, 815, citing to *Purkett v. Elem* (1995) 514 U.S. 765, 768. Under *Batson*, the purposeful discrimination in the exercise of a single peremptory challenge violates the Constitution. *See Batson*, 476 U.S. at 95 ("'A single invidiously discriminatory governmental act' is not 'immunized by the absence of such discrimination in the making of other comparable decisions'" (citations omitted); *see also United States v. Vasquez-Lopez* (9th Cir. 1994) 22 F.3d 900, 902 ("[T]he Constitution forbids striking even a single prospective juror for a discriminatory purpose.") Application of the comparative juror analysis to this case reflects that the prosecutor struck each of the five African-American potential jurors because of their race.

B. Comparative Juror Analysis – Macro View

A comparative juror analysis reflects that each of the five prospective jurors in issue were peremptory challenged by the prosecution on the basis of their race as African-Americans. Such a comparison is predicated on the juror questionnaires and voir dire testimony of the twelve seated jurors and five alternate jurors as contrasted with the questionnaires and voir dire testimony of the five challenged jurors. The juror questionnaires and the voir dire testimony, including the Court's *Hovey* voir dire and questioning by counsel, of the selected jurors and alternate jurors are as follows:

JUROR	QUESTIONNAIRE (CT PAGES)	VOIR DIRE (RT PAGES)
SITTING		
Juror No. 01	16332-16350	3130-3157
Juror No. 02	16351-16369	3011-3030
Juror No. 03	16370-16388	1091-1114
Juror No. 04	16389-16407	1151-1180
Juror No. 05	16408-16426	1022-1046
Juror No. 06	16427-16445	3196-3217
Juror No. 07	16446-16464	1402-1425
Juror No. 08	16465-16484	3632-3657
Juror No. 09	16485-16503	1047-1064
Juror No. 10	16504-16522	1260-1287
Juror No. 11	16523-16541	2386-2404
Juror No. 12	16542-16560	2310-2330
ALTERNATE		
Alt. Juror No. 1	16561-16579	1533-1551
Alt. Juror No. 2	16580-16597	1738-1760
Alt. Juror No. 3	16598-16616	1381-1401
Alt. Juror No. 4	16617-16635	1488-1509
Alt. Juror No. 5	16636-16654	1713-1737

The five challenged jurors also provided juror questionnaires and were subject to voir dire examination, including *Hovey* voir dire by the trial judge followed by questions from both the prosecution and defense, as reflected in the record noted below:

JUROR	QUESTIONNAIRE (CT PAGES)	VOIR DIRE (RT PAGES)
Doris Cornist	002-020	2077-2093
Harriet Davis	021-039	3326-3351
Lorraine Dokes	040-058	2663-2686
Victoria Esoimeme	059-077	3277-3294
Alice Faye Soard	078-096	3604-3622

During the two *Batson-Wheeler* hearings[8], the prosecutor, Jim Anderson, stated his reasons for challenging the five excluded jurors. (RT 3720-3723, 3745-3745, 3749-3754). The Court determined that the defense had made a "prima facie case" under *Batson-Wheeler*, placing the burden on the prosecution "to justify the reasons" for the challenges. (RT 3720) The prosecution stated that the fundamental reason for the challenges as to the excluded jurors was "based upon what they [the excluded jurors] would do in the penalty phase. It's got nothing to do with race." (RT 3752) The prosecutor stated that "the only reason that any challenges were exercised by the prosecutor" was predicated on the juror's "relative strengths or weaknesses regarding the penalty of death." (RT 3752) The prosecution was seeking a juror who would be predisposed to "impos[e] the death penalty." (RT 3751-3752)

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[8] During the *Batson-Wheeler* hearings, the Court made clear that the denial of the motion was based on both state (*People v. Wheeler* (1978) 22 Cal.3d 258) and federal (*Batson v. Kentucky* (1986) 476 U.S. 79) grounds. (RT 3750) Moreover, based on this Court's decision in *People v. Vines* (2011) 51 Cal.4th 830, 847 n.7, the Court deems a *Wheeler* motion to also be a *Batson* motion.

In an extended question, the prosecutor asked each juror where they stood philosophically on the death penalty based on a scale of one (1) to ten (10), with one representing Mother Teresa and ten representing Rambo or the Terminator. The prosecutor explained further that one on his scale is somebody who sees "the good in everybody" and effectively "turns the other cheek," i.e., forgive and forget, similar to Mother Teresa. A ten on the scale of the prosecutor is one who ascribes to the "eye for an eye in the Bible," i.e., Rambo or the Terminator. The prosecutor asked each juror to "choose a number between one and ten" which best exemplified how they felt about the death penalty. (See, e.g., RT 1414-1415) As noted, each juror and prospective juror was asked to choose such a number on the prosecutor's scale, and each did so as reflected below. Moreover, the Court endorsed both the prosecutor's question and scale by a number of times either clarifying the question or adding to the question, for example as follows:

[i.e., Juror No. 10]:

> THE COURT: But on a scale of one to ten, if Mother Teresa was number one, would never execute anyone - - . . . and Rambo was number 10, he'd kill everybody - - . . . you'd be right in the middle; right?

To which the prospective juror responded: "Right." (RT 1276).

[i.e., Alternate Juror No. 5]:

> THE COURT: So you would be about a five, approximate?
>
> PROSPECTIVE JUROR: Yeah, I guess I'd be about a five.
>
> THE COURT: Yeah, you'd be willing to take in both sides?

PROSPECTIVE JUROR: Yeah.

(RT 1730); and

[i.e., Prospective Juror Cornist]:

THE COURT: Ms. Cornist - - . . . then you're a six?

PROSPECTIVE JUROR [CORNIST]: Yeah.

THE COURT: We're not asking as it relates to this case.

PROSPECTIVE JUROR: Oh, no, just - -

THE COURT: Just as if we were just talking. So you'd be a six?

PROSPECTIVE JUROR: Yeah.

(RT 2091)

The question posed by the prosecutor and the response of each juror and alternate juror with regard to where they stood on the prosecutor's scale of 1 to 10 regarding the death penalty is reflected in the record as follows:

JUROR	**RT PAGES**	**NUMERICAL RANKING**
SEATED JUROR		
Juror No. 01	3145-3146	8
Juror No. 02	3022-3023	5
Juror No. 03	1105-1106	6-7
Juror No. 04	1164-1165	6
Juror No. 05	1037-1038	5
Juror No. 06	3212	5
Juror No. 07	1414-1415	5

JUROR	RT PAGES	NUMERICAL RANKING
Juror No. 08	3648-3649	5-7
Juror No. 09	1060	5
Juror No. 10	1275-1276	5
Juror No. 11	2399	6
Juror No. 12	2324-2325	6
ALTERNATE JUROR		
Alt. Juror No. 1	1545-1546	5
Alt. Juror No. 2	1752-1753	7
Alt. Juror No. 3	1393-1394	10
Alt. Juror No. 4	1502-1503	7-7½
Alt. Juror No. 5	1729-1730	5

In sum, based on the prosecutor's rating scale and the responses provided by the sitting jurors and alternate jurors, none of the jurors or alternates were ranked as 1, 2, 3, or 4. The rankings as to the jurors and alternates on the prosecutor's scale regarding the death penalty were as follows: eight were ranked as a 5; one was ranked as a 5-7; three were ranked as 6; one was ranked as 6-7; one was ranked as 7; one was ranked as 7-7½; one was ranked as 8; and one was ranked as 10. Hence, the large majority of the sitting jurors and alternate jurors were ranked, according to the prosecutor's scale, between 5 and 7½ (i.e., fifteen out of the seventeen jurors/alternates). There is only one ranked 8 (Juror No. 1) and only one ranked 10 (Alternate Juror No. 3) who had a numerical ranking higher than 7½ on the prosecutor's scale.

The five prospective jurors who were challenged by the prosecution also responded to his inquiry regarding where they stood on his scale as a death penalty juror and provided a numerical ranking predicated on the prosecutor's scale, which is reflected in the record as follows:

CHALLENGED JUROR	RT PAGES	NUMERICAL RANKING
Doris Cornist	2090-2091	6
Harriet Davis	3345-3346	10
Lorraine Dokes	2678-2679	8
Victoria Esoimeme	3290-3292	5
Alice Faye Soard	3618-3619	7

It follows that a comparison of the numerical rankings on the prosecutor's scale between the excluded jurors and the sitting jurors and alternates reflects that clearly the exclusion by the prosecution of prospective juror Lorraine Dokes, who had a numerical ranking of 8, and prospective juror Harriet Davis, who had a numerical ranking of 10, were pretextual. The prosecutor's stated goal was to seat the jurors who were predisposed to "impos[e] the death penalty" (RT 3751-3752), a predisposition reflected in the responses by prospective jurors Davis and Dokes' numerical ranking of 10 and 8, respectively. As to the 17 sitting jurors and alternate jurors, there was only one juror/alternate who had a numerical ranking of 10, i.e., Alternate Juror No. 3, and one juror/alternate who had a numerical ranking of 8, i.e., Juror No. 1. The fact that there were only two jurors/alternates who had a ranking of 10 and 8 demonstrates that the exclusion of prospective jurors Davis and Dokes, similarly ranked, were pretextual. Moreover, the same statistical comparison wherein the bulk of the jurors and

alternates had a numerical ranking of 5 to 7½ is also suggestive that the exclusion of Victoria Esoimeme, ranked a 5; Doris Cornist, ranked a 6; and Alice Fay Soard, ranked a 7, are similarly pretextual.

C. Comparative Juror Analysis – Micro View

After the trial court determined that the defense had made "a prima facie case" under the *Wheeler* decision, the Court placed "the burden" on the prosecution "to justify the reasons" for his challenges of the five black/African-American female jurors. (RT 3720, 3745-3746, 3749-3750) The prosecutor then gave his reasons for the challenge of each black female juror. (RT 3721-3723, 3752-3753)

1. Harriet Davis

The prosecutor acknowledged that on his scale regarding the death penalty, Harriet Davis "was a ten philosophically." (RT 3722) The sole reason that the prosecutor gave for excusing Davis was the response in her questionnaire that "the death penalty was a last resort" which he interpreted to mean would substantially increase his burden of proof to beyond a "shadow of a doubt" as reflected in the following:

> When somebody tells me that, that tells me I'm going to have to sit there and, you know, prove something beyond any possible shadow of a doubt.

(RT 3722) In her questionnaire, Davis did respond to question no. 1 under "Attitudes Concerning the Death Penalty" with respect to her general feelings regarding the death penalty that it should be used "as the last resort." (CT 021 at 036)

In voir dire, the prosecutor asked Davis to expand on her response regarding the death penalty being used "as the last resort." (RT 3335) Davis noted that a decision to impose the death penalty is irreversible and hence,

one should "try to be absolute as far as your decision without any remorse." (*Id.*) She noted further that once a person has been "sentenced to death" and "they die, you cannot bring them back." (*Id.*) Davis also noted that when making the decision to impose the death penalty, "a person must seriously take into consideration the consequences" of their decision, as reflected in the following:

> [O]nce a person - - if they've been sentenced to death, once they die, you cannot bring them back. You cannot change your mind on that issue. So, therefore, a person must seriously take into consideration the consequences of the response of yes or no, death penalty or life sentence.

(RT 3355)

The prosecutor inquired further whether the use of the term "absolute" by Davis referred to the kind of proof that Davis would require for the determination of guilt or innocence. (RT 3335-3336) Davis responded "[n]o," and stated further that the use of the term absolute referred to the "particular sentence" and whether "this person" should "actually go to the death chamber." (RT 3336) That is, as she originally noted, "you want to try to be absolute as far as your decision without any remorse" because of the seriousness of the consequences. (RT 3335) Moreover, Davis acknowledged, in response to the Court's inquiry, that this case was serious enough in her judgment that the death penalty may be appropriate. (RT 3338-3339) Further, in response to the prosecutor's inquiry, following up on the questionnaire as to "whether California should retain the death penalty" if it were placed on the ballot in the next election, Davis responded "I believe in it." (RT 3339)

The responses by Davis in voir dire belie the stated concern by the prosecutor regarding the response of Davis in her questionnaire that the death penalty was a "last resort" which means that his burden of proof would be substantially increased beyond "any possible shadow of a doubt." Moreover, a comparison of the responses by two other jurors, Juror No. 12 and Juror No. 2, with respect to their attitudes concerning the death penalty as reflected in their questionnaires and voir dire testimony, reflects that the stated reason by the prosecutor to exclude Davis was pretextual.

(a) Comparison as to Juror No. 2

Juror No. 2 noted in response to question number 1, under "Attitudes Concerning the Death Penalty," that her general feelings regarding the death penalty were that while she believed in the death penalty, the guilty verdict would have to be "without question" as follows:

> Believe in the death penalty but I would have to be certain that the guilty verdict was without question.

(CT 16351 at 16366)

In voir dire, the prosecutor followed up on her questionnaire as to her stated belief in the death penalty, but that she would require that guilt "be proven without a doubt" and sought clarification of her response. (RT 3018) Juror No. 2 responded further that "the facts would have to prove it enough to me to put somebody to death." (*Id.*) The Court interrupted, advising that "[t]he burden of proof on the prosecution is only beyond a reasonable doubt" and "not beyond all possible doubt." (*Id.*) Juror No. 2 confirmed that she would not hold the prosecution to a higher standard than the law required. (*Id.*) Further, she noted that it would be emotionally "draining" on her to impose the death penalty. (RT 3019) Moreover, she stated several times

that it would be "difficult" for her to impose the death penalty, but also noted that she "could do it if it was proven to [her]." (RT 3019-3020)

In her questionnaire, as to question number 4 under "Attitudes Concerning the Death Penalty," Juror No. 2 stated that if the issue of whether California should retain the death penalty was placed on the ballot in the coming election, she would vote for it. (CT 16366-16367) During voir dire, she again confirmed her belief in capital punishment as follows: "I believe in capital punishment." (RT 3026) She noted further that the reason for her belief in capital punishment is her judgment that it is "a just punishment." (RT 3027) As to the prosecutor's scale regarding the death penalty, she ranked herself as a 5. (RT 3022-3023)

A comparison of the responses provided by Juror No. 2, as reflected in her questionnaire concerning the death penalty as well as her voir dire responses as contrasted with the responses provided by Davis reflects that their responses are substantially the same. Both stated their belief in the death penalty. Both stated that if the issue of whether California should retain the death penalty was placed on the ballot, they would vote for it. Juror No. 2 responded to the questionnaire concerning question number 1, under "Attitudes Concerning the Death Penalty" as to her general feelings regarding the death penalty, that she would have to "be certain that the guilty verdict was without question." In follow up by the Court, she acknowledged that she would not hold the prosecutor to a higher standard than the reasonable doubt standard. Davis noted in response to the questionnaire concerning question number 1, under "Attitudes Concerning the Death Penalty" that her general feelings are that it should be imposed "[a]s the last resort," but noted that she would not hold the prosecutor to a higher standard on the question of guilt or innocence. She simply noted the seriousness of

the imposition of the death penalty, as it involves an irreversible decision. By the same token, Juror No. 2 noted that she would have difficulty and that it would be emotionally draining for her to impose the death penalty. This is similar to the concerns expressed by Davis that a person must seriously take into consideration the consequences of imposing the death penalty given the finality involved. As noted, Davis ranked herself as a 10 philosophically on the prosecutor's scale, while Juror No. 2 ranked herself as a 5 on the scale.

Given that Davis and Juror No. 2 both stated that they believed in the death penalty and would vote to retain the death penalty, the serious consideration they would give with respect to the decision of whether to impose the death penalty in this case, and their respective expressions indicating they would not increase the prosecutor's burden as to the guilt or innocence determination, it follows that the prosecutor's stated reason for excluding Davis is pretextual. This is particularly true when comparing the similarities of their responses, both in their questionnaires and in voir dire, but, more importantly, when considering the numerical value on the prosecutor's scale regarding the death penalty, wherein Davis is a 10 and Juror No. 2 is 5, a comparative juror analysis demonstrates that the stated reason for excluding Davis is a pretext.

(b) Comparison as to Juror No. 12

The responses to the questionnaire and in voir dire by Juror No. 12 reflects that her attitude toward the death penalty was substantially the same as that of Harriet Davis, who was excluded.

In her questionnaire and voir dire testimony, Juror No. 12 noted both that she believed in the death penalty and that if the issue of whether California should retain the death penalty was placed on the ballot in the coming election, she would vote for it. (CT 16542 at 16557-16558) In her

questionnaire, as to question number 1 under "Attitudes Concerning the Death Penalty," regarding her general feelings, Juror No. 12 stated: "I believe death penalty is warranted." (CT 16557) She noted further as follows:

> There are times in life, when all options to redeem and rehabilitate an individual has not worked. Death penalty should then be retained as an option.

(CT 16558) This statement is akin to the statement by Davis, that the death penalty should be used "as the last resort." (CT 036)

In voir dire, Juror No. 12 noted in response to an inquiry by the prosecutor concerning her general feelings regarding the death penalty, that she believed that it was a "deterrent." (RT 2318) She also explained her response in the questionnaire that the death penalty should be retained as an option when redemption and rehabilitation have not worked, noting further that when you are presented with such a situation, "you have to make a decision" and if it is proven "that there is no rehabilitation for the person of any kind, then that [the death penalty] should be an option." (RT 2318-2319) She also noted that the death penalty should be reserved for "first degree murder where you have planned and carried out a heinous act" involving "some special circumstances." (RT 2319-2320) She further noted that in making a decision as to whether the death penalty should be employed, she would look "at all the evidence" before making a decision. (RT 2322-2323)

Hence, Juror No. 12's responses in voir dire regarding her attitude toward the death penalty track those expressed by Davis in her voir dire testimony. She is in favor of the death penalty, particularly when

rehabilitation has not worked, when the murder is particularly heinous, involving special circumstances, and after looking at all the evidence. On the prosecutor's scale regarding the death penalty, she ranks herself as a 6. (RT 2325) Based on a comparison of her attitude regarding the death penalty, as reflected in her juror questionnaire and voir dire, as contrasted with that of Davis, who was excluded, it becomes clear that the exclusion of Davis was pretextual. This is particularly true in light of the similarities of their responses in the juror questionnaire and voir dire reflecting on their attitudes toward the death penalty and the fact that Juror No. 12 ranked a 6 on the prosecutor's scale, while Davis ranked a 10.

2. Lorraine Dokes

The prosecutor stated the following reasons for challenging Lorraine Dokes: (1) she "was very weak on the death penalty;" (2) he considered her to have "a liberal bent" as her husband ran a homeless shelter which may influence her decision making regarding "the defendant's past life;" and (3) her sister died of AIDS and drugs, which would make her familiar with "drug abuse," which might have some application "in this particular case" because there was "a possibility of drug use." (RT 3722-3725)

On the prosecutor's scale regarding the death penalty, Dokes ranked an 8. (RT 2678-2679) Both in her questionnaire and during voir dire, as to the death penalty, she noted that she did not feel "that taking a person's life is always the answer," but noted further that "each situation is different" and that it depends on the circumstances. She also noted that it depends on the nature of the crime. (RT 2672; CT 055) She believed that she could withstand the pressures of being in open court facing the defendant, and causing her vote for the death penalty to be recorded. (RT 2676-2677) However, she was "not sure" if she would vote to retain the death penalty if

it was placed on the California ballot in the coming election. (CT 056) The prosecutor asked no questions in voir dire regarding drug abuse or the use of drugs. (RT 2671-2679) In her questionnaire, she acknowledged that her sister died of AIDS and drug abuse, noting that it impacted her family as follows: "trying, ups and downs." (CT 053) She also noted her general feelings regarding the use of illegal drugs as "[i]t's stupid." (*Id.*) Moreover, she noted that her opinion of people who use methamphetamines or other illegal drugs as being "[s]tupid." (CT 054)

The responses to the questionnaires and voir dire testimony of Jurors No. 3, 4, and 7, as discussed below, reflect that their attitudes toward the death penalty were substantially similar; that they had what would be considered a "liberal bent;" and had similar experiences and/or attitudes concerning the use of drugs, and hence, the challenge of Dokes was pretextual.

(a) Comparison as to Juror No. 3

Juror No. 3 had a Bachelor's degree in psychology. (CT 16370 at 16374, 16381.) As to the death penalty, he noted in his questionnaire that "sometimes it needs to be used," but he did not "think it's a blanket cure for crime." He would vote to retain the death penalty if it was placed on the California ballot, but qualified this support, noting that "sometimes it needs to be used." (CT 16385-16386) In voir dire, he noted that the death penalty should be "based on individual circumstances" and should not be applied on a "blanket" basis. (RT 1099-1100) On the prosecutor's scale regarding the death penalty, he considered himself to be "between a 6 and a 7." (RT 1106) In his questionnaire, he acknowledged that his brother "smoked pot" for a period of time and that, in fact, he smoked pot in Amsterdam, noting further that "when in Rome . . ." He noted further that as to illegal drugs, if

somebody wants to use them, they should be able to do so but should be "responsible & keep them away from my family." (CT 16383) As to people who use methamphetamines or other illegal drugs, he noted "there must be something wrong." (CT 16384)

(b) Comparison as to Juror No. 4

Juror No. 4 was a substitute teacher who had a degree in biology. (CT 16389 at 16392-16393) As to the death penalty, she noted that "in certain circumstances, I believe in it - - depends on the case." (CT 16404) She was "not sure" if she would vote to retain the death penalty if it was placed on the California ballot in the coming election, noting "I believe in it in certain cases - - I would have to be convinced that was the best option." (CT 16405) On the prosecutor's scale regarding the death penalty, she considered herself to be a 6. (RT 1165) In her questionnaire, she acknowledged having experimented with marijuana in high school but noted she did not have an opinion on the use of methamphetamines or other illegal drugs, but noted that "I don't prefer to use drugs, so I don't." (CT 16403)

(c) Comparison as to Juror No. 7

Juror No. 7 was a retired education administrator with 25 years of experience. She had a Doctorate degree in education from USC, a Master's degree in teaching math from the University of Santa Clara, and a Bachelor's degree in child development from UC Berkeley. (CT 16446 at 16449-16450) As to the death penalty, she noted "[i]t is justified in some cases." (CT 16461) She is "not sure" if she would vote to retain the death penalty if it were placed on the California ballot in the coming election, but noted she "would probably vote in favor," but noted further she "would read both sides carefully." (CT 16462) On the prosecutor's scale regarding the death penalty, she ranked herself as a 5. (RT 1414-1415) As to her attitude

regarding drugs, she noted that her stepfather was an alcoholic when she was a teenager. (CT 16459) Years ago, she tried marijuana. (*Id.*) She noted further that two of her sons were arrested for marijuana violations while teenagers. (CT 16455) As to her opinion concerning people who use methamphetamine or other illegal drugs, she noted that "[t]hey are playing with fire." (CT 16460)

Excluded juror Lorraine Dokes ranked higher on the prosecutor's scale regarding the death penalty at an 8, while Jurors No. 3, 4, and 7 ranked 6-7, 6, and 5, respectively. The prosecutor's stated reason for excluding Dokes was largely due to her being "weak" on the death penalty, yet she ranked higher than retained Jurors No. 3, 4, and 7, and her responses to the questions concerning the death penalty would be considered either stronger or similar to those of the excluded jurors. As to the impact of drugs in her life, she opined that the use of drugs was "stupid," which is similar to the responses of the retained jurors who, for the most part, also had some experience with drugs in their family situations. Finally, the so-called "liberal bent" attributed to Dokes because her husband worked for a homeless shelter, was similar in kind to Juror No. 3, who had a degree in psychology; Juror No. 4, who worked as a substitute teacher; and Juror No. 7, who was a retired educator with a Ph.D. in education from USC. Given this comparison as to Jurors No. 3, 4, and 7, the exclusion of Dokes was pretextual.

3. Victoria Esoimeme

The prosecutor stated the following reasons for excusing Victoria Esoimeme: (1) she vacillated between death and LWOP, noting that the death penalty does not bring back the victim; (2) he considered her to be a

"wild card" and did not want to take a chance on her when there were other "better qualified jurors as far as imposing the death penalty;" (3) she is a welfare worker and, consequently, "liberal;" and (4) he suspected that there might be "a language barrier." (RT 3721-3722)

A review of the record and a comparison with the other seated jurors and alternates reveals the prosecutor's stated reasons for excusing Esoimeme are pretextual.

In voir dire and in her questionnaire, Esoimeme stated her general feelings regarding the death penalty to be that if you kill another person intentionally, you should also be killed because the person that he or she killed did not have a second chance. (CT 059 at 074; RT 3287-3288) She expanded on this response by noting that "if you kill someone without any reason," e.g., no argument or fight, that is, "just kill somebody without any reason," the person "should be killed." (RT 3287-3288) She noted further that you have to "look at it again" and pose the rhetorical question "would killing that person bring the person back?" She noted: "my mind is opened." (RT 3288) She acknowledged that as to life without parole or the death penalty, "[t]hey are both open to me." (RT 3290) In her questionnaire, she did note that she would vote for retaining the death penalty if it was placed on the California ballot in the coming election. (CT 075) On the prosecutor's scale regarding the death penalty, she ranked herself as a 5. (RT 3291-3292)

Of note, eight other jurors noted above (six sitting jurors and two alternate jurors) were also ranked as a 5 on the prosecutor's scale, but they were not excluded. The prosecutor noted that she "vacillated" between death and LWOP. However, in voir dire with the trial judge, she noted that she would "really look into the case" before she could choose the death

penalty, but acknowledged that as to both penalties, death or LWOP, she could keep both penalties open. (RT 3279-3280)

The other eight jurors who ranked themselves as a 5 on the prosecutor's scale[9] also expressed some reservation regarding whether they were inclined to impose the death penalty or LWOP (*see* Juror Nos. 2, 5, 6, 7, 9, 10; and Alternate Juror Nos. 2 and 5, as discussed below).

(a) Comparison as to Juror No. 2

Juror No. 2 stated that she believed "in the death penalty" but noted that before imposing it, she would "have to be certain that the guilty verdict was without question." (CT 16351 at 16366) Juror No. 2 also noted that she would vote to retain the death penalty if it was placed on the ballot. She also noted how "difficult" and "draining" it would be for her to impose the death penalty. (RT 3019-3020)

(b) Comparison as to Juror No. 5

Juror No. 5 noted that he believed in capital punishment and would vote to retain the death penalty if it was placed on the ballot. (CT 16408 at 16423-16424) As to voting to impose the death penalty, Juror No. 5 noted "I think that would give me great personal difficulty." (RT 1023) Juror No. 5 noted further that it is "one thing to say that" you are in favor of capital punishment, but it is "another thing to be the one that makes the decision to do that to another human being," e.g., vote to impose the death penalty. (RT 1032-1033)

(c) Comparison as to Juror No. 6

Juror No. 6 noted that "[d]epending on the circumstances," the death

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[9] Juror Nos. 2, 5, 6, 7, 9, 10, and Alternate Juror Nos. 1 and 5 ranked themselves a 5 on the prosecutor's rating system as noted above, *ante*, pp. 130-131.

penalty "can be an acceptable form of punishment." (CT 16427 at 16442) During voir dire, Juror No. 6 reiterated that he was not "philosophically opposed to the death penalty," but noted that it must be "the right circumstances." (RT 3201)

(d) Comparison as to Juror No. 7

Juror No. 7 noted that the death penalty "is justified in some cases." (CT 16446 at 16461) Further, she was not sure if she would vote to retain the death penalty if it were placed on the ballot, but noted that she would probably vote in favor of it, but "would read both sides carefully." (CT 16462) As far as imposing the death penalty, in voir dire, she noted that "[i]t would depend totally on the circumstances." (RT 1414-1415)

(e) Comparison as to Juror No. 9

Juror No. 9 noted that "[i]f a person takes another life intentionally, they don't deserve to live. Further, she noted that she would vote to retain the death penalty if it was placed on the ballot. " (CT 16485 at 16500-16501) Juror No. 9 noted that she would not automatically pick the death penalty every time, but noted that life without parole would be an option, but her decision would depend on "the facts." (RT 1055-1056, and 1062-1063)

(f) Comparison as to Juror No. 10

Juror No. 10 noted that he felt "for the death penalty" and would vote to retain the death penalty if placed on the ballot. (CT 16504 at 16519-16520) In voir dire, in determining whether to impose the death penalty, Juror No. 10 noted that "you have to hear the evidence" which may "make a difference." (RT 1266-1267) You want to hear all the evidence in the penalty phase before making a decision between death and LWOP. (RT 1267-1268) Juror No. 10 believed that the death penalty should be used only in the most severe cases or for the very worst kind of case. (RT 1270)

(g) Comparison as to Alternate Juror No. 1

Alternate Juror No. 1 noted that she was "generally pro death penalty," but was not sure if she would vote to retain the death penalty if placed on the ballot because "[s]ometimes I think there are extenuating circumstances." (CT 16562 at 16576-16577) In voir dire, as to the imposition of the death penalty, she noted that "it depends on the crime," as well as "how bad the world is at the time." (RT 1540) She agreed that every murder is not a death penalty case. (RT 1541)

(h) Comparison as to Alternate Juror No. 5

Alternate Juror No. 5 noted that he was "in favor of" the death penalty and would vote for retaining the death penalty if placed on the ballot in the coming election. (CT 16636 at 16651-16652) Alternate Juror No. 5 noted that he would consider both the death penalty and life without possibility of parole as possible penalties. (RT 1719) The reason that he was in favor of the death penalty was due to his belief that "laws and punishment [are] to keep the world from anarchy." (RT 1722) Alternate Juror No. 5 noted that he did not grow up in such a "great area," and hence, he understood "how people could do certain things, commit crimes, the environment they grew up in, been beaten since they were a kid and drug use, et cetera, et cetera," which is why he ranked himself "a 5." (RT 1730)

In sum, the six sitting jurors and two alternate jurors who ranked as a 5 on the prosecutor's scale regarding the death penalty, i.e., the same numerical ranking as Victoria Esoimeme, who was excluded, all expressed some type of reservation and/or concern with regard to the imposition of the death penalty. Hence, the so-called vacillation between the death penalty and LWOP by Esoimeme, who also ranked as a 5, is similar to and/or akin with the reservations and/or concerns expressed by the eight remaining

jurors/alternates. It follows that the exclusion of Esoimeme was pretextual.

While the prosecutor stated that he considered Esoimeme to be a "wild card" and that there were other "better qualified jurors" as far as imposing the death penalty, a review of the eight other jurors/alternates who also ranked as a 5 on the prosecutor's scale regarding the death penalty reflects that each of these jurors had similar reservations and/or concerns with respect to imposing the death penalty, and hence, each of them similarly would be considered wild cards with respect to the imposition of the death penalty, just like Esoimeme.

Moreover, while the prosecutor characterized Esoimeme as a "liberal," given her employment as a "welfare worker," her position and responses reflected that she was no more liberal than Juror No. 7, who had a doctorate in education from USC, a Master's in teaching math from the University of Santa Clara, and an undergraduate degree in child development from UC Berkeley, and had worked 25 years as an administrator in education. (CT 16446 at 16449-15450, and RT 1402-1425) Juror No. 7 also ranked as a 5 on the prosecutor's scale and served on the jury.

As to the purported "language barrier" referenced by the prosecutor (RT 3722), her juror questionnaire reflected that she had lived in Alameda County for 17 years, had 4 children ages 8 to 17 who were in the third, eighth, tenth, and twelfth grades, respectively, that she worked as an eligibility technician for Alameda County for 10 years, and that she had an AA degree from the College of Alameda in business administration. (CT 059 at 060-063) Notwithstanding the fact that she was born in Nigeria, given her educational background, the educational background of her four children, and her longstanding employment history with Alameda County, and AA degree, the record does not support the prosecutor's suspicion that

she had a "language barrier." (RT 3722) Hence, based on a comparison with the eight seated jurors/alternates who also ranked as a 5 on the prosecutor's scale, and a review of the record, the prosecutor's stated reasons for excluding Esoimeme were pretextual.

4. Alice Faye Soard

The prosecutor stated the following reasons for excusing Alice Faye Soard: (1) he "had doubts whether she could personally impose" the death penalty; (2) she is a liberal who works as a social worker for special education; (3) her brother was murdered about five years ago which did not seem to "phase her;" (4) she never married, and hence, the prosecutor concluded that "she has no family values" relative to the "penalty phase;" and (5) the murder of a minister's wife "meant nothing to her," reflecting on "victim impact." (RT 3721)

A review of the record and a comparison with the other seated jurors and alternates reveals that the prosecutor's stated reason for excusing Soard are pretextual. On the prosecutor's scale regarding the death penalty, she ranked herself as a 7. (RT 3618-3619) Hence, she ranked higher than 11 other jurors noted above (9 sitting jurors and 2 alternate jurors) who ranked 5 and 6 on the prosecutor's scale, but they were not excluded.

As to the "doubts" expressed by the prosecutor as to whether Soard "could personally impose a death penalty," he noted that in response to the Court's inquiry as to whether she was "the type of person" who can impose the death penalty, there was a "15-second pause" before she gave her answer. (RT 3721) The record reflects that the Court did inquire of Soard as to whether she was "the type of person that could ever vote to execute another human being?" Soard responded, "I'm not certain." She stated further, "I'm not absolutely, positively sure." (RT 3606) In follow up by the

Court, she noted that "the circumstances" would "influence" her greatly. That is, the "[c]ircumstances" of the crime. (RT 3606-3607) In response to the Court's further inquiry, whether she could execute somebody if she felt that somebody deserved it, she responded "[y]es." In follow up she reiterated, "I still say I could." (RT 3607) In the questionnaire, with respect to question number 1 under "Attitudes Concerning the Death Penalty," she stated that as to her "general feelings regarding the death penalty," she had "not really thought about it until today." (CT 078 at 093) She stated further, "I guess I believe that in some cases it should be needed." Further, she noted that if retaining the death penalty was placed on the California ballot in the coming election, she would vote for it, because she believed "it may be needed in some cases." (CT 094) In response to the prosecutor's inquiry, she noted that given a serious crime or terrible crime, that is, "just the crime" and "nothing else," she stated "yes" to the question posed by the prosecutor whether the death penalty could possibly apply. (RT 3614-3616) She further responded to the prosecutor's inquiry regarding returning a death verdict in open court in front of the defendant, and stated "[y]es," she could do that. (RT 3617-3618) Any reservations or concerns that the prosecutor surmised Soard may have expressed regarding the imposition of the death penalty were no different than those expressed by the eight jurors who ranked themselves as a 5 on the prosecutor's scale, discussed above, *ante* at pages 144-148. Hence, the purported "doubts" expressed by the prosecutor regarding whether Soard could personally impose a death penalty are pretextual.

As to the stated reason that Soard is a "liberal" who works as a "social worker for special education children," the record reflects that Soard is a self-employed administrator who has been educated and trained as a

teacher with an emphasis in "special education." (CT 078 at 081-082) The responses contained in her questionnaire reflects her work in special education, not social work. (CT 078-096) In college, as well as in graduate school, she received her education in social sciences. (CT 082) In her voir dire testimony, she noted her work as a teacher in junior high school and that in graduate school she did a "reading study," helping children "with learning disabilities learn to read." (RT 3620-3622) There is no reference to Soard working as a social worker in either her questionnaire or voir dire. Moreover, there is nothing in her questionnaire and/or voir dire testimony that makes her anymore "liberal" than Juror No. 4, the substitute teacher (see discussion, *ante*, p. 141, or Juror No. 7, the retired educational administrator (discussed *ante*, at 141-142 and 145, both of whom ranked as a 5 on the prosecutor's scale and served on the jury.

As to her brother being murdered about five years ago, according to the prosecutor this did not seem to phase her one bit. (RT 3721) In response to the Court's inquiry, she noted that her brother had been killed in a drug-related incident. Further, in response to the Court's inquiry as to whether she could separate the death of her brother from this case, she noted: "I can separate them." (RT 3605) In response to the prosecutor's inquiry regarding the killing of her brother being somewhat drug-related, she noted that no one was ever caught as a consequence of his killing, and noted further that it took place in North Carolina, not Oakland or Alameda County. (RT 3619) She stated further that "[a]ll the information" she received regarding the death of her brother came from her other brother and that she did not "personally get to talk to the police." (RT 3620) Finally, the prosecutor inquired as to whether she was "close to the brother who was murdered," to which she responded that they had "been separated as grown people a long

time." She stated further that they had been "a pretty close family," and in response to the prosecutor's inquiry as to whether she still felt a "kind of loss for having lost a family member" under such circumstances, she responded "[s]ure." (RT 36260) While one of the reasons given for excusing Soard was the murder of her brother, which according to the prosecutor, did not "phase her," he retained Juror No. 1, who was the victim of a rape (CT 16341; RT 3146-3150), but noted that she "kind of blamed herself for" the rape, which is why she "never followed through" with the prosecution. (RT 3154) By comparison, the retention of Juror No. 1, who was a rape victim but did not press charges, and the exclusion of Soard, whose brother was murdered in a drug-related incident in North Carolina, reflects that the challenge of Soard was a pretext.

As to the stated reason that Soard "never married" and hence, according to the prosecutor had "no family values" which would be of help to the prosecution "in the penalty phase," based on a comparison, the stated reason is a pretext. (RT 3721) The juror questionnaire of Soard does reflect that she is a 53-year-old single female who has never married. (CT 079) By comparison, Alternate Juror No. 1 is similarly a single 50-year-old female who has never married. (CT 16562) Morover, Alternate Juror No. 1, on the prosecutor's scale, regarding the death penalty ranked as a 5. (RT 1545-1546) Given that they are nearly the same age, both female, both single, and both have never been married, and further that Soard ranked on the prosecutor's scale as a 7, while Alternate Juror No. 1 ranked as a 5, the stated reason for exclusion that Soard having never been married reflects that she has no family values would also apply to Alternate Juror No. 1. However, the prosecutor retained Alternate Juror No. 1 and excluded Soard. Further, Juror No. 9 was a 37-year-old single female who had never married

and also ranked as a 5 on the prosecutor's scale regarding the death penalty. Given that Juror No. 9 had never married, this, according to the prosecutor, reflects that she has "no family values" relative to the death penalty. However, the prosecutor retained Juror No. 9, while excluding Soard. Given that the prosecutor retained two jurors, one sitting and one alternate, both of whom were single females ages 37 and 50, respectively, who had never been married, i.e., according to the prosecutor, "no family values," who on the prosecutor's scale ranked as a 5, while Soard ranked higher as a 7, it follows that the stated reason for excluding Soard based on her marital status is a pretext.

As to the prosecutor's final stated reason for exclusion that he inquired of Soard whether the murder of a minister's wife meant anything to her and Soard purportedly responded that "it meant nothing to her" which, according to the prosecutor, reflected on victim impact (RT 3721). A review of the record reflects that the stated reason is a pretext. In his recitation of reasons justifying the exclusion, the prosecutor specifically said that, as to Soard, "I asked her if a minister's wife being murdered meant anything. She says it meant nothing to her, . . ." (RT 3721) A review of the voir dire (RT 3604-3622), specifically the voir dire examination conducted by the prosecutor (RT 3613-3620), reveals that the prosecutor did not inquire and/or ask Soard whether "a minister's wife being murdered meant anything" to her. In her questionnaire, under "Attitudes Concerning the Death Penalty," there are two questions relative to whether the prospective juror had "seen, heard, or read anything" regarding "the killing of Terena Fermenick, a minister's wife" in 1966 (question number 5) and whether they were familiar with "the Church of Christ" on Santa Clara Avenue in Alameda (question number 6) (CT 094), Soard checked "No," that she had

neither seen, heard, or read anything regarding the killing of the minister's wife. Further, she checked "No" with regard to whether she was familiar with the "Church of Christ" on Santa Clara Avenue in Alameda. (CT 094) Hence, Soard had no knowledge regarding the killing of Terena Fermenick, a minister's wife, nor was she familiar with the location where the killing took place, at the Church of Christ on Santa Clara Avenue in Alameda. Six of the twelve sitting jurors and two of the alternate jurors also had neither seen, heard, nor read anything about the killing of the minister's wife, and moreover, were not familiar with the "Church of Christ" on Santa Clara Avenue in Alameda. (CT 16348, 16405, 16424, 16443, 16520, 16558, 16595, 16662)

Moreover, defense counsel, Mr. Horowitz, did inquire as to whether, given that Soard was active in her church, the killing and the sodomy of a minister's wife would affect her differently than if she was the wife of somebody with a different occupation, to which she responded in the negative. Defense counsel asked the following question and received the following negative response:

> Q. [Horowitz]: We are talking in this case about the killing and the sodomy affecting a minster's wife.
>
> Since you are active in your church, does the fact that it is a minister's wife affect you differently than if she was the wife of somebody with a different occupation?
>
> A. [Soard]: No.

(RT 3621) The record here does not support the prosecutor's stated reason that the murder of a minister's wife "meant nothing to her" (RT 3721), the question posed and answer provided simply reflects that Soard, who was active in her church, would not treat the death of a minister's wife differently

than the death of a wife of someone in a different occupation. (RT 3621) Specific to Terena Fermenick, the minister's wife, six sitting jurors and two alternate jurors similarly had not "seen, heard, or read anything" regarding the killing of the minister's wife, nor were they familiar with the location of the killing, at the Church of Christ on Santa Clara Avenue in Alameda. Consequently, the stated reason for exclusion, that the murder of a minister's wife meant nothing to her, is not supported by the record. (RT 3621) Hence, the stated reason for exclusion by the prosecutor was a pretext.

In sum, the stated reasons for exclusion by the prosecutor, when compared to the record and the responses by the retained jurors and alternates, reveals that the stated reasons for exclusion as to Ms. Soard were pretextual.

5. Doris Cornist

The prosecutor stated the following reasons to support his challenge of Doris Cornist as follows: (1) she indicated that things in childhood can cause problems later in life, e.g., penalty phase evidence; (2) she works for the welfare department and thus, she is a liberal; (3) she has animosity toward the police, as indicated on page 8 of her questionnaire; (4) she has a rich-versus-poor attitude, again reflected on page 8 of her questionnaire; (5) her questionnaire is misleading; and (6) there were better qualified jurors more willing to impose the death penalty. (RT 3752-3753)

A review of the Cornist questionnaire and voir dire testimony, as compared with that of the seated jurors and alternates, reflects that the stated reasons for excusing Cornist were pretextual. On the prosecutor's scale regarding the death penalty, Cornist ranked herself as a 6. (RT 2091) In her questionnaire, under "Attitudes Concerning the Death Penalty," with respect to question number 1 concerning her general feelings regarding the death

penalty, she stated: "[i]f you do the crime – you should pay the price!" (CT 002 at CT 017) Further, she noted that if the issue of retaining the death penalty was placed on the California ballot in the coming election, she would vote for it. (CT 018) In voir dire, she reiterated that she believed in capital punishment as follows: "I believe if you commit a crime - - I believe in capital punishment - - that you should die, also." (RT 2083) She also observed that depending on the evidence, both options, e.g., the death penalty or life without possibility of parole, she noted that she could impose either penalty, depending on whether "the evidence supports it." (RT 2082) She also reiterated her belief in the death penalty as follows: "I believe that if you go out and kill someone and you're found guilty, then death is a possibility for you, also." (RT 2086-2087) However, she noted further that both options remained open, as reflected in the following: "I have an open mind enough to determine whether it should be death or life." (RT 2089) Given her belief in capital punishment and ranking on the prosecutor's scale of a 6 as to the death penalty, as contrasted with the six seated jurors who ranked as a 5 and the two alternate jurors who ranked as a 5, it follows that the prosecutor's stated reasons for excusing Cornist were pretextual. That is, Cornist ranked higher than 8 of the selected jurors and alternates on the prosecutor's scale, yet she was excused, which indicates that the challenge was pretextual.

As to the first stated reason for the challenge, that things in childhood can cause problems later in life, e.g., what the prosecutor termed "penalty phase evidence," a number of other jurors expressed this belief. For example, the juror questionnaire at page 12, question number 4 inquires into this belief as follows:

> Do you believe that the manner in which a child

is raised or treated has an impact on who they turn out to be as adults?

If yes, how so?

Juror No. 1 responded: "[s]ometimes" (CT 16344); Juror No. 2 responded: "[y]es – abused children have a tendency to be abuser" (CT 16363); Juror No. 3 responded: "yes. I believe people are raised to become like their surroundings" (CT 16382); Juror No. 4 responded: "[y]es. I believe that children treated wrongful or unfairly may be prone to act differently than those who were not in that type of situation. i.e., learned examples." (CT 16401); Juror No. 5 responded as follows: "[v]alues taught or observed when growing up is what determines how a person will be as an adult" (CT 16420); Juror No. 6 responded: "[y]es. Issues of self confidence" (CT 16439); Juror No. 7 responded: "[y]es – nurturing has an impact though it is not known exactly what makes some people from a very poor background succeed." (CT 15458); Juror No. 8 responded: "[y]es. How a child is treated or raised has a big impact on what kind of adults they become." (CT 16477); Juror No. 9 responded: "[y]es, in most cases. If a child is raised in a criminal free + loving home, they will in turn have the same values." (CT 16497); Juror No. 10 did not respond to this question (CT 16516); Juror No. 11 responded as follows: "[i]n part, yes. But you can't always tell whether effects will be positive or negative." (CT 16535); Juror No. 12 responded: "[t]o an extent, yes. We are all products of the way we were raised. But, this does not mean that we can blame all of our "wrong doings" on our past." (CT16554). Alternate Juror No. 1 responded as follows: "[y]es. I believe abused children turn into abusive adults. But I also believe that as adults the cycle can be broken" (CT 16573); Alternate Juror No. 2 responded: "[y]es.

The "nurturing" you receive during childhood & adolescence has a big impact on how you be as an adult." (CT 16591); Alternate Juror No. 3 responded: "no" (CT 16610); Alternate Juror No. 4 responded: "as the twig is bent" (CT 16629); and Alternate Juror No. 5 responded: "[y]es. Environment plays a big role in who a person is." (CT 16648) Thus, the vast majority of the jurors and alternates selected had the view that the manner in which a child is raised, "whether positive or negative," has an impact on who they turn out to be as adults. This belief is precisely the belief that Cornist expressed in responding to question number 4 on her questionnaire (CT 014) as well as in responding in voir dire, when she stated "I believe that almost everything that's happened in your childhood can affect you. But then on the other hand, I believe that we can overcome a lot of it, also." (RT 2092) Hence, the belief expressed by Cornist regarding the impact on how a child is raised or treated can affect how they turn out to be as an adult was largely the response given by the majority of the seated jurors and alternates, yet constituted the basis for the prosecutor to challenge her, which reflects that the stated reason for the challenge was pretextual.

As to the characterization of Cornist as a liberal because she works for the "welfare department," a review of her questionnaire (CT 002-020) and her voir dire testimony (RT 2077-2093), reflects that she is no more liberal than Juror No. 4, the substitute teacher discussed above (*ante*, p. 141) or Juror No. 7, the retired educational administrator discussed above (*ante*. pp. 141-142 and 145).

As to the animosity towards the police department as indicated on page 8 of her questionnaire, she noted in response to question number 8 that her grandson's father, Roy Cosby, was killed in his home by an Oakland policeman and that no one had been charged for this crime, i.e., "this

murder." (CT 010) Of note, the prosecution asked no questions regarding this incident (RT 2086-2091) nor did the Court (RT 2077-2086) or defense counsel (RT 2091-2092).

As to the rich-versus-poor attitude, which the prosecutor concluded did not bode well for his witnesses, other jurors expressed concern regarding the inequality in the criminal justice system with respect to rich-versus-poor. For example, Juror No. 5 noted that the "underpriveleged (sic) seem more likely to commit crime" (CT 16416). Juror No. 12 also expressed concerns regarding rich-versus-poor as follows: "I believe it is universal that poverty can lead to crime. This in no means excludes well-off members of society from committing crimes either, it simply means if people lives are improved, they are less likely to engage in criminal behavior." (CT 16550). Alternate Juror No. 5, while noting that the criminal justice system was "fairly effective," noted further that it was "not very equal in terms of social status or wealth." (CT 16644) Further, Alternate Juror No. 5 also noted that "[o]nly people in difficult circumstances (i.e., disadvantaged communities, rougher neighborhoods; environment)" are more likely to commit violent crimes. (CT 16644) Hence, Jurors No. 5 and 12 and Alternate Juror No. 5 also note a rich-versus-poor attitude relative to the criminal justice system and the problems in today's society regarding a particular group being more predisposed to commit violent crimes. Thus, Cornist did not stand alone with respect to her rich-versus-poor attitude as reflected in the responses by Jurors No. 5 and 12 and Alternate Juror No. 5.

While the prosecutor claimed that Cornist was misleading as to her questionnaire, he noted that this was "as far as I'm concerned," however he provides no specifics as to how he was misled with respect to the responses on the Cornist 19-page questionnaire (CT 002-020). Further, the voir dire

examination by the prosecutor fails to reveal how or why he concluded that Cornist misled him on her questionnaire. (RT 2086-2091)

As to the prosecutor's stated reason that there were "better-qualified jurors more willing to impose the death penalty," as noted, Cornist ranked as a 6 on the prosecutor's scale regarding the death penalty. However, eight of the seventeen jurors and alternates ranked as a 5 on the prosecutor's scale, and hence, comparing the ranking of Cornist, who was a 6, as contrasted with the eight other jurors/alternates who were ranked as 5, it follows that Cornist was certainly "better-qualified" with respect to imposing the death penalty than the other eight jurors/alternates who ranked as a 5 on the prosecutor's scale regarding the death penalty. Under these circumstances, for the reasons outlined above, the stated reasons by the prosecutor for excusing Cornist were pretextual.

D. Conclusion

Whether analyzing the prosecutor's stated reasons for the peremptory challenge of each of the five African-American jurors is based on a comparative macro view or a comparative micro view, the result is the same, to wit, the prosecutor's stated reasons for challenging the African-American jurors, either individually or in the aggregate, were pretextual. *See Hernandez v. New York* (1991) 500 U.S. 352, 365 ("In the typical peremptory challenge inquiry [into discriminatory intent], the decisive question will be whether counsel's race-neutral explanation for a peremptory challenge should be believed") That is, the comparative juror analysis as outlined above, whether macro or micro, demonstrates that the prosecutor's reasons for challenging each of the five African-American prospective jurors were pretextual, and hence, the prosecutor violated the *Batson/Wheeler* doctrine. It is well settled that the purposeful discrimination in the exercise

of a single peremptory challenge violates the Constitution. *See Batson*, 476 U.S. at 95; *see also United States v. Vasquez-Lopez* (9th Cir. 2006) 22 F.3d 900, 902 ("[T]he Constitution forbids striking even a single prospective juror for a discriminatory purpose"). Application of the comparative juror analysis to this case, both macro and micro, reflects that the prosecutor struck each of the five African-American potential jurors because of their race.

II. MULTIPLE RULINGS BY THE TRIAL COURT REGARDING A NON-DISCLOSED DEFENSE DNA CONSULTING-EXPERT AND RELATED PROSECUTORIAL MISCONDUCT, RESULTED IN A TRIAL THAT WAS FUNDAMENTALLY UNFAIR AND A DEPRIVATION OF DUE PROCESS OF LAW, AND VIOLATED A HOST OF APPELLANT'S OTHER STATE AND FEDERAL CONSTITUTIONAL RIGHTS, AS WELL AS HIS STATE STATUTORY RIGHTS

A. Introduction.

Appellant retained a consulting-expert in forensic DNA evidence, Dr. Ed Blake, to assist in the evaluation of and challenge to the prosecution's DNA evidence. Dr. Blake was not called as a witness nor was he included on the defense witness list provided to the prosecution. Over defense objection, the prosecution was erroneously allowed to introduce evidence through their own expert that the defense had retained a DNA expert, Dr. Blake, and that he was also provided access to the prosecution's DNA evidence, and to then improperly argue in closing that the defense did not call the expert because the expert would have supported the prosecution's position. These errors deprived appellant of due process and a fair trial, shifted the burden of proof to appellant, deprived him of the presumption of innocence, violated his Fifth Amendment right to remain silent, undermined his rights to the effective assistance of counsel and to present a defense, and violated the attorney work-product privilege. (U. S. Const., amends. V, VI, VIII and XIV; Cal. Const., art. I, §§ 7, 15, 16, and 17; Pen. Code 1054, et. seq.; CCP § 2018.010, et seq.)

Compounding the above errors, and comprising reversible errors in their own right, were errors committed by the trial court in addressing a note submitted by the jury during defense counsel's argument. During the

argument, the jury submitted a question: "Does the defense have access to a DNA expert . . .?" Rather than inform counsel of the content of the note, the court allowed defense counsel to complete his argument and only then advised counsel of the jury's question regarding the DNA evidence. The court informed the jury that the "question will be answered for you this afternoon" by the prosecution. Defense counsel requested an opportunity to respond to the juror's note, and objected to the court's statement to the jury that the prosecution would answer their question. The court erred in failing to advise counsel during argument as to the content of the jury's note, in refusing to allow counsel to reopen argument to address the note, and in failing to give an instruction to the jury in response to the note as requested by defense counsel. These errors deprived appellant of all of the constitutional and statutory rights as noted above. In addition, the court's statement to the jury that the "question will be answered for you this afternoon" by the prosecution, and its refusal to give the requested instruction additionally constituted judicial bias and a de facto endorsement of the prosecution's position.

B. Factual and Procedural Background

1. Pretrial Hearings, Including *Kelly-Frye* Hearing

In the pretrial hearing of September 29, 1998, the prosecutor, James Anderson, advised the trial judge that the defense had hired Dr. Ed Blake as their expert to review the lab work and documentation of the State's DNA expert, Mr. Steve Myers. (RT 11-12) Defense counsel, James Giller, noted that Dr. Blake had been asked to look at the materials provided to the defense by the prosecution and had not been requested to prepare a report. (RT 14, 22) They intended to question Mr. Myers on the stand with the

assistance to be provided by Dr. Blake. (RT 15) In response to a prosecution request for discovery, the defense advised that if they called Dr. Blake, they would, of course, turn over to the prosecution his relevant notes. (RT 23)

In a pretrial hearing of October 26, 1998, the court informed defense counsel that the prosecution wanted the names of the defense guilt phase witnesses. (RT 312) Defense counsel, Mr. Giller, said that there was a "possibility" that they might call Dr. Blake in the guilt phase; they would contact the prosecutor and let him know once a decision was made. (RT 312)

In a pretrial appearance of October 29, 1998, the court addressed the issue of the DNA evidence. (RT 348) The defense had filed a motion in limine challenging the DNA evidence and requested a *Kelly-Frye* hearing. (RT 348; CT 597-709) The court ordered a hearing only on the third prong of the *Kelly-Frye* test regarding whether correct procedures were used in this case. (RT 350-351) The prosecutor noted that Steve Myers of the State Department of Justice DNA Lab was scheduled to testify at the *Kelly-Frye* hearing. (RT 351) The defense sought permission from the court to have their consulting expert, Dr. Ed Blake, present during the testimony of Mr. Myers, but the court declined, noting that Dr. Blake had received all of Myers' reports. (RT 351-352; 472-473, 490, 492; Court Exhibit VI.)

On November 3, 1998, the court conducted a *Kelly-Frye* hearing. (RT 472-474) Mr. Myers testified at length regarding the DNA analysis in this case and was cross-examined by defense counsel, Mr. Horowitz. (RT 475-488, 504-585) In response to the court's inquiry regarding whether the defense was going to present any evidence that the DNA testing was not done in a scientifically acceptable manner, defense counsel, Mr. Horowitz, noted that he was going to obtain a copy of the transcript and provide it to his consultant, Dr. Blake. (RT 585-586) The court then continued the matter

to Monday, November 9, 1998. (RT 589)

At the continued hearing of November 9, 1998, the defense, Mr. Horowitz, submitted the matter on the testimony of Mr. Myers. On behalf of the defense, Mr. Horowitz noted that the testimony of Myers, particularly with the cross-examination, demonstrated that "no further evidence is needed to carry the defense burden." The court ruled that the defense motion under *Kelly-Frye* would be denied. (RT 595-596)

2. The Disclosure of Defense Witnesses

Prior to trial, pursuant to Penal Code §1054, the defense provided the prosecution with a witness list. (RT 4103-4107) (Court Exhibit XII). Dr. Ed Blake was not disclosed and/or designated on the "Defense Proposed Witness List" as a witness who would be called by the defense at the time of trial. (Court Exhibit XII) (RT 4107)

3. Examination of DNA Expert, Steve Myers, by the Prosecution at Trial.

At trial during direct examination, the prosecutor inquired as to whether Mr. Myers provided his entire work notes and copies of everything he did in this case to a man described as Dr. Edward Blake, who was hired by the defense. (RT 4509-4510) The defense objected on the grounds of relevance, noted that the question was improper, and requested that it be "stricken." The court overruled the objection. (RT 4509-4510) Myers testified: that copies of all of his notes were provided to Dr. Blake of Forensic Science Associates, a private firm in Richmond, California; that Dr. Blake came to his lab and took photographs of his photos and his notes; and corresponded with him regarding what notes Dr. Blake wanted to see. (RT 4510)

The prosecution offered People's Exhibit No. 51, which is a one-page letter, dated August 3, 1998, from the Forensic Science Associates signed by Edward T. Blake addressed to Mr. Steve Myers. The defense again objected on relevance and hearsay grounds. The court again overruled the objections (RT 4510-4511). Myers noted that Exhibit 51 was a copy of a letter he received from Dr. Blake requesting additional pieces of discovery. Myers also noted that he produced the materials requested. (RT 4511)

4. Jury Question Regarding DNA Expert

After defense counsel, Mr. Horowitz, concluded his closing argument, the court addressed the jury as follows:

> THE COURT: All right. Thank you, Mr. Horowitz.
>
> All right. Ladies and Gentlemen, we are going to take the noon recess because Mr. Anderson will be arguing at 1:30 this afternoon, and he has to have some time to prepare his response.
>
> Juror Number 7 handed me a question, and I can tell Juror Number 7 that I do believe that that question will be answered for you this afternoon.
>
> JUROR NUMBER SEVEN: Thank you.

(RT 5120)

Outside the presence of the jury, the Court read the note from Juror No. 7 as follows:

> Does the defense have access to a DNA expert which it could have had as a defense witness, or is there a limitation of funds to prevent this?
>
> Signed Juror Number 7.

(RT 5121) (Court Exhibit XXV) There was then an extended colloquy between the court and counsel regarding the court's decision to permit the prosecutor to answer the question posed by Juror No. 7, objections thereto by

the defense, and the court's denial of the defense request to briefly reopen for the limited purpose of responding to the juror's note. (RT 5121-5124)

The court stated it believed it was "safe in saying" that the issue would be addressed by the prosecution in its closing. Defense counsel argued that it was impermissible for the prosecutor to talk about the access to DNA labs or funding because it was not in evidence; the court said that the defense had a DNA expert, that that fact was in evidence (a fact which had come in over the defense objection); and that the prosecution had a right to comment on the fact that the defense did not call a particular witness. The defense asked the court to then limit the comment to the fact that the defense had hired an expert to review some records because that was all that was in evidence; the court refused to limit the prosecutor's comments, saying the DA could argue it "the way he wants." Counsel also requested the opportunity to address the juror's note and noted the inequity of allowing the prosecution to do so but not the defense. (RT 5121-5124)

The defense continued to object and requested the opportunity to reopen argument as follows:

> MR. HOROWITZ: [T]hen I ask that we call Mr. Giller as a witness to explain the funding issue.
>
> THE COURT: We are not going to turn this into a circus. Your objection is overruled. The DA can argue the way he wants. Overruled.
>
> . . .
>
> MR. HOROWITZ: That note was read after I was done with my argument, and that means that Mr. Anderson has the ability to address a specific concern of a juror when I didn't.
>
> So I'd ask to be allowed to reopen for just the limited purpose of explaining to the juror my point of view about

hiring the expert because otherwise it's an unfair advantage.

THE COURT: Mr. Horowitz, you argued for five hours and 15 minutes. If you didn't see fit to cover that issue in your argument, you're not going to deal with it now. Denied. [RT 5122-5123]

. . .

MR. GILLER: It's outrageous because the note came after he finished his argument. You bring it up. There was no need. And the juror called attention to it, and Mr. Anderson is going to be able to argue it without our being able to make any response.

(RT 5123)

The court denied the request, maintaining that defense counsel should have "anticipated" the issue and stated that if defense counsel "didn't see fit to cover that issue[,] [t]hat is not [the Court's] problem.] The court concluded by noting that if defense counsel felt the ruling was "so outrageous," they may have a good ground for "appeal" as follows:

> You know, we didn't just get off the hay wagon. So if you find it so outrageous, then you have a good ground for an appeal.
>
> But we are not going to reopen the argument. We are going to let the district attorney argue.

(RT 5123-5124)

Following the noon recess, the court and counsel continued their extended dialog regarding the note from Juror No. 7, the denial by the court of the defense request to reopen for two-three (2-3) minutes to respond to the note, as well as the denial of the defense request that the court read to the jury an "appropriate" jury instruction, and the further objection to the court's

decision to permit only the district attorney to respond to the juror note on the grounds of "fundamental fairness." (RT 5125-5133) The court acknowledged that his statement to the juror whose note had been submitted during the defense closing argument, that her question would be answered "this afternoon," was intended to convey that the prosecutor would answer her question during his closing. (RT 5126) Defense counsel argued that fundamental fairness required that the court should have informed the parties of the contents of the note when it was submitted and that defense counsel should have had the opportunity to address it then; given that the court failed to do that, counsel argued that they should have the opportunity to address the jury now. (RT 5125-5127)

> MR. GILLER: . . . Well, the fact is that in fundamental fairness, Mr. Horowitz should have had an opportunity to look at that note before he finished his argument. The fact that we wouldn't have been the least concerned if you had interrupted his argument to show him the note and Mr. Anderson has the opportunity and the benefit of having the note and certainly can now - - he can address in whatever manner he chooses fit to one particular juror, which we – who has a question about this issue, and we have been given no opportunity to speak to it, and we think that that is unfair.

(RT 5126-5127). Mr. Horowitz stated he would need "probably two, three minutes" to address it. (RT 5127) The court denied the request to reargue for even two to three minutes as follows:

> THE COURT: . . .There was plenty of time allotted to the defense to argue this case. . . . Now, you didn't argue it. You know. And so I'm not going to let you reopen. That's the way it is.
>
> Somewhere along the line, we have to draw the line here.
>
> Now, if you're unhappy with that, I'm sure that if your

client is convicted, there is going to be 10,000 issues that are going to be raised. This will be one of them.

(RT 5130)

Given the court's refusal to let counsel reopen to address the jurors's question (and instead leave it to the prosecution to do so), defense counsel asked the court to instruct the jury in response to its question that "Not everybody has to call every witness," "so that she [the juror submitting the note] doesn't feel that a question to the Judge is delegated to the prosecutor." The judge disagreed that that was what the juror would think, and refused to give the instruction in response to the note, having noted that it would be given with the other instructions. (RT 5131-5132)

5. Prosecution Rebuttal Closing Argument

During the rebuttal closing argument, the prosecutor argued the DNA evidence in great detail. (RT 5133-5179) Moreover, the prosecutor commented at length regarding the failure of the defense to call their own DNA expert, Dr. Edward Blake, as reflected in the following:

> PROSECUTION: . . . Now, the defense makes all of these allegations regarding DNA: It's contaminated. It's got poor databases. It's got faulty machines. . . .
>
> One thing we do know is that they have hired their own expert.
>
> Remember the testimony?
>
> One Dr. Edward Blake, and he has access to all of Steve Myers' work, including his notes and the evidence. If Myers is wrong in anything he has done, then they certainly would have picked up on it and retested the evidence to exclude Mr. Nadey.
>
> Wouldn't they? Isn't that right?
>
> You've got your own expert. You have access to all of

Myers' lab notes, as Mr. Horowitz had. Certainly they shared them with their expert.

Why then didn't we see any defense expert here to say that Steve Myers was wrong or to show by their own expert, the famous Dr. Blake - - not master (sic), as Mr. Myers was, but a doctor - - why didn't they call him to say that Myers is wrong and that we've got the wrong guy; Nadey is excluded?

And you know the answer to that. You all know the answer. They can't.

Let's look at the testimony relative to this issue.

. . .

[I]n direct response to this series of questions.

. . .

QUESTION: Did you as a matter of fact provide your entire work notes - -

And there was an objection by Mr. Horowitz.

QUESTION: Entire work notes and copies of everything up in this case to a man described as Dr. Edward Blake, who was hired by the defense in this case?

Again, Mr. Horowitz posed an objection. It was overruled.

THE WITNESS: Copies of all my notes were provided to Dr. Blake of Forensic Science Associates. It's a private forensic firm in Richmond, California. He also came over to our lab and took his own photographs of photos in my notes.

And then I asked him:

Was there any correspondence between you and Dr. Blake?

People's Number 51. Okay.

This is on the letterhead of Dr. Blake's, their expert,

who was hired by them[.]

On August 3rd of last year, he wrote to Steve Myers at his lab, People versus Giles Nadey.

And it even gives Mr. Blake's file number, 97254.

Okay?

So he's hired. There is no question about that. These guys have hired a defense expert.

Okay?

Everything is there to be retested.

> Dear Steve:
>
> There are two and possibly three additional documents needed for review of the work in the Nadey case. First the photograph was not obtained of the DQ-alpha typing strips described on page 130.

And he goes on and on, and he signs it.

> If you can call me to discuss the problem, that would also be helpful.
>
> Sincerely, Ed.
>
> Carbon copy to Mr. Giller.

Gee, doesn't something strike you as really kind of funny?

They all have this evidence that Mr. Horowitz had, each and every page, documentation, . . . And for five and a half hours Mr. Horowitz is railing on the People's contaminated evidence, on the faulty databases, calling my case garbage in and garbage out, . . .

Oh my. As Dick Enberg (phonetic) said on the Wide World of Sports, "Oh, my."

Why not? Why don't we see this expert? . . .

(RT 5151-5155)

The DNA is one in 32 billion. . . .

If you don't like it, call your own defense expert to do it. But, whoops, they don't want to do that, and they don't want to retest it because they know Myers is correct, and they don't want another DNA finger of guilt pointing their way.

> We have the now uncontroverted testimony of Steven Myers when they have hired an expert and refused to call him. That makes his testimony uncontroverted.

(RT 5178)

C. The Trial Court's Errors and the Misconduct of the Prosecutor Denied Appellant of His Right to Due Process and a Fair Trial.

As outlined in the introduction and described above, multiple rulings by the trial court each deprived appellant of due process and a fair trial, as did the prosecutor's misconduct. Even if this court were to determine that any one error alone did not result in a due process violation, taken together, or in any combinations, the due process deprivation resulting from the errors is unquestionable. The prosecutor injected into evidence during the direct examination of his DNA expert, Mr. Steven Myers, that the defense had retained a DNA consulting-expert, Dr. Ed Blake, and furthermore, in closing argument, the prosecutor argued that the defense did not call him at trial, which, in effect, undermined Nadey's due process rights. The problem was compounded by the court's failure to (1) sustain the defense objection to the admissibility of the testimony of Mr. Myers regarding the defense consulting-expert, Dr. Blake; and (2) the failure to respond to a juror inquiry regarding whether the defense had a DNA expert or whether there was limited funding with respect to a DNA expert. The court overruled the objection and, moreover, did not respond to the jury inquiry or instruct it, but, instead, permitted the prosecution to respond to this jury question. Hence, this culminated in a due process violation wherein the court abdicated its responsibility to respond to a jury inquiry regarding an evidentiary matter which implicated due process rights; allowed the

prosecution to respond to the juror's question, thereby equating the prosecutor with the judge; and denied the defense the opportunity to either respond to the prosecutor's comments and/or respond to the juror's inquiry.

The injection into evidence by the prosecutor through his DNA expert, Mr. Steve Myers, that the defense had a DNA consulting expert, followed by his argument to the jury – in response to the juror question, that the defense had a DNA consultant expert, Dr. Ed Blake, but chose not to call him at trial because the defense did not "want another DNA finger of guilt pointing their way," violated defendant Nadey's right to a fundamentally fair trial guaranteed by the Due Process Clause of the Fifth and Fourteenth Amendments. One aspect of the due process inquiry focuses on whether the admission of evidence was arbitrary or so prejudicial that it rendered the trial fundamentally unfair. *See Walters v. Maass* (9th Cir. 1995) 45 F.3d 1355, 1357. Similarly, courts review remarks made by the prosecution in a capital case to determine if they rendered the proceedings fundamentally unfair. *See Darden v. Wainwright* (1986) 477 U.S. 168, 180-83; *Jeffries v. Blodgett* (9th Cir. 1993) 5 F.3d 1180, 1191 (noting that the court reviews the "remarks by the prosecution in a capital case to determine if they rendered the proceedings fundamentally unfair," citing *Darden v. Wainwright*, 477 U.S. at 181). *See also, Jammal v. Van de Kamp* (9th Cir. 1991) 926 F.2d 918, 920 (noting that "if there are no permissible inferences the jury may draw from the evidence," the admission of such evidence violates due process."). Here, the prosecutor injected into evidence that not only did the defense have a DNA consulting expert, i.e., Dr. Ed Blake, but Dr. Blake also had access to the DNA analysis and information of the State-designated DNA expert, Mr. Steve Myers. Of note, the defense vigorously challenged the prosecution's DNA evidence by way of cross-examination of their DNA expert, Mr.

Myers, and addressed in closing argument the issue of contamination and cross-contamination of the DNA evidence as well as the presence of a third party, i.e., Mr. Unknown. There is nothing in the record to support the prosecution's argument that the reason the defense did not call Dr. Blake was because they did not "want another DNA finger of guilt pointing their way." The only inference that can be drawn from this evidence is an impermissible one: that because the defense DNA consulting expert, i.e., Dr. Blake, had access to the same evidence as the prosecution expert, i.e., Mr. Myers, but was not called to testify, Dr. Blake must have agreed with the conclusions reached by the prosecution's DNA expert. The admission of this evidence, coupled with the failure of the trial judge to promptly respond to the juror inquiry by way of an appropriate instruction as requested by the defense, and the prosecutor's comments in closing argument explicitly inviting the jury to make this impermissible inference, rendered the proceedings fundamentally unfair.

The Due Process Clause also guarantees criminal defendants access to certain experts to assist them in presenting a defense. *See Ake v. Oklahoma,* 470 U.S. 68, 105 S.Ct. 1087, 84 L.Ed.2d 53 (1985); *Smith v. McCormick*, 914 F.2d 1153, 1159 (9th Cir. 1990). The underlying principle is 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. *Ake*, 470 U.S. at 76. 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.* On this basis, the courts have envisioned

access to competent defense consultants who will conduct appropriate examinations and assist in evaluation, preparation and presentation of the defense, *id.* at 83, without requiring their testimony at trial as a precondition of defense access to the experts. Yet, when the trial court allowed the prosecution to comment on the defense consulting expert, Dr. Ed Blake, who was not called to testify by the defense, it, in effect, forced the defense DNA consulting expert (i.e., Dr. Blake) to "de facto" testify for the prosecution to bolster the opinions of the prosecution's DNA expert (Mr. Myers). As a consequence, the trial court failed to insure that Nadey had a fair opportunity to prepare and present a defense, free from the risk that the defense's DNA consulting expert would, de facto, be involuntarily converted into a prosecution expert, thereby violating due process.

1. The Prosecutor's Closing Argument Related to Appellant's DNA Expert Constituted Misconduct and Shifted the Burden of Proof; and the Court Erred in Refusing to Sustain Appellant's Objection To It.

In *People v. Bennett* (2009) 45 Cal.4th 577, this Court addressed the issue of due process under both the federal Constitution and state law based on a claim of prosecutorial misconduct, stating:

> A prosecutor's conduct violates a defendant's federal constitutional rights when it comprises a pattern of conduct so egregious that it infects "'the trial with unfairness as to make the resulting conviction a denial of due process.' [Citation.]" (*Darden v. Wainwright* (1986) 477 U.S. 168, 181, 106 S.Ct. 2464, 91 L.Ed.2d 144.) The focus of the inquiry is on the effect of the prosecutor's conduct on the defendant, not on the intent or bad faith of the prosecutor. (*People v. Crew* (2003) 31 Cal.4th 822, 839, 3 Cal.Rptr.3d

> 733, 74 P.3d 820.) Conduct that does not render a trial fundamentally unfair is error under state law only when it involves " ' "the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury." ' [Citations.]" (*People v. Espinoza* (1992) 3 Cal.4th 806, 820, 12 Cal.Rptr.2d 682, 838 P.2d 204.)

45 Cal.4th at 594-595.

In *Bennett*, the defendant claimed that the questions posed by the prosecutor "insinuated defendant should have retested the DNA evidence," and hence, constituted reversible misconduct. The court disagreed. *Id.* at 594. This Court stated that the prosecutor neither stated nor implied that the defendant had a duty to produce evidence – "the complained of questions merely asked whether there was evidence for retesting" – and hence concluded, the questions posed by the prosecutor did not shift the burden of proof. *Id.* at 596.

Here, the prosecutor in closing argument both stated and/or implied that Nadey had a duty to produce evidence, particularly with respect to his references to the defense DNA consulting expert, Dr. Ed Blake. Moreover, the prosecutor argued that, if called, Dr. Blake would have supported his expert, Mr. Myers; however, there is nothing in the record to support such a claim. Mr. Anderson, argued in pertinent part, as follows:

> PROSECUTION: . . . Now, the defense makes all of these allegations regarding DNA: It's contaminated. It's got poor databases. It's got faulty machines. . . .
>
> One thing we do know is that they have hired their own expert.
>
> Remember the testimony?
>
> One Dr. Edward Blake, and he has access to all of Steve Myers' work, including his notes and the evidence. If Myers is

wrong in anything he has done, then they certainly would have picked up on it and retested the evidence to exclude Mr. Nadey.

Wouldn't they? Isn't that right?

You've got your own expert. You have access to all of Myers' lab notes, as Mr. Horowitz had. Certainly they shared them with their expert.

Why then didn't we see any defense expert here to say that Steve Myers was wrong or to show by their own expert, the famous Dr. Blake - - not master (sic), as Mr. Myers was, but a doctor - - why didn't they call him to say that Myers is wrong and that we've got the wrong guy; Nadey is excluded?

And you know the answer to that. You all know the answer. They can't.

. . .

They all have this evidence that Mr. Horowitz had, each and every page, documentation, . . . And for five and a half hours Mr. Horowitz is railing on the People's contaminated evidence, on the faulty databases, calling my case garbage in and garbage out, . . .

Oh my. As Dick Enberg (phonetic) said on the Wide World of Sports, "Oh, my."

Why not? Why don't we see this expert? . . .

(RT 5151-5155)

The DNA is one in 32 billion. . . .

If you don't like it, call your own defense expert to do it. But, whoops, they don't want to do that, and they don't want to retest it because they know Myers is correct, and they don't want another DNA finger of guilt pointing their way.

We have the now uncontroverted testimony of Steven Myers when they have hired an expert and refused to call him. That makes his testimony uncontroverted.

(RT 5178)

This argument both states and/or implies that Nadey had a duty to produce evidence: (1) by way of the reference to Dr. Edward Blake who

should have "retested the evidence to exclude Mr. Nadey;" (2) the notation that they did not "see any defense expert here" to contradict Steve Myers; (3) the statement that if you do not like the DNA analysis of Mr. Myers, e.g., "DNA is 1 in 32 billion," you should "call your own defense expert;" and (4) the conclusion that the testimony of Steven Myers is "uncontroverted." This argument certainly stated and/or implied that Nadey had a duty to produce evidence. As noted above, this argument was ostensibly in response to a juror inquiry regarding whether the defense had access to a DNA expert or whether there was a limitation on funding which precluded the defense from having such an expert. The force of the argument was strengthened by the court's denial of the defense request for the court to read "one of the appropriate jury instructions" which would be responsive to the jury's inquiry, such as "not everybody has to call every witness." (RT 5131)[10] That is, that the juror would not feel that "a question to a judge is delegated to the prosecutor." Further, the trial judge denied the request by the defense that counsel be permitted two or three minutes to respond to the juror inquiry as well. (RT 5127-5129) Under these circumstances, in light of the prosecutor's argument which was, in effect, sanctioned by the court, the argument by the prosecutor, de facto, shifted "the burden of proof" onto the defendant. This impermissible shifting of the burden of proof resulted in a denial of Nadey's

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[10] The court gave a CALJIC 2.11 jury instruction entitled "Production of All Available Evidence Not Required" (CT 907 at 919) as well as a CALJIC 2.61 jury instruction entitled "Defendant May Rely on State of Evidence" (CT 907 at 929) at the conclusion of the trial. However, this did not timely address the inquiry as expressed by Juror No. 7 in the note, nor did it alleviate the perception that the court had delegated to the prosecutor the duty to respond to the inquiry of Juror No. 7 regarding this important evidentiary question. *See generally, People v. Serrato* (1973) 9 Cal.3d 753, 766-767, discussed herein.

due process rights under both the federal and state Constitutions.

In *People v. Serrato* (1973) 9 Cal.3d 753 [*overruled on other grounds* by *People v. Fosselman* (1983) 33 Cal.3d 572, 584 n.1], this Court addressed an erroneous instruction to the jury which, in effect, reversed the burden of proof and, hence, constituted an infringement of the constitutional right of due process. *Id.* at 765-767. The trial court had stated as follows:

> [I]n exploring the case, what you have to decide is, . . . fundamentally, whether there is enough of an explanation given by the defense case with reference to these particular contraband items. Is it enough for you, as citizens, to feel satisfied?

The trial court continued:

> If you reach the affirmative view, of course you have got to acquit the defendants. If you think the explanation given isn't sufficient, you perhaps may reach a contrary conclusion.

Id.

This Court concluded that "[t]he thrust of the of the court's statement was to reverse the burden of proof on the only contested factual issue in the case." Further, this Court noted that "[t]he impact of the court's comment was augmented by its refusal to make a correction when defendants' attorney called attention to the error." *Id.* This Court acknowledged the other appropriate instructions that were given by the trial court regarding the customary instruction concerning the presumption of innocence, that the State had the burden of proof beyond a reasonable doubt, and further, that the failure of the defendant to testify should not enter their deliberations in any way. However, this Court concluded that the effect of the trial court's erroneous instruction was to, in effect, reverse the burden of proof, which

violated the defendant's constitutional right to due process, noting that:

> "Such an error is not necessarily cured by instructions which state the rules correctly. (See *People v. Hardy* (1948) 33 Cal.2d 52, 66 [198 P.2d 865]; *Smith v. Smith, supra.*)."

Id. at 766-767. It also found that the error was not "'harmless beyond a reasonable doubt.'" (*Chapman v. California* (1967) 386 U.S. 18, 24) *Id.*

While the *Serrato* case dealt with an instructional error, the same principle applies here. That is, there was a reversal of the burden of proof as a consequence of the following events: (1) the injection by the prosecutor that the defense had an expert in DNA; (2) the trial court's failure to respond to the juror's inquiry regarding whether the defense had access to a DNA expert and/or any limitations thereto; (3) the failure of the trial court to give an appropriate instruction regarding the issue, as requested by the defense; (4) the trial court's allowance of the prosecutor, over objection, to respond to the jury inquiry and point out in detail that the defense had a DNA expert, but they did not call him; and (5) the trial court's preclusion of the defense from commenting on the jury's inquiry and/or responding to the need and/or propriety of calling a DNA expert and/or responding in some fashion to the jury's inquiry. Each of these circumstances reversed the burden of proof and deprived appellant of due process. Further, the amalgamation of these circumstances resulted, in effect, in a reversal of the burden of proof, wherein the issue became not whether the prosecutor had met his burden on the DNA evidence, but the failure of the defense to call a DNA expert. *See People v. Hill*[11] (1998) 17 Cal.4th 800, 831 n.3, and 832 (noting in n.3 that

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[11] Other states have similarly concluded that prosecutorial argument seeking (continued...)

"due respect for defendant's rights would suggest the court make clear to the jury that defendant bore no burden to prove a reasonable doubt," and referencing CALJIC 2.61 for the proposition that "the defendant may choose to rely on the state of the evidence and upon the failure, if any, of the People to prove beyond a reasonable doubt every essential element of the charge.")

Here, the reversal of the burden of proof regarding the DNA evidence was not harmless beyond a reasonable doubt under the *Chapman* standard, but resulted in a trial that was fundamentally unfair under both the federal and state standard. The DNA evidence proffered by the State was hotly contested during the cross-examinations of Mr. Myers as well as Ms. Smith and by the defense in closing argument. The evidence of contamination and cross-contamination was established, as well as the presence of a third person referred to by the defense as Mr. Unknown. The DNA evidence was the key to the prosecution's case, and hence, the reversal of the burden of proof on the DNA evidence resulted in a trial that was fundamentally unfair.

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[11](...continued)
to shift the burden of proof based on the failure of the defense to call witnesses and/or introduce evidence violates the defendant's fundamental right to a fair trial. *See Ross v. State* (1990) 106 Nev. 924, 927-928 (noting that it is outside the boundaries of proper argument to comment on a defendant's failure to call witnesses which can be viewed as impermissibly shifting the burden of proof to the defense, thereby infringing upon the defendant's right to a fair trial); *People v. Aguilar* (2006) 829 N.Y.S.2d 395, 396-397 (noting that the prosecutor attempted to improperly shift the burden of proof by implying that the defendant had an obligation to introduce evidence, thereby infringing upon his right to a fair trial).

2. The Misconduct and Trial Court Errors Delineated Above Deprived Appellant of the Presumption of Innocence

The presumption of innocence is a fundamental requirement to a fair trial. In *Estelle v. Williams*, 425 U.S. 501, 503 (Burger, C.J.) *reh'g denied*, 426 U.S. 954 (1976), the Supreme Court concluded as follows: "presumption of innocence, . . . is a basic component of a fair trial under our system of criminal justice." The presumption of innocence is a necessary corollary to the burden of proof which imposes on the state the obligation to prove every element of a case. "[A] State must prove every ingredient of an offense beyond a reasonable doubt, and . . . may not shift the burden of proof to the defendant . . . ." (*Patterson v. New York* (1977) 432 U.S. 197, 215; *see also In re Winship* (1970) 397 U.S. 358, 364). This Court has recognized that "a defendant enjoys a federal due process right to have the state prove beyond a reasonable doubt every fact necessary to constitute the crime charged." *People v. DeSantis* (1992) 2 Cal.4th 1198, 1224. The injection of the fact that the defense had a DNA consulting expert (i.e., Dr. Ed Blake) who was not called at trial, the juror inquiry regarding a defense DNA expert, and the trial court's abdication of a response to the prosecutor, the court's refusal to allow the defense to also respond to the juror inquiry, as well as the failure by the trial court to give an appropriate instruction to the jury as requested by the defense, and the prosecutor's rebuttal closing argument which, in effect, asserted that the defense had an obligation to call Dr. Blake as their DNA expert, all violated the presumption of innocence.

In *People v. Booker* (2011) 51 Cal.4th 141, 183-186, this Court addressed the presumption of innocence, noting that "[a] defendant is

presumed innocent until proven guilty, and the government has the burden to prove guilt, beyond a reasonable doubt, as to each element of each charged offense." *Id.* at 185 (citations omitted). In *Booker*, the defendant contended that the argument by the prosecutor regarding the presumption of innocence lessened the state's burden of proof by implying that the defendant was not entitled to be presumed innocent. *Id.* It made clear that it did not "condone statements that appear to shift the burden of proof onto a defendant," and parenthetically noted further that " a defendant is entitled to the presumption of innocence until the contrary is found by the jury." *Id.*

In *Booker*, this Court analyzed and distinguished the Ninth Circuit *Perlaza* decision [*United States v. Perlaza* (9th Cir. 2006) 639 F.3d 1149], which was relied on by the defendant, concerning the presumption of innocence. It noted that in *Perlaza* the prosecutor's misstatement of the law was compounded by the trial court's initial ratification of the misstatement and the curative instruction was inadequate. 51 Cal.4th at 185-186.

Here, contrary to *Booker*, the rebuttal closing argument by the prosecutor vitiated the presumption of innocence by both stating and implying that the defense had an obligation to call their DNA consulting expert when the defense had no such obligation and could rely on the presumption of innocence as the state bore the burden on this issue. The trial judge refused to give the defense an opportunity to respond to the juror's inquiry regarding a defense DNA expert, even two or three minutes, and hence, the defense was precluded from arguing to the jury that it had no burden of proof and/or that the prosecutor failed to meet his burden. Moreover, the trial court failed and refused to give an "appropriate" instruction in response to the juror inquiry regarding a defense DNA expert, as requested by the defense (RT 5131-5132). While CALJIC 2.11 -

Production of All Available Evidence Not Required; CALJIC 2.61 - Defendant May Rely on the State of the Evidence; and CALJIC 2.90 - Presumption of Innocence - Reasonable Doubt - Burden of Proof were given by the court at the conclusion of the prosecutor's argument (RT 5180-5204) (see also CT 907 at 934), the trial court rejected the defense request that an instruction be given in direct response to the juror inquiry regarding defense DNA evidence. (RT 5131-5132) An appropriate instruction would have ameliorated the prejudice stemming from the prosecutor's rebuttal closing argument regarding the defense's failure to call their DNA consulting expert. As a consequence, appellant was prejudiced under both the state constitutional standard (*People v. Watson* (1956) 46 Cal.2d 818, 836) and the federal constitutional standard. *See Chapman*, 386 U.S. at 24; *Booker*, 51 Cal.4th at 186.

Appellant was deprived of the presumption of innocence in light of the aforementioned misconduct and the trial court errors regarding the DNA evidence. The DNA evidence was critical to the prosecution case. To impose, or even suggest, that the defense had an obligation to call Dr. Blake as an expert witness and the failure to do so, reflected that Dr. Blake agreed with Mr. Myers, i.e., the defense did not call him because they did not "want another DNA finger of guilt pointing their way," undermined the presumption of innocence. Appellant had no obligation to call Dr. Blake nor did he have an obligation to present any evidence, but could rely on the presumption of innocence and the state of the record. The misconduct and trial court errors deprived appellant of the presumption of innocence, and hence, rendered the trial fundamentally unfair.

Under these circumstances, the errors were not harmless under the *Chapman* standard. Even under the *Watson* standard, reversal is mandated.

3. The Misconduct Delineated Above Deprived Appellant of His Fifth Amendment Rights

The injection into evidence by the prosecutor that the defense had retained a DNA consulting expert, and the further argument by the prosecutor in rebuttal closing argument specifically pointing out the failure of the defense to call said DNA consulting expert, i.e., Dr. Blake, as a witness at the time of trial, violated Nadey's Fifth Amendment right to remain silent.

In *People v. Lewis* (2001) 25 Cal.4th 610, 670, this Court addressed the assertion by Lewis that the prosecutor's statements regarding the nonexistence of mitigating evidence were an impermissible comment on his failure to testify, in violation of *Griffin v. California* (1965) 380 U.S. 609. This Court analyzed the Fifth Amendment issue, noting that a prosecutor is prohibited from "directly or indirectly" commenting on the exercise of the right to silence, but also concluded that the prosecutor may comment on the state of the evidence. *Lewis*, 25 Cal.4th at 670.

Here, the injection into evidence by the prosecutor that the defense had retained a DNA consulting expert and the rebuttal closing argument by the prosecutor specifically addressing the failure of the defense to call the DNA consulting expert, Dr. Blake, "indirectly" implicated Nadey's invocation of his constitutional right to silence. Nadey did not testify during either the guilt or the first penalty phase. The natural inference to be drawn from his not testifying at trial, coupled with the prosecutor's argument regarding the failure to call the defense consulting DNA expert, is that Nadey's silence at trial as well as the failure to call the DNA expert are intertwined, and hence, the argument by the prosecutor regarding the failure of the DNA expert, i.e., Dr. Blake, to testify, is part and parcel of the

decision of Mr. Nadey not to testify, and that they both have something to hide. Consequently, the comments and arguments as to the failure of the DNA expert to testify constitute an indirect comment and/or argument regarding Nadey's invocation of his right to remain silent. That is, in the eyes of the jury, the non-testifying DNA consulting expert, i.e., Dr. Blake, is one and the same as the defendant, Nadey, to wit, neither are testifying.

The link in the eyes of the jury between defendant Nadey and the non-testifying DNA expert, Dr. Blake, becomes evident based on review of pertinent federal jury instructions as found in the NINTH CIRCUIT MODEL JURY INSTRUCTIONS. In O'MALLEY, GRENIG & LEE, FEDERAL JURY PRACTICE AND INSTRUCTIONS, CRIMINAL (6th ed.),Vol. 1, Jury Trials, at pp. 188-199, the treatise writers address the Ninth Circuit instruction entitled "Charge Against Defendant Not Evidence–Presumption Of Innocence–Burden of Proof." The treatise writers quote from the Instruction as follows:

> The indictment is not evidence. The defendant has pleaded not guilty to the charge. The defendant is presumed to be innocent and does not have to testify or present any evidence to prove innocence. The government has the burden of proving every element of the charge beyond a reasonable doubt.

Id. at p. 188-189 (emphasis added). Here, reference to the defendant being presumed innocent and not having to testify, i.e., Fifth Amendment privilege against self-incrimination, and the further statement, "or present any evidence to prove innocence," reflects on the link between the Fifth Amendment right "not to have to testify" as well as the right not to "present any evidence," as they both reflect on the presumption of innocence and the

Fifth Amendment privilege against self-incrimination.

Moreover, the Ninth Circuit Model Criminal Jury Instruction 1.2, entitled "The Charge–Presumption of Innocence," contains language with respect to the government's burden to prove the defendant guilty beyond a reasonable doubt as follows:

> In addition, the defendant has the right to remain silent and never has to prove innocence or to present any evidence.

This instruction clearly expresses that the defendant does not have to "present any evidence" and is linked to his Fifth Amendment right to remain silent. Hence, the argument advanced by the prosecution, in effect, violated Nadey's Fifth Amendment privilege against self-incrimination, as the fact that the defense may have consulted with a DNA expert, Dr. Blake, and made a decision not to present evidence of DNA through Blake, was consistent with the exercise of his Fifth Amendment right to remain silent, which includes the right not to present any evidence.

As a consequence, appellant was prejudiced under both the state constitutional standard (*People v. Watson* (1956) 46 Cal.2d 818, 836) and the federal constitutional standard. *See Chapman*, 386 U.S. at 24; *Booker*, 51 Cal.4th at 186.

4. The Misconduct Delineated Above Deprived Appellant of His Rights Under Penal Code Section 1054, *et seq.*

The injection into evidence by the prosecutor of the fact that the defense had a DNA consulting expert, and the argument by the prosecutor regarding the failure of the defense to call the DNA consulting expert at trial in rebuttal closing argument, also violated the provisions of Penal Code

§1054 *et seq.* regarding disclosure. The defense has no obligation to identify an expert or turn over an expert report until that expert is designated to testify as an expert witness at trial. *See* Penal Code §§1054.3 and 1054.7; ***see also*** 5 WITKIN & EPSTEIN, CALIFORNIA CRIMINAL LAW (3d ed.), §36, Information Protected from Discovery, p. 83 (West) ("Correctly read, P.C. 1054.6 modifies the blanket disclosure provisions of P.C. 1054.3. Thus, P.C. 1054.3 requires disclosure when the witness is designated only when that information is not privileged as work product or by statute or the federal Constitution.")

Moreover, §74, *supra*, entitled Defendant's Statutory Duty to Disclose, and §75, *supra*, entitled Experts' Identity and Reports, clearly addresses the obligation to identify a defense expert pursuant to the provisions of Penal Code §1054.3(a) and (b) and generally the criminal discovery statutes require disclosure of a defense expert only that the "defendant intends to call as a witness." 5 WITKIN & EPSTEIN, CALIFORNIA CRIMINAL LAW, at pp. 132-134; see also 5 WITKIN & EPSTEIN, CALIFORNIA CRIMINAL LAW, 2011 SUPPLEMENT TO VOL. 5, at pp. 62-63.

In *People v. Varghese* (2008) 162 Cal.App.4th 1084, the court discussed this extensively in the context of DNA testing when there are multiple samples as well as a single sample and the discovery that would ensue relative to defense testing. The court noted that "where there are multiple pieces of evidence sufficient enough to allow multiple testing by each of the parties . . . the findings and investigation of a defense expert may not be subject to prosecution discovery" (*id.* at 1094, citing to *Prince v. Superior Court* (1992) 8 Cal.App.4th 1176, 1180, cited with approval in *Alford v. Superior Court* (2003) 29 Cal.4th 1033, 1046). There is no obligation to disclose a DNA expert who will not be testifying at trial.

Moreover, in *Sandeffer v. Superior Court* (1993) 18 Cal.App.4th 672, 678, the court held that it was error to require disclosure by defense counsel of the identity and notes of a potential expert when defense counsel has not made the decision whether to call the expert as a witness.

Therefore, the injection into evidence by the prosecutor that the defense had a consulting DNA expert and the comments regarding the defense's failure to call the DNA consulting expert in rebuttal closing argument by the prosecutor, constituted a violation of both the letter and spirit of Penal Code §1054, *et seq.*, which does not contemplate the disclosure of experts until they are designated to testify at trial, pursuant to Penal Code §1054.3. Simply because the prosecution learns of the identity of a defense consulting-expert does not warrant their disclosure or argument to the jury, over objection, as said disclosure and/or argument undermines both the letter and spirit of Penal Code §1054 et seq. It follows that the injection into evidence by the prosecutor that the defense had a consulting DNA expert, and the further comment and argument regarding the failure of the defense to call said consulting DNA expert, violated Penal Code §1054, *et seq.*

As a consequence, appellant was prejudiced under both the state constitutional standard (*People v. Watson* (1956) 46 Cal.2d 818, 836) and the federal constitutional standard. *See Chapman*, 386 U.S. at 24; *Booker*, 51 Cal.4th at 186.

5. The Misconduct Delineated Above Deprived Appellant of His Sixth Amendment Rights

The prosecutor's questioning and argument regarding the defense's non-testifying DNA consulting expert, Dr. Ed Blake, violated the Sixth Amendment right to effective assistance of counsel by interfering with the

ability of counsel to make independent decisions about how to conduct the defense, interfering with the right to present a defense, and by interfering with the attorney-client relationship. *See Strickland* (1984) 466 U.S. 668, 686 ("Government violates the right to effective assistance when it interferes in certain ways with the ability of counsel to make independent decisions about how to conduct the defense."); *Weatherford v. Bursey* (1977) 429 U.S. 545, 554 n.4 ("the Sixth Amendment's assistance-of-counsel guarantee can be meaningfully implemented only if a criminal defendant knows that his communications with his attorney are private and that his lawful preparations for trial are secure against intrusion by the government, his adversary in the criminal proceedings;" quoting Brief for United States as Amicus Curiae at 24 n.13); *United States v. Nobles* (1975) 422 U.S. 225, 238-41 ("Disclosure of an attorney's efforts at trial . . . could disrupt the orderly development and presentation of his case."); *Smith v. McCormick* (9th Cir. 1990) 914 F.2d 1153, 1159 (wherein the court concluded that "Smith was entitled to his own competent psychiatric expert.")

Competent assistance from experts is a basic tool that must be provided to the defense. *See Smith*, 914 F.2d at 1159. To allow the prosecution to comment on non-testifying defense experts at trial takes away the efficacy of the tool. *See id.* The effective assistance of counsel demands recognition that a defendant be as free to communicate with an expert as with the attorney he is assisting. *See id.* at 1159-1160 ("'The issue here is whether a defense counsel in a case involving a potential defense of insanity must run the risk that a psychiatric expert whom he hires to advise him with respect to the defendant's mental condition may be forced to be an involuntary government witness. The effect of such a rule would, we think, have the inevitable effect of depriving defendants of the effective assistance

of counsel . . . . The attorney must be free to make an informed judgment with respect to the best course for the defense without the inhibition of creating a potential government witness.'") (quoting *United States v. Alvarez* (3d Cir. 1975) 519 F.2d 1036, 1045-57).

Here, the prosecutor, both in his examination of his own expert, Mr. Steve Myers, and in rebuttal closing argument, focused the jury's attention on the non-testifying defense DNA consulting expert, Dr. Ed Blake, and his access to the evidence, which turned the non-testifying defense DNA consulting expert into a witness for the state. As noted, the prosecution argued in closing that the reason the defense did not call Dr. Blake was because "they don't want another DNA finger pointing their way." (RT 5178) If the prosecution is allowed to inquire into, and then comment on, the use of defense experts who are not called at trial, defense attorneys will be more hesitant to take full advantage of their right to fully investigate all aspects of the case (both good and bad). The fear that experts consulted by defense counsel may later be used by the prosecution interferes with the ability of defense counsel to prepare adequately for trial and to make independent decisions about how to conduct the defense, in violation of the Sixth Amendment assistance of counsel guarantee.

Further, the Sixth Amendment as well as the state constitutional right to counsel proscribe that the defendant has the right to effective assistance of counsel. Effective assistance of counsel includes the assistance of experts in preparing a defense (*Corenevsky v. Superior Court* (1984) 36 Cal.3d 307, 319, 320) and communication with them in confidence (*Alford v. Superior Court* (2003) 29 Cal.4th 1033, 1046; *Prince v. Superior Court, supra*, 8 Cal.App.4th 1176, 1180). "The right logically extends to the opportunity to investigate and develop evidence generally, such as

impeachment evidence of the kind at issue here." (*Alford v. Superior Court, supra*, 29 Cal.4th at 1046; see also *Prince v. Superior Court, supra*, 8 Cal.App.4th at 1180 [the right to the effective assistance of counsel requires counsel to have blood tested where it may exonerate the client].)

Moreover, this Court in *People v. Moore* (2011) 51 Cal.4th 1104, 1124, restated the general rule as to both the federal and state constitutional provisions regarding assistance of counsel and defense services as follows:

> We have held, as a general rule, that the federal and state constitutional provisions concerning the assistance of counsel for criminal defendants include the right to access "'reasonably necessary defense services.'" (*People v. Blair* (2005) 36 Cal.4th 686, 732, 31 Cal.Rptr.3d 485, 115 P.3d 1145, quoting *Corenevsky v. Superior Court* (1984) 36 Cal.3d 307, 319–320, 204 Cal.Rptr. 165, 682 P.2d 360.) In addition, "we have recognized that depriving a self-represented defendant of 'all means of presenting a defense' violates the right of self-representation" under the Sixth Amendment to the federal Constitution. (*Blair, supra*, 36 Cal.4th at p. 733, 31 Cal.Rptr.3d 485, 115 P.3d 1145, quoting *People v. Jenkins* (2000) 22 Cal.4th 900, 1040, 95 Cal.Rptr.2d 377, 997 P.2d 1044 (*Jenkins*).)

The retention of a defense DNA consulting expert clearly falls within the rubric of reasonably necessary defense services contemplated by both the federal and state constitutional provisions concerning the assistance of counsel for a criminal defendant.

In *United States v. Chase* (9th Cir. 2007) 499 F.3d 1061, the Ninth Circuit distilled and crystalized the two-fold purpose of an expert: (1) to produce his or her own investigation, interpretation, and testimony on a

given issue, and (2) to educate, inform, and prepare defense counsel for purposes of cross-examination of the adverse expert. *Id.* at 1066-1067. The Ninth Circuit addressed the two-fold purpose of an expert as follows:

> In this case, Chase had a right to hire an expert who could have produced his or her own 'investigation, interpretation, and testimony.' [*Ake v. Oklahoma,* 470 U.S. 68] at 80, 105 S.Ct. 1087.
>
> Additionally, the aid of an expert could have made the cross-examination of [the government expert] more effective. Informed by an expert, Chase's attorney could have asked [the government expert] more specific questions about the formula he used, flaws in that formula, and any additional factors that he should have considered. The attorney could have posed more sophisticated inquiries concerning the literature and experience upon which [the government expert] based his opinion, whether he was familiar with other literature in the field, and whether he would have conceded that other estimation methods might be preferable to the one he had used in this case.

499 F.3d at 1066-1067.

In *Chase*, the defendant sought the appointment of an expert in "forensic chemistry to assist his attorney in formulating a theory" concerning the quantity of methamphetamine and to "rebut that of the government's expert." *Id.* at 1066. The Ninth Circuit noted that a defense expert could have informed Chase's attorney on the issue of estimating drug quantity, which was at issue in the case regarding sentencing. *Id.* at 1066-1067. The Ninth Circuit noted the importance of "scientific knowledge" in cross-examination and concluded that Chase's attorney would have benefitted

from the services of a defense expert *Id.* at 1067. The Ninth Circuit's *Chase* decision is illustrative of the point that a defense expert serves two roles: (1) to investigate, interpret, and provide testimony, and (2) to inform, educate, and prepare defense counsel for purposes of cross-examination of the adverse expert. This is particularly true when dealing with complex scientific knowledge involving DNA, which is undeniably complex. In *Polk v. Mississippi* (1992) 612 So.2d 381, 393-394, App. A, the Supreme Court of Mississippi observed that the "complexity of forensic DNA analysis requires that an attorney or judge have more than just a nodding acquaintance with the subject," (*id.* at 934) and also concluded "that due process considerations require that a defendant have access to an independent [DNA] expert." (*Id.* at 394 n.2)

Given the complexity of DNA evidence, the need of defense counsel for the assistance of a DNA expert to prepare for trial, which is mandated by due process, and the dual purpose that a DNA expert serves, i.e., (1) to investigate, interpret, and testify, and (2) to inform, educate, and prepare defense counsel for the cross-examination of the adverse expert, it follows that in order to effectuate a defendant's right to effective assistance of counsel under both the federal and state constitutional provisions, defense counsel must be able to employ the DNA expert for either both purposes or simply one if he or she so chooses. In order for defense counsel to discharge his or her duty to provide effective assistance of counsel under the federal and state constitutional provisions, defense counsel must be able to make an election regarding whether he or she will utilize the expert for both purposes or simply one, as the trial strategy may dictate. Under some circumstances, defense counsel in a given case may elect not to call a DNA expert in light of the cross-examination of the adverse DNA expert called by the

prosecutor. It must **be** borne in mind that the burden of proof is on the prosecutor as the representative of the state, and, moreover, Nadey is entitled to a presumption of innocence.

In *Melendez-Diaz v. Massachusetts* (2009) 557 U.S. 305, 129 S.Ct. 2527, the Supreme Court reiterated the importance of cross-examination as to all witnesses who testify against the defendant, not just those who are accusatory. The Supreme Court rejected the proposition that evidence of scientific testing is inherently reliable: "forensic evidence is not uniquely immune from the risk of manipulation" or incompetence, and cross-examination is the only means to insure accurate forensic testimony. *Id* at 2536-2537. Hence, based on the analysis and holding by the Supreme Court in *Melendez-Diaz* regarding the importance of cross-examination, particularly as it pertains to the Confrontation Clause, the ability of defense counsel to consult an expert for purposes of cross-examination, without fear of the prosecution using the fact of that consultation against the defendant must be respected and safeguarded. To permit the prosecutor to comment on the failure of defense counsel to call his own forensic expert not only undermines the burden of proof and presumption of innocence, but also the right to effective assistance of counsel.

In order to provide effective assistance of counsel, defense counsel must be able to consult experts without the prosecution being able to argue that a non-testifying consulting expert did not testify because he or she undoubtedly agreed with the State's expert. This not only violates the burden of proof and presumption of innocence, but invades and compromises the decision making process of defense counsel, thereby depriving the defendant of his or her right to the effective assistance of counsel under both the federal and state Constitutions.

As discussed below, these errors were not harmless. During cross-examination, defense counsel, Mr. Horowitz, was able to establish that the DNA results that the state was relying on through their designated expert, Mr. Steve Myers, was subject to both contamination and cross-contamination, as reflected in the testimony obtained under cross-examination. Further, there was evidence of a third party's DNA, not that of Mr. Fermenick nor that of Mr. Nadey, which was referenced by defense counsel as "Mister Unknown." Defense counsel made the election neither to designate nor call their DNA consulting expert at trial. It was a deprivation of defendant's right to the effective assistance of counsel under both the federal and state constitutional provisions for the prosecutor to comment on and argue that the defense failed to call their own consulting-DNA expert. In fact, in rebuttal closing argument, the prosecutor bemoaned the assertions by defense counsel concerning contamination and asserted that the defense should have called their own DNA expert. The problem here is that the defense had no obligation under either the burden of proof or presumption of innocence to call a DNA expert. The assertion by the prosecution that the defense should have called their own DNA expert, Dr. Edward Blake, in effect violates Nadey's right to assistance of counsel under both the federal and state constitutions, because it undermines the election made by defense counsel that their DNA consulting expert serve only to inform, educate, and prepare defense counsel for purposes of the cross-examination of the state's DNA expert. It follows that the injection into evidence by the prosecutor that the defense had a DNA consulting expert, i.e., Dr. Blake, and the comments by the prosecutor in rebuttal closing argument regarding the defense's failure to call Dr. Blake, violated Nadey's right to counsel under both the federal and state constitutions.

As a consequence, appellant was prejudiced under both the state constitutional standard (*People v Watson* (1956) 46 Cal.2d 818, 836) and the federal constitutional standard. *See Chapman*, 386 U.S. at 24; *Booker* 51 Cal.4th at 186.

6. The Misconduct Delineated Above Deprived Appellant of His Rights Under the Attorney Work-Product Privilege

By the same token, the prosecutor's comments and argument regarding the failure of the defense to call their own DNA consulting expert violated the attorney work-product privilege. (CCP § 2018.010, *et seq.*) In *People v. Coddington* (2000) 23 Cal.4th 529, *overruled on other grounds* by *People v. Price* (2001) 25 Cal.4th 1046, 1081 n.13, this Court analyzed the attorney work-product privilege in detail and concluded that the prosecutor's conduct contravened the policy behind the work-product privilege and further took advantage of defense counsel's efforts and industry as follows:

> The work product privilege, now codified in Code of Civil Procedure section 2018 [currently CCP § 2018.010, *et seq.*] and applicable in criminal as well as civil proceedings (*People v. Collie* (1981) 30 Cal.3d 43, 59 [177 Cal.Rptr. 458, 634 P.2d 534, 23 A.L.R.4th 776]), absolutely bars the use of statutory discovery procedures to obtain "[a]ny writing that reflects an attorney's impressions, conclusions, opinions, or legal research or theories" (Code Civ. Proc., § 2018, subd. (c)), and bars discovery of any other aspect of an attorney's work product, unless denial of discovery would unfairly prejudice a party. (*Id.*, subd. (b).)
>
> This privilege reflects "the policy of the state to: (1) preserve the rights of attorneys to prepare cases for trial with that degree of privacy

necessary to encourage them to prepare their cases thoroughly and to investigate not only the favorable but the unfavorable aspects of the case; and (2) to prevent attorneys from taking undue advantage of their adversary's industry and efforts." (Code Civ. Proc., § 2018, subd. (a) [currently CCP § 2018.010, *et seq.*].

The prosecutor's cross-examination and his invitation to the jury to infer that defendant had been examined by other experts who had not been called to testify contravened that policy. Work product encompasses the investigation of defendant's mental state to assess both the favorable and the unfavorable aspects of the case. It also encompasses counsel's impressions and conclusions regarding witnesses who would be favorable and those who would not be so. (*Nacht & Lewis Architects, Inc. v. Superior Court* (1996) 47 Cal.App.4th 214, 217 [54 Cal.Rptr.2d 575].) It follows that the party's decision that an expert who has been consulted should not be called to testify is within the privilege. (*County of Los Angeles v. Superior Court* (1990) 222 Cal.App.3d 647, 656-658 [271 Cal.Rptr. 698].)

The prosecutor did not seek or learn the identities of the nontestifying experts through discovery. Regardless of how the information is obtained, however, if a party were permitted to use information about pretrial investigation that reveals opposing counsel's thought processes and reasons for tactical decisions, thorough investigation would be discouraged. By inviting the jury to infer that the other experts were not called because their testimony would not be favorable, the prosecutor also took advantage of defense counsel's efforts and industry. . . .

Coddington, 23 Cal.4th at 605-606.

Here, the comments and argument by the prosecutor regarding the failure of the defense to call their DNA consulting expert, Dr. Blake, contravened the policy behind the work-product privilege regarding privacy, thorough preparation of the case, and the prevention of taking undue advantage of an adversary's efforts. As this Court acknowledged in *Coddington*, citing *County of Los Angeles v. Superior Court* (1990) 222 Cal.App.3d at 656-658, the decision by the defense to consult with, but not call, Dr. Blake to testify falls within the work-product privilege. Moreover, in *People v. Wash* (1993) 6 Cal.4th 215, this Court made clear that it was improper for a prosecutor during closing argument to invoke the names of experts who did not testify at trial, to wit: "[i]nasmuch as neither expert testified at trial, their names should not have been invoked by the prosecutor during closing argument." *Id.* at 262. Moreover, funding of a defense expert by an indigent defendant in a capital case is confidential under Penal Code § 987.9. (*People v. Mendoza* (2000) 24 Cal.4th 130, 159.) The juror question was directly related to the funding of a defense expert. Hence, the conduct of the prosecutor in injecting into evidence the fact that the defense had a DNA consulting expert and his comments in rebuttal closing argument regarding the failure of the defense to call said expert, i.e., Dr. Blake, not only violated the policy behind the attorney work-product privilege, but also the confidential nature with respect to the funding of said expert, as envisioned by Penal Code § 987.9.

As a consequence, appellant was prejudiced under both the state constitutional standard (*People v Watson* (1956) 46 Cal.2d 818, 836) and the federal constitutional standard. *See Chapman*, 386 U.S. at 24; *Booker* 51 Cal.4th at 186.

D. Conclusion

The prosecutorial misconduct and the trial court rulings discussed above violated the Fifth, Sixth, Eighth, and Fourteenth Amendments of the federal Constitution and state constitutional corollaries with respect to their guarantees of fundamental fairness, due process of law, trial by an impartial jury, and reliability of verdicts. Moreover, it is settled that prosecutorial misconduct in argument violates the federal Constitution when it "so infect[s] the trial with unfairness as to make the resulting conviction a denial of due process." *Donnelly v. DeChristoforo* (1974) 416 U.S. 637, 643. Further, prosecutorial misconduct in argument violates the state law when deceptive or reprehensible methods are used and will result in reversal when it is reasonably probable that absent said conduct the result would have been different. *People v. Watson* (1956) 46 Cal.2d 818, 836. A review of the record here, as outlined above, compels reversal under both the federal and state standards for due process.

III. APPELLANT WAS DENIED HIS RIGHT OF CONFRONTATION UNDER THE SIXTH AMENDMENT WHEN THE RESULTS OF TERENA FERMENICK'S AUTOPSY WERE ENTERED INTO EVIDENCE THROUGH IN-COURT TESTIMONY OF A FORENSIC PATHOLOGIST WHO DID NOT PERFORM THE AUTOPSY.

A. Introduction

Extensive testimony was introduced about the autopsy, including the DNA collection, conducted on the victim. However, rather than call the pathologist who performed the autopsy, the DNA collection, and wrote the report, the prosecution called another pathologist who had had no connection to the autopsy, the DNA collection, or the report to testify about the autopsy, DNA collection, and the pathologist's findings and conclusions. This testimony violated appellant's confrontation rights under the Sixth Amendment.

B. The Testimony at Trial

In the course of prosecuting and convicting Appellant for the murder and sodomy of Fermenick, the prosecution introduced evidence of the results of Fermenick's autopsy, including the DNA collection, which was performed by pathologist Paul W. Herrmann, M.D., of the Institute of Forensic Sciences, which is contracted to perform autopsies for the Coroner's Office of the Alameda County Sheriff's Department. (People's Exh. 3; RT 3800-3802, 3798) However, rather than call Dr. Herrmann to testify about the autopsy, a different pathologist from the Institute, Dr. Thomas Rogers, testifying as an expert in the area of forensic pathology, testified about the findings made by Dr. Herrmann which were reflected in

the autopsy protocol[12] (People's Exh. 3; RT 3798-3802). The autopsy protocol is a document which is produced after every autopsy done by the coroner's office in the county. (RT 3800-3802)

Dr. Rogers testified regarding the findings, observations, activities, conduct, and conclusions of Dr. Herrmann in performing the autopsy of Terena Fermenick. He reviewed the slides taken by Dr. Herrmann during the course of performing the autopsy of Terena Fermenick. (RT 3804) He noted that the photographs of the person being autopsied [Terena Fermenick] as reflected in People's Exh. 4 as well as the other photographs to be shown to the jury [People's Exhs. 5 through 11] corresponded to the slides that Dr. Herrmann took. (RT 3803-3804) Moreover, he attested to the observation by Dr. Herrmann as to the clothing of Terena Fermenick based on the photographic exhibit (People's Exh. 5) as follows:

> Q. [PROSECUTOR]: Okay. Sir, I'm going to show you what has been marked previously as People's Exhibit Number 5 and ask if you would look at that photograph, sir, more particularly the garments which appear to be at the foot of the person lying there.
>
> A. [DR. ROGERS]: Okay.
>
> Q. Do those appear to be the blue jeans and the undergarments that you testified to that the body was initially clad at the coroner's office upon first observation by Dr. Herrmann?
>
> A. Yes, they do.

(RT 3804:15-25)

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[12] The autopsy protocol (autopsy) was identified as People's Exhibit 3 (RT 3801) but was not admitted into evidence. [CT 017512]

Dr. Rogers also indicated the injuries that were present upon initial observation by Dr. Herrmann as two types: (1) incised ones; and (2) blunt injuries:

> Q. Can you indicate to us the external injuries which were visible on the body upon initial observation?
>
> A. Two types of injuries were present. There were incised ones, and there were also some blunt injuries.

(RT 3804:26-3805:1) Hence, through a series a photographs Dr. Rogers described the incised injuries and blunt injuries to the body by reference to the photographic exhibits, People's Exhibits 4-11 (RT 3804-3812).

Dr. Rogers testified that during the autopsy, once the external examination of the body was completed, then an internal examination of the body was performed by Dr. Herrmann. (RT 3812-3813) This involved a Y-shaped incision in which the body was opened in order to examine the internal organs. (RT 3812-3813) Once this was completed, there was an investigation of the neck injuries. (RT 3813) Dr. Rogers testified the autopsy then showed that "[o]ne of the incised wounds to the neck extended down into the muscle of the neck. It also caused a incised defect, a total severance to a major blood vessel in the neck. The blood vessel is called the internal jugular vein. This was the left side of the neck." (RT 3814) Dr. Rogers noted further that during the autopsy, "one large, deep incised defect" and seven "superficial" defects were found in the neck (RT 3814), for a total of eight (8) defects. (RT 3814-3815) Dr. Rogers also noted that when the body was first observed on the gurney, prior to the internal examination, there was fecal matter around the anus. (RT 3817)

Dr. Rogers noted that the cause of death of Terena Fermenick was

"[i]ncised wound to the neck." (RT 3827) This, of course, is the cause of death noted by Dr. Herrmann in the autopsy protocol (People's Exh. 3 at p. 1) as well as in Dr. Herrmann's grand jury testimony (CT 17740 at 17760-17776, specifically at 17776).

Finally, Dr. Rogers described the activities and conduct of Dr. Herrmann in collecting the DNA sample material as to the rectal, vaginal, and vulva swabs, as reflected in People's Exhibits 12, 12A, and 13, 13A. (RT 3819-3824) First, Dr. Rogers described the activity of Dr. Herrmann in obtaining the rectal swab from Terena Fermenick, People's Exhibit 12A. Dr. Rogers testified that Dr. Herrmann inserted an application tip into the rectum of the decedent (Terena Fermenick) to obtain the sample. (RT 3820) Dr. Rogers noted that in his "opinion," that "Dr. Herrmann did put these test tubes [People's Exh. 12A] into this envelope [People's Exh. 12], and he then would have sealed it and also signed it," and further noted, "I do see his signature on the front of the envelope." (RT 3821) Second, as to the DNA sample with respect to the vaginal swabs and vulva swabs (People's Exh. 13A; RT 3815-3820), Dr. Rogers testified that the vaginal swabs were taken by Dr. Herrmann in the same fashion as he took the rectal swabs. (RT 3822) However, as to the vulva swabs, this involved a location outside the body, and hence, "in this case the applicator sticks are applied to this area of the body instead of inside the vaginal vault." (RT 3822) He further testified that in his opinion Dr. Herrmann eventually placed the vaginal and vulva swabs [People's Exh. 13A] into an evidence envelope [People's Exh. 13] and sealed and signed it. (RT 3823) Thus, Dr. Rogers testified as to his opinion regarding the findings, observations, activities, conduct and conclusions of Dr. Herrmann in performing the autopsy, including the DNA collection, of Terena Fermenick.

C. The Admission of Evidence Relating to the Autopsy Violated Appellant's Rights Under the Confrontation Clause of the Sixth Amendment.

The prosecution violated the Confrontation Clause by introducing the testimonial statements of one pathologist in a forensic autopsy, Dr. Herrrmann, including the autopsy protocol report, through the testimony of a different pathologist, Dr. Rogers, who had neither performed nor observed any of the tasks or analyses described in the statements.

The Sixth Amendment to the United States Constitution, made applicable to the states via the Fourteen Amendment (*Pointer v. Texas* (1965) 380 U.S. 400, 401, provides in relevant part: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him."

In *Crawford v. Washington* (2004) 541 U.S. 36, 68 (*Crawford*), the United States Supreme Court held that under the Sixth Amendment, a witness's testimony against a defendant is inadmissible unless the witness appears at trial or, if the witness is unavailable, the defendant had a prior opportunity for cross-examination. Later, in *Melendez-Diaz v. Massachusetts* (2009) 557 U.S. 305, 129 S.Ct. 2527 (*Melendez-Diaz*), the Court held that forensic laboratory reports made for the purpose of producing evidence for litigation, like the autopsy report in issue here, are testimonial evidence. (*Id.* at 2532) Then, in *Bullcoming v. New Mexico* (2011) __ U.S. __ , 131 S.Ct. 2705 (*Bullcoming*), the Court held that the prosecution violates the Confrontation Clause when it introduces a forensic laboratory report containing a testimonial certification prepared by one scientist through the in-court testimony of a scientist who neither signed the certification or performed or observed the test reported in the certification.

Most recently, the Court again addressed the confrontation issue in the four-one-four decision of *Williams v. Illinois* (June 18, 2012) 132 S.Ct. 2221. Although no majority opinion was generated, what can be gleaned from the multiple opinions is that "the Confrontation Clause, as interpreted in *Crawford*," bars "testimonial statements by declarants who are not subject to cross-examination." *Id.* at 2238 (plurality opinion of Alito, J., joined by Roberts, C.J., Kennedy and Breyer, JJ.)

The United States Supreme Court has repeatedly held that the prosecution violates the Confrontation Clause when it introduces one witness's testimonial statements through the in-court testimony of a second or surrogate witness. In *Crawford*, 541 U.S. at 68, for example, the Court found a Confrontation Clause violation because "the State admitted Sylvia's statement against petitioner, despite the fact that he had no opportunity to cross-examine *her*" [italics added]. In *Davis v. Washington* (2006) 547 U.S. 813, 826 (*Davis*), the Court found a Confrontation Clause violation when "a note-taking policeman recite[d] the unsworn hearsay testimony of the declarant." In *Melendez-Diaz, supra*, Justice Kennedy in his dissent commented, "The Court made clear in *Davis* that it will not permit the testimonial statement of one witness to enter into evidence through the in-court testimony of a second." (*Melendez-Diaz, supra,* 129 S.Ct. at 2546.) In *Bullcoming*, the Court held that the admission into evidence of the defendant's blood alcohol level, through the testimony of a substitute analyst from the same laboratory as the forensic analyst who prepared the report, violated the defendant's right to confront the analyst who prepared the report. (*Bullcoming, supra*, 131 S.Ct. at 2716.)

As the United States Supreme Court has explained, the Confrontation Clause "ensur[es] that evidence admitted against an accused is reliable and

subject to the rigorous adversarial testing that is the norm of Anglo-American criminal proceedings." (*Maryland v. Craig* (1990) 497 U.S. 836, 846.) There are four "elements of confrontation." Confrontation (1) enables cross-examination concerning the witness's factual assertions, his believability, and his character; (2) guarantees that the witness gives his testimony under oath; (3) allows the trier of fact to observe the witness's demeanor; and (4) ensures that the witness testifies in the presence of the defendant. (*Ibid.*)

These elements of confrontation are only served when the forensic pathologist who conducted the autopsy testifies to his or her observations and analyses in the forensic autopsy, including the autopsy protocol report as well as the DNA collection. They are not served where, as here, the testimonial statements are allowed into evidence through the in-court testimony of a surrogate witness who neither performed nor observed the autopsy.

As Appellant will further explain below, the erroneous admission of this evidence was not harmless beyond a reasonable doubt and he is entitled to have his conviction reversed. (*Chapman v. California* (1967) 386 U.S. 18, 24.)

1. The Record Fails to Establish That Dr. Herrmann Was Unavailable or That Appellant Had a Prior Opportunity to Cross-Examine Him.

Dr. Paul Herrmann was scheduled to be on vacation in Patagonia, South America, at the time the trial was scheduled to commence. (RT 1681, 3691-3692, 3782, 3783) This does not constitute "unavailability" for constitutional purposes and, furthermore, he was actually scheduled to return

from vacation in time to testify during the prosecution's case in chief.[13] Evidence Code Section 240(a)(1)-(6) sets forth the conditions under which a witness will be deemed "unavailable" to testify. They are, in relevant part, where a witness is: (1) exempted or precluded on the ground of privilege; (2) disqualified; (3) dead or unable to attend or to testify; (4) absent from the hearing and the court is unable to compel his attendance; (5) absent from the hearing and the proponent of his statement has exercised reasonable diligence; and (6) persistent in refusing to testify concerning the subject matter.

Notably, a witness being on vacation of which the prosecution had prior notice is not one of them. Yet, here, the prosecution's sole basis for claiming that Dr. Herrmann would be and was "unavailable" was that he was going to be on vacation in Patagonia, South America, at the time of trial. (RT 1681, 3691-3692, 3682-3683)

Accordingly, Dr. Herrmann's ostensible "unavailability" was of a temporary nature, an event driven by his vacation and the prosecution's witness schedule.[14] As noted above, Evidence Code § 240 defines

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[13] The trial commenced on January 26, 1999. (RT 3759 at 3769) On February 10, 1999, the People rested as to their case in chief. (RT 4817-4818) Dr. Herrmann was scheduled to return from vacation on February 2, 1999. (RT 1681)

[14] Apparently, the prosecutor wanted to call the pathologist first, but there was nothing that prevented the prosecutor from reordering his witness schedule to accommodate the vacation of Dr. Herrmann. Based on the record, Dr. Herrmann was to return from vacation on February 2, 1999. (RT 1681) However, the trial commenced on January 26, 1999 (RT 3759 at 3769), with the prosecution concluding its case in chief on February 10, 1999 (RT 4817-4818), and hence, the prosecution had more than a week to put Dr. Herrmann on in their case in chief.

unavailability generally as the witness being dead, mentally ill, privileged or disqualified, or is absent and cannot be found with reasonable diligence. Moreover, the prosecutor has a duty to make a reasonable, good faith effort to obtain a witness' attendance before that witness is deemed unavailable. *See, e.g.*, *People v. Sandoval* (2001) 87 Cal.App.4th 1425, 1433 (admission of preliminary hearing testimony of absent witness residing in Mexico violated defendants' right of confrontation where prosecution failed to make reasonable, good faith effort to obtain witness' attendance in light of treaty with Mexico providing cooperation in securing testimony, and in light of witness' apparent willingness to attend trial); *People v. Avila* (2005) 131 Cal.App.4th 163, 169 (prosecution's delay until morning of trial to secure witness, explaining it feared witness would flee, was not due diligence where witness had been cooperative and seemingly fearless; due diligence suggests ''untiring effort,'' which standard was not satisfied in this case).

This Court, in *People v. Herrera* (2010) 49 Cal.4th 613, 622, *cert. denied*, 131 S.Ct. 361, addressed the question of unavailability of a witness in the constitutional sense, noting that the prosecution must make a "good faith effort" to obtain the witness's presence at court. The Court addressed the issue as follows:

> A witness who is absent from a trial is not "unavailable" in the constitutional sense unless the prosecution has made a "good faith effort" to obtain the witness's presence at the trial. (*Barber v. Page* (1968) 390 U.S. 719, 724–725, 88 S.Ct. 1318, 20 L.Ed.2d 255 (*Barber*).) The United States Supreme Court has described the good-faith requirement this way: "The law does not require the doing of a futile act. Thus, if no possibility of procuring the witness exists (as, for example, the witness' intervening death), 'good faith' demands nothing of the prosecution. But if there is a

> possibility, albeit remote, that affirmative measures might produce the declarant, the obligation of good faith may demand their effectuation. 'The lengths to which the prosecution must go to produce a witness . . . is a question of reasonableness.' [Citation.] The ultimate question is whether the witness is unavailable despite good-faith efforts undertaken prior to trial to locate and present that witness." (*Ohio v. Roberts* (1980) 448 U.S. 56, 74, 100 S.Ct. 2531, 65 L.Ed.2d 597, disapproved on another point in *Crawford v. Washington* (2004) 541 U.S. 36, 60–68, 124 S.Ct. 1354, 158 L.Ed.2d 177.)

Id. at 622.

Dr. Herrmann was not unavailable, and the prosecution made no effort whatsoever to secure his presence at trial. Neither the prosecutor's witness schedule nor Dr. Herrmann's vacation are sufficient to constitute unavailability or to trump the confrontation rights of Appellant Nadey.

Crawford held that when a witness is unavailable, the Sixth Amendment requires that the defendant must have had a prior opportunity for cross-examination before the witness's testimonial statements may be admitted into evidence. The record also fails to establish that Appellant had a prior opportunity to cross-examine Dr. Herrmann regarding the Fermenick autopsy. Instead, the record shows only that the prosecution called Dr. Herrmann to testify about his autopsy of Fermenick's body at a grand jury proceeding. (CT 17747) At that proceeding, no cross-examination of Dr. Herrmann by counsel representing Appellant took place. (CT 17741 at 17760, 17776)

Thus, there was no adequate demonstration at trial that Dr. Herrmann was both unavailable to testify and that the defense had a prior opportunity to cross-examine him on the subject of the Fermenick autopsy.

2. *Bullcoming* and *Melendez-Diaz* Establish That the Results of the Forensic Autopsy Performed by Dr. Herrmann Are Testimonial Evidence and Together with *Crawford* and *Davis* Present a Clear Iteration That the Confrontation Clause Does Not Permit the Testimonial Statement of One Witness to Enter into Evidence Through the In-Court Testimony of a Second.

In *Crawford*, the United States Supreme Court held that if the prosecution decides to introduce testimonial evidence, the Confrontation Clause guarantees the defendant the right to confront the declarant. (*Crawford, supra*, 541 U.S. at 68.) The Court explained that the "ultimate goal" of the Confrontation Clause "is to ensure reliability of evidence." (*Id.*, at 61.)

In further expressions, the Court has repeatedly held that the prosecution violates a defendant's Confrontation Clause rights when it introduces a witness's testimonial statement through the in-court testimony of someone other than the maker or creator of the testimonial statement.[15] In *Crawford*, in *Davis*, and in *Melendez-Diaz*, for example, the Court found confrontation violations in allowing police officers to testify to the testimonial statements others made in response to police questioning and in the admission of certificates containing forensic analysts' assertions regarding drug test results of substances found by police during their investigation. (*Crawford, supra*, 541 U.S. at 68; *Davis, supra*, 547 U.S. at 826; *Melendez-Diaz, supra*, 129 S.Ct. at 2532.) In *Bullcoming*, the Court

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[15] See *Melendez-Diaz, supra*, 129 S.Ct. at 2552 (Kennedy, J., dissenting), "The Court today . . . [holds] that anyone who makes a formal statement for the purpose of later prosecution – no matter how removed from the crime – must be considered a 'witness against' the defendant."

found a confrontation violation in allowing one scientist to testify to forensic laboratory results reached by another scientist in the same laboratory in procedures the surrogate witness had neither performed nor observed. (*Bullcoming, supra*, 131 S.Ct. at 2710.) But for the forensic specialties involved, the salient facts underlying Appellant's claim of error echo those of the defendant in *Bullcoming*.

The clear implication of these holdings is that, absent unavailability and the prior opportunity for cross-examination, the declarant must testify regarding his or her own extrajudicial testimonial statements. ("The accused's right is to be confronted with the analyst who made the certification, unless that analyst is unavailable at trial, and the accused had an opportunity, pretrial, to cross-examine that particular scientist." (*Bullcoming, supra*, 131 S.Ct. at 2710); see also *Melendez-Diaz, supra*, 129 S.Ct. at 2546 (Kennedy, J., dissenting), "The Court made it clear in Davis that it will not permit the testimonial statement of one witness to enter into evidence through the in-court testimony of a second. . . .")[16]

Crawford further observed that where reliability is concerned, "replacing categorical constitutional guarantees [*viz.*, the cross-examination of the declarant prescribed by the Confrontation Clause] with open-ended

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[16] Justice Kennedy supported this observation by quoting, and by making the bracketed annotations included here, from *Davis*: "[W]e do not think it conceivable that the protections of the *Confrontation Clause* can readily be evaded by having a note-taking policeman [here, the laboratory employee who signs the certificate] *recite* the unsworn hearsay testimony of the declarant [here, the analyst who performs the actual test], instead of having the declarant sign a deposition. Indeed, if there is one point for which no case – English or early American, state or federal – can be cited, that is it." (*Melendez-Diaz, supra*, 129 S.Ct. at 2546 (Kennedy, J., dissenting), quoting from *Davis, supra*, 547 U.S. at 826.)

balancing tests [*viz.*, assessing reliability through surrogate testimony]" does "violence" to the Framers' design because "[v]ague standards are manipulable." (*Crawford, supra*, 541 U.S. at 67-68.)

Crawford continued:

> Where nontestimonial hearsay is at issue, it is wholly consistent with the Framers' design to afford the States flexibility in their development of hearsay law – as does *Roberts*, and as would an approach that exempted such statements from *Confrontation Clause* scrutiny altogether.

(*Crawford, supra*, 541 U.S. at 68)

Crawford concluded: "Where testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation." (*Id.* at 68-69; emphasis added.)

In *Davis*, the Court adhered once more to the principle that the Confrontation Clause ensures the reliability of testimonial evidence only through the guarantee of confrontation, by stating that the requirement of confrontation is compelled even in circumstances where precluding testimonial evidence results in a "windfall" for the criminal defendant. The Court rejected contentions that the Confrontation Clause should be construed to allow "greater flexibility in the use of testimonial evidence" in domestic violence cases where the crime victims are more susceptible to coercion or intimidation and therefore more likely not to testify, saying, "We may not . . . vitiate constitutional guarantees when they have the effect of allowing the guilty to go free." (*Davis, supra*, 547 U.S. at 833.)

In *Melendez-Diaz*, the Court repeatedly explained that it is the maker or creator of the testimonial statement the defendant is entitled to confront.

In circumstances analogous to those in appellant's case, the Court explained it is the analyst who made the assertions in the report who must testify. For example, the Court expressly and specifically said the Confrontation Clause required that the defendant be able to confront the forensic analysts who performed the drug tests and whose testimonial statements were in issue.

> In short, under our decision in *Crawford* the analysts' affidavits were testimonial statements, and the analysts were "witnesses" for the purposes of the Sixth Amendment. Absent a showing that the analysts were unavailable to testify at trial and that petitioner had a prior opportunity to cross-examine them, petitioner was entitled to "'be confronted with'" the analysts at trial. [Citation.]

(*Melendez-Diaz, supra*, 129 S.Ct. at 2532)

In yet another demonstration that Confrontation Clause jurisprudence must adhere to the literal language of the constitutional text by compelling confrontation, the Court rejected the contention that analysts are not subject to confrontation because they do not directly accuse the defendant of wrongdoing. The Court reasoned that the analysts provided testimony against the petitioner by proving one fact necessary for his conviction – that the substance he possessed was cocaine. (*Melendez-Diaz, supra*, 129 S.Ct. at 2533.)

Melendez-Diaz also rejected contentions that the analysts should not be subject to confrontation because forensic analysts are not "conventional" witnesses in that: (1) the analyst's report contains "near-contemporaneous observations," whereas a conventional witness recalls events observed in the past; (2) the analyst neither observed the crime nor any human action related to the crime; and (3) the analyst's statements were not provided in response

to interrogation. (*Id.*, at 2534-2535.)

In rejecting the first of these points – the notion that contemporaneous observations are a requisite for testimonial statements – the Court pointed out that its decision in *Davis* disproved the contention that contemporaneity of the reporting determined whether a statement is testimonial and its maker a witness within the meaning of the Confrontation Clause. In *Davis*, the domestic battery victim's report was so fresh the trial court admitted it as a present sense impression. (*Id.* at 2535, citing *Davis, supra*, 547 U.S. at 820.)

The Court rejected the second point – that the forensic analyst was not a conventional witness because the analyst had neither observed the crime nor any human action connected with it – because the contention was patently unsupported by authority. The Court also reasoned that if the Confrontation Clause were held to exempt those who did not observe the crime or human action connected with it, the anticipated result would be that all expert witnesses would conceivably be exempted from confrontation and a police crime scene report would be admissible without the authoring police officer being subjected to cross-examination. (*Melendez-Diaz, supra*, 129 S.Ct. at 2535.)

The Court rejected the third contention – that the forensic analysts should not be subjected to confrontation because their statements were not provided in response to interrogation – again on the ground the contention was unsupported by authority, and also because the analysts' affidavits were in fact, as was the autopsy report in appellant's case, prepared in response to a police request. The Court referred once more to its holding in *Davis* and pointed out that there it was the wife's affidavit regarding a domestic battery that was prepared in response to a police officer's request that triggered the Sixth Amendment's protection (*Davis, supra*, 547 U.S. at 819-820). The

Court analogized that circumstance to the circumstance in the case before it – where the analysts' affidavits were also prepared pursuant to a police request – and concluded that the analogous circumstances required that "the analysts' testimony should be subject to confrontation as well." (*Melendez-Diaz, supra*, 129 S.Ct. at 2535.) In Appellant's circumstance, Dr. Herrmann's autopsy findings identified an "[i]ncised wound to the neck" as the cause of Fermenick's death which, in effect, characterized the death as a homicide, necessary elements in the investigation and eventual prosecution of Appellant. (RT 3827) The analogy to the circumstances in *Davis* and *Melendez-Diaz* is apparent.

The Court also demonstrated its adherence to the literal language of the constitutional text in rejecting contentions that testimonial evidence produced by forensic laboratory analysts did not require confrontation to guarantee its reliability. *Melendez-Diaz* considered and systematically rejected arguments claiming that the scientific nature of the work of forensic analysts should cause them to be exempt from the requirements of the Confrontation Clause.

The Court, thus, rejected the contention that the Confrontation Clause should be construed to exempt "neutral, scientific testing," which, unlike testimony recounting historical events, is not "prone to distortion or manipulation," and the related contention that confrontation of forensic analysts would be of little value because the analyst is not likely to feel differently about the results of his testing when looking at the defendant. The Court explained that confrontation is required because "[f]orensic evidence is not uniquely immune from the risk of manipulation," and pointed to publications citing examples of convictions based on discredited forensic evidence. The Court noted that "[c]onfrontation is designed to weed out not

only the fraudulent analyst, but the incompetent one as well." (*Melendez-Diaz, supra*, 129 S.Ct. at 2537.)

Melendez-Diaz rejected the contention that the analysts' affidavits satisfied the confrontation requirement because they were the equivalent of "official and business records admissible at common law." (*Melendez-Diaz, supra*, 129 S.Ct. at 2538.) The Court found that the forensic analysts' affidavits did not qualify as traditional official or business records because the regular course of the business was the production of evidence for use at trial, but also said that even if the affidavits did qualify for admission as a business record, their authors would still be subject to confrontation. (*Ibid.*) The Court made it clear in the following elaboration that it was the analysts' role as creators of the testimonial evidence that subjected them to confrontation:

> Business and public records are generally admissible absent confrontation not because they qualify under an exception to the hearsay rules, but because – having been created for the administration of an entity's affairs and not for the purpose of establishing or proving some fact at trial – they are not testimonial. Whether or not they qualify as business or official records, the analysts' statements here – prepared specifically for use at petitioner's trial – were testimony against petitioner, and the analysts were subject to confrontation under the *Sixth Amendment*.

(*Melendez-Diaz, supra*, 129 S.Ct. at 2539-2540.)

As part of this discussion concerning business and official records, the Court considered the dissent's reliance on a class of evidence – a clerk's certificate authenticating an official record – that was both produced for use at trial and traditionally admissible. The Court noted that the clerk could by

affidavit authenticate a copy of an otherwise admissible record, but the clerk "could not do what the analysts did here: create a record for the sole purpose of providing evidence against a defendant." (*Id.* at 2538-2539, fn. omitted.)

This distinction drawn by the Court is particularly illuminating with regard to the issue of surrogate testimony discussed in this argument. The clerk in the illustration above was by way of affidavit able to authenticate an otherwise admissible document, but the clerk was not able to create it. In much the same way, a pathologist may be able to authenticate the procedures followed in the forensic protocol of an autopsy performed by another pathologist, but he or she can never be the creator of the testimonial evidence prepared by another.

The Court reinforced its adherence to the principles set forth above in *Bullcoming*, in which the defendant's blood was drawn pursuant to warrant following his arrest for driving under the influence of alcohol. At trial, the State did not call Curtis Caylor, the analyst who performed the test who, according to the prosecution, had recently been put on unpaid leave. Instead, the prosecution called Gerasimos Razatos, an analyst who was familiar with the laboratory's testing procedures, but who had neither participated in nor observed the test on the defendant's sample. (*Bullcoming, supra*, 131 S.Ct. at 2712.)

On review, New Mexico's Supreme Court concluded in light of *Melendez-Diaz* that the blood-alcohol analysis was "testimonial," but that the Confrontation Clause did not require the in-court testimony of the scientist who performed the analysis for two reasons. First, the New Mexico court said the analyst who performed the testing was a "mere scrivener" who "simply transcribed the results generated by the gas chromatograph machine. [Citation.]" Second, the New Mexico court found the surrogate witness

qualified as an expert witness on the gas chromatograph machine and thus was available for cross-examination regarding its operation. (*Bullcoming, supra*, 131 S.Ct. at 2713.)

On certiorari to the United States Supreme Court, New Mexico contended that surrogate testimony adequately satisfied the Confrontation Clause because the "true accuser" was the gas chromatograph machine and not the testing scientist who simply transcribed the results produced by the machine and, alternatively, that the forensic report was nontestimonial and therefore not subject to the Confrontation Clause. (*Bullcoming, supra*, 131 S. Ct. at 2714.)

In finding for the defendant, the United States Supreme Court in *Bullcoming* pointed to representations in Caylor's report concerning the particular test and testing process he employed – foundational issues surrounding the blood sample testing, the particular testing done, and the precise protocol followed – that involved more than machine-generated numbers. (*Bullcoming, supra*, 131 S.Ct. at 2714.) Further, the Court noted that the "comparative reliability of an analyst's testimonial report drawn from machine-produced data" is not constitutionally adequate because the Confrontation Clause commands that reliability be tested in the "crucible of cross-examination." (*Bullcoming, supra*, 131 S.Ct. at 2714.)

The Court observed that surrogate testimony could never convey what Caylor knew or observed about the particular test and testing process he employed. Lapses or lies on the part of the certifying analyst would not be reachable through the testimony of a surrogate. Caylor had been placed on unpaid leave, but Razatos had no knowledge regarding why that had been done, and defense counsel was precluded from asking questions designed to reveal whether incompetence or dishonesty was the reason for Caylor's

removal. (*Bullcoming, supra*, 131 S.Ct. at 2715.)

The *Bullcoming* Court concluded: "[T]he Clause does not tolerate dispensing with confrontation simply because the court believes that questioning one witness about another's testimonial statements provides a fair enough opportunity for cross-examination." (*Bullcoming, supra*, 131 S.Ct. at 2716.)

Finally, *Bullcoming* concluded that the laboratory report in its case resembled those in *Melendez-Diaz* in all material respects and so were testimonial statements for the reasons the reports in *Melendez-Diaz* were testimonial statements. In *Melendez-Diaz* and in *Bullcoming*, police provided seized evidence to a police-related laboratory for testing related to a police investigation. The analysts in both cases tested the materials and prepared certificates reporting the results of their testing. The certificates were "formalized" in a signed document. The "certificates of analysis" in *Melendez-Diaz* were sworn to before a notary public by the analysts at the state laboratory. (*Melendez-Diaz, supra*, 129 S.Ct. at 2531.) The reports in *Bullcoming* were "unsworn." (*Bullcoming, supra*, 131 S.Ct. at 2717) *Bullcoming* held the absence of a notarization from the New Mexico certificate did not remove that certificate from Confrontation Clause governance. *Bullcoming* concluded that the certificate in issue before it fell within the "core class of testimonial statements," described in *Melendez-Diaz*, *Davis*, and *Crawford*. (*Bullcoming, supra*, 131 S.Ct. at 2717.)

The foregoing discussion shows that the United States Supreme Court has consistently rejected any and all contentions that would compromise or dilute the guarantee of the Confrontation Clause that the reliability of

evidence is assessed only through confrontation. The Court's recognition in *Bullcoming* that when New Mexico elected to introduce the results of Caylor's testing, Caylor became the witness that the defendant had the right to confront is consistent with the precedent established in *Melendez-Diaz*, *Davis*, and *Crawford*. (*Bullcoming, supra*, 131 S.Ct. at 2715.) The Court's express statement in *Melendez-Diaz* that the Confrontation Clause required that the forensic analysts themselves testify[17] and the Court's consistent adherence to the principle that confrontation is the only method of assessing the reliability of evidence lead inescapably to the conclusion that appellant was denied his right of confrontation under the Sixth Amendment when Dr. Rogers testified to the results of the autopsy performed by Dr. Herrmann, and the DNA collection process.

In *Williams v. Illinois*, 132 S.Ct. at 2264-2277, Justice Kagan in her dissenting plurality opinion (joined by Justices Scalia, Ginsburg, and Sotomayor), makes clear the continued vitality of *Melendez-Diaz* and *Bullcoming* as follows:

> I would decide this case consistently with, and for the reasons stated by, *Melendez-Diaz* and *Bullcoming*. And until a majority of this Court reverses or confines those decisions, I would understand them as continuing to govern, in every particular, the admission of forensic evidence.

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[17] The Court stated: "In short, under our decision in *Crawford* the analysts' affidavits were testimonial statements, and the analysts were 'witnesses' for purposes of the *Sixth Amendment*. Absent a showing that the analysts were unavailable to testify at trial and that petitioner had a prior opportunity to cross-examine them, petitioner was entitled to ' "be confronted with"' the analysts at trial. (*Crawford, supra*, 541 U.S. at p. 54.)" (*Melendez-Diaz, supra*, 129 S.Ct. at 2532.)

Id. at 2277. Consequently, this reaffirms the aforementioned conclusion that appellant was denied of his right of confrontation under the Sixth Amendment.

3. Permitting the Testimonial Statement of One Witness to Enter into Evidence Through the In-Court Testimony of a Second Thwarts All Four Elements of Confrontation Identified in *Maryland v. Craig*.

In *Maryland v. Craig* (1990) 497 U.S. 836, *supra*, the Supreme Court identified the "elements of confrontation" to be (1) "cross-examination"; (2) the giving of testimony under oath; (3) "observation of [the declarant's] demeanor by the trier of fact"; and (4) "physical presence" of the defendant during the witness's testimony. (*Maryland v. Craig, supra*, 497 U.S. at 846.)

1. Cross-examination enables the defendant to "test the recollection of the witness" and to inquire into the circumstances underlying any of his prior recorded recollections introduced into evidence. (*Dowdell v. United States* (1911) 221 U.S. 325, 330.) A surrogate would not be able to testify to the recollection of a declarant. Here, for example, because Dr. Herrmann's findings were allowed into evidence through the testimony of Dr. Rogers, the defense was unable to test the accuracy of either Dr. Herrmann's autopsy findings or to confront him with his prior testimony to the grand jury. Moreover, the defense was unable to cross-examine Dr. Herrmann regarding the DNA material with respect to the rectum, vaginal, and vulva swabs, that is, People's Exhibits 12A and 13A. This prejudiced Appellant, because he was unable to test the process by which the DNA materials were extracted from the body of Terena Fermenick. This evidence became critical to the DNA analysis, and the failure to be able to cross-examine was imperative in light of the later determined contamination and

cross-contamination of the DNA and the presence of an unidentified third donor.

Cross-examination promotes truthful testimony at trial by allowing the defendant to "sift[] the conscience of the witness" testifying against him for the truth. (*Mattox v. United States* (1895) 156 U.S. 237, 242.) In addition, before trial, the prospect of facing cross-examination deters witnesses from making false testimonial statements. Allowing surrogate witnesses to testify to the declarant's testimonial statements eviscerates the deterrent effect of cross-examination by shielding the declarant from cross-examination.

Cross-examination further allows the defendant to "force the declarant to clarify ambiguous phrases and coded references" made in prior statements by the declarant the prosecution wishes to introduce into evidence. The defendant may seek clarification of any "inconsisten[cies]" between the prior statements and the witness's in-court testimony. (*United States v. Inadi* (1986) 475 U.S. 387, 407 (Marshall, J., dissenting.) Here, again, Dr. Roger's efforts to attest to the accuracy of Dr. Herrmann's findings, in particular the extraction of the DNA material, People's Exhibits 12, 12A, and 13, 13A, which were found to be subject to contamination, illustrates the point that the use of a surrogate thwarts the truth-finding purpose of cross-examination.

Finally, cross-examination enables a defendant to attack the credibility of a witness by probing into his personal history, experience, sensory perceptions, and motives. (*See Davis v. Alaska* (1974) 415 U.S. 308, 316.) Information of this nature, including a declarant's job performance or history of substance abuse, is not information typically known by a surrogate witness.

2. The Confrontation Clause requires witnesses to provide their

testimony under oath, "impressing [them] with the seriousness of the matter and guarding against the lie by the possibility of a penalty for perjury." (*Maryland v. Craig, supra*, 497 U.S. at 845-846.) The Supreme Court has made clear that while a "trial by sworn ex parte affidavit" is offensive to the Confrontation Clause, a system of "trial by unsworn ex parte affidavit" would be worse. (*Crawford, supra*, 541 U.S. at 52-53 fn. 3; accord *Davis, supra*, 547 U.S. at 826.)

3. Confrontation of the declarant ensures that the jury has the chance to observe the witness who made the testimonial statement and to "judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief." (*Mattox, supra*, 156 U.S. at 242-243.) Here, when Dr. Rogers testified in place of Dr. Herrmann, it was Dr. Rogers whose qualifications and credentials the jury heard and Dr. Rogers whom the jury listened to and observed. It is therefore reasonable to expect that it was Dr. Rogers' credibility the jury likely assigned to the testimonial statements actually made by Dr. Herrmann.

4. Confrontation traditionally guarantees a "face-to-face encounter between witness and accused." (*Coy v. Iowa* (1988) 487 U.S. 1012, 1017.) "[T]here is something deep in human nature that regards face-to-face confrontation between accused and accuser as 'essential to a fair trial in a criminal prosecution.'" (*Ibid.*, quoting *Pointer v. Texas* (1965) 380 U.S. 400, 404.) The employment of a surrogate witness eliminates the face-to-face encounter between the defendant and the declarant and deprives the defendant of the opportunity to have the negligent or careless or intentionally malperforming declarant realize the import of his testimonial statements. A system that requires a face-to-face encounter between the witness who made the testimonial statement and a defendant facing death, as

in this case, helps ensure that the declarant fully realizes the import of his testimony.

Moreover, the use of a surrogate witness, even an expert surrogate witness, is no more than an attempt to establish the reliability of the testimonial evidence, as *Bullcoming* recognized. As that Court stated: "[T]he Clause does not tolerate dispensing with confrontation simply because the court believes that questioning one witness about another's testimonial statements provides a fair enough opportunity for cross-examination." (*Bullcoming, supra*, 131 S.Ct. at 2716.)

4. Appellant's Failure to Object at Trial Did Not Waive the Issue on Appeal Because a Well-established Rule Was Changed after Trial.

The record reflects that the prosecutor offered the testimony of Dr. Rogers "as an expert in the area of forensic pathology as to the findings made by Dr. Herrmann" based upon the purported unavailability of Dr. Herrmann. (RT 3802) Dr. Rogers agreed that this was the basis upon which his testimony was offered and confirmed that he had reviewed records, photographs, and writings, including the autopsy protocol, prepared and/or performed by Dr. Herrmann with respect to the autopsy of Terena Fermenick on January 19, 1996 in preparation for said testimony. (RT 3801-3802) The record also shows that defense counsel made no objection to the autopsy evidence under the Sixth Amendment. (RT 3800) It should be noted that Appellant's trial herein took place in 1999, well before the decision of *Crawford v. Washington* (2004) 541 U.S. 36, and thus, well before the defendant's attorneys would have been expected to raise an objection to the admission of the Rogers testimony based upon the Confrontation Clause. Counsel cannot forfeit a claim by failing to make an objection that was futile

at the time of trial. (*O'Connor v. Ohio* (1966) 385 U.S. 92, 93 ["failure to object to a practice which Ohio had long allowed cannot strip him of his right to attack the practice following its invalidation by this Court"]; *People v. Birks* (1998) 19 Cal.4th 108, 116, fn. 6 [no waiver where lower court was bound by decision of higher court on issue].)

It is well settled in this state that the defendant is not required to anticipate a wholesale change in the law such as wrought by *Crawford v. Washington* (2004) 541 U.S. 36, 68. "A contrary holding would place an unreasonable burden on defendants to anticipate unforeseen changes in the law and encourage fruitless objections in other situations where defendants might hope that an established rule of evidence would be changed on appeal. . . ." (*People v. Kitchens* (1956) 46 Cal.2d 260, 263; *see also*, *People v. Turner* (1990) 50 Cal.3d 668, 703 [no waiver "when the pertinent law later changed so unforeseeably that it is unreasonable to expect trial counsel to have anticipated the change"]; *People v. Thomas* (2005) 130 Cal. App.4th 1202, 1208; *People v. Johnson* (2004) 121 Cal. App.4th 1409, 1411, n.2 [failure to object excused because under pre-*Crawford* hearsay regime of *Ohio v. Roberts* (1980) 448 U.S. 56, 66, defendant had "scant grounds for objection"]; *People v. Sisavath* (2004) 118 Cal. App.4th 1396, 1400 [*Crawford* announced a new rule re: *6th Amendment* and hearsay].) It follows that the waiver rule cannot be fairly applied in this instance.

This Court should find that appellant's constitutional objections to Dr. Rogers' testimony are not waived. (*See People v. Sandoval* (2007) 41 Cal.4th 825, 837, n.4 [finding trial counsel's failure to object on Sixth Amendment grounds to sentence was not forfeited because counsel could not have anticipated decision in *Cunningham v. California* (2007) 547 U.S. 270].) Accordingly, this Court should reach the merits of the claim.

5. The Erroneous Admission of Dr. Herrmann's Testimonial Statements Through the In-Court Testimony of Dr. Rogers Was Not Harmless Beyond a Reasonable Doubt.

Confrontation Clause violations are subject to federal harmless-error analysis under *Chapman v. California* (1967) 386 U.S. 18, 24. (*Delaware v. Van Arsdall* (1986) 475 U.S. 673, 681.) "Since Chapman, we have repeatedly reaffirmed the principle that an otherwise valid conviction should not be set aside if the reviewing court may confidently say, on the whole record, that the constitutional error was harmless beyond a reasonable doubt." (*Delaware v. Van Arsdall, supra*, at 681.) The harmless error inquiry asks: "Is it clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error?" (*Neder v. United States* (1999) 527 U.S. 1, 18.)

The autopsy evidence established that the death of Terena Fermenick was the result of a homicide and indicated that she had been sodomized. Dr. Rogers testified regarding the findings, observations, activities, conduct, and conclusions of Dr. Herrmann in performing the autopsy of Terena Fermenick. Dr. Rogers noted that the cause of death of Terena Fermenick was "[i]ncised wound to the neck." (RT 3827) This, of course, is the cause of death noted by Dr. Herrmann in the autopsy protocol (People's Exh. 3 at p. 1) as well as in Dr. Herrmann's grand jury testimony (CT 17740 at 17760-17776, specifically at 17776). Dr. Rogers also noted that during the autopsy, "one large, deep incised defect" and seven "superficial" defects were found in the neck (RT 3814), for a total of eight (8) defects. (RT 3814-3815) This again was predicated on the autopsy findings of Dr. Herrmann as reflected in the autopsy protocol (People's Exh. 3) and Dr. Herrmann's grand jury

testimony (CT 17760-17776). The cause of death noted by Dr. Rogers as the "incised wound to the neck" and the eight defects found in the neck indicated that the death of Terena Fermenick was the result of a homicide, not some type of accident. Moreover, Dr. Rogers also noted that when the body was first observed on the gurney, prior to the internal examination, there was fecal matter around the anus (RT 3817). This, again, was predicated on the observations by Dr. Herrmann as reflected in the autopsy protocol (People's Exh. 3) and Dr. Herrmann's grand jury testimony (CT 17760-17776). Thus, Dr. Rogers, based on the findings, observations, activities, conduct, and conclusions by Dr. Herrmann in performing the autopsy of Terena Fermenick, as reflected both in the autopsy protocol authored by Dr. Herrmann (People's Exh. 3) and Dr. Herrmann's grand jury testimony (CT 17760-17776), provided testimony regarding the results of the Fermenick autopsy regarding the death of Terena Fermenick being the result of a homicide and, moreover, that she had been sodomized, as reflected in the testimony of Dr. Rogers.

Moreover, Dr. Rogers testified as to Dr. Herrmann's activities and conduct in collecting the DNA sample material as to the rectal, vaginal, and vulva swabs, as reflected in People's Exhs. 12, 12A, and 13, 13A (RT 3819-3824). Dr. Rogers described the activity of Dr. Herrmann in obtaining the rectal swab from Terena Fermenick People's Exh. 12A) (RT 3820-3821). Dr. Rogers also testified how Dr. Herrmann took the vaginal swabs (RT 3822). Further, he testified as to how Dr. Herrmann took the vulva swabs (RT 3822). Moreover, Dr. Rogers testified that in his opinion Dr. Herrmann placed the rectal swabs (i.e., People's Exh. 12A) into the evidence envelope identified as People's 12. (RT 3820-3821) Further, he testified that the vaginal swabs and vulva swabs (i.e., People's Exh. 13A) were placed in the

envelope (People's Exh. 13) by Dr. Herrmann. (RT 3822-3823) Thus, Dr. Rogers testified as to the critical DNA link regarding the rectal swabs, vaginal swabs, and vulva swabs taken from Terena Fermenick as reflected in People's Exhs. 12A and 13A, which were placed in evidence envelopes, People's Exhs. 12 and 13, respectively, and further opined regarding the observations, activities, and conduct by Dr. Herrmann with respect to the extraction of this DNA material from the body of Terena Fermenick during the autopsy. The rectal swabs (People's Exh. 12A) and the vaginal swabs and vulva swabs (People's Exh. 13A) were examined and evaluated in connection with a DNA analysis performed by Sharon Smith, a supervising criminalist with the Alameda County Sheriff's Office Crime Laboratory (RT 4264-4285). Steven Myers was a criminalist with the California Department of Justice DNA Laboratory (RT 4457). He received People's Exhibits 12 and 12A as well as 13 and 13A with respect to the rectal swabs, vaginal swabs, and vulva swabs, which were utilized in the DNA analysis. (RT 4477-4478) Based on his analysis, which included the rectal swabs, vaginal swabs, and vulva swabs (RT 4492-4508), Mr. Myers concluded that they were strong evidence that Mr. Nadey was the sperm donor as to the vulva swab taken from Terena Fermenick (i.e., People's Exh. 13A). (RT 4508-4509)

Thus, the critical DNA evidence, which purportedly established the link between Appellant Nadey and the victim, Terena Fermenick, was derived from the sperm fraction of the vulva swab (People's Exh. 13A) (RT 4508) which, according to Dr. Rogers, was taken from the body of Terena Fermenick during the autopsy by Dr. Herrmann. Both Sharon Smith and Steven Myers attested to the rectal, vaginal, and vulva swabs (People's Exhs. 12, 12A, and 13, 13A) as to their involvement in the DNA processing and analysis which resulted in the opinion of Mr. Myers that there was strong

evidence that Appellant Nadey was the "major donor to the sperm fraction of the vulva swab." (RT 4508) However, Dr. Herrmann did not testify regarding the taking of the vulva swabs from the body of Terena Fermenick during the autopsy; Dr. Rogers, who was not present during the autopsy, testified as to Dr. Herrmann's conduct and activities with respect to the taking of the vulva swabs. Most importantly, the prosecution relied principally on the DNA evidence in closing argument to argue a link between Appellant Nadey and the victim Terena Fermenick based on the DNA analysis performed by Sharon Smith and Steven Myers, which relied on the rectal, vaginal, and vulva swabs (People's Exhs. 12, 12A, and 13, 13A) which were taken by Dr. Herrmann during the autopsy, but were attested to by Dr. Rogers, who was not present during the autopsy. (RT 5133-5179)

The admission of the autopsy evidence, particularly as to the aforementioned DNA evidence, cannot be said to have been harmless beyond a reasonable doubt with regard to proving the link between Appellant Nadey and the victim, Terena Fermenick with respect to the sodomy and murder of Terena Fermenick. *Chapman v. California*, *supra*, 386 U.S. at 24. Moreover, it was the autopsy evidence that established the special circumstance of sodomy (violation of §286) which pursuant to §190.2(a)(17)(iv) as charged in the indictment (CT 353-358) rendered appellant death eligible in light of the jury finding. (CT 903-906, CT 898-899) Consequently, the Confrontation Clause violations were not harmless under the *Chapman* standard.

IV. THE TRIAL COURT VIOLATED STATE LAW AND APPELLANT'S FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENT RIGHTS, AS WELL AS HIS CONCOMITANT RIGHTS UNDER THE STATE CONSTITUTION, BY FAILING TO PERFORM AN APPROPRIATE INQUIRY AS TO JUROR MISCONDUCT WITH RESPECT TO THE GUILT PHASE DELIBERATIONS.

A. The Relevant Facts

On the second day of the penalty phase trial, March 3, 1999, the court advised counsel that two poems written by Juror No. 1 were found in the jury room by the bailiff:

> [THE COURT] And last night when the bailiff was tidying up the jury room, he gave me what appears to be two poems written by - - I can't say who they are written by - - Juror Number 1, signed JN.01, February 1999, sort of a reflection on the soul searching that a juror goes through with respect to their chores as jurors.
>
> I've shown these to defense counsel and the prosecution. At the present time, it's not the Court's intention to do anything about it until counsel have an opportunity to think about it. And if it becomes an issue, then I'd be glad to pursue it further.
>
> So I'm going to file both of these poems and mark them as a court exhibit next in order. And if it becomes an issue, we will deal with it.

(RT 5480) The prosecutor advised that he had no desire to inquire on the issue. The defense, Mr. Giller, requested copies of the poems. (RT 5480) The poems were marked as Court XXVI (Twenty-Six). (RT 5481)

Later that day, during a recess, the court said it would hear from defense counsel regarding the issue of the poetry. (RT 5509) The poems

were read into the record. The first poem is titled "Juror #1" and states as follows:

JUROR #1

What kind of person could do such a crime?
This is the thought that runs through my mind.
The brutality and nature of this attack -
Surely it was a vicious act.
The day seems long, focusing on facts;
I start to get pains in my neck and my back.
The details are very long and graphic,
My mind seems like it's weaving in traffic.
Both sides arguing to prove their points;
Listening so hard you feel it in your joints.

The Jury enters and leaves in a row,
Emotions and feelings unable to show.
You're instructed not to talk about the case;
Your insides churn; the tension in your face.
For someone to hold all of this in
Really should be considered a sin.
A part of you has to stop living
While on the jury you are sitting.
Some of the evidence I have seen
Are in my thoughts and in my dreams.

No one said it was going to be easy,
Talking about blood and samples of feces.
I can't wait 'til the end of this trial
So I can release my soul of this bile.

February 1999

(Court Exhibit XXVI; RT 5509-5510) The second poem is titled "Juror Responsibility" and states as follows:

JUROR RESPONSIBILITY

The responsibility of someone's life in your hand -
Only a juror could understand.
Is he guilty? Or is he not?
In your mind this battle's fought.
If there is a reasonable doubt,
"Not guilty," the jury will shout.
If the evidence is so compelling,
"Guilty," is what they'll be yelling.

Justice certainly will prevail
If a guilty man is put in jail.
An innocent man shall be free.

These decisions are up to WE.
WE as a jury need to find
If - or if not - he did the crime.

Clear up any of your confusion
Before you come to your conclusion.
Remember WE all must agree
Whether or not he's guilty!

February 1999

(Court Exhibit XXVI; RT 5511)

Defense counsel suggested that Juror No. 1 be called down by herself and an inquiry be made as to whether she wrote the poems. Moreover, they wanted certain areas inquired into, to which the court responded as reflected in the following:

> MR. HOROWITZ [DEFENSE COUNSEL]: Was it before or after the verdict, has she shown it to any other jurors, did they discuss it, and has she written any other - - anything else, and, if so, what and where is it, and has it been shown to other jurors.

. . .

> MR. HOROWITZ: The other thing is we would like the Judge to make an inquiry as to whether or not the jurors have been - - prior to the submission of the case to them or outside the times that they are all assembled together in the jury room, have the jurors been discussing their reaction to the evidence, their feelings about the case in ways that might violate the jurors' obligation not to deliberate except in the presence of all 12 and after the case is submitted to them.
>
> THE COURT: Well, I don't think I can really inquire as to that. I can - - if - - if the need develops, I can bring each individual juror down - - and depending on what this inquirer discloses - - and ask each one of them if anything they have heard or read or said might affect their ability to be fair in this case. I don't think I can go into that reasoning or so forth.

(RT 5512)

Defense counsel, Mr. Horowitz, noted that they were not asking the court to inquire into Juror No. 1's reasoning, but that there was the potential that this had been a hard case for her and there may have been talk during breaks or other times regarding matters. The prosecution, Mr. Anderson, responded that "[h]e is asking her if she violated the oath she took and your instruction." (RT 5513) Defense counsel and the court discussed the issue further as follows:

> MR. HOROWITZ [DEFENSE COUNSEL]: I'm not saying on purpose. I'm saying that she might - - that she would say yes. I'm saying that without her understanding, perhaps, the parameters, her strong emotional reaction may have caused her to do what she considered venting but what we might consider deliberating.
>
> THE COURT: That's really a stretch.
> I'm going to deal with it in my own way.

> MR. GILLER [DEFENSE COUNSEL]: And then also whether anything about it - - whether she still feels she is a fair and impartial juror.
>
> THE COURT: Oh, sure.

(RT 5513)

The court then conducted a separate inquiry as to Juror No. 1. Juror No. 1 acknowledged that she was the author of the two poems. (RT 5514) She also acknowledged that the poems were given to each of the jurors. (RT 5514) She wrote the poems at home. (RT 5515) She noted that the jurors were given the poems "last week," after all the evidence had been presented "one day after - - when we were up in deliberation." (RT 5515-5516) These were the only writings she distributed to the jurors. The court inquired further:

> THE COURT: Okay. And as I understand it, Juror Number 1, you gave each juror a copy of both of these poems?
>
> JUROR NUMBER ONE: What happened was a lady - - one the jurors typed them up for me, and she brought them in. She gave them all copies.

(RT 5516) The court then asked whether anything that she wrote affected her ability to be a fair juror in the guilt phase, to which she responded: "No, I don't believe so." (RT 5516) She also noted that she did not talk to anybody about her feelings concerning the case and that she followed the court's instructions in this regard. (RT 5517) In response to the court's inquiry as to whether anything she wrote might affect her ability to be a fair juror in the penalty phase, she responded: "No, I don't believe so." She continued to believe that she could be "objective." (RT 5517)

The court advised that it was going to bring down each juror and ask

them the following 3 questions: (1) whether they had read the poems before they arrived at a guilty verdict; (2) did the poems in any way affect their decision in arriving at the guilty verdict; and (3) whether it had compromised their ability to be a fair juror as far as the penalty phase. (RT 5517-5518).

Juror No. 1 told the court that she wrote one of the poems because one of the jurors was having difficulty:

> JUROR NUMBER ONE: I apologize.
>
> . . .
>
> THE COURT: . . . But, see, we also have to be very careful that you don't influence some of the other jurors.
>
> JUROR NUMBER ONE: I mean, like to tell you the truth, I wrote the one poem because the one lady was struggling. You know, I mean it wasn't - - nobody was pressuring her. I felt for her, to tell the truth.
>
> THE COURT: Sure. And you're almost tearful now.
>
> JUROR NUMBER ONE: Yeah.

(RT 5518)

The defense, by Mr. Horowitz, raised the issue that there may have been "jury misconduct" as reflected in the following:

> MR. HOROWITZ [DEFENSE COUNSEL]: We are a little concerned because we think that there may be jury misconduct, number one, to focus attention on what we thought one of the problems might be. There may be others that we're missing.
>
> But it seems to us that there might have been one juror either holding out or unsure of a guilty verdict and that this juror and another juror in some context, perhaps out of the presence of the other 12 jurors - - which would be a violation - - said let's type up this tomorrow and give to it her *[sic]* or in some way, shape, or form this poem was then given to that

juror to help her reach a decision, which in this case was guilty.

So there would have been - - actually been a poem written out of the presence of the jury, two people talk at least about it, and then the poem being used in a way to help a juror.

And, sure, it's not a threat, it's not a gun to the head, but it is an out-of-the-process application of emotion to get a juror to feel better, i.e. to vote guilt.

So that's what we were concerned about.

(RT 5519) Mr. Horowitz then requested the court conduct a fact-based investigation with regard to the issue. (RT 5520) The court replied it was going to follow its own procedure:

THE COURT: Mr. Horowitz, I'm going to tell you what the Court is going to do.

MR. HOROWITZ: Okay.

THE COURT: I'm going to bring each juror down and ask them whether or not they read these poems before they arrived at a guilty verdict in this case, number one.

Number two, did these poems in any way affect their decision in arriving at a guilty verdict.

Number three, assuming the answer is no, then has it compromised your ability to be a fair juror as far as the penalty phase goes.

That's the three questions I intend to ask.

(RT 5520) The defense, Mr. Horowitz, objected to this procedure as follows:

MR. HOROWITZ: We object to that. I'll tell you why. Because - -

Your first question is fine.

But I wish you would follow it up with what are the circumstances and how was it used, in other words, a factual basis - - . . . They may say I don't know, but can you just please - -

THE COURT: No, I'm not - - I'm going to reject that question. I'm going to do it my way. So it's on the record, and I intend to do it the way I indicated, whether or not it affected their verdict in any way, shape, or form, and then if that gives rise to something else, then I'll pursue it.

MR. GILLER [DEFENSE COUNSEL]: We do know from Juror Number 1 that she used that to help influence another juror.

THE COURT: Maybe.

MR. GILLER: That's what she said.

. . .

THE COURT: She said she was having some trouble. It could have been emotional troubles, whatever. And I'm - - I'm going to do it just the way I said. Each juror will have an opportunity to tell me whether or not this poetry in any way affected her or his decision in the guilt phase. If they say no, ba-boom. [RT 5520-5521]

. . .

MR. GILLER: Did it affect the way they deliberated or their decision?

Because she gave - - apparently, from what she is saying, is that one of the jurors was having a real struggle in her deliberations. That was why she gave the poem.

THE COURT: That's right.

MR. GILLER: And the poem – well, then the poem apparently helped somebody.

THE COURT: I'm - - and I'm going to ask each juror whether or not - - if they read this poem, whether or not it influenced their verdict in any way and see what the answers are. Now, to me, that's what I'm asking.

MR. GILLER: All right. Influence them or affect them in the way as to their deliberations?

. . .

THE COURT: I'm going to ask them my way.

(RT 5521-5522) Finally, the Court concluded by addressing the scope of its inquiry as follows:

THE COURT: . . . The scope of the inquiry is up to the discretion of the trial court based upon what I've been advised of.

And I heard what you had to say, and I'm going to conduct it in my opinion the proper way. I'm going to cover the bags.

(RT 5522)

The court then conducted its inquiry as to Juror No. 2:

THE COURT: Juror Number 2, last night the bailiff discovered these two poems up in the jury room.

And, first of all, it's my understanding that these poems were distributed during the deliberations in the guilt phase; is that correct?

JUROR NUMBER TWO: That's correct.

THE COURT: Did you read these poems?

JUROR NUMBER TWO: Yes.

THE COURT: Now, did these poems in any way affect your decision?

JUROR NO. TWO: No.

THE COURT: In any way?

JUROR NO. TWO: No.

THE COURT: Okay. The next thing, has it compromised - - have these poems in any way compromised your ability to be a fair juror in the penalty phase?

JUROR NUMBER TWO: No.

THE COURT: Thank you.

JUROR NUMBER TWO: That's it?

THE COURT: That's it.

(RT 5523)

The defense again raised concerns regarding the inadequacy of the court's inquiry:

THE COURT: Mr. Giller, go ahead. Make your record.

MR. GILLER [DEFENSE COUNSEL]: Okay. I'm concerned just listening to her, that was so short and to the point.

However, there are some other questions that we would have with them. The - -

You know, my reaction would be let her explain how they came into being during the deliberations.

She got those under what circumstances?

To her, were they given to her for any particular reason that she knows of?

THE COURT: Well, how would she know why they were - -

MR. GILLER: Well, she may know why. She may know why.

THE COURT: Mr. Giller, I'm going to do it my way.

MR. GILLER: Yeah, except we are not finding out anything.

THE COURT: Okay. Well, that is your record. There is your record.

MR. HOROWITZ [DEFENSE COUNSEL]: But we are not just making a record. We really mean this.

THE COURT: Mr. Horowitz, I'm not disputing that you mean this. And what I'm telling you, I mean it, too. The way I'm doing it, I think that's the right way to do it. That's the way I'm going to do it. And if a reviewing court is unhappy, there is another issue they can raise.

(RT 5524)

The court then questioned Jurors 3 through 12 as well as Alternates 1 through 4, individually, utilizing the aforementioned 3 question procedure. (RT 5525-5542) The court then invited counsel to put whatever they wanted to on the record. (RT 5542) The defense, Mr. Horowitz, requested the court make a further factual inquiry and at the same time made a motion for mistrial. (RT 5542)

As to the further factual inquiry, the court and defense counsel, Mr. Horowitz, engaged in the following colloquy:

MR. HOROWITZ: I think we should talk to the person who typed it and - -

THE COURT: And what would that person tell us?

MR. HOROWITZ: Well, I would like to know under what circumstances there were people talking about this poem. It looks like the jury pads were used to write this poem and that the pads or pages from it were taken out of the courtroom, which is improper.

I would like - -

THE COURT: That's all speculation, Mr. Horowitz.

MR. HOROWITZ: Well, that's why we would like you to make a better inquiry.

THE COURT: No.

MR. HOROWITZ: But what I'm understanding is from - - Juror Number 10, the gentleman who expanded a little bit, he says Number 7 somehow was looking at the binder and then took the notes out of court and typed them. So this looks to me like this juror is talking out of the presence of other jurors - - let's type this up, let's give them to the other jurors, let's give them to this woman who is having problems.

And, bottom line, what you've got is you've got jurors - - I'm going to use loaded words - - jurors conspiring to help, which means manipulate, another juror to go their way.

And you can do things with sugar or you can do them with a bat, but what's illegal is illegal, and what's wrong is wrong. And it is wrong out of the presence of every other jury member to manipulate or handle a juror.

And that's what happened here, so I would ask the Court to find out who typed it, what the conversations were, what was taking place in the jury room, what was taking place out of the jury room, because I think what we have here is a hold-out juror who was coerced, maybe with a velvet glove in an iron fist, but, you know, a velvet glove in an iron fist is still peer pressure, and that is an issue here. And one juror was targeted with a poem, and then shortly thereafter, according to our foreperson, a verdict came down. And that's bad, particularly in a case where death may be imposed.

So I'd like a further inquiry, but I am also making a motion for a mistrial in case you don't - -

THE COURT: Well, I'm not going to allow the inquiry.

(RT 5543-5544)

As to the motion for mistrial, the court and the defense, Messrs. Horowitz and Giller, engaged in a further colloquy as follows:

MR. HOROWITZ: Motion for mistrial based then on the grounds I stated.

THE COURT: All right. That motion is denied.

. . .

MR. HOROWITZ: I know. Maybe I'm wrong about the facts, but while we are all here, didn't Juror Number 7 sort of indicate that she didn't read the poem until after deliberations were done, and yet were she the person who typed the poem - -

THE COURT: We don't know she is the person.

MR. GILLER: Yeah.

MR. HOROWITZ: There was a representation from Juror Number 10 that she was - -

MR. GILLER: 11

MR. HOROWITZ: - - and that she is the one who distributed it. And if that was the case, that would be in contradiction of what she said.

THE COURT: Well, it's not a contradiction because I didn't ask her if she typed it. I only asked her if she had read it. And we don't know if she is, in fact, the one. She wasn't sure when.

He was going through his mind. He was checking it off here. He wasn't sure. He thought Seven. It could it (sic) have been somebody else.

MR. HOROWITZ: Maybe we should inquire into that further.

THE COURT: No.

MR. HOROWITZ: I renew my request for further inquiry and, in the alternative, for a mistrial.

THE COURT: I'm going to deny your question.

And your motion for mistrial is denied, also.

(RT 5544-5545)

B. The Trial Court Erred in Failing to Make an Adequate and Appropriate Inquiry into the Misconduct of One or More Jurors, Depriving Appellant of His Federal and State Rights to Due Process and a Fair Trial, to an Impartial Jury, and to a Reliable Guilt and Penalty Verdict.

The trial judge conducted an inquiry with respect to each juror by asking them the following three questions: (1) whether they had read the poems before they arrived at a guilty verdict; (2) did the poems in any way affect their decision in arriving at the guilty verdict; and (3) whether it had compromised their ability to be a fair juror as far as the penalty phase. (RT 5517-551; *see also* RT 5520, 5523-5542) This limited inquiry was inadequate as it failed to elicit sufficient information to assess potential juror misconduct. Moreover, the inquiry was improper as it invaded the deliberative process.

1. Applicable Law

It is well settled that when the court has reason to believe that a juror may be unable to perform his or her duties, the court must conduct "an inquiry sufficient to determine the facts." (*People v. Burgener* (1986) 41 Cal.3d 505, 519, overruled on another ground in *People v. Reyes* (1998) 19 Cal.4th 743.) Such an inquiry is required in part because, on appellate review, "the trial court's determination that good cause exists to discharge a juror must be supported by substantial evidence." (*People v. Delamora* (1996) 48 Cal.App.4th 1850, 1856.) Failure to conduct an adequate injury into allegations of juror misconduct or inability to perform has been held to be prejudicial and reversible error. (*See*, e.g., *People v. Castorena* (1996) 47 Cal.App.4th 1051, 1066 [failure to conduct an adequate inquiry into allegations of juror misconduct was prejudicial where the trial court "did not have the requisite facts upon which to decide whether [the discharged juror]

in fact failed to carry out her duty as a juror to deliberate or whether the jury's inability to reach a verdict was due, instead, simply to [the juror's] legitimate disagreement with the other jurors"]; *People v. Delamora* (1996) 48 Cal.App.4th 1850, 1856 [trial court's determination that good cause exists to discharge a juror must be supported by substantial evidence and where there is no evidence to show good cause because no inquiry of any kind was made, the procedure used was by definition inadequate]; see also *People v. McNeal* (1979) 90 Cal.App.3d 830, 838 [holding that "[o]nce the court is alerted to the possibility that a juror cannot properly perform his duty to render an impartial and unbiased verdict," the court "is obligated to make reasonable inquiry" as to the facts concerning impartiality and bias.].)

Moreover, because the guilt phase misconduct came to light after the guilt verdict had been rendered, Evidence Code section 1150 applied.[18] That is, where, as here, possible jury misconduct is discovered post-verdict, Evid. Code section 1150 governs the nature and extent of the inquiry that may permissibly be made.

In *People v. Allen* (2011) 53 Cal.4th 60, this Court, noting Evidence Code § 1150 applied to post-verdict challenges, discussed with approval *Grobeson v. City of Los Angeles* (2010) 190 Cal.App.4th 778 (*Grobeson*), in which juror misconduct had been raised in a motion for new trial. The *Allen* court agreed that the trial court properly relied on a midtrial statement by the juror that she had prejudged the case because:

> Her midtrial remark required "neither

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[18] Even assuming that the guilt phase misconduct was not subject to inquiry under the rigors of Evidence Code section 1150, the court's inquiry was still inadequate.

> interpretation nor the drawing of inferences. It [was] a flat, unadorned statement that this juror prejudged the case long before deliberations began and while a great deal more evidence had yet to be admitted." (*Grobeson, supra*, 190 Cal.App.4th at p. 794, 118 Cal.Rptr.3d 798.)

Allen, 53 Cal.4th at 72. Hence, the trial court did not violate section 1150.

Evidence Code § 1150(a) provides as follows:

> Upon an inquiry as to the validity of a verdict, any otherwise admissible evidence may be received as to statements made, or conduct, conditions, or events occurring, either within or without the jury room, of such a character as is likely to have influenced the verdict improperly. No evidence is admissible to show the effect of such statement, conduct, upon a juror either in influencing him to assent to or dissent from the verdict or concerning the mental processes by which it was determined.

In analyzing the *Grobeson* decision, this Court noted that the trial court had excluded the juror's subsequent declaration as inadmissible evidence of her mental process. Moreover, the Court of Appeal ruled that "the trial court correctly excluded the juror's posttrial declaration, and admitted evidence of her midtrial remarks to her fellow jurors." *Allen*, 53 Cal.4th at 72 n.10. This Court made clear that the intent of Evid. Code § 1150 is to "focus on the conduct of the jurors" not "the deliberations." *Id.*

In the seminal decision of *People v. Hutchinson* (1969) 71 Cal.2d 342, *cert. denied*, 396 U.S. 994, this Court held that a verdict may be impeached by otherwise admissible evidence only as to statements, conduct, conditions or events. The proper distinction is between "proof of overt acts, objectively ascertainable," and "proof of the subjective reasoning processes

of the individual juror." The latter can be neither corroborated nor disproved, and are excluded. (71 Cal.2d 349) *[See People v. Orchard* (1971) 17 C.A.3d 568 (where a woman juror executed an affidavit in support of defendant's motion for a new trial, declaring that after several hours of deliberation she had sent a note to the jury foreman expressing her unchangeable belief that defendant was innocent of attempted burglary. The foreman, she said, had torn up the note, then angrily chastised her for 10 to 15 minutes before the other jurors for not keeping an open mind. Because of this harassment, she concluded, she felt embarrassed and humiliated, with such a desire to leave as soon as possible that she voted guilty. *Held*, conviction affirmed. The foreman's conduct and statements were admissible, but the effect of the conduct and statements on the juror was inadmissible. (17 C.A.3d 574.) The court explained: "Stripped of its inadmissible portions, the sum total of juror Bosman's affidavit simply describes an account of interchange between jurors in which the foreman sought to persuade Mrs. Bosman to maintain an open mind. To permit inquiry as to the validity of a verdict based upon the demeanor, eccentricities or personalities of individual jurors would deprive the jury room of its inherent quality of free expression." (17 Cal.App.3d 574.); *see also People v. Danks* (2004) 32 Cal.4th 269, *as modified on denial of reh'g, and cert. denied*, 543 U.S. 961 (this Court again addressed the limitation imposed by Evid. Code. §1150(a), again noting the distinction between proof of overt acts as opposed to proof of the subjective reasoning process of the individual juror as follows: "This statute distinguishes 'between proof of overt acts, objectively ascertainable, and proof of the subjective reasoning processes of the individual juror, which can be neither corroborated nor disproved. . . .' " [citation omitted] " 'This limitation prevents one juror from upsetting a

verdict of the whole jury by impugning his own or his fellow jurors' mental processes or reasons for assent or dissent. The only improper influences that may be proved under [Evidence Code] section 1150 to impeach a verdict, therefore, are those open to sight, hearing, and the other senses and thus subject to corroboration.' " [citation omitted]. 32 Cal.4th at 302.)]

For the reasons discussed below, based on the foregoing authorities, the trial court's inquiry was both inadequate and improper.

2. The Trial Court's Inquiry Was Inadequate And Improper

(a) The Inquiry Was Inadequate to Determine the Question of Misconduct

As noted above, the trial judge conducted an inquiry with respect to each juror by asking them the following three questions: (1) whether they had read the poems before they arrived at a guilty verdict; (2) did the poems in any way affect their decision in arriving at the guilty verdict; and (3) whether it had compromised their ability to be a fair juror as far as the penalty phase. (RT 5517-5518; *see also* RT 5520, RT 5523-5542)

As to question number one, whether the individual juror had read the poem before he or she arrived at a guilty verdict, this was a proper question that clearly fell within the purview of Evid. Code §1150(a) as "admissible evidence" with respect to "statements made, or conduct, conditions, or events occurring, either within or without the jury room, of such a character as is likely to have influenced the verdict improperly." *People v. Hutchinson*, 71 Cal.2d at 349).

As to question number two posed by the trial judge as noted above, whether the poems in any way affected the decision of the individual juror in arriving at the guilty verdict, this question was clearly in violation of Evid.

Code §1150(a), which prohibits any evidence "to show the effect of such statement, conduct, condition, or event upon a juror either in influencing him to assent to or dissent from the verdict . . .." This question is discussed further below under subsection (b) regarding invading the deliberative process.

As to question number three, whether reading the poems had compromised their ability to be a fair juror as far as the penalty phase, this question is moot. This jury was unable to reach a verdict as to the penalty phase and, hence, a mistrial was declared. Consequently, the question of whether the juror could be "a fair juror" as to the penalty phase became moot.

Therefore, the only question posed by the court which was both relevant and admissible as to the question of jury misconduct at the guilt phase regarding the poems was whether the individual juror had, in fact, read the poems. Under these circumstances, the inquiry by the court to determine the potential impact of jury misconduct on the guilt verdict was wholly inadequate.

Due to the court's failure to conduct an appropriate inquiry into juror misconduct concerning the poems, the record is inadequate to address the facts and circumstances surrounding the drafting, distribution, and potential impact of the poems on the guilt phase deliberations. A review of the record reflects that a majority of the twelve jurors and four alternates acknowledged receipt of the two poems and that a number of jurors read the poems either before or after the guilt verdict, and some could not recall whether they had read the poems.

In sum, the record reflects the following with regard to the receipt of the poems and reading said poems: (1) Juror No. 1 stated that she wrote the

poems "at home." During the deliberations in the guilt phase, one of the other jurors typed the poems for her, brought them in, and gave copies of the poems to all of the jurors. Juror No. 1 noted that she "wrote the one poem because the one lady was struggling." She noted that "nobody was pressuring her" but she "felt for her. . .. " (RT 5513-5519) (2) Juror No. 2 acknowledged receiving the poems during the guilt phase deliberations. Juror No. 2 also acknowledged reading the poems. (RT 5523) (3) Juror No. 3 acknowledged receiving the poems during the guilt phase deliberations. However, Juror No. 3 noted that he read the poems after the jury deliberations as to the guilt phase. (RT 5525-5526) (4) Juror No. 4 acknowledged receiving the two poems during the guilt phase deliberation. Juror No. 4 had not read the poems and she did not plan to read them until after the trial is over. (RT 5527-5528) (5) Juror No. 5 acknowledged receiving the two poems during the guilt phase deliberations. Juror No. 5 did not read the poems prior to arriving at the guilt phase verdict, but noted taking them home and reading them after the guilt phase deliberations had been completed. (RT 5529-5530) (6) Juror No. 6 acknowledged receiving the two poems during the guilt phase deliberations. Juror No. 6 read the poems before the verdict in the guilt phase proceedings. (RT 5530-5531) (7) Juror No. 7 acknowledged receiving the two poems during the guilt phase deliberations. However, Juror No. 7 could not remember reading either one of the poems before voting as to the guilt phase verdict. (RT 5531-5532) (8) Juror No. 8 could not recall receiving and/or reading the poems before the guilt phase verdict, but acknowledges, at some point, reading the poems either before or after the verdict. (RT 5532-5533) (9) Juror No. 9 acknowledged receipt of the two poems but did not read them until after the verdict in the guilt phase. (RT 5533-5534) (10) Juror No. 10 acknowledged

receiving the two poems as well as reading them, but was unclear as to when the poems were read. (RT 5534-5535) (11) Juror No. 11 noted that the poems had been distributed, but had not read them. Juror No. 11 noted that the lady who wrote the poetry had them in her 3-ring. During the deliberative process, one of the other jurors took them and put it on the computer. She noted that the lady who wrote the poems did not distribute them, somebody else did. Juror No. 11 believed that it was Juror No. 7 who distributed the poems. (RT 5535-5537) (12) Juror No. 12 acknowledged receiving the poems, but did not remember reading the poems before voting in the guilt phase. (RT 5537-5539) (13) Alternate Juror No. 1 acknowledged receiving the poems. (RT 5540) (14) Alternate Juror No. 2 also acknowledged receiving the poems and further acknowledged reading them the day before. (RT 5540-5541) (15) Alternate Juror No. 3 acknowledged receiving the poems as well as reading them. (RT 5541) (16) Alternate Juror No. 4 acknowledged seeing the poems, but had not read them. (RT 5542)

Hence, the record reflects that the majority of the jurors and alternates received the poems; a number of the jurors read the poems prior to the guilt phase verdict; some jurors could not recall reading the poems before the guilt phase verdict but acknowledged reading them after the verdict; and others had not read the poems. The record does reflect that Juror No. 1 wrote the poems at home. Another juror, apparently Juror No. 7, typed them up at home and distributed them to the other jurors during the guilt phase deliberations. Juror No. 1 acknowledged the purpose of writing one of the poems was because one lady was struggling and she felt for her. The poems were typed and distributed to the struggling juror by another juror. Some time after distribution of the poems, the jury reached a verdict of guilty in

the guilt phase proceedings.

The trial judge was repeatedly requested by defense counsel to explore the circumstances and factual basis surrounding the distribution of the poems and the interaction of the jurors regarding said poems, but the trial judge declined to do so. Juror No. 1 noted that the poems expressed her "own feelings." (RT 5516) The first poem, entitled "Juror #1," provides in pertinent part as follows:

> What kind of person could do such a crime?
> This is the thought that runs through my mind.
> The brutality and nature of this attack -
> Surely it was a vicious act.
>
> . . .
>
> No one said it was going to be easy,
> Talking about blood and samples of feces.
> I can't wait 'til the end of this trial
> So I can release my soul of this bile.

(Court Exhibit XXVI; RT 5509-5510)

Defense counsel, Mr. Horowitz, raised the issue of "jury misconduct" and noted that the facts reflected that one juror was "either holding out or unsure of a guilty verdict," and that Juror No. 1 and another juror, "in some context," sought "out of the presence of the other 12 jurors," provided the poem which was "then given to that juror to help her reach a decision, which in this case was guilty." (RT 5519) Mr. Horowitz summarized the facts as follows:

> So there would have been - - actually
> been a poem written out of the presence of the
> jury, two people talk at least about it, and then
> the poem being used in a way to help a juror.
> And, sure, it's not a threat, it's not a gun

> to the head, but it is an out-of-the-process application of emotion to get a juror to feel better, i.e. to vote guilt.

(RT 5519) This summary tracks the final paragraph of the poem entitled "Juror No. 1," to wit, "[n]o one said it was going to be easy, Talking about blood and samples of feces, I can't wait 'til the end of this trial So I can release my soul of this bile." Thus, the point raised by defense counsel was that the juror would feel better in concluding the guilt phase proceedings by voting guilt, as reflected in the reference, as follows: "I can't wait 'til the end of this trial so I can release my soul of this bile." The court's response was to advise counsel that he would ask the three questions referenced above. (RT 5520)

At the conclusion of the inquiry as to the twelve jurors and four alternates, defense counsel, Mr. Horowitz, again raised the issue of juror misconduct as follows:

> MR. HOROWITZ: . . . So this looks to me like this juror is talking out of the presence of other jurors - - let's type this up, let's give them to the other jurors, let's give them to this woman who is having problems.
>
> And, bottom line, what you've got is you've got jurors - - I'm going to use loaded words - - jurors conspiring to help, which means manipulate, another juror to go their way.
>
> And you can do things with sugar or you can do them with a bat, but what's illegal is illegal, and what's wrong is wrong. And it is wrong out of the presence of every other jury member to manipulate or handle a juror.

(RT 5543) Defense counsel then made a request for a "further inquiry," which was denied by the court, and followed up with a motion for a mistrial based on juror misconduct, which was also denied by the court. (RT 5543-

5544) After a further dialog with the court, defense counsel, Mr. Horowitz, renewed his request for a further inquiry and, in the alternative, requested a mistrial. The court denied the request for a further inquiry and denied the motion for mistrial. (RT 5544-5545)

This Court recently reiterated that whether and/or how to investigate an allegation of juror misconduct is discretionary, as follows: "Whether and how to investigate an allegation of juror misconduct falls within the court's discretion. [citation omitted]." (*People v. Allen*, 53 Cal.4th at 69-70.) Here, the trial court's investigation, which, as discussed, was limited to three questions that failed to adequately address the question of juror misconduct. Moreover, said investigation violated Evid. Code §1150(a). Hence, the investigation constituted an abuse of discretion.

Moreover, in light of the inadequate inquiry performed by the trial judge concerning juror misconduct, prejudice should be presumed in this case. *See People v. Danks*, 32 Cal.4th at 322-335 (Moreno, J., concurring and dissenting) (discussing at length the "presumption of prejudice recognized in juror misconduct cases.") *See also People v. Tafoya* (2007) 42 Cal.4th 147, 192, *cert. denied*, 552 U.S. 1321 (2008) (noting that jury misconduct raises a rebuttable presumption of prejudice [citing *In re Hamilton* (1999) 20 Cal.4th 273, 294-295]); *Grobeson v. City of Los Angeles* (2010) 190 Cal.App.4th 778, 792 (noting that juror misconduct raises a presumption of prejudice). Here, the record reflects that the poems were provided to the jurors, and hence, the sharing of this improper information constitutes juror misconduct. (See *In re Hamilton* (1999) 20 Cal.4th 273, 294-295). Further, the record indicates that two jurors communicated outside the presence of the other jurors during deliberations, i.e., one juror composed the poems and a second juror typed the poems and distributed

them to the other jurors. This conduct and communication constitutes juror misconduct. *See People v. Allen*, 53 Cal.4th at 69 n.7, wherein this Court noted that a separate meeting between the foreperson and Juror No. 4 constituted misconduct.

Due to the court's failure to conduct an appropriate inquiry into juror misconduct concerning the poems, the record is inadequate to address the facts and circumstances surrounding the drafting, distribution, and potential impact of the poems on the guilt phase deliberations. A review of the record reflects that a majority of the twelve jurors and four alternates acknowledged receipt of the two poems and that most of the jurors read the poems either before or after the guilt verdict, and some could not recall whether they had read the poems. Consequently, prejudice must be presumed.

(b) The Inquiry was Improper As It Invaded the Deliberative Process.

As to question number two noted above, whether the poems in any way affected the decision of the individual juror in arriving at the guilty verdict, this question was clearly in violation of Evid. Code §1150(a), which prohibits any evidence "to show the effect of such statement, conduct, condition, or event upon a juror either in influencing him to assent to or dissent from the verdict . . ..". Here, Judge Delucchi was asking a question that goes to the "mental processes" of the individual juror; that is, whether the reading of the poems in any way affected the decision of the juror in arriving at the guilty verdict. In other words, whether the poems "influen[ed] him to assent to or dissent from the verdict." Thus, the second question posed by Judge Delucchi was clearly in contravention of Evid. Code. §1150(a).

The situation presented here as to question number two is analogous to the Court of Appeal decision of *People v. Orchard*, 17 Cal.App.3d 568, 574, where the foreman's conduct and statements were determined to be admissible, but the effect of the conduct and statements on the juror was inadmissible. By the same token, the poems, and whether the individual juror had read the poems, was admissible; but the effect that receiving and reading the poems had on their decision was inadmissible; just as the effect of the foreman's conduct and statements on the juror in *Orchard* was inadmissible.

The provisions of Evidence Code §1150(a), which apply in cases of post-verdict challenges clearly apply in this instance as the jury had already rendered a determination of guilt, notwithstanding the fact that this bifurcated capital trial was in the penalty phase. *Allen*, 53 Cal.4th at 72 n.10.

A review of the record reflects that defense counsel, Mssrs. Giller and Horowitz, repeatedly requested that the court conduct an inquiry that would be consistent with the provisions of Evid. Code §1150(a) concerning a fact-based investigation (RT 5519-5520); that is, an inquiry into "the circumstances" regarding the poems and the "factual basis." (RT 5521-5522) These requests are consistent with obtaining evidence as to statements, conduct, conditions, or events "likely to have influenced the verdict improperly." Evid. Code §1150(a). However, the trial judge repeatedly responded that it was going to follow its own procedure, i.e., "I'm going to do it my way," (RT 5521); "I'm going to do it my way" (RT 5524). The court concluded as follows:

> The way I'm doing it, I think that's the right way to do it. That's the way I'm going to do it. And if a reviewing court is unhappy, there is another issue they can raise.

(RT 5524)

As noted, the trial court denied the multiple motions for a further inquiry as well as the alternative motions for a mistrial. (RT 5543-5545) In fact, the defense challenged the propriety of question number two as reflected in the following rhetorical questions: (1) "Did it affect the way they deliberated or their decision?"; (2) "Influence them or affect them in the way as to their deliberations?" (RT 5521-5522), to which the court reiterated: "I'm going to ask them my way." (RT 5522) Hence, the court not only conducted a limited, inadequate inquiry, but also violated the provisions of Evid. Code §1150(a) with regard to question number two as it pertained to whether the effect of receiving and reading the poems influenced the respective jurors "to assent to or dissent from the verdict."

Under these circumstances, prejudice should be presumed. (See discussion, *ante* pp. 254-255.) Further, assuming for the sake of argument that the abuse of discretion standard applies, as discussed *ante* p. 254, the inquiry reflected in question number two invaded the jury's deliberative process, and hence, violated Evid. Code §1150, and consequently, constitutes an abuse of discretion.

C. Violation of Federal and State Constitutional Rights.

Every person accused of criminal conduct has a federal and state constitutional right to trial by a fair and impartial jury. U.S. Const., amends. VI, XIV; Cal. Const. art. I, § 16; *Duncan v. Louisiana* (1968) 391 U.S. 145, 149; *Irvin v. Dowd* (1961) 366 U.S. 717, 722; *People v. Collins* (2001) 26 Cal.4th 297, 304; *People v. Diaz* (1984) 152 Cal.App.3d 926, 933 ("The right of unbiased and unprejudiced jurors is an inseparable and inalienable part of the right to trial by jury guaranteed by the Constitution"). In deliberating on questions of fact, the jury has the duty to follow the law in

the trial court's instructions. *See* Cal. Penal Code § 1126.

"A sitting juror commits misconduct by violating [his or] her oath, or by failing to follow the instructions and admonitions given by the trial courts." *In re Hamilton*, 20 Cal.4th at 305; *Hamilton, supra* at 294 (juror misconduct occurs when there is "a direct violation of the oaths, duties, and admonitions imposed on actual or prospective jurors . . ."). "To succeed, defendant must show misconduct on the part of a juror; if he does, prejudice is presumed; the state must then rebut the presumption or lose the verdict." *People v. Marshall* (1990) 50 Cal.3d 907, 949.

There is no question that the two jurors committed jury misconduct by meeting privately and discussing the case. By their conduct related to the two poems, i.e., Juror No. 1 wrote the poems at home and Juror No. 7 typed the poems at home and distributed them to the jury during the guilt phase deliberations and, obviously, Juror No. 1 and Juror No. 7 talked about the poems and the struggling juror. The jury was instructed with CALJIC 1.03, and in accordance with Penal Code sections 1121 and 1122, that during periods of recess from deliberations, "[y]ou must not discuss this case with any other person except a fellow juror, and then only after the case is submitted to you for your decision and only when all twelve jurors are present in the jury room." (RT 5183-5184; CT 907 at 912) Violation of this duty is serious misconduct. *See In re Hitchings* (1993) 6 Cal.4th 97 (juror conversing with co-worker violates Penal Code section 1122, and constitutes serious misconduct).

The trial court failed to acknowledge that the two jurors committed misconduct, refused to conduct an adequate inquiry to determine juror misconduct, and denied the multiple defense motions for a further inquiry and alternatively for a mistrial. Apparently, the trial court determined that

any misconduct was harmless because he denied the motions for a further inquiry and for a mistrial.

The court, however, failed to understand that once juror misconduct is established, there is a rebuttable presumption of prejudice. *In re Hamilton* (1999) 20 Cal.4th 273, 295. Such a presumption can only be rebutted "if the entire record in the particular case, including the nature of the misconduct or other event, and the surrounding circumstances, indicates there is no reasonable probability of prejudice . . . ." *Id.* at 296 (citing *In re Carpenter* (1995) 9 Cal.4th 634, 653, and *In re Hitchings*, 6 Cal.4th at 121). Nothing in the record sufficiently rebuts the presumption of prejudice that arose when these two jurors committed misconduct by meeting outside the deliberative process regarding the poems and the struggling juror.

The trial court's failure to conduct an appropriate and proper inquiry and, alternatively, grant the motion for a mistrial, violated Nadey's rights to trial by a fair and impartial jury, due process, and a reliable determination of guilt and penalty. U.S. Const. amends. V, VI, VIII, and XIV, and California state constitutional corollaries. Both the guilt and penalty phase verdicts must be vacated.

V. THE TRIAL COURT DEPRIVED DEFENDANT OF A FAIR AND RELIABLE PENALTY DETERMINATION UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS OF THE FEDERAL CONSTITUTION AND STATE LAW AND DEPRIVED DEFENDANT OF DUE PROCESS OF LAW UNDER BOTH THE FEDERAL AND STATE CONSTITUTIONS BY EXCLUDING DNA EVIDENCE OF LINGERING OR RESIDUAL DOUBT IN THE PENALTY RETRIAL.

A. Introduction

The first penalty phase jury heard the DNA evidence, which included evidence concerning the presence of a third donor in testing on the vulva swabs referenced as "an extra sperm donor" or "a real extra donor" (RT 4497-4506, 4719-4720, 4731-4732, 4739, 4749, 4810), that is, not the husband or the defendant, as well as evidence of contamination. (RT 4686-4692, 4698-4700, 4704, *see also* RT 4692-4697) The court refused the proffered lingering doubt instruction by defense counsel (RT 5295-5296), but did give the standard CALJIC Instruction No. 8.85, which included factors (a) (circumstances of the crime) and (k) (any other circumstance which extenuates the gravity of the crime) (RT 6059-6060). It told defense counsel that they could argue lingering doubt. (RT 5295-5296) Defense counsel did argue lingering doubt, noting the DNA evidence reflected the presence of a third person (RT 6005). The first jury hung, 7-4-1 (RT 6085-6086), and the court declared a mistrial (RT 6087-6088).

The second penalty phase jury was prevented from hearing the DNA evidence and, hence, had no knowledge of the presence of DNA indicating a third donor. Moreover, the jury did not hear the evidence concerning contamination as to the DNA evidence. The trial court denied the defense request to present DNA evidence as to the issue of contamination and the

presence of the third donor (CT 1117; RT 6099-6103, 8471-8486), and denied the defense motion to submit a lingering doubt instruction (RT 9480-9481). The trial court again instructed the jury as to CALJIC 8.85, which included factors (a) and (k). (RT 9717-9718) Defense counsel again raised the issue of lingering doubt in closing argument but without the benefit of the DNA evidence concerning contamination and the presence of a third person. (RT 9631-9632) The second jury imposed a sentence of death. (RT 9732-9734)

The critical difference in the presentation of evidence to the jury in the first penalty phase as contrasted with the second penalty phase was the DNA evidence of contamination and the presence of a third donor. . The exclusion of the proffered DNA evidence regarding contamination and the presence of a third donor in the second penalty phase trial deprived defendant of a fair and reliable penalty determination and violated his right to compulsory process and right to present a defense. Moreover, the trial court deprived defendant of due process of law as well as equal protection under the federal and state constitutions. (U.S. Const. amends. VI, VIII, XIV; Cal. Const. art. I, §§ 7, 15 and 17.)

B. First Penalty Phase Trial

1. Pre-Trial Hearing

At a pre-trial hearing on March 1, 1999, the court conducted a pretrial hearing regarding the penalty phase instructions. (RT 5290-5309). The court discussed Instruction No. 1 proposed by the defense regarding the scope and proof of mitigation. (RT 5290) The court denied the instruction, noting that the requested instruction was "covered by 8.85 [CALJIC]." (RT 5290)

As to the defense proposed Instruction No. 7 – lingering doubt as to guilt – the Court denied the instruction, but noted that the defense could

argue this to the jury. (RT 5295-5296) The defense noted that they felt that the facts of this case made the instruction particularly relevant because of the DNA being circumstantial evidence. (RT 5295-5296) The Court noted that if this was the defense position, it was certainly a factor (k) [CALJIC 8.85]. (RT 5296)

2. Closing Argument

In closing argument, the defense addressed both aggravating and mitigating factors. (RT 5996) Moreover, the defense addressed factor (k) [CALJIC 8.85] as follows:

> [A]ny other evidence that we presented to you as mitigating factors is considered, any other circumstance which extenuates the gravity of the crime, and even though it is not a legal excuse for the crime, and any sympathetic or other aspect of the defendant's character or record as a basis for a sentence less than death, whether or not related to the offense for which he is on trial.
>
> And so that's basically when we talked to you about mitigating - - the mitigating evidence and the evidence that we are talking to you about as far as defendant's background and character, it's under (k).

(RT 6000)

Further, the defense also addressed the question of the third donor as follows:

> The unanswered question that was never ferreted out here, was there a third donor. And the authorities had an opportunity to try to determine who that was, but they never did. But there is no evidence that that third donor would have committed this crime, and so I just leave you with that thought.

(RT 6005) The defense had previously argued extensively regarding the

contamination of the DNA evidence by Mr. Horowitz during his closing argument in the guilt phase. (RT 4945-5120)

3. Jury Instructions

On March 11, 1999, the court instructed the jury (RT 6040). Specifically, the court instructed the jury as to CALJIC 8.85, factors (a)-(k). (RT 6059-6060; CT 1092-1094) The court instructed the jury as to factor (a) as follows:

> The circumstance of the crime of which the defendant was convicted in the present proceedings and the existence of any special circumstance found to be true;

(RT 6059)

The court instructed the jury as to factor (k) as follows:

> Any other circumstance which extenuates the gravity of the crime, even though it is not a legal excuse for the crime, and any sympathetic or other aspect of the defendant's character or record that the defendant offers as a basis for a sentence less than death, whether or not related to the offense for which he is on trial.

(RT 6060)

4. Motion for New Trial on Guilt And, Alternatively, for an Order Regarding the Scope of the Trial Evidence.

On March 12, 1999, the court declared a mistrial based on the court's determination that there was not a "reasonable probability that this jury will be able to arrive at a [penalty] verdict." (RT 6088) This determination was predicated on the jury split of seven to four (7-4). (RT 6088) The jury foreperson had previously noted that the jury was deadlocked at 7-4-1. (RT

6086)

On April 6, 1999, the defense filed a motion entitled "Motion for New Trial on Guilt; Alternatively for Order Re Scope of Trial Evidence." (CT 1115-1118) The motion requested, among other things, a ruling regarding the right of the defense "to introduce evidence re: lingering doubt including DNA evidence, DNA experts refuting prosecution DNA evidence and other evidence which might raise a lingering doubt." (CT 1117)

On June 2, 1999, the court held a hearing on the motion. (RT 6099) The defense asked how much of the DNA evidence they could introduce at the penalty phase retrial. (RT 6100-6101) The defense argued that the circumstances of the crime include the type of sexual contact that occurred, the type of injuries suffered, whether there was an aider and abettor, and whether there was another person involved. (RT 6102) The defense also noted that the DNA evidence would be relevant to address Dr. Hermann's report which dealt with the vaginal contact or rectal contact, the degree of tearing or not, how much penetration there was; and argued that the DNA helps to explain what the sexual conduct was or was not. (RT 6102-6103) The defense argued further that there is no prohibition on understanding the degree of proof in the case; that is, there are differences between absolute certainty and beyond a reasonable doubt, and hence, the jury has the right to understand whether this is a circumstantial evidence or a direct evidence case, or a combination of the two; it goes to both the circumstances of the crime and the constitutional rights of the defendant. (RT 6103)

The court concluded that the law does not allow the defense to introduce evidence not otherwise admissible at the penalty phase for the purpose of creating a doubt as to the defendant's guilt. It ruled that the defense could introduce evidence of the defendant's character, prior record,

and circumstances of the offense. However, it stated that what the defense was offering was "beyond the scope of the evidence that will be admissible in the penalty phase," and ruled that there would be no DNA evidence presented by the defense in the penalty phase. (RT 6103)

C. The Second Penalty Phase Trial

1. Petition for Writ of Mandamus and/or Prohibition in the Court of Appeal of the State of California, First Appellate District, Division Five

The defense filed a petition for writ of mandamus and/or prohibition in the First District Court of Appeal (Court of Appeal No. 087306), challenging the order of Judge Delucchi denying defendant's motion regarding DNA evidence at the penalty retrial. (CT 18000,18020) The defense sought an order compelling that "the trial court be ordered to allow defendant to introduce forensic (e.g., DNA) evidence to establish lingering doubt and/or circumstances of the crime." (CT 18010, 18017) It asserted that "[l]ingering doubt evidence is admissible at a retrial of penalty phase," citing *People v. Davenport* (1995) 11 Cal.4th 1171 (CT 18009), and noted that "[t]he DNA evidence did show the existence of sperm from a person who was not the victim, defendant or victim's husband" (citing to RT 4504:13-4505:10). (CT 18010)

The First District Court of Appeal denied the petition for writ of mandate/prohibition on procedural grounds, stating :

> "Absent specific statutory authorization (e.g., Pen. Code, § 1538.5) prerogative writs do not issue to review questions of the admission or preclusion of evidence. *[citations omitted]*"
>
> . . .

> "[A]bsent certain extraordinary circumstances, extraordinary writs do not issue once trial has commenced. *[citations omitted]*"

(Order filed June 24, 1999 (Jones, P.J.), CT 18020).

2. Pretrial Proceedings

On January 12, 2000, the court conducted pretrial hearings regarding the second penalty phase trial. (RT 8435, 8474) The court acknowledged having a copy of the petition for writ of mandate or prohibition as to the DNA issue, which the defense noted set forth the "exact position why the defense wants to introduce" the DNA evidence (RT 8471), and said that it was mindful of the defense position relative to DNA. The defense noted that it sought to introduce certain DNA evidence which was presented in the guilt phase. (RT 8477-8478) The defense noted that it sought to introduce this particular evidence to show the presence of sperm from a third party. The defense argued that this was a circumstance of the crime that the defense was entitled to show. Moreover, the defense noted that it wanted to show that there was some contamination in the process that was involved in the testing. There was an argument that could be made that the preliminary testing that preceded the DNA testing at first found no semen in the initial coroner's rectal slide and that upon retesting of a newly made slide, sperm was found in the rectum. In the same lab, the vaginal swab, as opposed to the rectal swab – the first testing from the coroner showed sperm, and the re-test sample of the vaginal sample also showed semen, but on the third test it did not. (RT 8478) It goes to show there might have been another person involved in the crime (e.g., third man). (RT 8478-8479) Moreover, the defense noted that it certainly "has evidentiary value in terms of residual and lingering doubt." The defense concluded that this was "the reason we are

seeking to have this particular evidence introduced." The court inquired as to whether "[y]ou mean in terms of offering lingering doubt?," to which the defense responded "[y]es." (RT 8479)

The court advised that it was satisfied that the defense had an absolute right to present evidence of lingering doubt at the penalty phase, as reflected in the following: "Well, I'm satisfied that's a rule of law, that the defense has an absolute right to present evidence of lingering doubt at the penalty phase." The court noted further, "[t]hat is not in dispute, Mr. Selvin [defense counsel]." (RT 8479)[19]

The defense noted that they sought to have this particular "DNA type of evidence" admitted to show "the circumstances of the crime." (RT 8480) The defense argued that the fact they were involved in a penalty phase without a guilt phase had to be factored into the court's determination of whether the court is going to allow the defense to present the evidence, noting that in a unitary trial, the penalty phase jury would have heard the guilt phase evidence. Thus, while generally you cannot present new guilt phase-type evidence in the penalty phase, you are entitled to an argument based on lingering or residual doubt which can lead the jury to vote against the death penalty. (RT 8480) In this case, however, because of the mistrial, the defense does not have the ability to make such an argument because the jury has not heard the evidence in the guilt phase. Moreover, the jury is being told that he has already been convicted. (RT 8480) Further, the prosecutor will be presenting evidence showing the circumstances of the crime. (RT 8480-8481) Thus, if the prosecution can present the

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[19] On October 25, 1999, Mr. Alex Selvin, Esq. was court appointed as "Second Counsel" to represent Mr. Nadey in place of Mr. Horowitz for the penalty retrial. (CT 1610)

circumstances of the crime, the defense should be able to present the circumstances of the crime to counterbalance; that is, give the defense version of the circumstances of the crime, which, in this case, would be the ability to introduce DNA evidence. (RT 8481)

The court noted that the defense would argue to the jury that the fact that there was a second source or third party donor raises the issue of lingering doubt. To this, the defense, Mr. Selvin, stated "[t]hat's correct." The prosecutor argued that it was not a circumstance of the crime but goes to identity. (RT 8481) The prosecutor noted that he would put in a certified copy of the jury verdict in his case in chief, which goes to the issue of identity. (RT 8482)

The court noted the position of the prosecution that the DNA evidence goes solely to identity and is not a circumstance of the crime, to which the prosecutor, Anderson, stated "[t]hat's correct." The court noted that by excluding the DNA evidence, the court risked reversal as follows:

> The Court's mindful that interfering with the defendant's trial strategy is doubtful, and the Court risks reversible error in excluding useful and probative evidence. The Court's aware of that.

(RT 8483) The court summarized the argument made that this is a defense trial strategy that the court should not interfere with as follows:

> The argument is being made that this is the defense trial strategy, and the Court should not interfere with whatever evidence the defendant wishes to offer in the penalty phase, and in particular evidence relating to lingering doubt, because you have a right to present evidence regarding lingering doubt, although you do not have a right to the instruction.

(RT 8483)

The court reviewed the evidence and the circumstances of the crime and then stated its reasons for concluding that it would not admit the DNA evidence. (RT 8484-8486)

First, the court stated that they had to determine in this dispute whether or not the semen samples taken relate to the circumstances of the crime or to identity. The court noted that a strong argument could be made that they do, in fact, relate to the circumstances of the offense. The semen was recovered from the rectum of the victim. There was evidence that she was sodomized, and hence, the argument could be made that it goes to the circumstances of the offense. While others may say it goes to the identity, which was the position of the prosecutor, the court noted that it was "leaning toward the fact that it's a circumstance of the offense." (RT 8484)

Second, the court noted that for the evidence to be admissible, it has to be useful and probative in order to submit it to the jury. The court relied on the fact the defense had Dr. Ed Blake as a defense expert, but the defense did not call him either in the guilt or first penalty phase. Thus, an inference can be drawn that there is no dispute with regard to the conclusions reached by Mr. Myers. (RT 8484)

Third, the court noted that the next question the court had to decide was whether revisiting the DNA issue could raise the issue of lingering doubt in this case. The court concluded that revisiting the DNA issue would not raise the issue of lingering doubt given that the DNA test (RFLP method) confirmed that there was a match with the defendant's blood, with a random match probability of 1 in 32 billion. (RT 8485) It noted "the Court's opinion that one in 32 billion is not lingering doubt. To the contrary, it's proof beyond a reasonable doubt, so I cannot come to the conclusion that the evidence offered would raise the issue of lingering

doubt." (RT 8485) Based on the PCR method, the court acknowledged that an argument could be made that there was a second source, third party donor. However, the court concluded: "It's the Court's opinion that the DNA evidence does not raise the issue of lingering doubt. One in 32 billion, in the Court's opinion, is not lingering doubt." (RT 8485-8486)

The court also addressed Evid. Code §352 regarding the admission of the DNA evidence tending to confuse the issues. The court noted that there was no issue as to whether the semen was the semen of the defendant. Under the RFLP, no third party donor was discovered nor was there any second source detected in the RFLP method. So this would not reflect a lingering doubt as far as the court was concerned. Under §352, the court concluded that the DNA evidence would require an undue consumption of time and the evidence would not be useful because it does not clear up and does not "raise the issue of lingering doubt." The court noted further that everybody accepts at face value the integrity of the DNA testing. Thus, the court ruled that they would not go into the DNA testing for the reasons stated as follows: "So that will be the Court's ruling. We will not go into the DNA for the reasons I've stated." The court acknowledged that there was some risk attendant to the court's ruling as follows:

> I'm mindful of the risk involved, Mr. Selvin [defense counsel]. I put that on the record. I'm mindful of the risk involved, and if I'm wrong, that inures to your client's benefit.

(RT 8486)

3. Pre-Instructions.

On the first day of trial, January 18, 2000, the court pre-instructed the jurors to consider all of the evidence although acknowledging that they did

not hear the first part of the trial. (RT 8532-8533) The court informed the jury that they will be "weighing the aggravating and mitigating factors." (RT 8534) The court instructed the jury as to CALJIC 8.85, noting that they should be guided by factors (a) through (k) and enumerated those factors. (RT 8534-8536)

4. Preliminary Review of the Jury Instructions

On January 20, 2000, the defense requested a lingering doubt instruction, and the court advised that it would entertain that. However, the court noted that it was disinclined to give a lingering doubt instruction for the reasons already stated. The defense, Mr. Selvin, noted that he would make a record later on. (RT 8848 and 8835)

5. Jury Instructions – Motion for Lingering Doubt Instruction

The court reviewed the jury instructions with counsel. (RT 9440-9472) The court, in effect, utilized its prior instructions from the first penalty phase trial and made some minor modifications and revisions (RT 9440-9471)

Later that afternoon, the court addressed the issue of a lingering doubt instruction. (RT 9480-9481) The defense, Mr. Selvin, noted that the defense had not submitted the actual wording of the lingering doubt instruction, because the defense had presented a "motion to introduce lingering doubt evidence" and the Court had denied the motion. (RT 9480) The Court noted that the defense did not have to prepare such an instruction to protect the record on the issue. (RT 9480-9481) The Court stated as follows:

> But I think for the record you only have to request it. You don't have to give me one in some sort of formal form. And the fact that you're requesting it and I'm officially denying it should protect the record.

The defense, Mr. Selvin, responded, "All right." (RT 9480) Of note, the court did give the CALJIC 8.85 instruction which included factors (a) and (k). (CT 1753 and CT 1803-1805; see also RT 9717-9718)

6. Closing Argument

In closing argument, the defense addressed factors (a) through (k) [CALJIC 8.85], noting that these are the factors which must be considered with respect to determining what penalty should be imposed. (RT 9573) The first factor involved the circumstances of the crime (i.e., factor (a)). (RT 9573)

The defense, Mr. Selvin, also raised the question of lingering doubt regarding the certainty of the verdict as follows:

> This is a delicate matter. . . . In the ordinary trial involving the death penalty, the jury sits as the fact finder and penalty determiner assuming they found the person guilty of murder with special circumstances. Given the nature of this case - - and the law required it to be that way without going into details why - - you don't hear the first part of the case. You only hear the parts that Mr. Anderson wants to present and that we present regarding why you should impose a particular penalty. Okay. So there's got to be in your mind some question about not only how it happened but who exactly was involved with what happened.
>
> Let me make it clear, absolutely clear; A former jury has convicted Mr. Nadey of murder in the first degree with special circumstance sodomy. They had the same beyond-a-reasonable-doubt standard to deal with as you have been given, and they did find him guilty. And I cannot and am not asking you to decide that he is not guilty. Okay? He is guilty. You have to accept that.
>
> . . .

> Is there any kind of a lingering or residual doubt that you may have in terms of the certainty of this verdict, the kind that you may want to, you know, give a person the death penalty?
>
> . . .
>
> But the question still remains, the certainty of someone else's verdict - - not the certainty for his guilt, but the certainty to send the man to death, to death, that's what we are talking about.

(RT 9631:3-9632:19)

As to factor (k) mitigation [CALJIC 8.85], as referenced by Mr. Selvin, Mr. Giller stated as follows:

> [A]ny other circumstance which extenuates the gravity of the crime, even though it's not a legal excuse for the crime, and any sympathetic or other aspect of the defendant's character or record as a basis for a sentence less than death, whether or not related to the offense for which he is on trial.

(RT 9655-9656).

7. Motion for New Trial

The court addressed the motion for new trial. (RT 9742) Defense counsel, Mr. Giller, noted that the prosecution's argument referring to the tattoos and the books concerning the Nazis and the SS signs as well as the Nazi regalia was error and misconduct by the prosecutor. (RT 9742) Further, the motion for new trial addressed the court's refusal to allow the introduction of forensic evidence to raise the possibility of lingering doubt as it relates to the circumstances of the crime. (CT 1818 at 1828). The prosecution argued that this did not constitute a refusal by the court to allow the presentation of a defense. The court merely rejected certain evidence that

the defense wished to present. (RT 9744) The court concluded that it was not persuaded by the motion, and the motion for new trial on guilt and penalty phase was denied. (RT 9746)

D. The Trial Court Erred by Excluding Evidence of Lingering or Residual Doubt in the Penalty Retrial

In *People v. Gay* (2008) 42 Cal.4th 1195, this Court held that the exclusion of evidence concerning lingering or residual doubt that related to "the circumstances of the crime," constituted error. *Gay*, 42 Cal.4th at 1217-1223. This Court discussed the importance of lingering doubt evidence which may "'in some measure affect the nature of the punishment'" and, if excluded from a penalty retrial, noted that "'the second jury necessarily will deliberate in some ignorance of the total issue'" (quoting from *People v. Terry* (1964) 61 Cal.2d 137, at 146). *Gay*, 42 Cal.4th at 1218-1219. This Court quoted extensively from *Terry* in discussing the importance of lingering doubt in a penalty retrial:

> In reversing the judgment and ordering a third penalty trial [*People v. Terry*, *supra*, 61 Cal.2d at 146], we declared that the text of Penal Code former section 190.1, which sanctioned "the presentation of evidence as to 'the circumstances surrounding the crime . . . and of any facts in . . . mitigation of the penalty,'" encompassed evidence relating to a "defendant's version of such circumstances surrounding the crime or of his contentions as to the principal events of the instant case in mitigation of the penalty." (*People v. Terry*, *supra*, 61 Cal.2d at p. 146, 37 Cal.Rptr. 605, 390 P.2d 381 (*Terry*).)
>
> . . .
>
> Judges and juries must time and again reach

> decisions that are not free from doubt; only the most fatuous would claim the adjudication of guilt to be infallible. The lingering doubts of jurors in the guilt phase may well cast their shadows into the penalty phase and in some measure affect the nature of the punishment." (*Terry, supra*, 61 Cal.2d at p. 146, 37 Cal.Rptr. 605, 390 P.2d 381.) "If the same jury determines both guilt and penalty, the introduction of evidence as to defendant's asserted innocence is unnecessary on the penalty phase because the jury will have heard that evidence in the guilt phase. If, however, such evidence is excluded from the penalty phase, the second jury necessarily will deliberate in some ignorance of the total issue. [¶] . . . [¶] The purpose of the penalty trial is to bring within its ambit factors such as these." (*Ibid.*)

Gay, 42 Cal.4th at 1218-1219.

This Court made clear that under the current Penal Code § 190.3, lingering doubt evidence is admissible as evidence of "mitigation" relevant to the "circumstances of the present offense" and reiterated that the "trial court errs if it excludes evidence material to" lingering doubt:

> Current Penal Code section 190.3 similarly authorizes the admission of evidence "as to any matter relevant to . . . mitigation, and sentence including, but not limited to, the nature and circumstances of the present offense" (Pen.Code, § 190.3), and a defendant may rely on such evidence to "urge his possible innocence to the jury as a factor in mitigation." [citations omitted] ["The 'circumstances of the crime' as used in section 190.3, factor (a), 'does not mean merely the immediate temporal and spatial circumstances of the crime. Rather it extends to "[t]hat which surrounds materially, morally, or

> logically" the crime'"].) Indeed, we have observed that the "rationale" of *Terry*, which "Justice Tobriner eloquently expressed" (and which is quoted, *ante*, 73 Cal.Rptr.3d at p. 460, 178 P.3d at p. 438), "obtains to this day." (*People v. Cox*, *supra*, 53 Cal.3d at p. 677, ...; see also *People v. Hawkins* (1995) 10 Cal.4th 920, 966–967, ... ["residual doubt about a defendant's guilt is something that juries may consider at the penalty phase under California law, and a trial court errs if it excludes evidence material to this issue," citing *Terry*]; *People v. Johnson, supra*, 3 Cal.4th at p. 1259, 14 Cal.Rptr.2d 702, 842 P.2d 1 (conc. opn. of Mosk, J.) ["In the almost 30 years that have passed since we decided Terry, we have firmly adhered to its teaching"].)

Gay, 42 Cal.4th at 1219-1220.

This Court also noted that its holding that evidence of the circumstances of the offense, including lingering doubt evidence, is admissible at a penalty retrial not only comported with Penal Code § 190.3 but the relevant case law in other jurisdictions as well. Said the Court:

> Our holding that evidence of the circumstances of the offense, including evidence creating a lingering doubt as to the defendant's guilt of the offense, is admissible at a penalty retrial under Penal Code section 190.3 is in accord with other jurisdictions that, like California, have recognized the legitimacy of a lingering-doubt defense at the penalty phase of a capital trial.

Gay, 42 Cal.4th at 1221.

The Court noted the question is not whether the evidence tends to prove that the defendant did not commit the crime, but whether it either (1) relates to the circumstance of the crime, or (2) relates to aggravating or

mitigating circumstances. Under CALJIC 8.85, evidence relating to the circumstances of the crime is admissible under factor (a) and evidence relating to mitigating circumstances is admissible under factor (k).

Subsequent decisions of this Court make clear that *People v. Gay* (2008) 42 Cal.4th 1195, stands for the proposition that lingering doubt evidence is admissible under Penal Code § 190.3 factors (a) and (k) as expressed in CALJIC 8.85. (See, e.g., *People v. Gonzales/Soliz* (2011) 52 Cal.4th 254, 325-326; *People v. Enraca* (2012) 53 Cal.4th 735, 767-768.) In *Gonzales/Soliz*, this Court reiterated that this Court's holding in *Gay* concerning lingering doubt was "based on California's death penalty statute, which authorizes the admission of evidence of innocence at a penalty retrial." *Gonzales*, 52 Cal.4th at 326 (citing *Gay*, 42 Cal.4th at 1220); see also *Enraca*, 53 Cal.4th at 768 (reiterating that lingering doubt evidence is admissible "based on California's death penalty statute, which authorizes the admission of evidence of innocence at a penalty retrial" [citing *Gay*, 42 Cal.4th at 1220]). . See also *People v. Page* (2008) 44 Cal.4th 1, 55 (reiterating that a jury's consideration of residual doubt is proper, while noting that a "defendant may assert his possible innocence to the jury as a factor in mitigation under section 190.3, factors (a) and (k).").

In this case Judge Delucchi excluded the proffered evidence by the defense concerning the DNA which the defense offered to establish both contamination in the DNA testing and the presence of a third donor. Of note, this was the same evidence that had been presented to the first jury in the guilt phase proceedings of the trial. Both were relevant as to the issue of lingering doubt relating to the circumstances of the offense and mitigating circumstances. The presence of contamination undermined the certainty of the DNA evidence establishing that defendant was responsible for the death

of the victim and, further, the evidence of a third donor was relevant to the circumstances of the offense as well as mitigation in that it created a residual doubt as to whether Nadey was the perpetrator as well as in mitigation with respect to whether another party was involved in the offense.

In *Gay*, this Court referenced and discussed a decision by the Georgia Supreme Court in a case remarkably similar to this case. In *Blankenship v. State* (1983) 251 Ga. 621, the Georgia Supreme Court was reviewing for a second time on direct appeal a sentence of death based on a penalty retrial. On retrial, the defendant was again sentenced to death. On review, the issue presented was the scope of evidence admissible in mitigation and whether the limitations imposed on Blankenship were permissible. *Blankenship*, 251 Ga. at 621-622.

The Georgia Supreme Court summarized the evidence presented at the original trial, noting that the possible involvement of a third party remained open:

> [In our review of the evidence, we noted the unexplained presence of blood, which was neither the victim's nor the defendant's, in the fingernail scrapings taken from the victim's left hand. We noted also that a segment of Negroid hair was discovered in combings taken from the victim's pubic hair, for the presence of which a plausible, though not conclusive, explanation was offered by the state. We concluded, from our review of the evidence, including footprint and fingerprint evidence and the defendant's confession, that the evidence was sufficient to support the convictions. However, in our review of the evidence, it was not necessary to determine, nor did we, that the evidence left no doubt as to the possible involvement of a third party.

Blankenship, 251 Ga. at 622. It follows from *Blankeship* that the evidence of lingering doubt was improperly excluded. In *Blankenship*, the trial court was focused solely on guilt or innocence and concluded that the possible involvement of a third party did not relieve the defendant of his responsibility for having been found guilty of the murder. Moreover, the comments of the trial judge regarding the "one hair" suggests that he found the evidence to be insufficient to establish the involvement of a third party, but further concluded that such evidence was not material since the guilt of the defendant had already been established in the prior trial. The Georgia Supreme Court determined this to be error. *Id.*

In this case, despite the fact the court had previously acknowledged that a strong argument could be made as to the DNA evidence with respect to the semen samples that they do relate to the "circumstance of the offense," (RT 8484) it erroneously concluded, as had the Georgia court, that the proffered evidence, in this case DNA evidence which was subject to both contamination and reflected the presence of a third donor, was insufficient to establish lingering doubt and, further, that the presence of a third person was not material. Judge Delucchi concluded that "[i]t's the Court's opinion that the DNA evidence does not raise the issue of lingering doubt. (RT 8485-8486) The court's exclusion of the DNA evidence precluded the defense from asserting the defense of lingering doubt, including the possible involvement of a third party as a circumstance of the offense as well as a potentially mitigating factor.

It follows from *Blankenship*, cited with approval by this Court in *Gay*, 42 Cal.4th at 1221-1222, that the presence of a Negroid hair finding, from the body of the victim, reflected on the possible involvement of a third party, which the Georgia Supreme Court concluded related to the circumstances of

the crime. Similarly, the DNA evidence involving contamination and the presence of a third donor which reflected on the possible involvement of a third party, as in *Blankenship*, related to the circumstances of the crime, and hence, the exclusion of said evidence constituted error.

Moreover, in another case cited and discussed by this Court in *Gay*, 42 Cal.4th at 1222, the South Carolina Supreme Court considered the admissibility of the defendant's alibi evidence at the retrial of the sentencing phase. *State v. Stewart* (1986) 288 S.C. 232. The South Carolina Supreme Court noted that the appellant [defendant] had "asserted an alibi defense during the guilt phase of his first trial," and concluded that it would be "unjust" to preclude defendant from presenting alibi evidence at the resentencing simply because he did not receive a proper sentencing hearing in the first instance as reflected in the following:

> The jury in the first trial was able to hear all the evidence which was admitted in the guilt phase, including the testimony of appellant's alibi witnesses. During the penalty phase, the jury was able to consider the alibi testimony along with the other evidence in determining the appropriate sentence. It is unjust to exclude appellant's alibi evidence as a matter of law from the consideration of the resentencing jury merely because the appellant did not receive a proper sentencing hearing in the first trial.

Stewart, 280 S.C. at 235.

Moreover, the South Carolina Supreme Court concluded that "basic fairness" required that the defendant's evidence of innocence be admitted at the resentencing hearing, particularly given the bifurcated structure of a capital proceeding, as reflected in the following:

> The bifurcated structure of a capital proceeding should not be used to prevent guilt phase evidence from being considered in the penalty phase. Since the state's evidence of guilt is admissible at the resentencing hearing, basic fairness requires that the appellant's evidence of innocence be admitted as well.

Id. at 235-236.

This Court quoted, with approval, the "basic fairness" requirement recognized by the South Carolina Supreme Court in *Stewart*, in *Gay*, 42 Cal.4th at 1222. While the South Carolina Supreme Court held that appellant's evidence of innocence, i.e., alibi evidence, must be admitted on the grounds of basic fairness, it follows that similarly in this case appellant Nadey's lingering doubt evidence, i.e., DNA evidence reflecting contamination and the presence of a third donor, should have been admitted on grounds of basic fairness in the penalty retrial.

In this case, the prosecutor was able to introduce evidence as to the guilt of Nadey by way of the prior jury verdict (People's Exhibit 1; RT 8561-8562, 8482) and the Court instructed the jury as to the guilt determination of Nadey in the prior trial. (RT 8533-8534, pre-instructions, and RT 9696, final instructions) However, the Court excluded the proffered lingering doubt evidence, to wit, the DNA evidence of contamination and the presence of a third donor, which precluded the defense from presenting evidence of lingering or residual doubt for consideration by the second penalty phase jury. On basic fairness grounds, as recognized in the *Stewart* decision, which this Court cited with approval in *Gay*, it follows that Judge Delucchi's ruling excluding evidence of lingering doubt violated the basic fairness requirement that applies to a penalty retrial.

Based on the foregoing, the decision by Judge Delucchi to exclude evidence of lingering doubt constituted error. It deprived Nadey of the ability to present to the second penalty jury evidence that the DNA evidence had been the subject of contamination, and moreover, that the DNA evidence reflected the presence of a third donor, the same DNA evidence that had been submitted to the first penalty jury. As recognized in *Gay*, this evidence was relevant to "[t]he circumstances of the crime" as reflected in CALJIC 8.85 factor (a) and as mitigation as reflected in CALJIC 8.85 factor (k) with respect to "[a]ny other circumstance which extenuates the gravity of the crime." Consequently, under *Gay*, the proffered lingering doubt evidence was relevant to both factors (a) and (k) of CALJIC 8.85 and the failure to admit said evidence constituted error.

E. The Exclusion of the Lingering Doubt Evidence Was Prejudicial

The defense of lingering or residual doubt has been recognized to be an extremely effective argument for the defense in capital cases:

> [T]he defense of "residual doubt has been recognized as an extremely effective argument for defendants in capital cases." *Lockhart v. McCree*, 476 U.S. 162, 181, . . . (1986); *see also Williams v. Woodford*, 384 F.3d 567, 624 (9th Cir. 2004) (same). We have noted in the past a comprehensive study on the opinions of jurors in capital cases that concluded that "'[t]he best thing a capital defendant can do to improve his chances of receiving a life sentence has nothing to do with mitigating evidence. . . . The best thing he can do, all else being equal, is to raise doubt about his guilt.'" *Williams*, 384 F.3d at 624 (quoting Stephen P. Garvey, *Aggravation and Mitigation in Capital Cases: What Do Jurors Think?*, 98 Colum. L.Rev. 1538, 1563

(1998)).

Cox v. Ayers (9th Cir. 2010) 613 F.3d 883, 898. This Court has recognized that residual doubt is the most effective strategy to employ at sentencing in capital cases. (*See Gay*, 42 Cal.4th at 1227. *See also Chandler v. United States* (11th Cir. 2000) 218 F.3d 1305, 1320 n.28.)

In *Gay*, this Court set forth the test for determining prejudice by way of the exclusion of lingering or residual doubt evidence as follows:

> Error in admitting or excluding evidence at the penalty phase of a capital trial is reversible if there is a reasonable possibility it affected the verdict. [citations omitted]

42 Cal.4th at 1223. A review of the record reflects that there is "a reasonable possibility" that the exclusion of the proffered lingering doubt evidence, that is, the evidence concerning contamination in the DNA testing as well as the presence of the third donor, affected the verdict imposing death in the second penalty phase trial.

As outlined above, the first penalty jury had the opportunity to consider the DNA evidence, including the evidence of contamination and the presence of a third donor. The first penalty jury hung 7-4-1, with the court declaring a mistrial. Of note, the DNA evidence was presented by the prosecution via principally the testimony of their DNA expert, Mr. Steven Myers, Senior Criminalist with the California Department of Justice DNA Laboratory, who was called by the prosecution. (RT 4457-4512, 4810) (See generally pp. 43-63 of the Guilt Phase Statement of Facts). Under direct examination, Mr. Myers acknowledged the presence of a third donor, not the husband and not the defendant, in the PCR testing of the vulva swabs. (RT 4497-4506) (See Statement of Facts, Guilt Phase, pp. 51-57) On cross-

examination, Mr. Myers conceded that there was evidence of contamination in the DNA testing. (RT 4686-4692, 4698-4700, 4704, see also RT 4692-4697) (See Statement of Facts, Guilt Phase, pp. 57-62) Moreover, on cross-examination, Mr. Myers confirmed a clear, unequivocal finding of a third person's DNA sperm (RT 4719-4720). (See Statement of Facts, Guilt Phase, pp. 54-55). Of note, Mr. Myers confirmed his belief that there was a "real extra donor" with respect to the sperm on the vulva. (RT 4719-4720) (See Statement of Facts, Guilt Phase, p. 55) Hence, the first penalty jury heard the lingering doubt evidence concerning contamination as to the DNA evidence and the presence of the third donor, not the husband and not the defendant. In the guilt phase trial, the defense, Mr. Horowitz, argued extensively regarding the evidence of contamination as to the DNA in closing argument. (RT 4945-5120) In the first penalty phase trial, the defense, Mr. Giller, argued lingering doubt predicated on the third donor artfully raising the "unanswered question" regarding the "third donor" and the failure of the authorities "to determine who that was." (RT 6005)

The first penalty jury hung 7 to 4 to 1. The second penalty jury, which did not have the benefit of considering the lingering doubt evidence, imposed a sentence of death. (RT 9732-9734) This is an unequivocal showing that the error affected the verdict; that at least one juror was affected by the evidence of lingering or residual doubt; that is, the evidence of contamination as to the DNA and the presence of a third donor. Consequently, there is a "reasonable possibility" that the exclusion of the lingering doubt evidence affected the penalty verdict reached by the second jury.

Moreover, a comparison of the evidence presented in the first penalty trial (RT 5327-5332, 5344-5508, 5901-5964) as contrasted with the evidence

presented in the second penalty trial (RT 8537-8545, 8563-8969, 8986-8999, 9500-9560) reflects that essentially the same evidence was presented in both penalty determinations, excepting the evidence of lingering doubt. In the first penalty trial, the prosecution presented factors in aggravation involving (1)circumstances of the crime; (2) prior felony convictions and prior acts of violence and threatened acts of violence; and (3) victim impact. (RT 5327-5332, 5344-5508, 5901-5964) In the second penalty trial, the prosecution again presented factors in aggravation concerning (1) the circumstances of the crime; (2) prior felony convictions and prior acts of violence and threatened acts of violence, and (3) victim impact. (RT 8537-8545, 8563-8969, 8986-8999, 9500-9560)

As to the circumstances of the crime, the first penalty jury had the opportunity to hear the evidence concerning the circumstances of the crime in the guilt phase determination. The prosecution sought to present the same evidence in the second penalty phase trial, excepting the evidence concerning the DNA. (RT 8477-8487) The first piece of evidence presented by the prosecution was a two-page certified copy of the jury's verdict which the prosecutor had referenced in his opening statement. (People's Exhibit 1; RT 8561-8562) The court admitted People's Exhibit 1, i.e., the certified copy of the conviction as to defendant Nadey. (RT 8561-8562) The verdict of the jury as to Count One as contained on page 1 of the verdict (Exhibit 1) provided, in pertinent part, as follows:

> We, the jury in the above entitled cause, find the defendant, GILES ALBERT NADEY, JUNIOR, GUILTY of the crime of a felony, to wit: MURDER OF THE FIRST DEGREE, a violation of Section 187 of the Penal Code of California as charged in COUNT ONE of the Indictment. . . .

> We, the jury, in the above entitled cause, find to be True the SPECIAL CIRCUMSTANCE pursuant to Section 190.2(a)(17)(iv) of the Penal Code of California as charged in the Indictment, that the killing of TERENA L.FERMENICK was committed while the defendant, GILES ALBERT NADEY, JUNIOR, was engaged in the commission or the immediate flight thereafter of a felony to wit: Unlawful Sodomy, in violation of Section 286 of the Penal Code of California.
>
> . . .

The second page of the verdict, set forth the Verdict of Jury as to Count Two in pertinent part, as follows:

> We, the jury in the above entitled cause, find the defendant, GILES ALBERT NADEY, JUNIOR, GUILTY of the crime of a felony, to wit: UNLAWFUL SODOMY, a violation of Section 286(c) of the Penal Code of California in that said defendant did then and there compel TERENA L. FERMENICK against her will by force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the said TERENA L. FERMENICK to participate with said defendant in an act of sodomy as charged in COUNT TWO of the Indictment. . . .

Of note, the court had pre-instructed the jury that defendant Nadey had been found guilty of murder in the first degree and that the allegation that said murder was committed under special circumstances had been specifically found to be true. (RT 8533)

Thus, the circumstances of the offense presented in the second penalty phase trial paralleled the evidence regarding the circumstances of the offense presented in the first penalty phase trial which, by its very definition,

constituted a unitary trial with the guilt phase proceedings being incorporated into the first penalty phase proceedings by reference. In fact, the court specifically instructed the jury that they were to determine the facts in the first penalty phase trial from the evidence received during the "entire trial," unless instructed otherwise. (RT 5326) Hence, the circumstances of the crime that was presented in the second penalty phase trial paralleled the evidence presented in the first penalty phase trial, excepting the DNA evidence with respect to lingering doubt. [Compare the evidence regarding the circumstances of the crime as to the second penalty phase trial (RT 8563-8969, 8986-8999) with the evidence regarding the circumstances of the crime as to the guilt phase trial (RT 3988-4818)]. The only difference in the presentation of the circumstances of the crime that was presented to the first penalty jury, as contrasted with the presentation of evidence to the second penalty jury, involved the exclusion of the lingering doubt evidence with respect to the DNA evidence that was presented to the first jury, but was excluded from the second jury. (RT 8477-8487)

As to the victim impact evidence, the same family members attested to victim impact in both the first penalty trial and the second penalty trial, to wit, Donald Fermenick (RT 5484-5490, 8939-8945); Donna Bryant (RT 5493-5497, 8952-8958); Robert McGurer (RT 5498-5502, 8958-8964); and Carolyn McGurer (RT 5503-5508, 8964-8968).

As to prior felony convictions, the same convictions with respect to two prior residential burglary convictions and a conviction of one count of second degree burglary and one count of petty theft with a prior theft conviction were admitted in both the first penalty trial and second penalty trial. (See People's Exhibits 54 and 55 in the first penalty trial [RT 5476-5477, and RT 5477-5478, respectively], as contrasted with People's Exhibit

32 [RT 8661] and People's Exhibit 33 [RT 8662], which were admitted in the second penalty trial.) Moreover, evidence concerning prior criminal acts involving the express or implied use of force or violence or threat of force or violence was introduced in the first penalty trial. This included 8 criminal acts which were referenced by the court by way of CALJIC Instruction 8.87 as follows:

1) The attempted rape of Sarah [S.], a non-spouse, with lack of consent due to intoxication;
2) A lewd act with Sarah [S.], a child under 14 years of age;
3) The unlawful penetration by a foreign object of the genital opening of Sarah [S.], a person under the age of 14 years;
4) Carrying a concealed dirk/dagger;
5) Possession of a firearm by a convicted felon;
6) Shooting from a vehicle;
7) Assault with a firearm upon the person of Virginia Hendrix; and
8) Simple assault upon the person of Virginia Hendrix

(CT 1068; see also RT 5344-5478)

In the second penalty trial, the prosecution presented evidence concerning two additional prior criminal acts involving the express or implied use of force or violence or threat of force or violence than were presented at the first penalty phase trial. (RT 8711-8935) Consequently, with the exception of the criminal act of possession of a billy (RT 8870-8876) and possession of a weapon while confined in the county jail (RT 8728-8733), the evidence concerning prior criminal acts was the same. The trial judge, again, instructed the jury pursuant to CALJIC 8.87. (CT 1754-1755)

Consequently, with the exception of the criminal act of possession of a billy and possession of a weapon while confined in the county jail, the evidence presented concerning the circumstances of the crime, prior felony convictions and prior criminal acts, and victim impact, was essentially the same in both penalty trials, excepting the evidence concerning lingering doubt with respect to the DNA evidence reflecting that said evidence was the subject of contamination and revealed the presence of a third person. In light of the foregoing, given that the evidence presented in the first penalty trial as contrasted with the second penalty trial was essentially the same, excepting the proffered evidence of lingering doubt, it follows that there is a reasonable possibility that the exclusion of the proffered lingering doubt evidence affected the verdict. *Gay*, 42 Cal.4th at 1223.

In *Gay*, this Court also noted that the "trial court's instructions to the jury" on the question of lingering doubt may also have compounded the error as to the evidentiary rulings resulting in prejudice. *Id.* at 1224. In the second penalty trial, as noted, the trial judge pre-instructed the jury that the defendant had been "found guilty of murder of the first degree" and that "the special circumstances alleged in the case has been specifically found to be true." (RT 8533) The court then instructed the jury as to their role in determining the appropriate punishment with respect to (1) "life in prison without the possibility of parole," or (2) "death penalty." (RT 8533) The tenor of the court's instruction, which informed the jury that it would be "a violation" of their "oath as jurors" to "rely on conjecture and speculation" with regard to either the penalty of life in prison or the death penalty, in effect, emphasized the prior jury's determination that defendant Nadey was guilty of murder in the first degree involving special circumstances. That is, there is no indication in the instruction regarding the potential for either

residual or lingering doubt to be considered by the jurors in their determination as to the appropriate penalty.

Moreover, in the concluding instructions, the court again instructed the jury pursuant to CALJIC 8.84, that the defendant had been found "guilty of murder of the first degree" and that the allegation "of special circumstance" had been specifically found to be true. (CT 1754-1755) The trial court specifically instructed the second jury as follows:

> The defendant in this case has been found guilty of murder of the first degree. The allegation that the murder was committed under a special circumstance has been specially found to be true.
>
> It is the law of this state that the penalty for a defendant found guilty of murder of the first degree shall be death or confinement in the state prison for life without possibility of parole in any case in which the special circumstance alleged in this case has been specially found to be true.
>
> I instruct you that life in prison without the possibility of parole means exactly what it says, that the defendant will be imprisoned in the state prison for the rest of his life.
>
> You are further instructed that the death penalty means exactly what it says, that the defendant will be executed.
>
> For you to conclude otherwise would be for you to rely on conjecture and speculation, and it would be a violation of your oath as trial jurors.

> Under the law of this state, you must now determine which of these penalties shall be imposed on the defendant.

(CT 1754-1755) The tenor of this instruction does not lend itself to consideration of residual or lingering doubt, particularly given that the lingering doubt evidence had been excluded. While the first jury was similarly instructed pursuant to CALJIC 8.84 in the first penalty trial (CT 1049-1050), that jury had the benefit of the lingering doubt evidence.

Further, the first penalty jury was also instructed pursuant to CALJIC 8.85(a) and (k) (CT 1092-1094), as was the second penalty jury with respect to CALJIC 8.85(a) and (k). (CT 1803-1805) This Court has repeatedly held that the instructions in CALJIC 8.85 factor (a) and factor (k) provide a basis from which a defendant may argue residual or lingering doubt as that concept is encompassed within CALJIC 8.85 factors (a) and (k). *People v. Rogers* (2009) 46 Cal.4th 1136, *cert. denied* (2010) 130 S.Ct. 1704) (noting that the concept [of lingering doubt] is sufficiently covered in CALJIC No. 8.85); *People v. DePriest* (2007) 42 Cal.4th 1, 59-60 (concluding that no lingering doubt instruction was required because the concept was encompassed in §190.3 factor (k) (i.e., Instruction 8.85(k)); *People v. Zamudio* (2008) 43 Cal.4th 327, 330 (concluding that the lingering doubt "concept is sufficiently covered in CALJIC No. 8.85"); *People v. Geier* (2007) 41 Cal.4th 555, 615 (concluding that the concept of lingering doubt is "sufficiently covered in CALJIC No. 8.85").

While the instruction of CALJIC 8.85, particularly factors (a) and (k), certainly provided a basis for the defense to argue lingering doubt, the problem here is that without the benefit of the evidence of lingering doubt, there is no factual basis from which the defense could argue lingering doubt.

For example, in the first penalty phase trial, where the jury did hear the DNA evidence, which included evidence concerning contamination and the presence of a third donor, there was a basis to argue lingering doubt and the defense so argued in closing argument as follows:

> The unanswered question that was never ferreted out here, was there a third donor. And the authorities had an opportunity to try to determine who that was, but they never did. But there is no evidence that that third donor would have committed this crime, and so I just leave you with that thought.

(RT 6005) Here, defense counsel artfully argues lingering doubt, and it certainly paid dividends when the jury hung 7-4-1.

In closing argument in the second penalty trial, the defense did try to raise the issue of lingering doubt, but there was no evidence upon which to clearly base such an argument. Defense counsel sought to raise the question of lingering doubt, but was ineffectual:

> Let me make it clear, absolutely clear; A former jury has convicted Mr. Nadey of murder in the first degree with special circumstance sodomy. They had the same beyond-a-reasonable-doubt standard to deal with as you have been given, and they did find him guilty. And I cannot and am not asking you to decide that he is not guilty. Okay? He is guilty. You have to accept that.
>
> . . .
>
> Is there any kind of a lingering or residual doubt that you may have in terms of the certainty of this verdict, the kind that you may want to, you know, give a person the death penalty?
>
> . . .

> But the question still remains, the certainty of someone else's verdict - - not the certainty for his guilt, but the certainty to send the man to death, to death, that's what we are talking about.

(RT 9631:3-9632:19) Without evidence supporting the claim of lingering doubt, the argument in this regard falls on deaf ears.

The jury was instructed in the second penalty phase trial that each juror "must determine what the facts are from the evidence received during the entire trial unless [the jury] are instructed otherwise" pursuant to CALJIC 8.84.1 (CT 1757) Hence, the jury could only consider residual or lingering doubt based on the determination of "what the facts are from the evidence received during the entire trial." However, the exclusion of the lingering doubt evidence precluded the jury from considering a lingering doubt or residual doubt argument regarding "the certainty of someone else's verdict" as argued by the defense. (RT 9631:3-9632:19) The court specifically instructed the jury that they "must decide all questions of fact in this case from the evidence received in this trial and not from any other source," pursuant to CALJIC 103. (CT 1766) Further, the court instructed the jury, consistent with CALJIC 103, that they "must not independently investigate the facts or the law or consider or discuss facts as to which there is no evidence." (CT 1766) Again, the jury instructions made clear that each juror could only consider the evidence presented at trial. Hence, the exclusion of the lingering doubt evidence precluded the jury from considering the question of lingering or residual doubt as there was no evidence in the record to support an argument regarding lingering or residual doubt.

It follows from the instructions in the second penalty trial that the jury

was first instructed to accept the fact that defendant Nadey had "been found guilty of murder of the first degree" and that the allegation of "a special circumstance" had been specifically found to be true, that the jury, of course, was bound by that instruction. (CT 1754) Further, the second jury was instructed that they were to determine the facts based only on the evidence received at trial. (CT 1757 and CT 1766) In light of these instructions and the exclusion of lingering doubt evidence, there was no basis upon which the second jury could consider lingering doubt as reflected in CALJIC 8.85 factors (a) and (k). (CT 1803-1805)

In *People v. Gay*, this Court held that the evidentiary and instructional errors concerning lingering doubt presented an intolerable risk that the jury did not properly determine the penalty phase. 42 Cal.4th at 1226. This Court held as follows:

> The combination of the evidentiary and instructional errors presents an intolerable risk that the jury did not consider all or a substantial portion of the penalty phase defense, which was lingering doubt. The defense could have had particular potency in this case, given the absence of physical evidence linking defendant to the shooting and the inconsistent physical and clothing descriptions given by the prosecution eyewitnesses.

Id.

The trial court was well aware of the risk attendant to excluding such evidence, as reflected in the following:

> I'm mindful of the risk involved, Mr. Selvin [defense counsel]. I put that on the record. I'm mindful of the risk involved, and if I'm wrong, that inures to your client's benefit.

(RT 8486) Thus, unlike *Gay*, the trial court did not simply exclude a "substantial portion of the penalty phase defense" of lingering doubt, but, in this instance, the trial court excluded the entirety of the penalty phase defense of lingering doubt. That is, the jury was precluded from considering both the evidence of contamination as to the DNA evidence as well as the evidence of a third party donor.

A review of the prosecution's guilt phase evidence (RT 3988-4818) reflects that the DNA evidence (RT 4264-4817) was the heart of the prosecution's case as it established the purported link between the defendant and the crime of murder and sodomy as to the victim. Without the benefit of the DNA evidence, the evidence was insufficient to link the defendant to the crime of murder and sodomy. Hence, the lingering doubt evidence had particular potency in this case because it not only chipped away at the link between the defendant and the crime of murder and sodomy, that is, the DNA evidence linking the defendant to the victim, but also established the presence of a third party donor, not the defendant and not the husband, which further undermined the DNA link.

It follows from *Gay* that in light of the exclusion of the lingering doubt evidence as well as the instructions given, both of which precluded the defense from effectively arguing lingering doubt, there is more than an intolerable risk that the jury did not consider the penalty phase defense of lingering doubt. That is, the trial court's ruling excluding the lingering doubt evidence precluded the jury from considering lingering doubt, whether it be by way of factor (a), the circumstances of the crime, or factor (k), mitigating circumstances. Based on the foregoing, it is submitted that there is a reasonable possibility that the exclusion of the lingering doubt evidence affected the verdict, and hence, reversal is required as contemplated by *Gay*.

F. The Trial Court Ruling Excluding Evidence of Lingering or Residual Doubt Violated Both the Federal And State Constitutions.

As discussed above, this case may be decided on state law grounds based on this Court's interpretation of Penal Code § 190.3(a) and (k) and the companion instructions reflected in CALJIC 8.85 (a) and (k), as set forth in *People v. Gay*, (2008) 42 Cal.4th 1195. Thus, this Court need not address the federal and/or state constitutional questions in deciding this matter, as the claim of error in excluding the lingering or residual doubt evidence may be decided on state law grounds, to wit, Penal Code § 190.3, as set forth in the *Gay* decision. In fact, this Court in *Gay* specifically noted that the decision was predicated on the California "death penalty statute that authorized the admission of evidence of innocence at a penalty retrial," as discussed in *People v. Terry* (1964) 61 Cal.2d 137, 142-147, and noted further that "although the statute has since been revised, the rule 'obtains to this day,'" (citing to *People v. Cox* (1991) 53 Cal.3d 618, 677). *Gay*, 42 Cal.4th at 1220. The Court also noted that the prior *Terry* decision "did not purport to base its holding or analysis on *any* constitutional right, state or federal." *Id.* at 1220 (emphasis in original).

In *Gay*, this Court stated that "there is no federal constitutional right" to present lingering doubt evidence by a capital defendant. *Id.* It is submitted that this Court, consistent with its decision in *Gay*, should reverse the death penalty judgment imposed as a consequence of the second penalty jury's verdict for the reasons outlined above on state law grounds, i.e., the California death penalty statute as interpreted by this Court in *Gay* for the reasons outlined above. However, in the event that this Court concludes that application of the California death penalty statute, as discussed above, does

not warrant a reversal of the penalty judgment, then it is respectfully submitted that this Court must necessarily revisit the federal and state constitutional issues presented based on the unique facts of this case. What makes the facts of this case unique is that the submission of the proffered evidence of lingering doubt, did not involve new evidence but the same evidence presented to the first penalty jury, which hung 7-4-1.

Unlike the capital defendant in *Oregon v. Guzek* (2006) 546 U.S. 517, appellant Nadey sought to submit the same lingering or residual doubt evidence to the second penalty jury that had been previously submitted to the first penalty jury, i.e., evidence of contamination in the DNA testing, and the presence of a third donor, not the defendant and not the husband. In *Oregon v. Guzek*, the United States Supreme Court addressed the question of new evidence being proffered to establish residual doubt as the Oregon statute permitted capital defendants to present the same evidence that had been previously submitted "at the guilt phase." *Guzek*, 546 U.S. at 522. Moreover, the Supreme Court made clear in *Guzek* that it was addressing the narrow issue of "new evidence" with respect to the asserted constitutional right under the Eighth and Fourteenth Amendments. The Supreme Court set forth the issue as follows:

> [T]he federal question before us is a narrow one. Do the Eighth and Fourteenth Amendments grant Guzek a constitutional right to present evidence of the kind he seeks to introduce, namely, *new* evidence that shows he was not present at the scene of the crime.

Id. at 523 (emphasis in original). The Supreme Court answered the question in the negative as follows:

> We can find nothing in the Eighth or Fourteenth Amendments that provides a capital defendant a right to introduce new evidence of this kind at sentencing.

Id.

As noted above, appellant Nadey did not seek to introduce "new evidence" of lingering or residual doubt at the second penalty trial, but evidence of the same residual or lingering doubt that had been presented in the guilt phase proceeding to the first jury, which was the same jury who considered said evidence in the penalty phase of the first trial and was unable to reach a verdict as to the appropriate penalty, hanging 7-4-1. While *Guzek* does establish the proposition that there is no constitutional right to introduce "new evidence" regarding residual or lingering doubt at a penalty retrial, this ruling does not apply to the same evidence that had been previously submitted in the guilt phase determination regarding residual or lingering doubt. As noted, the Oregon statute specifically provided for the admission of the same evidence at resentencing by virtue of Oregon Revised Statute § 138.012(2)(b) (2003). *Guzek*, 545 U.S. at 522. As the Supreme Court noted:

> We do not doubt that these provisions give Guzek the state-law right to introduce a transcript of guilt-phase testimony. . . . But Guzek wishes to do more . . .

Id. The further discussion by the United States Supreme Court suggests that an Eighth Amendment and Fourteenth Amendment right may attach to the submission of the same evidence of residual or lingering doubt presented in the guilt phase determination with respect to a penalty retrial. However, the Supreme Court noted that it "need not resolve whether such a right exists" with respect to the introduction of residual doubt evidence at sentencing,

because the evidence that Guzek sought to introduce "could not extend so far." *Id.* at 525.[20]

Furthermore, the Supreme Court reiterated that the Eighth Amendment requires both reliability in the sentencing determination as well as consideration of mitigating evidence in a capital case, as reflected in the following:

> The Eighth Amendment insists upon "'reliability in the determination that death is the appropriate punishment in a specific case.'" *Penry, supra*, at 328, 109 S.Ct. 2934 (quoting *Woodson v. North Carolina*, 428 U.S. 280, 305, 96 S.Ct. 2978, 49 L.Ed.2d 944 (1976) (plurality opinion)). The Eighth Amendment also insists that a sentencing jury be able "to consider and give effect to mitigating evidence" about the defendant's "character or record or the circumstances of the offense." *Penry, supra*, at 327–328, 109 S.Ct. 2934.

Guzek, 546 U.S. at 525-526. It follows from *Guzek* that the Supreme Court's interpretation of the Eighth Amendment would compel the same lingering or residual doubt evidence presented in the Nadey guilt phase trial, which was considered by the same jury in the first penalty trial, be submitted to the second jury in the penalty retrial in order to assure reliability in the sentencing determination as well as to assure consideration of mitigating

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[20] Several circuit courts have also held that a defendant has no right to present new evidence of innocence at sentencing based on the Eighth Amendment in light of the *Guzek* holding. See e.g., *Holland v. Anderson* (5th Cir. 2009) 583 F.3d 267, 278-279 (noting that "almost all of the evidence that Holland sought to present at resentencing is exactly the type of new evidence of innocence described in *Guzek*"); *Owens v. Guida* (6th Cir. 2008) 549 F.3d 399, 419 (referencing the *Guzek* holding that a defendant has no right to present new evidence of innocence at sentencing).

evidence as to the circumstances of the offense, both of which are mandated by the United States Supreme Court's interpretation of the Eighth Amendment as reflected in *Guzek.*

In this case, the evidence of a third party donor is certainly a circumstance of the offense, as recognized by this Court in *Gay*, discussed above. Thus, there can be no question that the exclusion of the DNA evidence reflecting the presence of a third party donor was not only error, but a violation of appellant Nadey's Eighth Amendment rights to a reliable sentencing determination and to present mitigating evidence as to the circumstances of the offense, as well as a violation of his rights to due process, equal protection, a fair trial, and to present a defense. (U.S. Const. amends. VI, VIII, XIV; Cal. Const. art. I, §§ 7, 15 and 17.)

In *Oregon v. Guzek*, the Supreme Court also addressed the question of the Eighth and Fourteenth Amendments requirement concerning mitigation, including the circumstances of the offense predicated on its decisions in *Lockett v.Ohio* (1978) 438 U.S. 586, and *Eddings v. Oklahoma* (1982) 455 U.S. 104. The United States Supreme Court addressed the issue of mitigation and circumstances of the offense, referencing *Lockett v. Ohio* and *Eddings v. Oklahoma* as follows:

> In *Lockett v. Ohio,* [(1978) 438 U.S. 586] *supra*, a plurality of this Court decided that a defendant convicted of acting in concert with others to rob and to kill could introduce at the sentencing stage evidence that she had played a minor role in the crime, indeed, that she had remained outside the shop (where the killing took place) at the time of the crime. A plurality of the Court wrote that,

> "the Eighth and Fourteenth Amendments require that the sentencer . . . not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and *any of the circumstances of the offense that the defendant proffers* as a basis for a sentence less than death." *Id.*, at 604, 98 S.Ct. 2954 (emphasis added and deleted).
>
> And in *Eddings v. Oklahoma*, 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1, the Court majority adopted this statement. See also *McCleskey v. Kemp*, 481 U.S. 279, 306, 107 S.Ct. 1756, 95 L.Ed.2d 262 (1987); *Bell v. Ohio*, 438 U.S. 637, 642, 98 S.Ct. 2977, 57 L.Ed.2d 1010 (1978) (plurality opinion).

Guzek, 546 U.S. at 523-524. It follows that both the Eighth and Fourteenth Amendments, and their state constitutional corollaries, mandate that a capital defendant be permitted to present evidence in mitigation which includes, of course, the circumstances of the offense. Thus, the presence of a third party donor certainly is a circumstance of the offense mandated for consideration by a penalty jury. Moreover, the fact that the DNA testing was subject to contamination also reflects on mitigation [see discussion, *ante* pp. 51-62] and should have been admitted.

Thus, rather than this Court's decision in *People v. Stitely*\ or the United States Supreme Court's decision in *Oregon v. Guzek* being dispositive authorities relied on in *Gay*, 42 Cal.4th at 1220, for the proposition that there is no federal constitutional right to have the jury consider lingering doubt in choosing the appropriate penalty, a review of the *Guzek* decision as noted above indicates that the unique facts of this case involve the exclusion of the same lingering or residual doubt evidence that

was presented in the guilt phase and first penalty phase trial, and not the presentation of new lingering or residual doubt evidence offered for the first time in a penalty retrial. These unique facts necessarily require that this Court revisit the constitutionality of their exclusion under the Eighth and Fourteenth Amendments, and their state constitutional corollaries, in the event that this Court determines that said evidence was properly excluded under the California death penalty statute.

Moreover, under the unique facts of this case regarding the exclusion of the same lingering or residual doubt evidence, as opposed to new lingering or residual doubt evidence, this Court should also revisit a number of other federal constitutional provisions and their state constitutional corollaries. That is, the exclusion of the same lingering or residual doubt evidence that was considered in the guilt phase trial and first penalty phase trial, and not the second penalty trial, violated appellant Nadey's right to compulsory process, his right to present a defense, his right to fundamental fairness and, as noted, his right to a fair and reliable capital trial as well as equal protection. (U.S. Const. amends. VI, VIII, XIV; Cal. Const. art. I, §§ 7, 15, and 17; *Davis v. Alaska* (1974) 415 U.S. 308, 315-319) These constitutional rights must also be revisited by this Court, both federal and state, given the unique facts of this case, wherein the same lingering or residual doubt evidence which was admitted in the guilt phase proceedings and considered in the first penalty trial, but was excluded from the second penalty trial, necessarily implicates an infringement of both appellant Nadey's federal and state constitutional rights. More to the point, Nadey was deprived of his right to present a defense regarding lingering or residual doubt, thereby depriving him of his fundamental right of due process of law. As the Supreme Court of the United States noted in *Chambers v. Mississippi*

(1973) 410 U.S. 284, 302, there are "[f]ew rights are more fundamental than that of an accused to present witnesses in his own defense." Further, the Supreme Court noted in *Washington v. Texas* (1967) 388 U.S. 14, 19, that: "[t]he right to offer the testimony of witnesses, and to compel their attendance . . . to establish a defense" is a right that is " a fundamental element of due process of law." In sum, as the Supreme Court noted in *Crane v. Kentucky* (1986) 476 U.S. 683, 690, every defendant is entitled to "'a meaningful opportunity to present a complete defense.'[citations]" The exclusion of the same residual or lingering doubt evidence that was presented in the guilt phase trial and incorporated into the first penalty trial, but excluded from the second penalty trial, violated the rights of appellant Nadey to present a defense which resulted in a deprivation of his right to due process of law as recognized in the federal and state constitutions.

It is well settled that a defendant's right to present a defense is protected by the federal guarantee of due process of law (U.S. Const. amend. XIV; *Hicks v. Oklahoma* (1984) 447 U.S. 343, 346; *Fetterly v. Paskett* (9th Cir. 1993) 997 F.2d 1295, 1300.) Moreover, as noted, exclusion of the same lingering or residual doubt evidence deprived appellant Nadey of both a fair trial and a fair and reliable capital sentencing determination. (U.S. Const. amends. VIII, XIV; Cal. Const. art. I, §§ 7, 15, and 17; *Beck v. Alabama* (19890) 447 U.S. 625, 638; *In re Murchison* (1955) 349 U.S. 133, 136.)

This Court should rule it was prejudicial error under the California death penalty statute to exclude such lingering or residual doubt evidence from the second penalty jury's consideration and order a penalty retrial. If this court does not so rule, it is respectfully submitted that the unique facts of this case involving the exclusion of the same lingering or residual doubt evidence that was presented in the guilt phase proceedings and considered by

the same jury in the first penalty phase trial, but was excluded from consideration by a different jury in a second penalty trial, necessarily requires that this Court revisit the constitutionality of the exclusion under both the federal and state constitutions on the grounds noted above.

Appellant's penalty phase verdict should be reversed.

VI. THE STATE'S RETRIAL OF THE PENALTY PHASE, FOLLOWING THE 7-4-1 DEADLOCK IN THE ORIGINAL PENALTY PHASE, WAS UNCONSTITUTIONAL.

The state and federal bans against cruel and/or unusual punishment (U.S. Const., amend. VIII; Cal. Const., art. I, § 17),[21] prohibit repeated attempts by the government to subject a capital defendant to the death penalty. Specifically, if a prosecutor is unable to convince a jury to unanimously vote to impose the death penalty upon a defendant, the prosecutor cannot, consistently with constitutional safeguards, make repeated attempts to exact the ultimate penalty against the defendant from new and different juries.

This Court concluded otherwise in *People v. Taylor* (2010) 48 Cal.4th 574, 633-634. Appellant Nadey respectfully requests that this Court reconsider that decision.

"[R]etrial is not the prevailing rule for capital penalty-phase proceedings." (*Jones v. United States* (1999) 527 U.S. 373,419 (Ginsburg, J., dissenting).) "The majority of states have statutorily provided for an automatic sentence of less than death in the event of a deadlocked jury." (*State v. Peeler* (2004) 271 Conn. 338, 428 [857 A.2d 808, 867], *cert. denied sub nom., Peeler v. Connecticut* (2005) 546 U.S. 845; *State v. Hochstein* (2001) 262 Neb. 311, 323 [632 N.W.2d 273,282].)

The death penalty is currently prohibited in the following 17 states: Alaska, Connecticut, Hawaii, Illinois, Iowa, Maine, Massachusetts,

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[21] "Unlike its federal counterpart, [the California constitutional provision] forbids cruel *or* unusual punishment, a distinction that is purposeful and substantive rather than merely semantic." (*People v. Carmony* (2005) 127 Cal.App.4th 1066, 1085, italics in the original.)

Michigan, Minnesota, New Jersey, Mew Mexico, New York, North Dakota, Rhode Island, Vermont, West Virginia, and Wisconsin. It is also prohibited in the District of Columbia.

(<<http://www.deathpenaltyinfo.org/states-and-without-death-penalty».)

The death penalty is available in 33 states. And, the federal judiciary is a 34th jurisdiction in which the death penalty is available. (18 U.S.C. § 3591, *et seq.*; see generally *United States v. Moussaoui* (4th Cir. 2010) 591 F.3d 263,300-303.) In 24 of these 34 jurisdictions, penalty phase retrials are statutorily prohibited. In these 24 jurisdictions, if the jury in the original penalty phase does not unanimously vote in favor of the death penalty, the prosecution may not make a repeat attempt to secure the death penalty. Rather, the defendant must be sentenced to life without parole or some lesser sentence.[22]

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[22] Title 18 United States Code section 3594; Arkansas Code Annotated section 5-4-603, subdivision (c); Colorado Revised Statutes section 18-1.3-1201, subdivision (2)(d); Georgia Code Annotated section 17-10-31, subdivision (c); Idaho Code section 19-2515, subdivision (7)(b); Kansas Statutes Annotated section 21-4624, subdivision (e); Louisiana Code of Criminal Procedure article 905.8; Maryland Criminal Law Code Annotated section 2-303, subdivision U)(2); Mississippi Code Annotated section 99-19-101, subdivision (3)(c); Missouri Revised Statutes section 565.030, subdivision (4); New Hampshire Revised Statutes Annotated section 630:5, subdivision (IX); North Carolina General Statutes section 15A-2000, subdivision (b); Oklahoma Statutes Annotated title 21, section 701.11; Ohio Revised Code Annotated section 2929.03, subdivision (D)(2); Oregon Revised Statutes section 163.l50, subdivisions (2)(a) & (1)(c)(B); 42 Pennsylvania Consolidated Statutes Annotated section 9711, subdivision (c)(1)(v); South Carolina Code Annotated section 16-3-20, subdivision (C); South Dakota Codified Laws section 23A-27 A- 4; Tennessee Code Annotated section 39-13-204, subdivision (h); Texas Code of Criminal Procedure Annotated article 37.071.2, subdivision (g); Utah Code

(continued...)

California is one of only five states that statutorily authorize retrial of a penalty phase following juror deadlock in the original penalty phase. (Penal Code section 190.4, subdivision (b).)[23] The other four states are Alabama, Arizona, Indiana, and Nevada.[24]

In two states, Connecticut and Kentucky, courts have determined, in the absence of specifically controlling legislation, that penalty phase retrials may go forward after original capital sentencing juries deadlock. (*State v. Daniels* (1988) 207 Conn. 374, 393-394 **[542 A.2d 306, 317]**; *Skaggs v. Commonwealth* (Ky. 1985) 694 S.W.2d 672,681.)[25]

The remaining three states are Delaware, Florida, and Montana. The relevant statutes in these states provide that juries do not make the ultimate sentencing determination in capital cases.[26]

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[22](...continued)
Annotated section 76-3-207, subdivision (5)(c); Virginia Code Annotated section 19.2-264.4, subdivision (E); Washington Revised Code Annotated section 10.95.080, subdivision (2); Wyoming Statutes Annotated section 6-2-102, subdivision (d)(ii).

[23] California previously adhered to the majority rule prohibiting penalty phase retrials following hung juries. (*People v. Kimble* (1988) 44 Cal.3d 480, 511, *cert. denied. sub nom., Kimble v. California* (1988) 488 U.S. 871.)

[24] Alabama Code section 13A-5-46, subdivision (g); Arizona Revised Statutes section 13.752, subdivision (K); Indiana Code Annotated section 35-50-2-9, subdivision (f); Nevada Revised Statutes Annotated section 175.556, subdivision (1).

[25] Connecticut has only executed one person since 1976. (<<http://www.deathpenaltyinfo.org/state by state».)

[26] Delaware Code Annotated title 11, section 4209, subdivisions (c)(3)(b)(1) & (2); Florida Statutes section 921.141, subdivisions (2) & (3); Montana
(continued...)

Thus, a national consensus has emerged that a capital case prosecutor should have only one opportunity to make his/her case for a death sentence. In light of this national consensus, if the prosecutor does not convince the originally empaneled jury to unanimously vote to impose the death penalty, the federal and state bans on cruel and/or unusual punishment prohibit the prosecutor from seeking to exact that penalty in a second penalty trial.

"Though the death penalty is not [presently deemed] invariably unconstitutional," the Supreme Court of the United States "insists upon confining the instances in which the punishment can be imposed." (*Kennedy v. Louisiana* (2008) 128 S.Ct. 2641, 2650.) The Court proceeds with rigor in this regard because the Eighth Amendment "imposes special limitations" on government authority to mete out the death penalty. (*Payne v. Tennessee* (1991) 501 U.S. 808, 824.) In California, it is the "imperative task of the judicial branch, as a coequal guardian of the [State] Constitution, to condemn any violation" of the prohibition against cruel or unusual punishment. (*People v. Dillon* (1983) 34 Cal.3d 441,478 (internal quotation marks omitted).)

"The basic concept underlying the Eighth Amendment is nothing less than the dignity of man. . . . The Amendment must draw its meaning from the evolving standards of decency that mark the process of a maturing society." (*Trop v. Dulles* (1958) 356 U.S. 86, 100-101.) Thus, "the power to prescribe penalties [must] be exercised within the limits of civilized standards." (*In re Lynch* (1973) 8 Cal.3d 410,424 (internal quotation marks omitted).) In assessing whether imposition of the death penalty violates the

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[26](...continued)
Code Annotated section 46-18-305.

Eighth Amendment in a particular type of case, courts must look to "objective indicia of society's standards, as expressed in legislative enactments and state practice with respect to executions." *(Roper v. Simmons* (2005) 543 U.S. 551, 563.) The "clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country's legislatures." (*Penry v. Lynaugh* (1989) 492 U.S. 302, 331.) The existence of a "national consensus" against imposing the death penalty in certain contexts can provide the basis for finding that the Eighth Amendment operates as a substantive ban on the death penalty in those contexts. (*Roper, supra*, 543 U.S. at 563-564; *Graham v. Florida* (2010) 130 S.Ct. 2011, 2022-2023, 176 L.Ed.2d 825, 837.) When the country's legislatures have developed a consensus, a court must ask "whether there is reason to disagree with the judgment reached by the citizenry and its legislators." (*Atkins v. Virginia* (2002) 536 U.S. 304,313.)

The figures set forth above reveal a strong national consensus against allowing prosecutors to make multiple attempts to convince juries to impose the death penalty against a single defendant. Of the jurisdictions in which the death penalty is available, 70% limit the prosecution to one attempt.[27] Factoring in the 18 jurisdictions in which the death penalty is prohibited, no authority exists in nearly 80% of the jurisdictions in this country for prosecutors to make multiple attempts to convince juries to impose the death penalty against a single defendant.[28]

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[27]As noted above, 24 of the 34 jurisdictions in which the death penalty is available allow only one attempt. 24 is 70.6% of 34.

[28] In 41 out of 52 jurisdictions (the 50 states plus the District of Columbia and the federal judiciary), no repeat attempt may be made to secure the

(continued...)

The "contemporary values" reflected by this "national consensus" requires this Court to ask "whether there is reason to disagree with the judgment reached by the citizenry and its legislators." (*Atkins v. Virginia, supra*, 536 U.S. at 313.) The answer to this question is no.

The Supreme Court of the United States has interpreted the Eighth Amendment to "require[] that each juror be permitted to consider and give effect to mitigating evidence when deciding the ultimate question whether to vote for a sentence of death." (*McKoy v. North Carolina* (1990) 494 U.S. 433, 442-443; accord, *Tennard v. Dretke* (2004) 542 U.S. 274, 285.) In appellant Nadey's original trial, a number of jurors felt that the death penalty was not warranted in this case. The voices of those jurors have not been "give[n] effect" in this case.

In *Kansas v. Marsh* (2006) 548 U. S. 163, the Supreme Court of the United States found the Kansas death penalty statute to be constitutional because the state's capital sentencing system was "dominated by the presumption that life imprisonment is the appropriate sentence for a capital conviction." (*Id.* at 178.) A significant manifestation of this presumption is the statutory provision that "if the jury is unable to reach a unanimous decision– in any respect–a sentence of life must be imposed." (*Id.* at 179.)

Accordingly, this Court should reconsider its decision in *People v. Taylor* (2010) 48 Cal.4th 574, 633-634, on this issue.

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[28](...continued)
death penalty. 41 is 78.8% of 52.

VII. THE PROSECUTOR'S MISCONDUCT DURING CLOSING ARGUMENT DEPRIVED MR. NADEY OF HIS STATE AND FEDERAL CONSTITUTIONAL RIGHTS AND RENDERED HIS PENALTY PHASE RETRIAL FUNDAMENTALLY UNFAIR.

A. Introduction

During closing argument, the prosecutor referred to matters outside the record – two Nazi books, entitled, "The Gestapo and SS Manual" and the "SS Regalia" – in order to establish that appellant Nadey was a member of a Nazi-like gang, the Aryan Brotherhood.[29] He argued that the "lightning bolt" tattoos on appellant's right hand were of "[SS] Runes," and sought to reinforce the purported gang membership by disparaging remarks, referring to appellant with respect to his tattoo, i.e., "that tattooed hyena" and the "tattooed barbarian." (RT 9499-9560)

The prosecutor's actions in this case went far beyond the limits of acceptable advocacy. A prosecutor "may strike hard blows, [but] he is not at liberty to strike foul ones." (*Berger v. United States* (1935) 295 U.S. 78, 88.) Prosecutorial misconduct violates state law if it involves the use of "deceptive or reprehensible methods" to attempt to persuade the jury. (*People v. Hill* (1998) 17 Cal.4th 800, 819.) It also violates federal due

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[29] "Gestapo" is defined by the ENCYCLOPEDIA BRITANNICA as follows:

> Gestapo, abbreviation of Geheime Staatspolizei (German: "Secret State Police"), the political police of Nazi Germany. The Gestapo ruthlessly eliminated opposition to the Nazis within Germany and its occupied territories and was responsible for the roundup of Jews throughout Europe for deportation to extermination camps.

Encyclopaedia Britannica Online. Encyclopaedia Britannica Inc., 2012 Web. 20 Aug. 2012 [http://www.britannica.com/EBchecked/topic/232117/Gestapo].

process standards if it infects a trial with fundamental unfairness. (*Donnelly v. DeChristoforo* (1974) 416 U.S. 637, 642-643; *Darden v. Wainwright* (1986) 477 U.S. 168, 181; *People v. Hill*, 17 Cal.4th 800, 819.) The references to matters outside the record as well as disparaging remarks deprives appellant of his Sixth Amendment confrontation rights. *People v. Bolton* (1979) 23 Cal.3d 208, 214 n.4 (noting "[t]he prosecutor, serving as his own unsworn witness, is beyond the reach of cross-examination," and noting further that recent Supreme Court decisions stressed the importance of cross-examination, thereby implicating "the Sixth Amendment right of confrontation. . . ."); see *Crawford v. Washington* (2004) 541 U.S. 36, 51 (the Sixth Amendment Confrontation Clause "applies to 'witnesses' against the accused" which typically involves a "'declaration or affirmation made for the purposes of establishing or proving some fact.'" Moreover, the Eighth Amendment guarantees of reliability in capital sentences requires exacting scrutiny of a prosecutor's conduct and a trial court's errors. (*Beck v. Alabama* (1980) 447 U.S. 625, 638 [constitutional demands for reliability in capital case].) Accordingly, this Court should find that the misconduct violated federal and state confrontation rights, due process guarantees, and the requirements for a reliable death judgment. (U.S. Const., amends. VI, VIII & XIV; Cal. Const., art. I, §§ 7, 15, and 17.)

B. Facts – Prosecution Closing Argument In Penalty Phase Retrial.

In closing argument in the penalty phase retrial, the prosecution argued that the jury must decide the appropriate penalty for a man who has been found guilty of "probably the most cowardly, brutal, and depraved conduct ever done to another human being - - the assault, the sodomy, the murder of Terena Fermenick, a minister's wife, a new mother, an innocent human

being." (RT 9500) He asked the jury to return a verdict of death for "this depraved aberration of humanity, Giles Nadey. Depraved aberration of mankind." (RT 9501) The prosecutor asked the jury to consider "his conduct, his self-indulgent lifestyle of sex, drugs, and possession of weapons, his absolute lack of remorse as shown for his afternoon of carnal knowledge on January 18th, 1996." (RT 9501)

The prosecution argued that the factors in aggravation not only "outweigh the factors in mitigation, they obliterate them, there is no contest," and argued further that the only proper penalty for "this depraved aberration of mankind is death row . . .." (RT 9501) The prosecutor addressed factors (a) through (k) (RT 9501-9554) and the victim impact evidence (RT 9520-9522).

However, throughout the argument the prosecutor made various references to defendant Giles Nadey as: (1) "this depraved aberration of humanity" (RT 9501); (2) "that tattooed hyena" (RT 9509); (3) "this depraved cancer" (RT 9509) (4) "that tattooed pervert" (RT 9514); (5) "you tattooed hyena" (RT 9522); (6) "our tattooed hero" (RT 9526); (7) the "tattooed hyena" (RT 9530); (8) the "tattooed predator" (RT 9553); (9) a "nasty predator" (RT 9553-9554); and (10) the " tattooed barbarian" (RT 9557).

The prosecutor asserted that the defense expert, James Park, was biased toward the defense, arguing that Mr. Park was an avid opponent of the death penalty and had testified 117 times in trials - - all for the defense and all in penalty phases in criminal trials. (RT 9534-9535) The prosecutor argued that bias was reflected in his testimony regarding "the defendant's "lightning bolt" tattoos, "those little SS runes." (RT 9535) The prosecutor claimed that the "SS marks" on Mr. Nadey's right hand related to the Aryan Brotherhood. (RT 9537-9538) Mr. Park noted that what the prosecutor referenced as "little

SS marks" on Nadey's right hand was more like a "double lightning bolt" which he did not recall the Aryan Brotherhood group using as their gang marking, but acknowledged that they "used the swastika." (RT 9126-9127) The prosecutor then explained that he had researched the issue concerning the lightning bolts or runes by going to the library and obtaining World War II books concerning the Gestapo as well as the Panzer SS:

> Well, you know, what I did, I went to a library. I went to a library and picked up some nomenclature on World War II. Here is a little book about the Gestapo.[30]
>
> What do you see at the top portion? Huh? What do you see? What do you see here?
> Oh, my.

(RT 9538)

At this juncture, defense counsel, Mr. Selvin, objected as follows:

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[30] As to the referenced book about the Gestapo, this book was not in evidence nor does it appear anywhere in the trial record. However, through the record correction process, the book was determined to be "The Gestapo and SS Manual," translated by Carl Hammer, published by Paladin Press, Boulder, Colorado, in March of 1996. (CT Vol. 64, 017937 at 017940-017945, specifically p. 017943:1-4.) The record has been augmented to include a copy of the book, and it is located in the augmented record at CT Vol. 65, pp. 018346-018454. (*See generally*, Appellant's Request to Complete and Correct Record on Appeal, filed Nov. 25, 2008, CT Vol. 62, p. 017651 at 017662:10-22; Supplement to Appellant's Request to Complete and Correct Record on Appeal Regarding Augmentation of Record, filed Apr. 21, 2009, CT Vol. 64, at pp. 017937 at 017940, line 16 to 017945, line 7; and Reporter's Transcript on Appeal of Hearing before Judge Larry J. Goodman, on April 23, 2009, in Alameda County Superior Court, pp. 8:20-10:18; *see also* Supplemental Declaration of Christopher Johns in Support of Supplement to Appellant's Request to Complete and Correct the Record on Appeal Regarding Augmentation of Record, filed April 21, 2009, CT Vol. 64, 017950 at 017958:9-017962:18.)

> Your Honor, I would - -
> Sorry. I don't want to interrupt.
> I would make an objection. One, it's not in evidence; two, we're far afield in light of the evidence that they've heard on this matter - -

(RT 9538-9539) The Court overruled the objection and instructed the jury as follows:

> Based on the opinion voiced by the expert, in his words these runes or these lightning bolts, I'll permit this providing he doesn't attempt to depict your client as a Nazi because there is no evidence of that.
> It only goes to the issue of gang membership, Ladies and Gentlemen of the Jury.

(RT 9539) The prosecutor continued and showed the jury another book, the "SS Regalia,"[31] and commented on its contents and, relating the SS runes or

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[31] The referenced book was not in evidence nor was it a part of the trial record. Through the record correction process, the referenced book was determined to be the "SS Regalia" by Jack Pia, published in 1994. (See CT Vol. 64, 017937, Supplement to Appellant's Request to Complete and Correct Record on Appeal Regarding Augmentation of Record, filed Apr. 21, 2009, specifically at p. 017941:17-017942:17. A copy of the book is set forth in CT Vol. 65, 018261, Supplemental Declaration of Christopher Johns in Support of Supplement to Appellant's Request to Complete and Correct the Record on Appeal Regarding Augmentation of Record, specifically at 018263-018344. (*See generally* CT Vol. 62, 017651, Appellant's Request to Complete and Correct the Record on Appeal, specifically at 017662:10-22; CT Vol. 64, 017937, Supplement to Appellant's Request to Complete and Correct the Record on Appeal Regarding Augmentation of Record, specifically at 017940:16-017945:7; CT Vol. 64, 017950, Supplemental Declaration of Christopher Johns in Support of Supplement to Appellant's Request to Complete and Correct the Record on Appeal Regarding Augmentation of Record, filed April 21, 2009, specifically at 017957:2-017958:8; Reporter's Transcript on Appeal of Hearing before Judge Larry J. Goodman, on April 23, 2009, in Alameda

(continued...)

thunderbolts in the book to the tattoos on Nadey's hands, said:

> See these runes? Don't they look familiar? Don't they?
>
> Okay. Another book, *SS Regalia*. Look, even the uniformed people of the SS, the pictures in here of their news magazine, their newspaper, what do you see? Runes, lightning bolts, whatever you want to call them. Okay?
>
> And to show that these were not just something I made up, here is a Panzer SS uniform with runes on the collar patch.
>
> Gee, why didn't this 31-year expert in the prison system give me that?
>
> Because he doesn't want to anger the side who hired him. That's why.
>
> Here we go. Here is another one, an SS vehicle pennant, SS runes, okay, or thunder bolts, the identical thing we have on Nadey's hands.
>
> Now, if he can't recall those as matching these, I question his expertise. I question his opinion.
>
> Is he biased? Draw your own conclusions.

(RT 9539-9540) The prosecution, Mr. Anderson, concluded his argument by requesting that the jury impose the death penalty as follows:

> This case screams out for the imposition of the death penalty. Giles Albert Nadey, Jr., you so have very dearly earned it.

(RT 9560)

Hence, the use and argument by the prosecutor as to the Nazi books, "The Gestapo and SS Manual" and the "SS Regalia," were not simply illustrative, but substantive, and hence, this Court's line of authority

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[31](...continued)
County Superior Court, pp. 8:20-10:18).

supporting the use of illustrations drawn from common experience, history, or literature, is inapposite. *People v. Harrison* (2005) 35 Cal.4th 208, 248. Consequently, the use and argument by the prosecutor with respect to the Nazi books constituted misconduct, violating appellant's federal and state confrontation rights, due process guarantees, and the requirements for a reliable death judgment. (U.S. Const., amends. VI, VIII & XIV; Cal. Const., art. I, §§7, 15 & 17.)

C. The Prosecutor Engaged In Improper Conduct

This Court has long held that prosecutors are held to a particularly high standard "because of the unique function he or she performs in representing the interests, and exercising the sovereign power, of the State." (*People v. Espinoza* (1992) 3 Cal.4th 806, 820.) The prosecutor's ethical obligation reaches its apex at the penalty phase of a capital case, in which the accused's life hangs in the balance. (See *State v. Ramseur* (N.J. 1987) 524 A.2d 188, 290 [characterizing prosecutor's ethical obligations in capital cases as "particularly stringent"].)

The duty of a prosecutor was clearly articulated in the seminal decision of *Berger v. United States* (1935) 295 U.S. 78, where the Court set forth the duty of a prosecuting attorney as follows:

> 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. As such, he is in a peculiar and very definite sense the servant of the law, the twofold 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.

Id. at 88. Of note, this language has been repeatedly quoted by both state and federal courts and has been accepted "as a definitive statement of the limitations on the scope and method of a prosecutor's argument." 5 WITKIN & EPSTEIN, CALIFORNIA CRIMINAL LAW, 3D EDITION, Criminal Trial, §571, Misconduct, Principles and Policy, p. 815 (2000).

Moreover, in *People v. Talle* (1952) 111 Cal.App.2d 650, the policy against "foul blows" was restated in the strongest terms as follows:

> The argument of the district attorney, particularly his closing argument, comes from an official representative of the People. As such, it does, and it should, carry great weight. It must, therefore, be reasonably objective. It is no answer to state that defense counsel also used questionable tactics during the trial and therefore the district attorney was entitled to retaliate. Defense counsel and the prosecuting officials do not stand as equals before the jury. Defense counsel are known to be advocates for the defense. The prosecuting attorneys are government officials and clothed with the dignity and prestige of their office. What they say to the jury is necessarily weighted with that prestige. It is their duty to see to it that those accused of crime are afforded a fair trial.

Talle, 111 Cal.App.2d at 677. (See 5 WITKIN & EPSTEIN, CALIFORNIA CRIMINAL LAW, 3D EDITION, Criminal Trial, *supra* at §571, p. 815 [quoting *Talle* decision as to duty of prosecutor].)

The prosecutor committed misconduct during his closing argument by

referring to matters outside the record. He displayed to the jury and virtually testified regarding highly inflammatory books about the Gestapo and the SS, linking them to appellant. He also made numerous disparaging remarks about appellant, i.e., "that tattooed hyena" and the "tattooed barbarian." The prosecutor's argument skewed the jury's sentencing determination by injecting irrelevant and inflammatory matters into the jury's consideration. In doing so, the prosecutor abused his position of trust (*Berger v. United States*, 295 U.S. at 78), deprived appellant of his state and federal confrontation rights (U.S. Const., amend. VI; Cal. Const., art. I, §17; *see also Crawford*, 541 U.S. at 51; *Bolton*, 23 Cal.3d at 214 n.4) and violated appellant's state and federal rights to due process and a reliable death judgment. (U.S. Const., amends. VIII & XIV; Cal. Const., art. I, §§7 & 15; *see also Donnelly v. DeChristoforo*, 416 U.S. 637; *People v. Hill*, 17 Cal.4th 800.)

1. Reference To Matters Outside The Record

It is well settled that statements of supposed facts not in evidence or references to matters outside the record constitutes misconduct. (See CALIFORNIA CRIMINAL LAW, 3D EDITION, Criminal Trial, References to Matters Outside Record, §576 in general, pp. 824-826.) In the seminal decision of *People v. Hill* (1998) 17 Cal.4th 800, 827-828, this Court addressed the contention that the prosecutor committed misconduct when, in closing argument, she referred to facts not in evidence:

> We have explained that such practice is "clearly . . . misconduct" (*People v. Pinholster* (1992) 1 Cal.4th 865, 948 [4 Cal.Rptr.2d 765, 824 P.2d 571]), because such statements "tend[] to make the prosecutor his own witness–offering unsworn testimony not subject to cross-examination. It has been recognized that such testimony, 'although worthless as a matter of law, can be "dynamite" to

> the jury because of the special regard the jury has for the prosecutor, thereby effectively circumventing the rules of evidence.' [Citations.]" (*Bolton, supra*, 23 Cal.3d at p. 213

Id.

In fact, a prosecutor is prohibited not only from stating but even from implying facts for which there is no evidence before the jury. *People v. Bain* (1971) 5 Cal.3d 839, 847.

> [T]he prosecutor's statement constituted improper argument, for he was attempting to smuggle in by inference claims that could not be argued openly and legally. In essence, the prosecutor invited the jury to speculate about - and possibly base a verdict upon - "evidence" never presented at trial.

People v. Bolton (1979) 23 Cal.3d 208, 212 (emphasis added); see also *United States v. Peak* (6th Cir. 1974) 498 F.2d 1337, 1339 (noting that a prosecutor "is not privileged to testify in the guise of a closing argument.") Further, a prosecutor may not make improper suggestions, insinuations, or assertions of personal knowledge. *United States v. Manriquez Arbizo* (10th Cir. 1987) 833 F.2d 244, 247 ("The prosecutor's remark, referring to what defense counsel must have been thinking, placed an improper inference into the minds of the jurors and was clearly inappropriate.")

Here, the prosecutor, in effect, testified in closing argument as to what he "did," that he "went to a library," and conducted research on "nomenclature on World War II." (RT 9538:22-24) He obtained and displayed to the jury a book about "The Gestapo" (RT 9538:22-24) and another book entitled the "SS Regalia." (RT 9539:13) These books were not in evidence nor were they submitted to the court for the purpose of admission into evidence, but were referenced extensively in the closing argument (RT

9538-9539) as de facto rebuttal and/or impeachment evidence with respect to the defense expert, James Park. (RT 9534-9539)

The prosecution sought to utilize the books to establish that the tattoos on appellant's hand were runes, thunderbolts, or SS marks and reflected an affiliation with the Aryan Brotherhood. In effect, the prosecutor became an unsworn expert prosecution witness for purposes of either impeachment or rebuttal as follows:

> Next was James Park. . . . Let's look more closely at what he testified to. The bottom line, if the defendant got a sentence of life without parole, he'll do just fine. He'll do just fine in prison. And this is based upon looking at the defendant's record, so to speak, and my, quote, "31 years of experience in the state prison system."
>
> First off, Mr. Park is an avid opponent of the death penalty. Okay? You heard him testify to that. So - - and he's testified 117 times in trials - - you heard him testify to that - - all for the defense, all in penalty phases of criminal trials. That should make your eyebrows kind of arch a bit when you think about his obvious bias. [RT 9534:22-9535:10]
>
> . . .
>
> Well, I've been a DA for 30 years, and I can predict Mr. Nadey will be a great prisoner on death row. That's my prediction. He will be great prisoner on death row. Okay? Same thing. I disagree with Park.
>
> His bias toward the side that hired him was blatantly shown when it came to the issue of the defendant's tattoos, you know, those little SS

runes that I asked him about. [RT 9535:16-22]

(emphasis added).

The prosecutor then read extensively from his cross-examination of Mr. Park regarding Mr. Nadey's tattoos as well as his familiarity with the Nazis of World War II as well as Nazi gangs in jail, and countered with his own "testimony" as follows [RT 9535:23-9537:14]:

PROSECUTOR: Question by me on cross:

> QUESTION: Explain to the jury the type of gangs that one would find in a California Department of Corrections facility?
>
> ANSWER: Well, there are various kinds. The Latino Hispanic inmates form gangs. The Northern California or Southern determines whether they are enemies or not. The African-Americans have some gangs. Some of the Caucasians have gangs. They have Nazi gangs. They have so-called Aryan Brothers. There is a whole variety of gangs which don't appear in his record, incidentally.
>
> QUESTION: You've interviewed Mr. Nadey; is that correct?
>
> ANSWER: Yes, sir.
>
> QUESTION: Are you familiar with what something called SS runes are?
>
> ANSWER: Not really.
>
> 31 years, not really.
>
> I've had a great deal of trouble keeping up with the gangs. They ebb and flo, ebb and flo.

Well - - QUESTION: Well, are you familiar with the Nazis of World War II? You said there were Nazi gangs in jail; isn't that right?

ANSWER: So-called, yeah.

QUESTION: Well, you remember the SS, that portion of the Nazis that had that little SS and the skull and crossbones?

ANSWER: Yes, sir.

QUESTION: And didn't they have runes? That was part of their nomenclature?

ANSWER: Runes?

[PROSECUTION] The Court chimes in: Like thunderbolts?
Thunderbolts?

ANSWER: Oh, bolts, yes.

QUESTION: Have you seen those before?

ANSWER: Yes. In my career, I've seen so many tattoos, I don't pay a lot of attention to them.

And I showed Mr. Park what had been marked as People's 45 and asked him to look at the photograph of the tattoos on Mr. Nadey's hands.

The prosecutor, Mr. Anderson, again referenced and read from his cross-examination of Mr. Park as follows [RT 9537:20-9538:17]:

QUESTION: You notice those little SS marks on his hands?

ANSWER: Well, it's more like a double

lightning bolt, I would say.

QUESTION: Have you ever seen members of the Aryan Brotherhood or white supremacist groups use those markings?

ANSWER: Oh, I don't recall. I know they've used the swastika.

QUESTION: Have you ever seen those runes before?

ANSWER: I probably have. I don't have a specific memory of a specific inmate.

QUESTION: Well, are you familiar with the Aryan Brotherhood?

ANSWER: Yes, sir.

QUESTION: And what are they?

ANSWER: They're - - again, they're a white supremacist group who sometimes identify themselves as Nazis, sometimes not.

QUESTION: And don't they usually identify themselves as being members of that particular prison gang by tattooing their affiliations on various parts of their body?

ANSWER: Very often they do, yes, sir.

The prosecutor stated further in closing argument as follows [RT 9538:18-27]:

Now, here is the right hand of Mr. Nadey. We talked about those lightning bolts, if you don't want to call them runes. And this 31-year expert, he thinks he may have seen them before, but he won't even give that

up.

Well, you know, what I did, I went to a library. I went to a library and picked up some nomenclature on World War II. Here is a little book about the Gestapo.

What do you see at the top portion? Huh? What do you see? What do you see here?

Oh, my.

Of note, an objection was made by defense counsel, which was overruled by the court, and the court instructed the jury as discussed below [RT 9538:28-9539:10]:

MR. SELVIN [DEFENSE COUNSEL]: Your Honor, I would - -

Sorry. I don't want to interrupt.

I would make an objection. One, it's not in evidence; two, we're far afield in light of the evidence that they've heard on this matter - -

THE COURT: Based on the opinion voiced by the expert, in his words these runes or these lightning bolts, I'll permit this providing he doesn't attempt to depict your client as a Nazi because there is no evidence of that.

It only goes to the issue of gang membership, Ladies and Gentlemen of the Jury.

The prosecutor, Mr. Anderson, continued his closing arguments, stating further [RT 3539:11-28]:

MR. ANDERSON [PROSECUTOR]: See these runes? Don't they look familiar? Don't they?

> Okay. Another book, *SS Regalia*. Look, even the uniformed people of the SS, the picture in here of their news magazine, their newspaper, what do you see? Runes, lightning bolts, whatever you want to call them. Okay?
>
> And to show that these were not just something I made up, here is a Panzer SS uniform with runes on the collar patch.
>
> Gee, why didn't this 31-year expert in the prison system give me that?
>
> Because he doesn't want to anger the side who hired him. That's why.
>
> Here we go. Here is another one, an SS vehicle pennant, SS runes, okay, or thunder bolts, the identical thing we have on Nadey's hands.
>
> Now, if he [Mr. Park] can't recall those as matching these, <u>I question his expertise. I question his opinion</u>.

(emphasis added).

Here, the prosecution is not only referring to the Nazi books entitled "The Gestapo and SS Manual" and the "SS Regalia," but he is utilizing them for purposes of impeachment and/or rebuttal of the defense expert, Mr. Park, who was accepted by the court as an expert in the field of prison classification and adjustment to prison life. (RT 9094) Mr. Park opined based on his experience in the prison system, that in his opinion, Mr. Nadey "will adjust well, he will be a good prisoner, and that he will - - if given the opportunity, he will work, be a good worker." (RT 9114) That is, Mr. Park opined that Nadey would make a pretty good prison adjustment. (RT 9115) The prosecutor sought to undermine the expertise of Mr. Park and to rebut

these opinions by using Gestapo-related books and, in doing so, became an unsworn witness who was not subject to cross-examination but was vested with the imprimatur of serving the People as the District Attorney. As noted (see footnotes 30 and 31), these books had not been admitted into evidence, but yet, the district attorney used them to establish as fact that Mr. Nadey was a member of a gang, the Aryan Brotherhood, and consequently, would not be the good prisoner as opined by Mr. Park; hence, he should receive a death sentence as opposed to life without possibility of parole. This was contrary to the opinion expressed by Mr. Park that Mr. Nadey would be a "good prisoner" (RT 9114) and that, based on his review of the record, Nadey had never been identified as a gang member, noting that "I have never seen any reference to gang membership." (RT 9143-9145)

Moreover, the prosecutor made extensive, specific references to both of the books during closing argument. As to the book referenced as "The Gestapo," identified as "The Gestapo and SS Manual," the prosecutor made specific reference to the "runes" reflected in the book, which were reflected in a number of places in the book. (RT 9538:24-9539:12) Further, as to the book referenced as the "SS Regalia," the prosecutor made specific reference again to the "runes" or the "lightning bolts" as depicted in the (1) uniformed people of the SS; (2) the pictures in the news magazine; (3) "a Panzer SS uniform" as to the collar patch; (4) an SS vehicle pennant which, according to the prosecution, had "SS runes, okay, or thunder bolts, the identical thing we have on Nadey's hands." (RT 9539:13-26) Hence, the Nazi books entitled "The Gestapo and SS Manual" and the "SS Regalia," were used by the prosecution to establish the purported critical link between the tattoos on Nadey's hands and purported gang membership in the Aryan Brotherhood. The defense expert, Mr. Park, made clear in his testimony that there was no

evidence in the record that he reviewed that Nadey had been a member of a gang while in prison or otherwise. (RT 9143-9145) In fact, Mr. Park testified that "I've never seen any reference to gang membership" which identified Nadey as a gang member. (RT 9145) . There is no evidence in the record establishing membership by Nadey in any gang. (RT 9119-9141; see also RT 9143-9145) Thus, in closing argument, the prosecution utilized the Nazi books to establish as fact the purported link between the tattoo of runes or thunderbolts on Nadey's right hand (Exhibit 45) and membership in a Nazi-type gang, i.e., the Aryan Brotherhood.

In *Hill*, 17 Cal.4th at 828, this Court recognized that statements of supposed facts not in evidence are a highly prejudicial form of misconduct because the prosecutor, in effect, offers unsworn testimony not subject to cross-examination. As such, this Court "recognized that such testimony, although worthless as a matter of law, can be 'dynamite' to the jury because of the special regard the jury has for the prosecutor, thereby effectively circumventing the rules of evidence." (*People v. Hill*, 17 Cal.4th at 828; accord *People v. Cash* (2002) 28 Cal.4th 703, 732; *People v. Johnson* (1981) 121 Cal.App.3d 94, 103.) Here, the unsworn testimony proffered by the prosecutor via the Nazi books and his own argument in the form of testimony regarding gang membership was the result of the trial court's ruling, which lit the fuse for the unsworn testimony regarding gang membership. The use and references to the two Nazi books deprived appellant of his confrontation rights as well as his due process rights, and rights to a fair and reliable penalty determination.

(a) The Claim of Misconduct Was Preserved

As a general rule, in order to preserve a claim of prosecutorial misconduct for appellate review, the defendant must promptly object and

request a curative instruction. (*People v. Monterroso* (2004) 34 Cal.4th 743, 785; *People v. Samayoa* (1997) 15 Cal.4th 795, 841.) However, "[a] defendant will be excused from the necessity of either a timely objection and/or request for admonition if either would have been futile." (*People v. Hill* (1998) 17 Cal.4th 800, 820; citing *People v. Arias* (1996) 13 Cal.4th 92, 159; *People v. Noguera* (1992) 4 Cal.4th 599, 638.) Furthermore, "the absence of a request for a curative admonition does not forfeit the issue for appeal if 'the court immediately overrules an objection to alleged prosecutorial misconduct [and as a consequence] the defendant has no opportunity to make such a request.'" (*Hill, supra*, at 820-821, brackets in the original; quoting *People v. Green, supra*, [(1980) 27 Cal.3d 1, 35 n.19].)

Here, defense counsel, Mr. Selvin, promptly objected to the use and reference to the Nazi books. As noted, defense counsel, Mr. Selvin, promptly objected on two grounds: (1) the referenced Nazi books were "not in evidence," and (2) the prosecutor was "far afield in light of the evidence" that the jury had "heard on this matter." (RT 9538-9539) Hence, defense counsel objected on the grounds that the Nazi books were outside the record and further on the ground of relevance since the evidence in the record, as attested to by Mr. Park, was that there was no evidence in the record that he had reviewed reflecting that Nadey was a gang member while in prison or otherwise. (RT 9143-9145) Thus, the objections by defense counsel preserved the issue.

The court overruled the objections and then instructed the jury as follows:

> Based on the opinion voiced by the expert, in his words these runes or these lightning bolts, I'll permit this providing he doesn't attempt to depict your client as a Nazi because there is no evidence of that.

It only goes to the issue of gang membership,
Ladies and Gentlemen of the Jury.

(RT 9539) Here, the court not only overruled the objection, but then instructed the jury that it could consider the prosecutor's books and argument as evidence of gang membership. Under these circumstances, the defense was not required to request an admonition of the jury because any request for an admonition would have been futile. *People v. Hill*, 17 Cal.4th at 820.

In fact, the court's instruction compounded the error. In instructing the jury that the use and references to the Nazi books by the prosecutor "only goes to the issue of gang membership," it approved the use of these Nazi books by the prosecution for the purpose of establishing that the "runes" or "lightning bolts" were substantive evidence to establish that Nadey was a gang member, and further bolstered the prosecutions' unsworn testimony challenging the expertise of Mr. Park as well as rebutting his expert testimony that Nadey would be a good prisoner. The Nazi books were used by the prosecutor to establish the missing link in his case; that is, the link between the tattoo of runes or lightning bolts on Nadey's right hand (People's Exhibit 45) and membership by Nadey in a Nazi gang, i.e., the Aryan Brotherhood. Therefore, the use and references to the Nazi books entitled "The Gestapo and SS Manual" and the "SS Regalia" were both used as substantive evidence to establish membership in a gang by Nadey, as sanctioned by the court, in light of the runes and/or thunderbolts on his right hand as depicted in People's Exhibit 45. Consequently, the issue was properly preserved by the objections.

2. Disparaging Remarks as to Appellant

It is well settled that it is misconduct for a prosecutor to conduct a personal attack on the defendant or to make remarks in argument that have no

apparent purpose but to denigrate and degrade the defendant before the jury. (See *Darden v. Wainwright* (1986) 477 U.S. 168, 181 [prosecutor committed misconduct by characterizing defendant as animal]; *Kellogg v. Skon* (8th Cir. 1999) 176 F.3d 447, 451-452 [prosecutor committed misconduct and created inflammatory prejudice by calling defendant "monster" and "sexual deviant"]; *Ippolito v. United States* (6th Cir. 1940) 108 F.2d 668, 670-671 [conviction reversed where prosecutor referred to defendant as "rattlesnake" and "skunk"].) Such "comments also create inflammatory prejudice" and ""have no place in the courtroom." (*Kellogg v. Skon, supra*, 176 F.3d at 452.) Moreover, "[w]here derogatory remarks regarding the defendant are not founded on evidence in the record and could seriously influence the jury, they may be held to be prejudicial error." (5 WITKIN & EPSTEIN, CALIFORNIA CRIMINAL LAW, 3D EDITION, Criminal Trial, *supra*, § 591, Misconduct, p. 845.)

As noted, in closing argument the prosecutor made various derogatory references to defendant Nadey as follows: (1) "this depraved aberration of humanity" (RT 9501); (2) "that tattooed hyena" (RT 9509); (3) "this depraved cancer" (RT 9509) (4) "that tattooed pervert" (RT 9514); (5) "you tattooed hyena" (RT 9522); (6) "our tattooed hero" (RT 9526); (7) the "tattooed hyena" (RT 9530); (8) the "tattooed predator" (RT 9553); (9) a "nasty predator" (RT 9553-9554); and (10) the "tatooed barbarian" (RT 9557). The ten derogatory references to defendant Nadey were intended to denigrate and degrade the defendant before the jury, in violation of *Darden v. Wainwright*, 477 U.S. at 181. Of note, the prosecutor uses the term "tattooed" seven of the ten times that he makes denigrating and derogatory references to the defendant and on these seven occasions, three times he references the defendant as a "hyena" as well as a pervert, hero, predator, and barbarian.

The use of such language is intended to dehumanize the defendant to obviously make it easier for the jury to impose a sentence of death as opposed to life without possibility of parole.

In addition, the reference to the fact that defendant is tattooed is a code word for gang membership. The seven references to "tattooed" followed by the further disparaging references to hyena, pervert, hero, predator, and barbarian, were all carefully crafted by the prosecutor for the purpose of arguing, without the benefit of evidence, that Nadey is a gang member. The reference to Nadey being "tattooed" is undoubtedly a reference to People's Exhibit 45, which reflects the runes or lightning bolts tattooed on his right hand, which is then linked to gang membership by virtue of the Nazi books, i.e., "The Gestapo and SS Manual" and the "SS Regalia." All of this is carefully choreographed to present a picture of Nadey as a gang member, for which there is no evidence, as attested to by Mr. Park.

Thus, each time that the prosecutor references Nadey as being tattooed associated with the denigrating terms hyena, pervert, "hero," predator, and barbarian, the prosecutor, in effect, seeks to reinforce the notion, based on matters outside the record (i.e., the Nazi books) that Nadey is a gang member. This was all calculated to achieve what the prosecutor obtained – a death verdict. Therefore, Nadey was prejudiced as a consequence of the aforementioned disparaging remarks made by the prosecutor.

(a) Review of Claims of Misconduct

Defense counsel did not object to the aforementioned disparaging remarks as to defendant Nadey. Generally, appellate courts do not consider whether acts of prosecutorial misconduct constitute reversible error unless the defense has objected. (*People v. Hill, supra*, 17 Cal.4th at 820; *People v. Berryman* (1993) 6 Cal.4th 1048, 1072). However, as this court noted in *Hill*,

there are exceptions, including where objections would be futile. (17 Cal.4th at 820). Moreover, where the actions of the prosecutor constitute a pervasive course of conduct interspersing objectionable material throughout the argument, objections might well serve to reinforce the damaging force of the challenged assertions. (*People v. Kirkes* (1952) 39 Cal.2d 719, 726; *People v. Pitts* (1990) 223 Cal.App.3d 606, 692). Appellant Nadey submits that the nature and volume of the disparaging remarks were so overwhelming (i.e., ten separate sets of disparaging remarks, seven of which utilized the term "tattooed") that it was futile for the defense to attempt to remedy the situation by objecting. Moreover, in this instance, objecting would have only reinforced the damaging force of the challenged remarks. This is particularly true here: where the disparaging remarks were entwined with the objected to – and overruled – use of the Nazi books by the prosecutor. This Court should review the issue on the merits.

Any weighing of the evidence suggests that another verdict was reasonably possible had the prosecution not used deceptive and inflammatory tactics. (*People v. Brown* (1988) 46 Cal.3d 432, 448). This is clearly reflected by the fact that the first penalty jury hung 7-4-1. However, the second penalty jury who was victimized by these tactics did reach a verdict and chose death. Reversal of the penalty verdict is appropriate as a remedy for these tactics. Moreover, appellant Nadey submits that the pervasive nature of the prosecution tactics amounted to a due process violation, depriving Appellant of a fair and reliable penalty process and therefore is reversible per se. (See *People v. Hill, supra*, 17 Cal.4th at 847 [reversing all counts of conviction based on pervasive misconduct, combined with numerous other errors].)

D. Conclusion

The prosecutor committed misconduct during closing argument by (1) referencing and using matters outside the record, i.e., the Nazi books, and (2) by making numerous disparaging remarks as to Mr. Nadey, all calculated to demonstrate that he was a gang member as well as to refute the opinion of the defense expert, Mr. Park, that Nadey would be a "good prisoner," i.e., worthy of a life without possibility of parole sentence as opposed to a death sentence. The conduct of the prosecutor, each with regard to the utilization of the matters outside the record, i.e., the Nazi books, and the disparaging remarks as to appellant Nadey, i.e., the tattooed hyena, and other references, both individually and collectively prejudiced appellant in the penalty retrial.

The first penalty jury did not consider the Nazi books, the "de facto" testimony and argument by the prosecutor in rebuttal to the opinion of the defense expert, Mr. Park, and the multitude of denigrating remarks as to Appellant Nadey, such as "tattooed barbarian" referencing the runes or lightning bolts tattooed on his right hand, thereby associating him with membership in the Aryan Brotherhood gang. The first penalty jury hung 7-4-1, with the court declaring a mistrial. However, the second penalty jury, as noted, did consider the Nazi books, the testimony and argument relating thereto by the prosecutor and the multitude of disparaging remarks by the prosecutor regarding the runes or lightning bolts tattooed on appellant's right hand, thereby associating him with membership in the Aryan Brotherhood gang. The second jury, unlike the first jury, reached a verdict as to the penalty and imposed a sentence of death.

The prosecutor's conduct skewed the jury's sentencing determination by injecting both irrelevant and inflammatory matters into the jury's consideration. In doing so, the prosecutor abused his position of trust (*Berger*

v. United States, 295 U.S. at 78), deprived appellant of his state and federal rights of confrontation (U.S. Const., amend. VI; Cal. Const., art. I, § 17; see also *Crawford v. Washington*, 541 U.S. at 51; *People v. Bolton*, *supra*, 23 Cal.3d at 214 n.4), and violated appellant's state and federal rights to due process and a reliable death judgment (U.S. Const., amends. VIII & XIV; Cal. Const., art. I, §§7 & 15; see also *Donnelly v. DeChristoforo* (1974) 416 U.S. 637; *People v. Hill* (1998) 17 Cal.4th 800.). Accordingly, the death judgment must be reversed.

VIII. CALIFORNIA'S DEATH PENALTY STATUTE, AS INTERPRETED BY THIS COURT AND APPLIED AT APPELLANT'S TRIAL, VIOLATES THE UNITED STATES CONSTITUTION

In *People v. Schmeck* (2005) 37 Cal.3d 240, a capital appellant presented a number of often-raised constitutional attacks on the California capital sentencing scheme that had been rejected in prior cases. As this Court recognized, a major purpose in presenting such arguments is to preserve them for further review. (*Id* at 303) This Court acknowledged that in dealing with these attacks in prior cases, it had given conflicting signals on the detail needed in order for an appellant to preserve these attacks for subsequent review. (*Id.* 303, n. 22) In order to avoid detailed briefing on such claims in future cases, the Court authorized capital appellants to preserve these claims by "do[ing] no more than (i) identify[ing] the claim in the context of the facts, (ii) not[ing] that we previously have rejected the same or a similar claim in a prior decision, and (iii) ask[ing] us to reconsider that decision." (*Id.* at 304)

Appellant Nadey has no wish to unnecessarily lengthen this brief. Accordingly, pursuant to *Schmeck* and in accordance with this Court's own practice in decisions filed since then,[32] appellant identifies the following systemic and previously rejected claims relating to the California death penalty scheme that require reversal of his death sentence and requests the

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[32] See, e.g., *People v. Taylor* (2010) 48 Cal.4th 574, 661-663, and *People v. McWhorter* (2009) 47 Cal.4th 318, 377-379. See also, e.g., *People v. Collins* (2010) 49 Cal.4th 175, 260-261; *People v. Thompson* (2010) 49 Cal.4th 79, 143-144; *People v. D'Arcy* (2010) 48 Cal.4th 257, 307-309; *People v. Mills* (2010) 48 Cal.4th 158, 213-215; *People v. Ervine* (2009) 47 Cal.4th 745, 810-811; *People v. Carrington* (2009) 47 Cal.4th 145, 198-199; *People v. Martinez* (2010) 47 Cal.4th 911, 967-968.

Court to reconsider its decisions rejecting them:

A. Factor (a)

Section 190.3, subdivision (a) – which permits a jury to sentence a defendant to death based on the "circumstances of the crime" – is being applied in a manner that institutionalizes the arbitrary and capricious imposition of death, is vague and standardless, and violates appellant's Fifth, Sixth, Eighth, and Fourteenth Amendment rights to due process, to equal protection, to reliable and non-arbitrary determinations of the appropriateness of the death penalty and of the fact that aggravation outweighed mitigation, and freedom from cruel and unusual punishment. The jury in this case was instructed in accord with this provision. (RT 9717; CT 1803) In addition, the jury was not required to be unanimous as to which "circumstances of the crime" amounting to an aggravating circumstance had been established, nor was the jury required to find that such an aggravating circumstance had been established beyond a reasonable doubt, thus violating *Ring v. Arizona*, 536 U.S. 584, and its progeny[33] and appellant's Sixth Amendment right to a jury trial on the "aggravating circumstance[s] necessary for imposition of the death penalty." (*Ring*, 536 U.S. at 609.) This Court has repeatedly rejected these arguments. (See, e.g., *People v. Collins* (2010) 49 Cal.4th 175, 260-261; *People v. Mills*, 48 Cal.4th at 213-214 ; *People v. Martinez*, 47 Cal.4th at 967; *People v. Ervine*, 47 Cal.4th at 810 ; *People v. McWhorter*, 47 Cal.4th at 378; *People v. Mendoza* (2000) 24 Cal.4th 130, 190; *People v. Schmeck*, 37 Cal.4th at 304-305.) The Court's decisions should be reconsidered because they are

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[33] *Ring v. Arizona* (2002) 536 U.S. 584, *Blakely v. Washington* (2004) 542 U.S. 296, *United States v. Booker* (2005) 543 U.S. 220, *Cunningham v. California* (2007) 549 U.S. 270.

inconsistent with the aforementioned provisions of the federal Constitution.

B. Factor (b)

During the penalty phase retrial, the jury was instructed it could consider criminal acts which involved the express or implied use of violence. (RT 9704; CT 1774-1775; and RT 9717; CT 1803) Evidence supporting this instruction of such acts were admitted at the penalty phase retrial pursuant to section 190.3, subdivision (b). The jurors were not told that they could rely on this factor (b) evidence only if they unanimously agreed beyond a reasonable doubt that the conduct had occurred. In light of the Supreme Court decision in *Ring v. Arizona*, 536 U.S. 584, and its progeny, the trial court's failure violated appellant's Sixth Amendment right to a jury trial on the "aggravating circumstance[s] necessary for imposition of the death penalty." (*Ring*, 536 U.S. at 609.) In the absence of a requirement of jury unanimity, defendant was also deprived of his Eighth Amendment right to a reliable, non-arbitrary penalty phase determination and to freedom from cruel and unusual punishment. This Court has repeatedly rejected these arguments. (See, e.g., *People v. Collins* (2010) 49 Cal.4th 175, 260-261; *People v. D'Arcy*, 48 Cal.4th at 308 ; *People v. Martinez*, 47 Cal.4th at 967 ; *People v. Martinez*, 47 Cal.4th at 968; *People v. Lewis* (2006) 39 Cal.4th 970, 1068.) The Court's decisions should be reconsidered because they are inconsistent with the aforementioned provisions of the federal Constitution.

In addition, allowing a jury that has already convicted the defendant of first degree murder to decide if the defendant has committed other criminal activity violated appellant's Fifth, Sixth, Eighth and Fourteenth Amendment rights to an unbiased decisionmaker, to due process, to equal protection, to a reliable and non-arbitrary determinations of the

appropriateness of the death penalty and of the fact that aggravation outweighed mitigation, and freedom from cruel and unusual punishment. This Court has repeatedly rejected these arguments. (See, e.g., *People v. Hawthorne* (1992) 4 Cal.4th 43, 77.) The Court's decisions in this vein should be reconsidered because they are inconsistent with the aforementioned provisions of the federal Constitution.

C. Factor (c)

During the penalty phase retrial, the state introduced evidence that appellant had had a prior felony conviction. (RT 8661-8662; People's Exhibits 32 and 33) This evidence was admitted pursuant to section 190.3, subdivision (c). The jurors were instructed they could not rely on the prior conviction unless it had been proven beyond a reasonable doubt. (RT 9704; CT 1775 and 1803.) The jurors were never told that before they could rely on this aggravating factor, they had to unanimously agree that defendant had suffered this prior conviction. In light of the Supreme Court decisions in *Ring v. Arizona* (2002) 536 U.S. 584, and its progeny, the trial court's failure violated appellant's Sixth Amendment right to a jury trial on the "aggravating circumstance[s] necessary for imposition of the death penalty." (*Id.* at 609.) In the absence of a requirement of jury unanimity, defendant was also deprived of his Eighth Amendment right to a reliable and non-arbitrary penalty phase determination. This Court has repeatedly rejected these arguments. (See, e.g., *People v. Collins* (2010) 49 Cal.4th 175, 260-261; *People v. Taylor*, 48 Cal.4th 574, 661-663; *People v. Martinez*, 47 Cal.4th at 967; *People v. Schmeck*, 37 Cal.4th at 304.) The Court's decisions should be reconsidered because they are inconsistent with the aforementioned provisions of the federal Constitution.

D. Factors (b) and (c)

At the penalty phase retrial, the prosecution introduced evidence that appellant had prior convictions: (1) two 1985 convictions for felony first degree burglaries; and (2) a 1993 felony conviction for second-degree burglary and a 1993 felony conviction for petty theft with a prior felony conviction. (RT 8661-8662; People's Exhibits 32 and 33). Moreover, the jury was told it could consider this evidence in deciding whether petitioner should live or die. (RT 9717-9718; CT 1803-1805) The introduction of this evidence put defendant in jeopardy a second time for that offense in violation of the Double Jeopardy clause of the federal Constitution. This Court has rejected this argument. (See, e.g., *People v. Bacigalupo*, 1 Cal.4th at 134-135.) The Court's decisions should be reconsidered because they are inconsistent with the aforementioned provision of the federal Constitution.

E. Factor (i)

The trial judge's instructions permitted the jury to rely on defendant's age in deciding if he would live or die without providing any guidance as to when this factor could come into play. (RT 9717-9718; CT 1803-1805) This aggravating factor was unconstitutionally vague in violation of due process and the Eighth Amendment right to a reliable, non-arbitrary penalty determination and requires a new penalty phase. This Court has repeatedly rejected this argument. (See, e.g., *People v. Mills*, 48 Cal.4th at 213; *People v. Ray* (1996) 13 Cal.4th 313, 358.) These decisions should be reconsidered because they are inconsistent with the aforementioned provisions of the federal Constitution.

F. Inapplicable, vague, limited and burdenless factors

At the penalty phase retrial, the trial court instructed the jury in

accord with standard instruction CALJIC 8.85. (RT 9717-9718; CT 1803-1805) This instruction was constitutionally flawed in the following ways: (1) it failed to delete inapplicable sentencing factors, (2) it contained vague and ill-defined factors, particularly factors (a) and (k), (3) it limited factors (d) and (g) by adjectives such as "extreme" or "substantial," and (4) it failed to specify a burden of proof as to either mitigation or aggravation. (RT 9717-9718; CT 1803-1805) These errors, taken singly or in combination, violated appellant's Fifth, Sixth, Eighth and Fourteenth Amendment rights to due process, to equal protection, to reliable and non-arbitrary determinations of the appropriateness of the death penalty and of the fact that aggravation outweighed mitigation, and freedom from cruel and unusual punishment. This Court has repeatedly rejected these arguments. (See, e.g., *People v. Thompson*, 49 Cal.4th at 143-144; *People v. Taylor*, 48 Cal.4th at 661-663; *People v. D'Arcy*, 48 Cal.4th at 308; *People v. Mills*, 48 Cal.4th at 214 ; *People v. Martinez*, 47 Cal.4th at 968; *People v. Schmeck*, 37 Cal.4th at 304-305; *People v. Ray*, 13 Cal.4th at 358-359.) The Court's decisions should be reconsidered because they are inconsistent with the aforementioned provisions of the federal Constitution.

G. Failure to Narrow

California's capital punishment scheme, as construed by this Court in *People v. Bacigalupo* (1993) 6 Cal.4th 457, 475-477, and as applied, violates the Eighth Amendment by failing to provide a meaningful and principled way to distinguish the few defendants who are sentenced to death from the vast majority who are not. This Court has repeatedly rejected this argument. (See, e.g., *People v. D'Arcy*, 48 Cal.4th at 308; *People v. Mills*, 48 Cal.4th at 213 ; *People v. Martinez*, 47 Cal.4th at 967; *People v. Schmeck*, 37 Cal.4th at 304.) The Court's decisions should be reconsidered

because they are inconsistent with the aforementioned provision of the federal Constitution

H. Burden of proof and persuasion

Under California law, a defendant convicted of first-degree special-circumstance murder cannot receive a death sentence unless a penalty-phase jury subsequently (1) finds that aggravating circumstances exist, (2) finds that the aggravating circumstances outweigh the mitigating circumstances, and (3) finds that death is the appropriate sentence. The jury in this case was not told that these three decisions had to be made beyond a reasonable doubt, an omission that violated the Supreme Court decisions in *Ring v. Arizona*, 536 U.S. 584 and its progeny. Nor was the jury given any burden of proof or persuasion at all (except as to a prior conviction and/or other violent criminal conduct). These were errors that violated appellant's rights under the Fifth, Sixth, Eighth and Fourteenth Amendment rights to due process, to a jury trial, to equal protection, to a reliable and non-arbitrary determination of the appropriateness of the death penalty, and freedom from cruel and unusual punishment. This Court has repeatedly rejected these arguments. (See, e.g., *People v. Collins*, 49 Cal.4th at 260-261; *People v. Taylor*, 48 Cal.4th at 661-663; *People v. D'Arcy*, 48 Cal.4th at 308; *People v. Mills*, 48 Cal.4th at 213 ; *People v. Martinez*, 47 Cal.4th at 967 ; *People v. Ervine*, 47 Cal.4th at 810-811 ; *People v. McWhorter*, 47 Cal.4th at 379; *People v. Schmeck*, 37 Cal.4th at 304.) The Court's decisions should be reconsidered because they are inconsistent with the aforementioned provisions of the federal Constitution.

I. Written findings

The California death penalty scheme fails to require written findings by the jury as to the aggravating and mitigating factors found and relied on,

in violation of Fifth, Sixth, Eighth and Fourteenth Amendment rights to due process, to equal protection, to reliable determinations of the appropriateness of the death penalty and of the fact that aggravation outweighed mitigation, and freedom from cruel and unusual punishment. This Court has repeatedly rejected these arguments. (See, e.g., *People v. Collins*, 49 Cal.4th at 260-261; *People v. Thompson*, 49 Cal.4th at 143-144; *People v. Taylor*, 48 Cal.4th at 661-663; *People v. D'Arcy*, 48 Cal.4th at 308; *People v. Mills*, 48 Cal.4th at 213 ; *People v. Martinez*, 47 Cal.4th at 967.) The Court's decisions should be reconsidered because they are inconsistent with the aforementioned provisions of the federal Constitution.

J. Mandatory life sentence

The instructions fail to inform the jury that if it determines mitigation outweighs aggravation, it must return a sentence of life without parole. This omission results in a violation of appellant's Fifth, Sixth, Eighth, and Fourteenth Amendment rights to due process of law, equal protection, a reliable, non-arbitrary determination of the appropriateness of a death sentence, and freedom from cruel and unusual punishment. This Court has repeatedly rejected these arguments. (See, e.g., *People v. McWhorter*, 47 Cal.4th at 379; *People v. Carrington*, 47 Cal.4th at 199.) The Court's decisions should be reconsidered because they are inconsistent with the aforementioned provisions of the federal Constitution.

K. Vague standard for decision-making:

The instruction that jurors may impose a death sentence only if the aggravating factors are "so substantial" in comparison to the mitigating circumstances that death is warranted (RT 9721; CT 1813-1814) creates an unconstitutionally vague standard, in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendment rights to due process, equal protection, a

reliable, non-arbitrary determination of the appropriateness of a death sentence, and freedom from cruel and unusual punishment. This Court has repeatedly rejected these arguments. (*People v. Carrington*, 47 Cal.4th at 199; *People v. Catlin* (2001) 26 Cal.4th 81, 174; *People v. Mendoza*, 24 Cal.4th at 190.) The Court's decisions should be reconsidered because they are inconsistent with the aforementioned provisions of the federal Constitution.

L. Intercase proportionality review

The California death penalty scheme fails to require intercase proportionality review, in violation of Fifth, Sixth, Eighth and Fourteenth Amendment rights to due process, to equal protection, to reliable determinations of the appropriateness of the death penalty and of the fact that aggravation outweighed mitigation, and freedom from cruel and unusual punishment. This Court has repeatedly rejected these arguments. (See, e.g., *People v. Collins*, 49 Cal.4th at 260-261; *People v. Thompson*, 49 Cal.4th at 143-144; *People v. Taylor*, 48 Cal.4th at 661-663; *People v. D'Arcy*, 48 Cal.4th at 308; *People v. D'Arcy*, 48 Cal.4th at 308-309; *People v. Mills*, 48 Cal.4th at 214; *People v. Martinez*, 47 Cal.4th at 968.) The Court's decisions should be reconsidered because they are inconsistent with the aforementioned provisions of the federal Constitution.

M. Disparate sentence review

The California death penalty scheme fails to afford capital defendants with the same kind of disparate sentence review as is afforded felons under the determinate sentence law, in violation of Fifth, Sixth, Eighth and Fourteenth Amendment rights to due process, to equal protection, to reliable determinations of the appropriateness of the death penalty and of the fact that aggravation outweighed mitigation, and freedom from cruel and

unusual punishment. This Court has repeatedly rejected these arguments. (See, e.g., *People v. Collins*, 49 Cal.4th at 260-261; *People v. Mills*, 48 Cal.4th at 214 ; *People v. Martinez*, 47 Cal.4th at 968 ; *People v. Ervine*, 47 Cal.4th at 811.) The Court's decisions should be reconsidered because they are inconsistent with the aforementioned provisions of the federal Constitution.

N. International law

The California death penalty scheme, by virtue of its procedural deficiencies and its use of capital punishment as a regular punishment for substantial numbers of crimes, violates international norms of human decency and international law — including the International Covenant of Civil and Political Rights — and thereby violates the Eighth Amendment and the Supremacy Clause as well, and consequently appellant's death sentence must be reversed. This Court has repeatedly rejected these arguments. (See, e.g., *People v. Collins*, 49 Cal.4th at 260-261; *People v. Taylor*, 48 Cal.4th at 661-663; *People v. D'Arcy*, 48 Cal.4th at 308; *People v. Mills*, 48 Cal.4th at 213 ; *People v. Martinez*, 47 Cal.4th at 968; *People v. Carrington*, 47 Cal.4th at 198-199; *People v. Schmeck*, 37 Cal.4th at 305.) The Court's decisions should be reconsidered because they are inconsistent with the aforementioned provisions of federal law and the Constitution.

O. Cruel and unusual punishment

The death penalty violates the Eighth Amendment's proscription against cruel and unusual punishment. This Court has repeatedly rejected this argument. (See, e.g., *People v. Thompson*, 49 Cal.4th at 143-144; *People v. Taylor*, 48 Cal.4th at 661-663; *People v. McWhorter*, 47 Cal.4th at 379.) Those decisions should be reconsidered because they are inconsistent with the aforementioned provision of the federal Constitution.

P. Cumulative deficiencies

Finally, the Eighth and Fourteenth Amendments are violated when one considers the preceding defects in combination and appraises their cumulative impact on the functioning of California's capital sentencing scheme. As the 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, 179, n.6. 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].) 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.

To the extent respondent hereafter contends that any of these issues is not properly preserved because, despite *Schmeck* and the other cases cited herein, appellant has not presented them in sufficient detail, appellant will seek leave to file a supplemental brief more fully discussing these issues.

IX. CUMULATIVE ERROR REQUIRES THAT THE GUILT AND PENALTY VERDICTS BE REVERSED

Even assuming that none of the errors identified by appellant is prejudicial standing alone, the cumulative effect of these errors, taken together or in any combination, undermines confidence in the integrity of the guilt and penalty phase proceedings. (*Harris v. Wood* (9th Cir. 1995) 64 F.3d 1432, 1438- 1439; *Mak v. Blodgett* (9th Cir. 1992) 970 F.2d 614, 622; *United States v. Wallace* (9th Cir. 1988) 848 F.2d 1464, 1475-1476; *People v. Hill* (1998) 17 Cal.4th 800, 844-845; *People v. Holt* (1984) 37 Cal.3d 436, 459.)

Even where no single error when examined in isolation is sufficiently prejudicial to warrant reversal, the cumulative effect of multiple errors may be such that reversal is required. (See *Cooper v. Fitzharris* (9th Cir. 1978) 586 F.2d 1325, 1333 (*en banc*) ["prejudice may result from the cumulative impact of multiple deficiencies"]; *Donnelly v. DeChristoforo* (1974) 416 U.S. 637, 642-643 [cumulative errors may so infect "the trial with unfairness as to make the resulting conviction a denial of due process"].) Indeed, where there are a number of errors at trial, "a balkanized, issue-by-issue harmless error review" is far less meaningful than analyzing the overall effect of all the errors in the context of the evidence introduced at trial against the defendant. (*United States v. Wallace, supra*, 848 F.2d at 1476.) Reversal is required unless it can be said that the combined effect of all of the errors, constitutional and otherwise, was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24; *People v. Williams* (1971) 22 Cal.App.3d 34, 58-59 [applying the *Chapman* standard to the totality of the errors when errors of federal constitutional magnitude

combined with other errors].)

In addition, the death judgment itself must be evaluated in light of the cumulative error occurring at both the guilt and penalty phases of appellant's trial. (See *People v. Hayes* (1990) 52 Cal.3d 577, 644 [court considers prejudice of guilt-phase instructional error in assessing that in penalty phase].) In this context, this Court has expressly recognized that evidence that may otherwise not affect the guilt determination can have a prejudicial impact on the penalty trial.

> Conceivably, an error that we would hold nonprejudicial on the guilt trial, if a similar error were committed on the penalty trial, could be prejudicial. Where, as here, the evidence of guilt is overwhelming, even serious error cannot be said to be such as would, in reasonable probability, have altered the balance between conviction and acquittal, but in determining the issue of penalty, the jury, in deciding between life imprisonment and death, may be swayed one way or another by any piece of evidence. If any substantial piece or part of that evidence was inadmissible, or if any misconduct or other error occurred, particularly where, as here, the inadmissible evidence and other errors directly related to the character of appellant, the appellate court by no reasoning process can ascertain whether there is a 'reasonable probability' that a different result would have been reached in absence of error.

(*People v. Hamilton* (1963) 60 Cal.2d 105, 136-137; see also *People v. Brown* (1988) 46 Cal.3d 432, 466 [error occurring at the guilt phase requires reversal of the penalty determination if there is a reasonable possibility that the jury would have rendered a different verdict absent the error]; *In re Marquez* (1992) 1 Cal.4th 584, 605, 609 [an error may be harmless at the guilt phase but prejudicial at the penalty phase].)

Other courts similarly have recognized that "what may be harmless error in a case with less at stake becomes reversible error when the penalty is death." (*Irving v. State* (Miss.1978) 361 So.2d 1360, 1363.) Accordingly, even if the individual errors are harmless on their own, the cumulative effect of these errors upon the penalty verdict must be examined with special caution. (See *Burger v. Kemp* (1987) 483 U.S. 776, 785 ["duty to search for constitutional error with painstaking care is never more exacting than it is in a capital case"].)

Here, appellant's trial was fundamentally unfair in light of the prosecutorial misconduct and trial court error regarding the admission into evidence and argument regarding the non-disclosed defense, DNA consulting expert, the admission of the autopsy and DNA evidence through the testimony of a pathologist who did not perform the autopsy and/or obtain the DNA samples, and juror misconduct in the guilt phase deliberations and the court's failure to conduct an appropriate inquiry regarding said misconduct; that is, with respect to the guilt phase proceedings. During the penalty phase retrial, the trial court erred by not admitting residual doubt evidence, i.e, evidence that the DNA evidence was the subject of contamination and reflected the presence of a third party donor, i.e., third man, not the defendant and not the victim's husband, and further, during closing argument the prosecutor engaged in misconduct, compounded by trial court error, regarding the Nazi books, i.e., "The Gestapo and SS Manual" and the "SS Regalia," as well as the derogatory remarks regarding appellant, i.e., the tattooed hyena and/or the tattooed barbarian. Finally, there was *Batson/Wheeler* error as a consequence of the prosecutor's peremptory challenges excluding African-American jurors in the jury selection process with respect to the guilt phase proceedings.

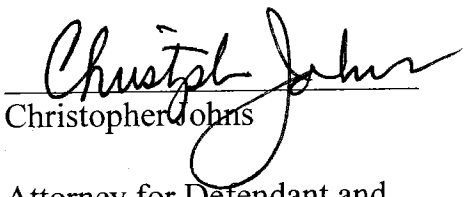
The cumulative impact of these errors led to a guilt conviction based upon conjecture and surmise and the penalty of death. This Court must find that the cumulative effect of the errors require reversal of both the guilt and penalty judgments. (*Chapman v. California, supra*, 386 U.S. at 24)

CONCLUSION

For the reasons stated above, the conviction and death sentence must be reversed.

Date: August 29, 2012

Respectfully submitted,



Christopher Johns

Attorney for Defendant and
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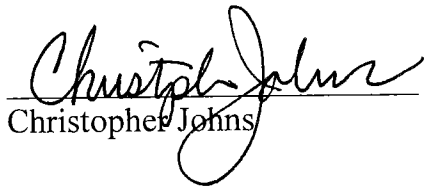
WORD COUNT

I declare that the number of words in Appellant's Opening Brief is 101,421. The font is Times New Roman and the font size is 13 point.



Christopher Johns

PROOF OF SERVICE BY MAIL

I, Denise M Brown, declare as follows:

I am over the age of 18 years, employed in the County of Marin and not a party to the within action; my business address is 1010 "B" Street, Suite 350, San Rafael, California 94901.

On August 29, 2012, I served the: **APPELLANT'S OPENING BRIEF** on the below parties in this action by placing true copies thereof in envelopes, addressed as shown, said envelopes were then, on August 29, 2012, sealed and deposited in the United States mail at San Rafael, California, with postage fully prepaid:

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on this 20th day of August, 2012, at San Rafael, California.

Denise M Brown