IN THE SUPREME COURT OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff/Respondent, v. **DOUGLAS EDWARD DWORAK,** Defendant/Appellant.	Case No.: **S135272** Ventura County Superior Court Case No.: 2004016721

ON AUTOMATIC APPEAL
FROM A JUDGMENT AND SENTENCE OF DEATH

Superior Court of California, County of Ventura
Honorable Kevin J. McGee, Judge Presiding

APPELLANT'S OPENING BRIEF

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STATEMENT OF APPEALABILITY

This is an automatic appeal from a judgment of death.

(Cal. Const., art. VI, § 11, subd. (a); Pen. Code,[1] § 1239, subd. (b).)

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

INTRODUCTION

On the morning of Sunday, April 22, 2001, the naked body of 18-year-old Crystal Hamilton was found in the ocean at a Ventura beach. Ms. Hamilton had been smoking marijuana and methamphetamine and marijuana with friends from Friday morning until she called her father at 3:10 p.m. (and again at 10:35 p.m.) on Saturday and arranged for him to pick her up at a nearby market. Her father went to the market to pick her up between 11:45 p.m. and 12:30 p.m., but she was not there. He was not overly concerned because she had previously made arrangements to meet him and failed to turn up. It was later determined that she had died between 11:00 p.m. on Saturday and 3:30 a.m on Sunday. The cause of death was most likely drowning (a diagnosis of exclusion), although the prosecution expert opined she could have been manually strangled intermittently in ocean water. There was no evidence of genital or vaginal injury. A blunt force injury to her forehead occurred before death, as did several other injuries, although others were post-mortem. Sperm found inside Ms. Hamilton matched the DNA of appellant, Douglas Edward Dworak.

There were no witnesses linking Mr. Dworak to Ms. Hamilton or to the area she was in that weekend. There was no clear evidence of homicide, as opposed to accident; no direct evidence of rape, rather than consensual intercourse; no evidence as to where the rape or murder, if any, took place; and no evidence of what blunt force instrument, if any, was used for the pre-mortem injury. There was no physical evidence at the beach, on Ms. Hamilton's body, under Ms. Hamilton's nails, or in Mr. Dworak's truck linking him to the crime. None of her clothes or possessions were linked to him.

Without legal cause, the trial court prevented Mr. Dworak from presenting relevant evidence in his defense, evidence which would have refuted the prosecution's theory of the case. The court excluded evidence that a third party may have committed the murder and that Ms. Hamilton's lifestyle, associations, and the circumstances of that weekend meant she may well have had consensual sex with an older man such as Mr. Dworak or found herself at the beach inviting an accident. The court admitted three photographs of a younger, well-scrubbed and cheerful Hamilton, while excluding a more recent booking photograph which would have illustrated how Ms. Hamilton appeared

disheveled and intoxicated at other times. Although the prosecution relied upon a comment by Mr. Dworak about a homicide case during one police interview to show consciousness of guilt, the court excluded local newspaper articles which would have established that her death had been publicized.

On the other hand, the trial court erroneously permitted irrelevant evidence about his wife's mood the weekend that Ms. Hamilton died; hearsay evidence about Ms. Hamilton's future plans; and other-crimes propensity evidence regarding Mr. Dworak's 1986 rape conviction.

Moreover, during closing argument, the prosecutor repeatedly committed prejudicial misconduct, disparaging the defense expert as a hired mouthpiece whose opinion was bought by the defense, while inappropriately vouching for her own experts and misleading jurors by exploiting inferences based on evidence she had successfully excluded.

The erroneous exclusion of some evidence and the erroneous inclusion of other evidence, combined with acts of prosecutorial misconduct, individually and collectively, deprived Mr. Dworak of a panoply of state and federal constitutional rights, as well as state statutory rights, at both the guilt and

penalty phases of the trial. Further, the excluded evidence would have served as mitigating evidence in the penalty phase of this case. The exclusion of evidence, as well as additional errors in the penalty phase discussed below, further deprived Mr. Dworak of his constitutional rights, including the right to a fair determination of penalty under the Eighth and Fourteenth Amendments to the United States Constitution and the concomitant provisions of the California constitution.

STATEMENT OF THE CASE

On April 23, 2004, the Ventura County Grand Jury returned an indictment against appellant Douglas Edward Dworak. (1 CT[2] 1-4, 5; 3 RT 447-448.) The indictment charged Mr. Dworak with one count of murder of Crystal Nichole Hamilton (Count 1; Pen. Code, § 187, subd. (a)) and with one count of rape of Ms. Hamilton (Count 2; Pen. Code, § 261, subdivision (a)(2)). (1 CT 1-2.)

The indictment alleged one special circumstance, that the murder was committed while Mr. Dworak was engaged in the commission of rape (Pen. Code, § 190.2, subdivision (a)(17)(C)). As to both counts, the indictment alleged two strikes (Pen. Code, §§ 667, subds. (c)(2), (e)(2), 1170.12, subds. (a)(2), (c)(2)) based on a prior conviction for rape and sexual penetration with a foreign object and use of a weapon in Napa County in 1987; one serious felony prior (Pen. Code, § 667, subd. (a)(1)), based on the same

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[2]"RT" designates the reporter's transcript, and "CT" designates the clerk's transcript. Before the indictment, a felony complaint had been filed in Ventura County Superior Court case number 2003024003. When the record from the earlier case is cited, it is referenced with case number 2003024003.

rape conviction; and a habitual sex offender (§ 667.71, subds. (a), (d)), based on the same rape conviction.[3] (1 CT 1-4.)

Mr. Dworak entered pleas of not guilty to the charges and denied the allegations. (1 CT 8-9; 4 RT 446-454.)

The court denied the defense motion to bar imposition of the death penalty because it failed to comply with the Eighth Amendment's narrowing requirement, violated equal protection, and constituted cruel and unusual punishment. (1 CT 19-42 [defense motion], 49-54 [prosecution motion], 3 CT 520 [denial].) The court granted the prosecution's motion to exclude evidence of third party culpability and other relevant evidence about Ms. Hamilton's lifestyle, associations, and circumstances of her last weekend. (1 CT 109-251 [prosecution trial brief, motions in limine], 2 CT 424-433 [defense opposition], 446-464 [prosecution response], 522 [denial].) The court granted the prosecution's motion to introduce photographs of Ms. Hamilton while denying a defense motion to introduce a previous booking photograph. (1 CT 109-251 [prosecution trial brief, motions in limine], 2 CT 416-

[3]In light of the indictment, the court dismissed a felony complaint filed on July 24, 2003 in case number 2003024003, which had alleged the same charges, special circumstances and allegations (2003024003 1 CT 1-3).

423 [defense opposition/motion], 4 RT 537-540 [rulings].) The court denied the defense motion to introduce relevant exculpatory evidence that discovery of the body was publicly known at the time Mr. Dworak was interrogated. (14 RT 2649-2653.) The court granted the prosecution's motion to admit a prior rape and sexual penetration with a foreign object under Evidence Code section 1108. (1 CT 116-120, 149-154 [prosecution motion], 2 CT 379-400 [defense opposition]; 4 RT 505-526 [grant].)

On March 8, 2005, Mr. Dworak waived his right to a jury trial on the prior convictions and admitted that he had suffered two prior felony convictions, for rape and sexual penetration with a foreign object with use of a weapon. (3 CT 684-691, 694-701; 8 RT 1133-1143.)

Jury selection for trial began on February 28, 2005. (3 CT 661-665; 5 RT 658.) Trial and alternate jurors were impaneled and sworn on March 9 and 11, 2005. (3 CT 702-712, 713, 720; 9 RT 1628-1629 [trial jurors], 10 RT 1745 [alternates].) The jury commenced deliberations on April 7, 2005. (3 CT 781-784; 13 RT 2837-2916.) On April 11, the jury found Mr. Dworak guilty of murder and rape and found the special circumstance that the murder was committed during commission or attempted

commission of rape true. (3 CT 799-802 [minute order], 823.1-823.2 [verdicts]; 16 RT 2917-2933.)

On April 20, 2005, the penalty phase of the trial began. (3 CT 854-858; 16 RT 2981-3056.) The court had earlier denied defense motions to exclude victim-impact testimony and not to permit prosecution argument about lack of remorse. (1 CT 105-108 [prosecution notice], 278-302 [defense motion], 3 CT 794-796 [amended notice], 829-833 [supplemental defense motion]; 16 RT 2940, 2960-2961.) Jurors began deliberations on April 25, 2005 at 3:56 p.m. (3 CT 869-873; 18 RT 3218-3360.) On April 26, the jury returned a verdict of death. (4 CT 993-996 [minute order], 999.1 [verdict]; 18 RT 3361-3369.)

On June 15, 2005, Mr. Dworak filed a motion to reduce the penalty to life without the possibility of parole under section 190.4, subdivision (e) (4 CT 1000-1005 [defense motion], 1028-1034 [prosecution opposition]) and, on June 20, 2005, filed a motion for new trial. (4 CT 1006-1028 [defense motion], 1035-1043 [prosecution opposition], 1046-1048 [defense supplemental declaration], 1049-1061 [prosecution supplemental opposition].)

The court denied both motions on June 30, 2005. (4 CT 1065-1068 [minute order], 1069-1074 [court's statement of

reasons]; 18 RT 3372-3418.) On the same day, the court sentenced Mr. Dworak to death as to Count 1. (4 CT 1065-1068 [minute order], 4 CT 1077-1079 [judgment of death and commitment]; 17 RT 3414.) The court sentenced Mr. Dworak to 75 years to life as to Count 2 and stayed sentence pursuant to section 654. (4 CT 1065-1068 [minute order], 1075-1076 [abstract of judgment]; 17 RT 3415.)

A notice of automatic appeal was filed on June 30, 2005. (4 CT 1076.1)

STATEMENT OF FACTS

GUILT PHASE

PROSECUTION EVIDENCE

1. THE EVENTS OF APRIL 20, 21, AND 22, 2001 (CRYSTAL HAMILTON, FAMILY, AND FRIENDS)

In April 2001, Matt Zeober lived with his mother and sister on Shenandoah Street in Ventura. (11 RT 2096.) Crystal Hamilton, who was 18 years old and lived in Oxnard with her father, Michael Hamilton, an Air Force officer, her brother Robyn, and her 13-year-old sister, Corianne, had known Mr. Zeober for five or six years. (11 RT 2044, 2047-2049, 2095.)

On Friday, April 20, 2001, a friend, Jason, picked up Ms. Hamilton for a visit to Mr. Zeober. (11 RT 2056, 2087-2088, 2100.) Ms. Hamilton was wearing a long-sleeved thermal shirt, blue jean overalls, a brown coat, and tan Puma lace-up tennis shoes. (11 RT 2088-2089, 2097-2099.) She wore little makeup and did not wear it very often nor did she wear a lot of jewelry, mostly small petite bracelets or necklaces and rings. (11 RT 2046, 2089, 2099; People's Exhibit No. 17.) Her sister thought that Ms. Hamilton was wearing a small bracelet when Jason picked her up. (11 RT 2089.)

Ms. Hamilton and Jason arrived at Mr. Zeober's house midmorning, and two other friends showed up. (11 RT 2100-2101.) The group hung out, and everyone smoked pot and methamphetamine. (11 RT 2102.) Mr. Zeober's mother came home and slept. (11 RT 2101.) Jason left early; other people came over and left. (11 RT 2102.) Ms. Hamilton spent the night; she and Mr. Zeober slept in his room upstairs. (11 RT 2102, 2104.)

On Saturday, Ms. Hamilton wore the same clothes as the day before. (11 RT 2104.) She had a purse, and Mr. Zeober recalled she "probably" wore some bracelets, a cuff one and a looser one with dangling beads. (11 RT 2099-2100.) They "just hung out" and watched a movie. (11 RT 2104-2105.)

Mr. Zeober's mother wanted everyone to leave; although he no longer recalled at trial his mother saying on Saturday, "If I didn't give birth to you, I want you out of here," he had heard her say that before. (11 RT 2106.) Ms. Hamilton really wanted to go home, to shower, change clothes, "and stuff." (11 RT 2105.) Ms. Hamilton used his mother's phone to call people to get a ride; she was getting irritated as she was making the calls, according to Mr. Zeober. (11 RT 2106, 2108.) Mr. Zeober did not know who

she was calling, other than Jason.[4] (12 RT 2126-2128.) However, Mr. Zeober recalled telling a detective that Ms. Hamilton was trying to call "some of these older men" outside their group to arrange a ride home but was unable to connect with them. (12 RT 2126, 2128, 2132.) She never got hold of anyone to give her a ride. (12 RT 2127-2128, 2133.)

Lt. Col. Hamilton and his younger daughter, Corianne, spent the day with his girlfriend in Corona. (11 RT 2056.) Ms. Hamilton had told him she was going to spend the night at Mr. Zeober's. (11 RT 2057-2058.) At 3:10 p.m., she called to tell him she wanted to come home;[5] he said that was fine but he could not pick her up until the evening. (11 RT 2058, 13 RT 2405-2406 [stipulation]; People's Exhibit No. 21.) Mr. Zeober heard Ms. Hamilton talking to her father's voicemail. (11 RT 2107.)

The two watched a Cheech and Chong movie in Mr. Zeober's bedroom, with Ms. Hamilton sitting at the foot of the bed and Mr. Zeober falling asleep within five or ten minutes of the

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[4]Detectives did not request local telephone call records until after April 22, 2002, and SBC Pacific Bell maintains local call records for one year only. (13 RT 2404-2405 [stipulation]; People's Exhibit No. 23.)

[5]Any calls from the Zeober residence to Lt. Col. Hamilton's cell phone would have been local calls. (11 RT 2062, 13 RT 2404-2405 [stipulation]; People's Exhibit No. 23.)

movie's start. (11 RT 2109-2110.) When he woke, Ms. Hamilton was drawing a picture and said she was going to be leaving, but did not say how.[6] (11 RT 2110, 12 RT 2114.)

At 10:35 p.m., Ms. Hamilton called her father again to make sure he was on his way. (11 RT 2060, 2091-2092.) She did not sound worried or frustrated to him, just that it was important that he pick her up. (11 RT 2060.) She said everything was okay, but she just felt like she wanted to be home that night. (11 RT 2060.) He told her it would be close to midnight before he got there, and she asked him to pick her up in front of a nearby Ralph's Market, which was unusual. (11 RT 2060, 2064.) He said he would pick her up at Mr. Zeober's house, but she said she did not want to be there anymore; people were getting ready to go to sleep. (11 RT 2061-2062.)

When Mr. Zeober woke again, Ms. Hamilton was gone, and the news was on; Mr. Zeober assumed it was the ten o'clock news. (12 RT 2117-2118.) He thought the television was tuned to Channel 3 because the VCR used Channel 3. (12 RT 2120.)

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[6]Mr. Zeober had told detectives the conversation took place both around 9:00 p.m. and between 8:00 p.m. and 10:00 p.m., but he really did not have any idea what time the conversation was. (12 RT 2110, 2117-2119.)

Channel 3 aired the news from 11:00 to 11:30 p.m. (14 RT 2548 [stipulation]; People's Exhibit No. 54.) He did not know when she left. (12 RT 2121-2122.) She had left a drawing for him, with a note on the back that said "Hi, Matt. You're sleeping right now. I drew this for you. I even put a swing in. Crystal." (12 RT 2116; People's Exhibit No. 22.)

Methamphetamine and its by-products were later found in Ms. Hamilton's blood, in a quantity which indicated that she had to have taken methamphetamine on Saturday evening. (12 RT 2245; People's Exhibit No. 32; see also 15 RT 2725.) Mr. Zeober did not recall using methamphetamine on Saturday and did not see Ms. Hamilton using any, nor did she leave the house Friday or Saturday nor did visitors drop by on Saturday with methamphetamine. (11 RT 2103, 2105, 12 RT 2112-2113, 2123, 2137.) Methamphetamine is shared, and, if Ms. Hamilton had had any, she would have offered it to him. (12 RT 2124-2125.) It is also expensive and illegal; he had no methamphetamine lying around in his house. (12 RT 2124-2125.)

According to Mr. Zeober, methamphetamine keeps you awake and gives you energy, but it also diminishes judgment; some people end up doing potentially dangerous things. (12 RT

2122-2123.) Mr. Zeober described Ms. Hamilton as someone who was vocal, stood up for herself, and would have put up a fight if someone had assaulted her. (12 RT 2128.)

Ralph's Market was then located at the corner of Victoria Avenue and Ralston Street. (People's Exhibit No. 6.) The walk from the Zeober residence to Ralph's, done briskly, takes 11 minutes, 7 seconds via one route (.7 miles) and 15 minutes, 16 seconds via another (.85 mile). (11 RT 1974-1976.) There is no shortcut through an adjacent apartment complex without jumping over walls. (11 RT 1976.)

When Lt. Col. Hamilton got to Ralph's, around 11:45 p.m., he did not see his daughter.[7] (11 RT 2064, 2067, 2092.) He was driving a white 1997 Ford F-150 truck, with no signage, toolboxes or lumber braces. (11 RT 2071, 2074-2075; People's Exhibit No. 20.) He drove around the parking lot, sat there for a few minutes, and then drove toward the Zeober residence, slowly, looking for her. (11 RT 2064, 2075.) The house lights were out, it did not appear anyone was awake, and he did not go to the door. (11 RT 2065.) He spoke on the phone with his girlfriend, twice,

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[7]At the time, he told police that he did not get to Ralph's until 12:00 or 12:30 a.m., but at trial he thought he had arrived at 11:45 p.m., as that was more realistic. (11 RT 2067.)

once for a minute at 11:44 p.m. and for 16 minutes at 11:50 p.m. (11 RT 2066-2067, 13 RT 2405-2407 [stipulation]; People's Exhibit Nos. 21, 24.)

In the past, Ms. Hamilton had failed to be where she had said she would be and had failed to do things that he asked her to do. (11 RT 2065.) He was not overly concerned when she failed to appear, because she had previously made arrangements to meet him at given places and had failed to turn up. (11 RT 2075.) He denied that he had told her she had to stay drug-free to stay at home. Rather, he had told her she needed to move in the correct direction and he would give her whatever "assistance and help and support" she needed." (11 RT 2079-2080.) He could not remember whether, on April 22, 2001, he told detectives that he had told Ms. Hamilton she would not be able to remain at the family home while using drugs. (11 RT 2082.)

When he got home, Ms. Hamilton was not there. (11 RT 2068.) He thought she had just decided to stay and go to bed. (11 RT 2068.) He checked his messages, called his girlfriend again, and also phoned the house where his son was staying with a friend. (11 RT 2068-2070, 12 RT 2139-2141, 13 RT 2405-2406 [stipulation]; People's Exhibit No. 21.)

2. APRIL 22, 2001: DISCOVERY OF THE BODY

Shortly before 6:00 a.m. on Sunday, April 22, Ms. Hamilton's body was found in the ocean at Mussel Shoals Beach,[8] 16.3 miles north of Ventura and an 18-minute drive from Ralph's Market. (11 RT 1976-1978, 1985, 2029.) The beach is accessed from Highway 101 north by taking the Seacliff exit, going past a fire station for a mile and a half, then under the freeway before turning right or left on the access road, which dead ends in a tenth of a mile at both the north and south ends. (11 RT 1983-1984, 1993, 2026-2028; People's Exhibit No. 15.) At both ends of the asphalt road, there is a circular dirt turnout. (11 RT 1994, 2001.) A rock jetty or outcropping runs along the beach from north to south. (11 RT 1986-1987, 2028, 2030.) There is a trail to the beach at the north end, and a wooden walkway at the south end. (11 RT 1986, 1989-1991, 2039, 13 RT 2369-2371.)

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[8]Witnesses called the beach area where the body was found various colloquial names, including Mussel Shoals Beach, Seacliff Beach, the Rincon area, the Mobil piers area, and the old oil piers area. (11 RT 1983, 2006-2007, 2026-2027, 12 RT 2154, 13 RT 2349-2350.) Mussel Shoals Beach appears to more accurately encompass the sandy area at the north end of the rock jetty and the frontage road. (11 RT 2027-2028.) This brief refers to the location Mussel Shoals Beach for consistency.

Jorge Valdez spotted the body in the water while fishing. (11 RT 2006, 2010.) The beach was a nice place to fish; sometimes people were there in the early morning, sometimes not. (11 RT 2019-2020.) There was a big van parked at the south end of the frontage road, about 50 feet away, but he saw no one. (11 RT 2010, 2013-2015.) Mr. Valdez parked at the north end of the beach and walked down to the water. (11 RT 2007-2009; People's Exhibit Nos. 14A, 14C.) Twenty minutes later, he saw a naked body in the water near the south end of the rock jetty, face up, with the head toward the rocks in the jetty. (11 RT 2010-2012, 2018, 2023.) He drove to the nearby fire station to report the body. (11 RT 2010, 2026, 2029.) The van was gone then. (11 RT 2017.)

Ventura County Fire Department Captain Fernando Jimenez returned with Mr. Valdez. (11 RT 2011, 2032, 2041.) The body was floating in the ocean, face up, with the head toward the rock jetty and her feet angling in a southwest fashion. (11 RT 2033.) It was high tide, and the water was touching the rocks. (11 RT 2034.)

There were no vital signs; it was clear to Captain Jimenez the woman was dead, and she was pronounced dead at 6:20 a.m.

(11 RT 2037-2038.) Ms. Hamilton was identified by her fingerprints. (11 RT 1998-1999.)

Ventura County Sheriff's Department ("VCSD") deputies searched the area north and south of where the body was found to look for clothing or other items, but found nothing connected to Ms. Hamilton. (11 RT 1992-1993.) They found no hair, blood, or other bodily fluids, no clubs or other items appearing to contain blood, hair, or skin, no indication of a struggle or dragging of a body. (11 RT 1995-1997.) They thoroughly examined the wooden walkway for hair, skin, bodily fluids, footprints, but found nothing. (11 RT 1997.) There were no tire tracks that looked fresh. (11 RT 1994-1995, 2002.)

According to VCSD Sergeant James Panza, who responded to the homicide call and had worked patrol in the area for two years, there were fishermen, surfers, and people on Mussel Shoals Beach throughout the day. (11 RT 2002-2003.) It was one of the prime recreational areas in Ventura County, and it seemed as if there was always someone there. (11 RT 2003.) He has been there between midnight and 3:30 a.m. and, although there are not a lot of people there then, one still finds one or two cars occasionally. (11 RT 2004.)

3. THE EXPERTS

a. Dr. O'Halloran

Ventura County chief medical examiner Ronald O'Halloran performed the autopsy on April 22. (12 RT 2209-2212.) In his opinion, the cause of death was most likely drowning, but the evidence also strongly suggested she was manually strangled. (12 RT 2252.) If strangled, she would have had to be strangled intermittently in water, inhaling sandy water found in her lungs. (12 RT 2252.)

Dr. O'Halloran explained that a hemorrhage is a collection of blood, where red blood cells have leaked outside the blood vessels. (12 RT 2218, 2220.) The leaking starts a chemical stimulation, which causes white blood cells to migrate in, break in, and consume the red blood cells, so the bruises eventually fade away once the hemoglobin or pigment has been removed. (12 RT 2220-2221.) The length of time it takes white blood cells to migrate to an injury depends on the person's age, health, blood pressure, and other factors. (12 RT 2221.) Generally, white blood cells begin to migrate into the tissue within half an hour to several hours. (12 RT 2221.) The determination is not very precise. (12 RT 2221.) If hemorrhage has a significant number of

white cells in the area, the injury was probably there for at least an hour, perhaps longer. (12 RT 2221.)

After death, there is no blood pressure because the heart has stopped beating, so impact post-mortem against a hard surface will not cause bleeding. (12 RT 2218.) A body pushed up and down against the rocks would not get bruises because of the lack of blood pressure, but there would be abrasions. (12 RT 2270.) An abrasion with no evident hemorrhage cannot be described as pre- or post-mortem. (22 RT 2219.) If there is significant hemorrhage, a wound is probably pre-mortem. (22 RT 2219.) Although active bleeding does not take place after death, if an area of postmortem impact is lower than where the body rests, passive settling of blood can allow some red blood cells to leak into an area of postmortem trauma. (12 RT 2222.)

The head, trunk, legs, and arms of the body had abrasions, which are caused by something brushing against the skin, and lacerations, which are caused by something bumping hard against the skin and splitting it. (12 RT 2216-2217.) Dr. O'Halloran evaluated whether the injuries were pre- or post-mortem by cutting through the skin to look into subcutaneous fat to see redness and by taking nine biopsies of injuries to examine

under a microscope for white and red blood cells. (12 RT 2218, 2220, 2227.) A wound to the right forehead was a blunt force injury, caused by impact against a hard, but not sharp, object. (Biopsy A; 12 RT 2227, 2237-2240, 2271.) It contained hemorrhage and fairly numerous white blood cells of two types, which to him indicated it had been inflicted probably more than one hour pre-mortem. (12 RT 2237-2238.) There were other small abrasions and scrapes on her face, without hemorrhage, so they could have been pre- or post-mortem. (12 RT 2239-2240.) An abrasion and apparent contusion on the left breast was more likely than not pre-mortem because of slight hemorrhage and some white blood cells. (Biopsy B; 12 RT 2216, 2227-2229.) There were abrasions and scrapes on the upper left arm over the bicep muscle abut two inches in diameter, consistent with pre-mortem but some possibility it was post-mortem based on hemorrhage and very few white blood cells. (Biopsy C; 12 RT 2223, 2227-2229.) An abrasion on the right shoulder was possibly post-mortem because there were no white blood cells. (Biopsy D; 12 RT 2216, 2227-2230.) Three biopsies from the right hand and wrist showed hemorrhage, one of which had some white blood cell infiltrate; the injuries were most likely pre-mortem. (Biopsy E;

12 RT 2227-2228, 2231, 14 RT 2549; People's Exhibit No. 58.) There were superficial abrasions on both anterior hips which had a little bit of hemorrhage, and he could not opine whether they were pre-mortem or post-mortem, although they were more likely to be post-mortem than the other injuries. (Biopsy F; 12 RT 2217, 2222, 2227-2228, 2231-2232.) There was a bruise from the left hip to the knee, with skin scraped off, which showed hemorrhage but no white blood cells and could have been pre- or post-mortem. (Biopsy G; 12 RT 2224, 2228, 2232.) A bruise on the front of the right knee showed hemorrhage and a moderate amount of white blood cell infiltrate, suggesting to him that it was probably pre-mortem; the moderate amount probably meant that she received the injury an hour or more before she died. (Biopsy H; 12 RT 2224, 2227-2228, 2233.) There were red areas on the back of the left wrist, abrasions close to the knuckles, and a purplish bruise at the base of the thumb and index finger. (12 RT 2223-2224.) The bruise on the back of the left hand, showing moderate hemorrhage and minimal white blood cell infiltrate was probably pre-mortem, but the white blood cell count was insufficient to determine how long before death the injury was sustained. (Biopsy I; 12 RT 2223-2224, 2227-2228, 2233-2234.)

Regarding a mark on the left wrist just above the biopsy, cutting and examination with the naked eye found no blood under the skin; the mark could have been there pre- or post-mortem, could be a pressure mark, and might not be an injury at all. (12 RT 2234.) If Ms. Hamilton had worn a solid bracelet, pressure from it could leave a similar mark. (12 RT 2235.)

Examination of the genital and vaginal areas, without a colposcope or any dye, showed no evidence of injury. (12 RT 2242-2243.) There was some sand and a little bit of seaweed at the vaginal opening. (12 RT 2243.) Dr. O'Halloran took swabs from her vagina and saw fluid consistent with seminal fluid. (12 RT 2243.) He took fingernail clippings from her right and left hands. (12 RT 2244.)

Ms. Hamilton's blood sample tested positive for THC, a metabolic product of marijuana, methamphetamine (.15 milligrams per liter), and amphetamine, a metabolic product of methamphetamine. (12 RT 2245 [stipulation]; People's Exhibit No. 32.) The level of methamphetamine probably affected her brain function, making her high and euphoric, possibly even paranoid, but the level is not generally accepted as fatal. (12 RT 2246-2247.)

The lungs contained sand inhaled deep into the bronchi, intermixed with frothy fluid from respiratory activity mixing sand with fluid in the lungs, probably seawater, which is where the sand came from. (12 RT 2247.) Both eyes showed petechial hemorrhage, in the whites of the eyes and mostly on the inner lining. (12 RT 2248-2249.) Strangulation compresses the neck, so blood cannot drain out while other blood is pumped into the head, causing blood vessels to burst from pressure. (12 RT 2249.) It can occur in other cases, such as gagging or vomiting. (12 RT 2250.) Although there was no vomit, the vomit would go away because of her being in the ocean. (12 RT 2250.) He found no indication of vomiting in the esophagus or digestive track. (12 RT 2277.)

There were three linear or slightly curved abrasions on the neck, one on the right side and two on the left. (12 RT 2250; People's Exhibit Nos. 28B, 28D.) The neck is protected by the head and shoulders and does not generally get an injury by falling on flat surfaces. (12 RT 2251.) In manual strangulation, fingernails often leave marks like this. (12 RT 2251.) More often than not, in manual strangulation, there are underlying injuries, especially bruises of the muscles underneath the skin of the neck.

(12 RT 2252, 2280-2281.) However, Ms. Hamilton had no underlying tissue injuries. (12 RT 2252.)

Based on her body temperature and the water temperature, Dr. O'Halloran estimated that she died between 11:00 p.m. on April 21 and 3:30 a.m. on April 22. (12 RT 2254-2257, 2282; People's Exhibit No. 26.) From 12:50 a.m. to 6:50 a.m., the air temperature ranged from 11.3° C to 12.5° C (about 51.8° F to 53.6° F) and the water temperature ranged from 10.6° C to 11.7° C (about 50° F to 52.5° F), based on air and water temperatures measured by buoys 12 nautical miles south of Santa Barbara and 38 nautical miles southwest of Santa Barbara, and assuming the temperature at shore was warmer than at the buoys. (12 RT 2275; People's Exhibit No. 26.) At room temperature, an average-sized body in average street clothing loses about 1-1/2 degrees per hour. (12 RT 2254, 2268.) Because her body was not dressed and the air temperature was 53° F, it would have cooled faster, two to three degrees per hour. (12 RT 2268-2269.) Her body had cooled 23 degrees by 8:30 a.m., and he estimated she had lost three to four degrees per hour. (12 RT 2256, 2268.) The coroner's investigator at the scene had described rigor mortis as fairly weak, which alone would indicate she was probably dead from a

couple of hours to eight hours. (12 RT 2253.) However, tumbling in the surface could have prevented rigor mortis from setting in. (12 RT 2253.) Livor mortis was present, so she was probably dead for four hours or more, but there were lots of variables, like how long she was in the water and whether she was in and out of the water due to tidal action. (12 RT 2254, 2283-2284.)

After the autopsy, he believed the manner of death was homicide, but, at the request of investigators, he indicated it as "pending investigation" and changed it to homicide on July 25. (12 RT 2257-2260; People's Exhibit No. 50.)

On cross-examination, Dr. O'Halloran explained that the free-floating hyoid bone, the thyroid cartilage, and the cricoid cartilage, can be broken during manual strangulation. (12 RT 2260.) The bone is easily broken, but breaking the two cartilages take a lot of force. (12 RT 2261.) In most cases of manual strangulation to death, there is internal injury, but not in this case. (12 RT 2264.)

As to the three horizontal marks on the neck, there would not necessarily be trauma under the marks if fingernails were used for strangulation, especially if she was strangled right before she drowned. (12 RT 2262.) Dr. O'Halloran could not say

with scientific certainty that she was strangled right before she drowned; there is no indication it occurred or not. (12 RT 2262.) He did not opine the marks were fingernail marks, but were merely consistent with them, which, to him, means a "reasonable probability." (12 RT 2267-2268.) Dr. O'Halloran demonstrated various ways in which the hands could be placed to strangle someone with fingernails on the marks, from the front or the back, with the thumb pressing enough to cut off the air supply. (12 RT 2263, 2265.)

Although Dr. O'Halloran agreed that a drowning victim bleeds more readily, making the determination of pre- or post-mortem difficult, but a microscopic look at the white cell infiltrate does not make it impossible. (12 RT 2273-2274.) If there is a small amount of white blood cells, the injury may be pre- or post-mortem; if there are a lot of white blood cells, it is probably pre-mortem, although it is not a certainty. (12 RT 2274.) Petechial hemorrhages can occur if a body is upside down with head down while dying. (12 RT 2275.) Drowning does cause a form of vomiting, and vomit that was not inhaled could have been washed away. (12 RT 2275.)

b. DNA Results

On February 22, 2002, a DNA profile for Ms. Hamilton's blood was obtained (People's Exhibit No. 44). The profile from the DNA non-sperm cellular material from vaginal swabs matched Ms. Hamilton's. A lone male profile was developed from the sperm cellular material (People's Exhibit No. 44) and submitted to the California Department of Justice ("DOJ") Convicted Offender DNA data bank. On March 18, 2002, the DOJ Bureau of Forensic Services notified the VCSD Crime Laboratory that the DNA profile matched the profile on file for Douglas Dworak (People's Exhibit No. 45). On February 24, 2004, a saliva swab was obtained from Mr. Dworak, and the Ventura County Sheriff's Crime Laboratory developed a DNA profile on March 11, 2004 (People's Exhibit No. 44). (12 RT 2243, 13 RT 2407-2409 [stipulation], 2409-2410 [stipulation]; People's Exhibit Nos. 43, 51.)

Based on population studies, Mr. Dworak's DNA profile occurs one in 46 quadrillion African-Americans, one in 8.2 quadrillion Hispanics, and one in 924 trillion Caucasians. There are currently less than 6.5 billion people on the planet. (13 RT 2407-2409 [stipulation]; People's Exhibit No. 43.)

The DNA profile from Ms. Hamilton's right-hand fingernail clippings matched her own profile. (12 RT 2244, 13 RT 2407-2409 [stipulation]; People's Exhibit No. 43.) The amount of cellular material recovered from her left-hand fingernail clippings was insufficient for DNA analysis. (13 RT 2407-2409 [stipulation]; People's Exhibit No. 43.)

c. Tides and Currents

George Kabris, a Ventura Port District patrol officer, had been a lifeguard for 23 years, involved in three searches for dead bodies underwater in Florida, and surfed locally for 30 years. (12 RT 2142-2148.) Mr. Kabris was familiar with Mussel Shoals Beach, a surf spot called the "old oil piers." (12 RT 2151-2154.)

Generally, the prevailing currents in April come from the west or northwest. (12 RT 2155.) Based on swell data graphs of the coastline of Mussel Shoals for 12:13 a.m. to 7:13 a.m. on April 22, 2001, Mr. Kabris opined that the swell slowly changed direction. (12 RT 2156-2160.) In the early hours, it was stronger and came in more directly from the northwest, but at a downward angle. (12 RT 2160.) By 7:13 a.m., the angle was more southernly, pushing water toward Mexico. (12 RT 2160.)

Based on certified tide data for the coastline between midnight and 3:00 a.m., Mr. Kabris opined the low tide was at 2:00 a.m., after which it rose. (12 RT 2162-2164; People's Exhibit No. 33.)

Asked in a hypothetical question if Mr. Kabris had an opinion about where a person might have drowned, if that person had drowned between midnight and 3:00 a.m. on April 22, 2001 and, at 6:00 a.m., was found in the water just below the southern tip of rock jetty, he opined there was no way to know exactly where, but it had to have been north, with the currents bringing the body south. (12 RT 2165-2166, 2171-2172.) The lungs help a body float, but, if they become filled with water, the body sinks. (12 RT 2148.) A drowned body will not go against the prevailing current. (12 RT 2150-2151.) Debris within the surf line gets pushed into the shoreline of the beach. (12 RT 2151.) There were variables as to where the currents would have taken the body, such as whether the body was beyond or in the surf line; how long she was in the surf zone, which is very fluid; how long she traveled along the coastline in the up rush zone, and how long she would have been on the bottom until she came to shore. (12 RT 2166, 2170.) When asked if it was consistent to say that, if

Ms. Hamilton was in the water for 2-1/2 to 6 hours, the body would have started out on the beach area north of the rock jetty, Kabris said it was "very possible." (12 RT 2167.) He could not say whether she would have drowned there, as "anything is possible in the ocean." (12 RT 2169.) Kabris could not tell how long the body was against the rocks nor whether she drowned in deep or shallow water. (12 RT 2188-2189.)

d. Sexual Assault

Natalie Erickson is a registered nurse, sexual assault nurse examiner and medical coordinator for Ventura County Safe Harbor, a program started by the Ventura County District Attorney's Office. (12 RT 2191.) She had not examined Ms. Hamilton's body. (12 RT 2207.) Ms. Erickson testified that, based on studies, only 25 percent of sexual assault victims from 15 years old to their 30's have injuries the naked eye can see. (12 RT 2193-2197.) Older adolescents with prior sexual experience rarely have such injuries after a sexual assault, in part because of a physiological lubricating response when an object touches the genital area. (12 RT 2194-2195.) Factors affecting whether there is vaginal trauma include the age of the victim (with older adolescents having higher estrogen levels and more resilient

vaginal areas), how much force was used, how much resistance there was, whether the victim was unconscious, and the combination of a very large penis with a very small woman. (12 RT 2193, 2195-2197.) Lack of injury, however, is also consistent with consensual sex. (12 RT 2199.)

On cross-examination, Ms. Erickson agreed that other studies show that 50 to 89 percent of victims had injuries when examined within 24 hours using a colposcope. (12 RT 2201-2205.) Although Ms. Erickson recalled that the study with the 89 percent figure was not considered accurate, the textbook she relied upon for the studies criticized other studies but not that one. (12 RT 2201-2204.)

e. Quantitative Sperm Analysis

Edwin Jones, a VCSD forensic scientist, analyzed the quantity of sperm present on the vaginal swab, measured by counting the sperm present in a microscopic field of view. (12 RT 2243, 13 RT 2412, 2425, 2430-2434, 2443; 7 CT 1844-1846 [People's Exhibit No. 51, stipulation, chain of custody].) Semen contains sperm and two enzymes in high concentrations, acid phosphatase and P30 or PSA. (13 RT 2415-2419.) After 48 hours, it is difficult to find sperm because drainage, dilution with

vaginal secretions, and attacks by the woman's immune system eliminate sperm. (13 RT 2427-2428, 2455.)

Mr. Jones knew of two studies on quantity of sperm following intercourse. (13 RT 2437-2438.) In the first study, the author determined that sperm of 12 or more per field remained, at most, for one hour, 15 minutes. (13 RT 2438.) In a second study sperm of 12 or more per field lasted for 8 hours, 10 hours and 11 hours. (13 RT 2439.) The second study did not specify whether the women were ambulatory, but he believed they were "probably" not ambulatory. (13 RT 2440, 2447.) The amount here was "off the charts" compared to his other cases. (13 RT 2446.) The average number of sperm per field was 43.85. (13 RT 2442.)

Based on the number of sperm present and the studies, in Mr. Jones's opinion, the semen was deposited within one hour, 15 minutes of death, but could have been within 2, 15 or 20 minutes or even after death given the high volume. (13 RT 2447-2448.) Both P30 and acid phosphatase are found in high concentrations in semen and, even diluted to 1 to 10,000 and 1 to 1,000, respectively, they can still be detected. (13 RT 2419.) The vaginal swab tested negative for acid phosphatase and P30. (7

CT 1844-1846 [People's Exhibit No. 51, stipulation].) With this quantity of sperm, Mr. Jones would have expected large quantities or at least a detectible level of both acid phosphatase and P30, neither of which was detected. (13 RT 2444.) Both enzymes are water soluble, and he concluded that the acid phosphatase and P30 had been washed out of her vagina by the ocean, and sea water in the vagina would have reduced the amount further. (13 RT 2419-2420, 2422, 2444-2446.)

On cross-examination, Mr. Jones admitted that the only studies showing that water can wash away acid phosphatase and P30 without diluting the number of sperm cells are on a dried stain. (13 RT 2452-2454.) This case was the first examination he had done on sperm found in someone floating in cold water. (13 RT 2462.) Colder temperatures mean slower degradation, and cold sea water in the vagina and refrigeration of the swabs could have prolonged sperm life. (13 RT 2457-2458.)

Mr. Jones did not prepare his sample in the same way it was prepared in the studies he relied upon and got more sperm out of a swab than the studies did. (13 RT 2457.) Mr. Jones has compared samples prepared both ways and, in his opinion, there

was only a non-substantial difference in grade. (13 RT 2460-2461.)

Had Ms. Hamilton been upright and ambulatory, he would have expected this quantity of sperm to remain for a relatively short period of time. (13 RT 2446.) Mr. Jones's determination about the length of time sperm was present in the vagina assumed Ms. Hamilton was ambulatory for a period of time. (13 RT 2458-2459.) If she was not ambulatory, never getting up after intercourse, his opinion about the length of time the sperm was in the vagina would be 11 to 12 hours, "maybe even more." (13 RT 2459.)

f. Forensic Examination of Mr. Dworak's Truck

Mr. Dworak owned a 1997 white Ford F-150 truck, impounded when he was arrested on July 22, 2003. (13 RT 2402; People's Exhibit Nos. 7, 8.) VCSD forensic scientist Vern Traxler examined the interior and exterior of the truck for three or four days, looking for trace evidence and using luminal and phenolphthalein to look for blood and acid phosphatase, and alternate light source (ALS), and MUP [4-methyl umbelliferyl phosphate] examination to look for semen. (12 RT 2286-2290, 2298, 2305-2306.)

Mr. Traxler found no evidence Ms. Hamilton had been in the truck. (12 RT 2302.) He found no evidence of semen or blood, except for one small spot on the back of the driver's seat where the right hip touches, which showed a weak reaction for blood with phenolphthalein, a screening test. (12 RT 2294.) No confirmatory test was done to determine if it was blood or if the blood was human or animal, and DNA tests detected no DNA in the sample. (12 RT 2294-2296, 2305, 2308-2309.) Spots on the passenger side floor mat and a lunch box showed a weak phosphatase reaction for seminal protein but no spermatozoa microscopically. (12 RT 2291-2292.) Mr. Traxler examined darks stains on the back side edge of the driver's seat and driver's sun visor with phenolphthalein and ALS for blood; both were negative. (12 RT 2293.)

Mr. Traxler tested material from the front seats, center console, rear seats, seat backs, seat components, hardware, cracks, and headliner. (12 RT 2298, 2304-2305.) He tried to find evidence of blood that would still be around after a long period of time, such as on the component parts. (12 RT 2297, 2304.) He examined "every possible aspect of the truck" (12 RT 2298) and used phenolphthalein reagent in "nooks and crannies and

hardware" to find something he might have missed with luminal, but found nothing. (12 RT 2304.)

According to Mr. Traxler, blood can last for a very long time and seeps through fabric into padding. (12 RT 2297.) He did not find blood in any cushioning. (12 RT 2298.) Whether blood would still be on the fabric two years later depended on how often the fabric was cleaned, the nature of the cleaning and detergent, and the fabric's make-up. (12 RT 2302.) Repeated cleaning would remove the water-soluble components of semen that he was testing for. (12 RT 2301.) Mr. Traxler found no evidence the truck had been scrubbed down to conceal blood. (12 RT 2303.)

Mr. Traxler found no evidence of sexual activity taking place in the truck and no evidence of impact trauma having occurred in the truck. (12 RT 2300-2301.) Based on Ms. Hamilton's head wounds, which he had seen on the autopsy photographs, and his knowledge about how head wounds bleed, he would have expected a lot of blood. (12 RT 2307.) Although it is common for an assault victim to have his blood transferred to his assailant and the assailant to transfer blood to his personal property, Mr. Traxler found no transfer blood. (12 RT 2307.)

Forensic scientist Jones compared tape lifts of fibers and hairs Mr. Traxler took from the truck with tape lifts of fibers and hairs from the body and found no correlation between them. (12 RT 2306, 13 RT 2448-2451.)

4. THE EVENTS OF APRIL 20, 21, AND 22 (MR. AND MRS. DWORAK)

In April 2001, Mr. Dworak worked for J. F. Da Pra Construction. (11 RT 1951-1952, 1954.) He was on call that weekend, something employees usually sign up for three months ahead of time, but was never actually called to work. (11 RT 1955-1956, 1961.) According to company vice president Mike Daniel, on-call employees respond to emergencies from insurance companies or prospective customers, such as flood, fire, vehicle damage, and do emergency work like boarding up damage; they are expected to be sober and to respond in a timely fashion to calls because their work is highly competitive. (11 RT 1959-1961.) The cell phone Mr. Dworak used for work showed that all calls from April 18-24, 2001 were placed and received in Ventura County. (11 RT 1958, 1962-1964, 1971; People's Exhibit No. 13.)

On Friday, April 20, Mr. Dworak's wife, Susannah, called the oral surgery office where she worked to say she was taking a

vacation day. (11 RT 1935, 1939-1940.) According to administrator Betty Hosler, she was upset and crying. (11 RT 1941.)

Susannah attended and completed a California Association of Oral and Maxillofacial Surgeons Certification course in Irvine on April 21 and 22, driving there with coworker Beth Martin and never leaving the conference alone. (11 RT 1943-1945, 1950-1951, 6 CT 1696-1698 [stipulation], People's Exhibit No. 12A.) According to Ms. Martin, Susannah was very upset and emotional; she had had a rough day on Friday. (11 RT 1946.)

5. THE NEIGHBOR, THE PUB, AND THE BEACH

Margaret Esquivel, a neighbor, socialized with Mr. Dworak and his wife in 2001. (11 RT 1888.) The couple had a "typical young marriage," and Mr. Dworak complained that his wife nagged him. (11 RT 1888-1889.) Mr. Dworak talked about

fishing all the time, had a boat, and talked about working on it.[9] (11 RT 1889-1891.) His hobby was fishing; he fished "anywhere and everywhere," including the oil pier area, Lake Casitas, and the Channel Islands. (11 RT 1892-1893; People's Exhibit No. 40B.) She recalled two times in 2001 when Susannah was away, once for a wedding and once for a weekend dental conference. (11 RT 1894-1895.) When Susannah was at the dental conference, Mr. Dworak was happy and came by several times that weekend, saying he was "out living it up and playing pool -- at local bars and going down to Ventura and staying out late" and "when cat's away, mouse will play." (11 RT 1895-1896.)

During 2001, Mrs. Esquivel was regularly taking 8 to 14 Vicodin in a 24-hour period and drinking alcohol, but she did not believe this affected her ability to think clearly or remember events accurately. (11 RT 1897-1899.) Earlier, she had told

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[9]The parties entered into a stipulation that Mr. Dworak owned a power fishing boat but "[t]he boat was not operational during the month of April, 2001." (13 RT 2475; 7 CT 1871-1872; People's Exhibit No. 55.) After both parties had rested but before closing argument, defense counsel realized the stipulation had not been read into evidence and stated, "We'll deal with it in argument. The jury has the written stipulations." (14 RT 2648-2649.) The stipulation was entered into evidence. (14 RT 2654.) However, the stipulation was never read to the jury in open court or mentioned in closing arguments.

Detective Proett that Mr. Dworak had bragged that he had gone out drinking until 2 or 3 a.m. every night during the wedding week that Susannah was gone, but that he had not told Mrs. Esquivel that he went out during the dental conference weekend. (11 RT 1905-1911.) During a second interview, when she reviewed her statement, she said that she remembered that he went out both times Susannah was out of town, bragging both times that he did not get home until 2:00 or 3:00 a.m. (11 RT 1922-1923; 7 CT 1837 [People's Exhibit No. 49].)

Victoria Pub and Grill is located in the Ralph's Shopping Center and, according to its owner, Michael Holbert, it was open from 11:00 a.m. to 2:00 a.m. in April 2001. (11 RT 1929-1931.) It has two pool tables, but is not a pool hall. (11 RT 1933.) Mr. Holbert did not recognize Mr. Dworak and had no idea whether Mr. Dworak had ever been in his pub. (11 RT 1932.) There are other bars in east Ventura with pool tables and drinks, including one across from apartments on Scandia. (11 RT 1933-1934.)

Michael Bachich knew Mr. Dworak through work, and the two first socialized together with their wives in March 2002. (13 RT 2347.) Mr. Dworak's favorite hobby was fishing, and they had gone ocean fishing together, out to the islands and south of

Mussel Shoals Beach in the kelp beds. (13 RT 2348-2349.) Mr. Dworak said he knew a great beach where they could take their dogs to run, Mussel Shoals Beach. (13 RT 2349.) Mr. Dworak said if you went early, there were not many people there. (13 RT 2350.) Mr. Bachich, Mr. Dworak, and their wives went to the beach for the first time in April or May of 2002, around 9:30 a.m., turning right on the frontage road, parking at the north end of the rock jetty, and walking down the trail to the beach. (13 RT 2351-2354, 2358.) The second time they got there around 10:30 or 11:00 a.m., and Mr. Dworak said it was getting a little late to go there, as there were too many people there with dogs; Mr. Bachich's dog was not obedient. (13 RT 2354-2355, 2357-2358.) On one visit, someone was fishing, but Mr. Bachich and Mr. Dworak never went fishing there. (13 RT 2355, 2358.)

6. THE INVESTIGATION

VCSD Detective Deborah Rubright was assigned to the case nine months to one year after Ms. Hamilton's body was found. (13 RT 2332-2334.) She talked to other officers about their investigation thus far. (13 RT 2334.) Told that there was a CODIS "hit" on Douglas Dworak, who had served time for a rape in Napa and whose birth date was May 6, 1966, and knowing

that a sex offender registers annually around his birthday, Detective Rubright told the records technician handling registrations to notify her when Mr. Dworak came in to register. (13 RT 2335-2337.)

a. First Interview -- May 12, 2003

On May 12, 2003, after being told that Mr. Dworak had arrived to register, Detective Rubright met him. (13 RT 2337-2338.) Mr. Dworak was in complete compliance with registration rules. (12 RT 2343-2344.) She asked him if he would speak to her voluntarily, and he cooperated willingly. (13 RT 2339, 2344-2345.) She and Detective Melissa Smith interviewed him. (12 RT 2340, 2374.)

The interview was taped, and an audiotape was played for the jury. (12 RT 2341, 2374-2375, 2377-2380; People's Exhibit Nos. 46A [audiotape], 46B [transcript], found at 6 CT 1743-1781.)

Detective Rubright explained they wanted to speak with him about an investigation, where they had already spoken with "hundreds and hundreds of people," and were concerned about April 21 and 22, 2001. (6 CT 1744, 1746.) Mr. Dworak indicated that, at that time, he drove a white Ford-150 truck, lived in Oak View, and worked for J.F. Da Pra and that he came to Ventura

all the time. (6 CT 1746-1748.) When he was first paroled, he had lived off Telephone Road and Scandia Avenue in Ventura.[10] (6 CT 1750-1752, 1767.) Detective Rubright asked about people he hung out with. (6 CT 1747-1748, 1750-1752.) Mr. Dworak expressed concern about their speaking to anyone at his work, but did not mind if they spoke with his wife. (6 CT 1748-1750, 1751.) A few months before, another officer investigating a crime in Thousand Oaks had come to his house to get a DNA sample, which Mr. Dworak gave him. (6 CT 1749.) When asked if he had been intimate with a woman other than his wife, he indicated that, over the last two years, he had picked up three different prostitutes on Thompson Boulevard after work, around 3:30 p.m. (6 CT 1754-1757, 1761.) He had first encountered prostitutes when he was in boot camp, at 18 years old. (6 CT 1761.)

One prostitute was black, one was Hispanic, and the third was white. (6 CT 1756-1758, 1760.) Detective Rubright asked him to tell her "more about the white one, the white girl." (6 CT 1762.) The white girl was not heavy, about five foot, six inches or taller. (6 CT 1762.) He would ask if the girl wanted a ride and,

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[10]The apartment where he lived is northeast of the Ralph's shopping center. (6 CT 1751; 11 RT 2726; People's Exhibit No. 6.)

after she got in, talked about what he wanted to do and how many dollars she wanted. (6 CT 1762.) Usually he asked for "head and sex." (6 CT 1762.) Each time, he parked nearby and they had sex in his truck. (6 CT 1758-1759, 1761.) He wore a condom each time, which they provided. (6 CT 1759, 1762-1763.)

When he asked what case they were talking about, Detective Smith showed him a photograph of Ms. Hamilton (People's Exhibit No. 18[11]). (13 RT 2379; 6 CT 1763.) Mr. Dworak said he did not know her and had never seen her before. (6 CT 1763.) He agreed with Detective Smith that she looked "pretty young," and, when he asked "How old is she?" Smith answered, "I think she's 19. She would have been,"[12] and Mr. Dworak repeated, "She would have been." (6 CT 1763.) He said she did not look familiar offhand and said he was not into young girls. (6 CT 1763.)

Detective Rubright indicated it was important for him to continue this investigation, and Mr. Dworak responded "[W]ell, yes it is if you have a deceased victim." (6 CT 1766.) Mr. Dworak

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[11]Ms. Hamilton's father testified that this was a photograph taken within one year of her death. (11 RT 2047.)

[12]Smith tried to gloss over her use of the past perfect conditional tense by immediately asking Rubright, "Back then she was 19, right?" (6 CT 1763.)

asked if they could not just take a DNA sample and be done with it. (6 CT 1768.)

Asked if he was into dope, Mr. Dworak replied that he smoked pot recreationally but did not do hard drugs or hang out with druggies. (6 CT 1769.) Mr. Dworak reiterated that the photograph did not look like the prostitute, who looked a lot rougher, whereas the photograph looked like a "teenybopper." (6 CT 1770.) Asked if he was familiar with the area of Telephone and Shenandoah, Mr. Dworak asked where Shenandoah was and did not know the landmarks Detective Rubright mentioned, but did say that he used to register at the police department she referenced. (6 CT 1770-1771.)

Mr. Dworak said he served nine years, three months, and eighteen days in prison for rape and penetration with a foreign object. (6 CT 1772.) He had babysat for the woman's son and was infatuated with her. (6 RT 1773-1775.) His wife was aware of the prior offense. (6 CT 1775.) When Detective Smith asked if that was his first offense, Mr. Dworak responded that, other than a malicious mischief as a child, it was, and that he had "denied it all the way through and fought it all the way through court and

(INAUDIBLE)," "pissing [the judge] off good."[13] (5 CT 1234; Court's Exhibit No. 1A/1B.)

Detective Rubright told Mr. Dworak they were talking about Crystal Hamilton. (6 CT 1776.) Asked about the white prostitute again, Mr. Dworak said her hair was pretty straight with a little wave and dirty blond. (6 CT 1778.) As to whether she was wearing makeup, Mr. Dworak said the prostitutes "usually do," but he did not know about her. (6 CT 1778.) She looked "rode hard." (6 CT 1778.) When he hires a prostitute, he spends fifteen minutes or less with them. (6 CT 1779.) He went to prostitutes because he was sexually frustrated, wanted to have sex, and he and his wife were not getting along. (6 CT 1780.) It

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[13]After tapes of this interview and two others were played, the court expressed concern that all three tapes contained Mr. Dworak's denial of the 1986 rape in Napa. (13 RT 2512.) The court indicated that it had earlier ruled that it would not admit evidence of Mr. Dworak's denial of responsibility in Napa and, had it been aware of the references, it would have ordered them redacted. (13 RT 2512-2513.) Defense counsel stated that it was an error on his part; he thought the court's ruling would have resulted in redaction and took responsibility for not making sure the statements were redacted. (13 RT 2514.) Defense counsel asked that the objectionable statements be redacted from the tapes and transcripts but that the jury not be admonished. (13 RT 2515, 2518.) The last sentence in the paragraph above was then redacted, the redacted tape and transcript were entered into evidence under People's Exhibit Nos. 46A, 46B, and the tape and transcript which the jury had heard and seen became Court's Exhibit Nos. 1A and 1B. (13 RT 2529-2532.)

was easier to see a prostitute; he was not going to rape someone and spend another 20 years in prison. (6 CT 1780.) He has never been violent with his wife, and they got along pretty well now. (6 CT 1781.) From 1997 to 2003, he believed that he had only had sex with the three prostitutes. (6 CT 1781.)

b. Second Interview -- July 11, 2003

In the middle of the Hamilton investigation, VCSD Sergeant Ernest Montagna took on the role of lead investigator. (13 RT 2388.) On July 11, 2003, he and Detective Rubright interviewed Mr. Dworak. (13 RT 2388-2390.) A videotape of the interview was played for the jury. (13 RT 2392-3294; People's Exhibit Nos. 47A [videotape], 47B [transcript], found at 6 CT 1784-7 CT 1832.)

Asked about his hobbies, Mr. Dworak explained that he went ocean fishing and had had a boat for about five years. (6 CT 1793-1794.) He had to rebuild the boat and got it running in January. (6 CT 1794.) Although Mr. Dworak and his wife had problems in the first year of their marriage, Mr. Dworak said his relationship with his wife was a lot better now, both because back then she fought traffic and did not like her job, so she would be "ragging on" him from the time she got home, and because at the

time he had lost his job and $15,000 in wages when the security company went out of business. (6 CT 1796-1797, 7 CT 1819-1820.)

Asked about his prior offense, Mr. Dworak said he had forcefully raped a woman at knifepoint, cutting her thumb, a woman on whom he had a crush. (6 CT 1797-1798.) Asked if he testified in the Napa case, appellant said, "Yeah. Yeah. I denied it all. At the time, like I said, I was 20. I just tried getting out of it . . . ."[14] (5 CT 1260.)

Asked about the prostitutes, Mr. Dworak said that he had oral copulation and intercourse with the Hispanic prostitute in 1999 or 2000, using a condom, and dropped her off afterwards. (7 CT 1802-1803, 1806-1808.) Asked how the encounters happen, Mr. Dworak reiterated that, on Thompson Boulevard near the bowling alley, around 3:30 or 4:00 p.m., he would ask a woman if she wanted a ride and, if she got in, he would proposition her, take her to the spot where she wanted to go, "do [the] deed," and

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[14]As set forth in footnote 13, *ante*, this sentence was redacted from the tape and transcript after the jury heard and saw them. The non-redacted tape and transcripts became Court's Exhibit Nos. 2A and 2B, the redacted tape and transcript were entered into evidence as People's Exhibit Nos. 47 and 47A, and the jury was not admonished. (13 RT 2512-2519, 2529-2530.)

take her back where she wanted to go. (7 CT 1805-1806, 1814-1815.) He approached the white girl in the same area, and they did the same thing, again using a condom. (7 CT 1808-1810.) With the black prostitute, it was the same area and time of day, but they drove to an area behind a hotel. (7 CT 1812-1813.)

Asked what the white girl looked like, Mr. Dworak described her as bleach blonde, somewhat short and dirty, "ragged" and in her mid-20's. (7 CT 1808, 1815-1816, 1818.) She wore jeans and a light yellow or orange t-shirt. (7 CT 1823-1824.) Asked about makeup, Mr. Dworak said that none of them wore a lot of makeup. (7 CT 1823-1824.) He did not think the white girl wore makeup, as "she looked pretty haggard and she wasn't really hiding it." (6 CT 1823.) Asked whether they wore jewelry, they did not wear necklaces and he did not notice bracelets. (7 CT 1824.) Detective Montagna showed Mr. Dworak photographs of women, including one of Ms. Hamilton (People's Exhibit No. 19[15]), asking if he had had any encounters with them, and he said no. (13 RT 2394-2395; 7 CT 1818.) He later said he was not

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[15]Ms. Hamilton's father identified this photograph as being taken within a couple of years of her death. (11 RT 2047.)

really looking at them that closely but just trying to get done what he was there to do. (7 CT 1824.)

c. Third Interview And Arrest -- July 22, 2003

On July 22, 2003, Montagna, with Albert Miramontes, interviewed Mr. Dworak again before arresting him. (13 RT 2396-2397.) A recording of the interview was played for the jury. (13 RT 2401; People's Exhibit Nos. 52A [tape], 52B [transcript], found at 7 CT 1848-1868.)

Shown a photograph of Ms. Hamilton (People's Exhibit No. 18), Mr. Dworak said he did not recognize her. (7 CT 1849-1852, 1858, 13 RT 2402.) After being told they had found his DNA in her and a medical examination of her vaginal area showed injuries,[16] he said he did not do anything to her. (7 CT 1851-1853, 1863.)

Detective Montagna told Mr. Dworak that he was in the same position he was in for the Napa offense, where they had his DNA and he also denied it. (5 CT 1308-1309.) Mr. Dworak said that they did not have DNA then; "[t]hey had this lady saying, this is him. Pointing me out saying, this is him." (5 CT 1309.)

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[16]The statement that Ms. Hamilton had vaginal injuries was not true. (See, e.g., 12 RT 2242 [no evidence of genital or vaginal injury].)

Detective Montagna reiterated that the "DNA came back" to him in that case, Mr. Dworak agreed that "once they went through and got all that back, yeah," and Detective Miramontes said the same DNA from that case matched the seminal fluids in the Hamilton case.[17] (5 CT 1309.)

Mr. Dworak said that he did not mess with little kids, and she looked like one. (7 CT 1852, 1859.) He did not think she looked like the white prostitute, who "looked a little hard" and "a lot worse than that." (7 CT 1854, 1863.) He had sex with three prostitutes. (7 CT 1858.) The few times he had picked up someone who did not want to do a trick, he let them right out. (7 CT 1858-1860.) He does not go out at night; he stayed home with his wife; if he went out, he was with his wife. (7 CT 1861, 1865, 1867.) He denied assaulting Ms. Hamilton and denied that he had not recognized her picture because he had been drunk at the time of the alleged assault. (7 CT 1863, 1867.) Mr. Dworak was then arrested. (7 CT 1867.)

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[17]As set forth in footnote 13, *ante*, the statements in this paragraph were redacted from the tape and transcript after the jury heard and saw them. The non-redacted tape and transcripts became Court's Exhibit Nos. 3A and 3B, the redacted tape and transcript were entered into evidence as People's Exhibit Nos. 52A and 52B, and the jury was not admonished. (13 RT 2512-2519, 2529-2530.)

d. Ventura Prostitution

According to Ventura Police Sergeant Timothy Turner, the main area for prostitution in Ventura was on Thompson Boulevard, from Plaza Park east to Hemlock Street, called the strand or strip, because there are vacant lots for "car dates." (13 RT 2380-2381, 2383-2384.) Two other less active areas are the 1700-1800 block of Thompson Boulevard near Hurst Avenue and Main Street west of Dunning Street. (13 RT 2382.) The Thompson Boulevard stretch is about four miles west of the Ralph's Market at Shenandoah Street and Saratoga Avenue, which is a predominantly residential area; there are no problems with prostitution in predominantly residential areas in Ventura. (13 RT 2384-2385.)

e. The Co-Workers

In 1999, Mr. Dworak worked for Steve Stetson and Associates, a security system installation company. (12 RT 2318-2319, 2312-2314.) John Penfold and Gary Stetson worked with Mr. Dworak installing a system at Fillmore High School. (12 RT 2314, 2320-2321.) High school girls, aged 16 to 18, walked by while they worked on the roof. (12 RT 2320-2321.) Mr. Dworak made sexual remarks, expressing admiration for one's physique,

but Stetson could not recall exactly what Mr. Dworak said. (12 RT 2321, 2323.) Penfold did not hear any remarks or see any behavior by Mr. Dworak that struck him as odd or inappropriate; he did not overhear Mr. Dworak making any specific remarks. (12 RT 2314-2315.) Penfold did not remember reporting any behavior to his supervisor. (12 RT 2315.)

5. JURY VIEWS

The jury viewed four locations, the outside of Matt Zeober's home, the location of the former Ralph's Market, Mussel Shoals Beach at the north end, and Mussel Shoals beach at the south end. At the two beach locations, the jurors were permitted to disembark and move around. (13 RT 2523; 7 CT 1873-1874; People's Exhibit No. 56.) The parties stipulated that, when the jury viewed Mussel Shoals beach on March 22, 2005, the tides were "low." (14 RT 2548 [stipulation], 2550 [correction]; People's Exhibit No. 57.)

6. EVIDENCE CODE SECTION 1108 EVIDENCE

On the late afternoon of October 25, 1986, Cynthia W. lived on a private road in Napa. (10 RT 1855, 1857.) She was taking items out of her trunk into her house when she heard footsteps, turned around, and saw Mr. Dworak. (10 RT 1858-1859.) Mr.

Dworak asked about someone living down the road, and Cynthia W. said she had never heard of them. (10 RT 1860.) Mr. Dworak grabbed her from behind, put his right hand around her neck, and put a 6- to 8-inch knife to her throat. There was a brief struggle; Cynthia W. got cut and her glasses fell off. (10 RT 1861-1862.) Mr. Dworak told her to get in the back seat and take her jeans off, which she did with his help. (10 RT 1862-1865.) He took her panties and bra off and told her to put her shirt over her face, which she did. (10 RT 1865-1866.) He unzipped his pants and wanted her to grab his penis and make him hard, which she did, although she was unable to make it erect. Mr. Dworak put a finger inside her. (10 RT 1867.) He raped her, ejaculating. (10 RT 1868.) Mr. Dworak told her to wait four or five minutes before getting up or he would come after her. (10 RT 1871.) She had surgery on her thumb. (10 RT 1873.) Cynthia knew Mr. Dworak's mother through a sorority, but Mr. Dworak was a stranger to her. (10 RT 1860, 1874, 1876.) At the time, she had identified Mr. Dworak from photographs. (10 RT 1873.)

DEFENSE EVIDENCE

In April 2001, Mr. Dworak's white Ford F-150 truck, had a J. F. Da Pra Construction sign on the doors, three big tool boxes

in the bed (one large one behind the driver/passenger area and two side boxes) and a lumber rack over the bed and cab, none of which accouterments were on Lt. Col. Hamilton's white Ford F-150 truck. (11 RT 2071, 2074-2075, 14 RT 2551-2552, 2555; Defense Exhibit No. B [photographs of Dworak's truck, taken April 24, 2001]; People's Exhibit No. 20 [Hamilton's truck].)

On April 21, 2001, around 11:00 a.m., Mr. Dworak picked up his friend Scott Osler. (14 RT 2554, 2557.) They went to the Hilltop Bar in Oak View, had three beers each, and shot pool together until around 3:00 p.m. (14 RT 2554-2557.) Mr. Osler did not recall telling a defense investigator during an interview that Mr. Dworak had drunk six beers, although it was "very possible" that he had said so. (14 RT 2560-2562.) Mr. Osler had no contact with Mr. Dworak after 3:00 p.m. and did not recall having a four-minute phone conversation with him at 6:53 p.m. (14 RT 2557-2559.)

Bexar County Medical Examiner Robert Bux, who is board-certified in anatomical pathology, clinical pathology, and forensic pathology, reviewed the autopsy report, autopsy photographs, the death investigation report, the criminalistics laboratory report, the Sheriff's Department narrative report, the interview with Dr.

O'Halloran, Dr. O'Halloran's grand jury transcripts, and Dr. O'Halloran's testimony in the case. (14 RT 2563-2567, 2569.) In his opinion, the cause of death was drowning, not strangulation, but, based upon the forensic evidence, Dr. Bux could not form an opinion to a degree of medical certainty that the manner of death was a homicide rather than an accident, because there was no clear-cut evidence of homicide. (14 RT 2569-2570, 2589.) Although it is significant that the body was found in the ocean, with sand inside the lungs, which is evidence of drowning, drowning is a diagnosis of exclusion. (14 RT 2570.)

Dr. Bux could not state a time of death to a scientific certainty. (14 RT 2575.) Body cooling, livor mortis, and rigidity are very crude and variable markers. (14 RT 2575.) Although bodies in water do cool faster, only a gross estimate is possible. (14 RT 2575-2576.)

Dr. Bux could not conclude Ms. Hamilton was strangled, based on six factors. (14 RT 2576.) First, she had no facial congestion, although strangulation victims generally have an extreme amount of congestion above the level of strangulation. (14 RT 2576.) Second, because she was healthy and under the influence of a stimulant, he would have expected extensive

bruising along the neck, particularly internally, and there was none. (14 RT 2577.) Third, there were no fractures of the thyroid cartilage or hyoid bone, typically seen in more than 50 percent of strangulation victims. (14 RT 2577.) Fourth, petechiae are nonspecific findings to strangulation; they can be present for other reasons, such as the position in water. (14 RT 2577, 2591.) A body drowns head down because the head is more dense, which causes increased pressure and congestion. (14 RT 2577.) The eyes showed very fine petechiae, not a large amount. (14 RT 2580.) Fifth, there were no petechiae in the surface of the lung, a soft finding in strangulation. (14 RT 2577.) Sixth, the only injuries on the neck were three horizontal abrasions. (12 RT 2578; People's Exhibit No. 27.) A person can be strangled with one or two hands from the front or the back. (14 RT 2580.) The grip and the strength in strangling, however, comes from a position where the fingernail marks would be up and down, not sideways, and it takes a significant amount of compression, so he would expect the bleeding, fractures, and associated injuries typically seen when someone is manually strangled, particularly a young vigorous woman. (14 RT 2578, 2580, 2591.)

As to the three horizontal marks on the neck, Dr. Bux opined that it was not probable they were fingernail marks. If the assailant was pushing the victim's head into the surf with one hand, such marks would appear on the back part of the neck, not the front and be vertical to get sufficient strength. (14 RT 2598.) It would also not work because the use of sufficient strength would result in the neck arcing when the head was turned. (14 RT 2598-2599.)

Dr. Bux disagreed with Dr. O'Halloran's conclusion, in a scholarly article, that it is rare to have any fracture in the hyoid bone of a woman under 30 years old, because other studies have shown fracture rates ranging from 50 to 90 percent. (14 RT 2592-2593.) The younger a person, the more rubbery and less ossified the bone is; it can stay rubbery for decades or get hard, depending on the person. (14 RT 2593.) Even where a bone is not ossified, it can still be injured; it is just more difficult. (14 RT 2594.) Even if the hyoid bone was not broken in a young woman, he would expect hemorrhages in the muscles and overlying tissue; here, there were none. (14 RT 2594-2595.)

A number of the injuries were consistent with post-mortem dragging on the ocean floor and subsequent banging against the

rocks by waves and tides. (14 RT 2578.) Although some injuries were pre-mortem, they could have occurred during the act of drowning. (14 RT 2578.) There was no assaultive pattern to the injuries, which would show bruises around the orbital area. (14 RT 2579; People's Exhibit No. 27.) Many were scrape-like abrasions on prominences, expected from a body bumping on the ocean floor. (14 RT 2579.)

Timing an injury to death by hemorrhage and white blood cell analysis is imprecise, because the inflammatory response is quite variable from person to person, there is a settling of blood (red blood cells, white blood cells and serum) after death, and white blood cells can come out of a tissue breach just like red cells. (14 RT 2582.) He agreed the laceration on the left forehead with a stellate appearance was pre-mortem, caused by a sole impact on or by a blunt object. (14 RT 2583-2584.)

Dr. Bux could not state whether Ms. Hamilton had been raped or not, because there was no genital trauma or assaultive pattern, only the presence of semen, the only conclusion Dr. Bux could make was that Ms. Hamilton had had intercourse. (14 RT 2571, 2633-2634, 2642-2643.) There was no indication that a violent struggle had taken place, such as broken fingernails, and

several injuries appeared to be post-mortem, from striking rocks or the ocean floor. (14 RT 2571-2572.) Ms. Hamilton's fingernails were of short and moderate length, and Dr. Bux agreed that it was possible she would not have suffered broken fingernails in a struggle. (14 RT 2639-2640.)

Ms. Hamilton was under the influence of methamphetamine, which is a central nervous system stimulant increasing blood pressure. (14 RT 2585.) Psychologically, she could have been aggressive, agitated, and confused, with great strength. (14 RT 2585-2586.) Healthy and stimulated by methamphetamine, she would have fought any assault, and, if she was assaulted, there would be an assaultive pattern of bruising. (14 RT 2586.) A drowning victim loses consciousness at one-and-a-half minutes, but the heart can continue to beat involuntarily up to ten minutes, particularly where stimulated by a drug like methamphetamine, even if the victim is unconscious. (14 RT 2640.)

Dr. Bux agreed that the wound on the right side of the forehead was most likely pre-mortem, but disagreed that it could be characterized as longer before death than other injuries, because timing it based on microscopic biopsy is fraught with

problems. (14 RT 2619-2623.) He opined that one red bruise on the left hip was pre-mortem, with the rest, and those on the right hip, most likely post-mortem, from tumbling in the surf. (14 RT 2616-2618.) The right shoulder injury was pre-mortem, where biopsied, but the other brushed abrasions were post-mortem. (14 RT 2607.) The left bicep was pre-mortem. (14 RT 2608.) The left hand, where biopsied, was pre-mortem. (14 RT 2608.) While hemorrhage is indicative of a pre-mortem injury, trying to correlate the age of a wound cannot be done accurately or precisely. (14 RT 2617.)

Although Dr. Bux was not an expert on sperm, he believed the deposit of sperm had happened recently, but did not think it was possible to tell whether it was minutes or hours before death. (14 RT 2630-2632.) He did not agree that the existence of a recent semen deposit and pre-mortem injuries are consistent with a sexual assault where there is evidence of intercourse but no pathological trauma supporting assault. (14 RT 2633.)

Shown a picture of Cynthia W.'s cut thumb (People's Exhibit No. 3), Dr. Bux opined that he could not determine whether there had been a sexual assault; all he could tell was that the wound had been sutured. (14 RT 2644.)

Dr. Bux charges $250 per hour for review and consultation, for which he spent about eight hours, and $1600 for a day in court, plus expenses. (14 RT 2637.)

The parties entered into a stipulation that Mr. Dworak owned a power fishing boat, but "[t]he boat was not operational during the month of April, 2001."[18] (13 RT 2475; 7 CT 1871-1872; People's Exhibit No. 55.)

[18]As noted in footnote 9, *ante*, this stipulation was not read to the jury or mentioned in argument.

PENALTY PHASE

PROSECUTION EVIDENCE

The prosecution's case in aggravation was based on Mr. Dworak's prior felony convictions for rape and sexual penetration with a foreign object, criminal activity involving force or violence, the circumstances of the crime presented at the guilt phase and victim-impact evidence. (16 RT 2986-2990, 2992-2997 [prosecution penalty phase opening statement].)

Allen Brambrink, the Napa County Sheriff's Crime Laboratory employee who had processed the crime scene in Cynthia W.'s case, did not know Cynthia W. but knew she was also a county employee. When she arrived at the sheriff's department, Cynthia W. was very quiet and very solemn, but not emotional. Brambrink hugged her, out of compassion, and felt a momentary shudder; she relaxed and hugged him closer. After the hug, she had a smile on her face. (16 RT 3041-3048.)

As to victim-impact evidence, the prosecution presented two of Ms. Hamilton's family members (her father and grandfather). C. William Hamilton, Ms. Hamilton's grandfather, described his granddaughter's birth, her early life, her interests in music, art, and sports, her closeness to him and her

grandmother, and the effect of her death on their family. (16 RT 3007-3021.)

Michael Hamilton, Ms. Hamilton's father, described his daughter's childhood, her interest in sports, her talk about joining the Air Force and becoming a medic or nurse, and the effect of her death on him, her brother, and her sister. Ms. Hamilton had become rebellious as a teenager, with school problems, and he sent her to boarding school to get discipline for life. He blamed himself for what happened in part and for letting her down. (16 RT 3021-3040.)

DEFENSE EVIDENCE

Mr. Dworak called nine witnesses at the penalty phase: his wife, his mother, his mother-in-law, his brother and his wife, his sister and her husband, and his niece, as well as a corrections expert.

Tiffany Beck, Mr. Dworak's niece and a senior airman in the Air Force, is very close to Mr. Dworak and feels execution would be "devastating." (17 RT 3059.) When he went to prison, she was 4 or 5 years old and visited him with her mother once a month; he was loving and affectionate and never behaved inappropriately. (17 RT 3062-3063.) She knew he could have a

positive impact on everyone he met. (17 RT 3067.) They never spoke about his 1986 rape conviction, but it would not change her opinion of him; she did not believe he was guilty of raping and murdering Ms. Hamilton and did not believe he was guilty of the 1986 rape. (17 RT 3071-3073.)

Melvin Dworak, Mr. Dworak's older brother, testified that the two were very close and used to do lots of family things, like camping. (17 RT 3074.) Mr. Dworak had a very loving relationship with Melvin's three children, teaching them the right way to do things and to be polite and courteous. (17 RT 3074, 3075-3076.) Mr. Dworak really loved his high school girlfriend, who was killed in a motorcycle accident, which devastated him. (17 RT 3077.) When Mr. Dworak saw the motorcycle driver in a restaurant, Mr. Dworak "exchanged words" with him, but did not get physical. He did puncture two or three of the driver's tires, an act for which Melvin believed Mr. Dworak pled guilty to malicious mischief. (17 RT 3078-3079.) Melvin testified his brother was a loving, caring person who treats others with respect and believed he could do something good in prison and help someone there because of his outgoing personality. (17 RT 3079-3080, 3085.) Growing up, Mr. Dworak helped anyone

who needed help and always helped his family, around the house. (17 RT 3081.) Mr. Dworak counseled his nephew about mischief and took him to enlist because he was getting into trouble. (17 RT 3081-3082.) Melvin was convicted of misdemeanor extortion when he was 18 years old. (17 RT 3083.)

Melvin's wife, Shannon, testified that she has known Mr. Dworak since she dated him in high school. (17 RT 3087-3088.) Before she married Melvin, she was in a physically, mentally and emotionally abusive marriage. (17 RT 3089.) When she told Mr. Dworak she did not know how to get out of the abusive marriage, he dropped everything, came to get her, and took her to Napa to stay with his mother and family. (17 RT 3089-3090.) She did not want to see Mr. Dworak executed because he is a good and helpful person who would take his shirt off his back to help anyone. (17 RT 3091-3092.)

Donna Woods, Mr. Dworak's older sister, is extremely close to Mr. Dworak and loves him. (17 RT 3094-3095, 3097.) Mr. Dworak loved her daughters, especially Tiffany. (17 RT 3099.) Mr. Dworak had confided about problems with Susannah, and Donna suggested counseling. Mr. Dworak has never been aggressive or physical toward men or women. (17 RT 3102.) Mr.

Dworak was helpful, working with her husband on cars, houses, yard work, and maintenance.[19] (17 RT 3103.)

Steve Woods, Donna's husband, has known Mr. Dworak since 1978 and visited him many times in prison. (17 RT 3113-3114.) They have done lots of activities together, and Mr. Dworak helped with hundreds of projects around the house over the years. (17 RT 3114.) He has never felt unsafe around Mr. Dworak or had concerns about his daughter being around him. (17 RT 3115.) Mr. Dworak has a lot to offer. (17 RT 3116.) Steve's opinion about Mr. Dworak is not based on the fact he does not believe Mr. Dworak committed the 1986 rape, but on a lifetime's knowledge of him. (17 RT 3120.)

James Esten testified as an expert on the prison system. (17 RT 3122-3123.) Mr. Esten had reviewed Mr. Dworak's Department of Corrections history in order to render an opinion on his amenability for ongoing placement in prison. (17 RT 3124.) Mr. Dworak had been charged in prison with a few minor

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[19]On the one-year anniversary of the 1986 rape of Cynthia W., Donna sent her an angry "anniversary" card, wishing her ill and accusing her of getting her son to lie about what had happened. Donna explained that she sent the card out of anger and without reflection and that she had since become a very strong Christian who was remorseful about sending it. (17 RT 3100-3102.)

offenses; there was no offense that would cause Mr. Esten to believe ongoing incarceration would be problematic. (17 RT 3125.) Mr. Dworak's only disciplinary problem was a urinalysis test positive for marijuana after a family visit; Mr. Dworak admitted smoking marijuana before the visit but believed a pre-visit and post-visit sample had been mixed up, as he would not have jeopardized his family visits. (17 RT 3133-3134, 3147.) In Mr. Esten's opinion, Mr. Dworak was an above average prisoner with useful skills, such as a teacher's aide. (17 RT 3137.) In Mr. Esten's opinion, the best predicator of future behavior is past behavior. (17 RT 3141.) Based on Mr. Dworak's past incarceration record, his relative lack of negative behavior of any consequence, and his overwhelmingly positive behavior in terms of contributions made to others, Mr. Esten saw no problem with Mr. Dworak's assimilating into the level of prison environment where he would be housed until he died. (17 RT 3141.)

Mr. Dworak was disciplined at the lowest level for manipulation of staff because he entered another housing unit to take a shower for heat exhaustion, which was not substantiated by a medical report. (17 RT 3148-3150.) There was also an incident where all inmates with access to screwdrivers were

locked up because one was missing, but it turned out the supervisor had miscounted the inventory. (17 RT 3146.)

Marjorie Dworak, Mr. Dworak's mother, testified that Mr. Dworak was a loving, outgoing young man who had never met a stranger. (17 RT 3157.) In 1986, during a flood, Mr. Dworak worked for three days in their community to rescue people and do whatever was necessary. He helped a runaway 16-year-old girl, convincing her to return home and letting her stay at their house until her family could pick her up. (17 RT 3158-3159.) Mr. Dworak is a person who has something to offer in any environment he may be in. (17 RT 3160-3161.)

Virginia Duffy, Mr. Dworak's mother-in-law, testified that Mr. Dworak was close to his family and fit in with Susannah's family. (17 RT 3164-3167.) Mr. Dworak helped them around the house. (17 RT 3169.) He took an elderly neighbor fishing, helped one friend with remodeling, and helped another friend's mother move. (17 RT 3170.) She did not know about the 1986 rape conviction until after his arrest, but it has not changed how she felt about him. She believes he will adjust to where he is, but is fearful of what it would do to Susannah if he were executed. (17 RT 3173.)

Mr. Dworak's wife, Susannah, sat through the whole trial; she still loves her husband deeply. (17 RT 3176, 3187.) Mr. Dworak told her about his 1986 rape conviction a week after they started dating; it was her choice not to tell her family so they could get to know him. (17 RT 3181.) Mr. Dworak told her he was wrongly convicted; he never told her that a DNA test had confirmed his guilt. (17 RT 3195.) Mr. Dworak did a lot of work around the house and cooked dinner every night. (17 RT 3182, 3189.) Commuting, traffic, and a bad supervisor made her angry; she took it out on her husband; they also argued about money, which was tight. (17 RT 3182, 3186-3187.) She yelled at him, but he never yelled at her or called her names. (17 RT 3190.) Mr. Dworak suggested counseling, which she reluctantly agreed to. (17 RT 3188.) She did recall his going fishing in Mexico once without her knowing. (17 RT 3202.) She did not remember a big fight on April 20, 2001. (17 RT 3203.) Her marriage was not perfect, but she woke up every morning missing her husband. (17 RT 3208.)

ARGUMENTS
ERRORS IN THE GUILT PHASE

I.

THE TRIAL COURT COMMITTED PREJUDICIAL ERROR AND VIOLATED MR DWORAK'S 5TH, 6TH, 8TH, AND 14TH AMENDMENT RIGHTS BY EXCLUDING CRITICAL DEFENSE EVIDENCE UNDERCUTTING THE STATE'S THEORY OF THE CASE.

A. Introduction.

The United States Constitution guarantees every criminal defendant the right to present a defense:

> Whether rooted directly in the Due Process Clause of the Fourteenth Amendment or in the Compulsory Process or Confrontation clauses of the Sixth Amendment, the Constitution guarantees criminal defendants, a meaningful opportunity to present a defense.

(*Holmes v. South Carolina* (2006) 547 U.S. 319, 330-331 [126 S.Ct. 1727, 164 L.Ed.2d 503].) The California Constitution provides a similar guarantee. (Cal. Const., art. I, § 15; *People v. Lucas* (1995) 12 Cal.4th 415, 436.)

Here, the trial court erroneously excluded defense evidence that would not only have provided a defense but also seriously contradicted the prosecution's theory of Mr. Dworak's guilt for rape and murder. First, it erroneously excluded evidence of

third-party culpability for Ms. Hamilton's murder and rape. The evidence would have contradicted the prosecution's theory that Mr. Dworak had raped and murdered Ms. Hamilton. Second, the court also erroneously excluded relevant evidence about Ms. Hamilton, her circle of friends, and her behaviors. That evidence would have tended to show that Ms. Hamilton was not the sweet, naïve girl the prosecution depicted, i.e., one who would have never failed to meet her father at the market voluntarily, one who would have had nothing to do with an older man like Mr. Dworak, let alone have consensual intercourse with him, or one who would never have found herself partying at the beach or elsewhere, inviting an accident. These errors deprived Mr. Dworak of his state and federal constitutional rights to present a defense, to confront and cross-examine witnesses, to due process and a fair trial, to a reliable guilt and penalty determination, and to be free from cruel and unusual punishment. (U.S. Const., 5th, 6th, 8th, 14th Amends.; Cal. Const., art. I, §§ 7, 15, 16, 17, 24, 28, subd. (d).)

B. Proceedings Below.

1. The Prosecution's Motion And The Defense Response.

Before trial, the prosecution sought to exclude, and the defense sought to admit, testimony and evidence about Ms. Hamilton's friends and associates. For clarity, the factual and procedural background will be set out separately for each person.

a. Danny Carroll

Before trial, over the opposition of defense counsel, the prosecution moved to exclude any testimony or evidence regarding Danny Carroll and his possible culpability in the death of Ms. Hamilton. (1 CT 140-148.)

Ms. Hamilton had been friends with Matt Zeober' for five or six years and had stayed at his house, smoking pot and methamphetamine with him and other friends, from Friday morning, April 20, 2001, until sometime on Saturday night, April 21. (1 CT 125, 127-128.) Mr. Zeober's mother was Robyn Jones, and Mr. Zeober lived with her. (1 CT 127, 129.) Danny Carroll was described by the prosecutor as "a long time drug user, low-level dealer, and occasional boyfriend of Robyn Jones." (1 CT 140.)

The prosecutor sought to exclude the following evidence or testimony related to Carroll: (1) Carroll's theft of Jones's car shortly before Ms. Hamilton's death and its return to Jones with a broken car window and sand in the interior; (2) Carroll's shaving of his mustache and pubic hair shortly after Ms. Hamilton's death; (3) Carroll's letters to Jones from prison, in which he discussed what he called the murder and rape of Ms. Hamilton; (4) Carroll's computerized voice stress analysis test results indicating deception; and (5) anyone's opinion that Carroll was involved in Ms. Hamilton's death. (1 CT 140, 164-172.)

Defense counsel sought to introduce evidence of third-party culpability related to Carroll. (2 CT 426-430, citing *People v. Hall* (1986) 41 Cal.3d 826, 832.)

i) Carroll's theft of Jones's car shortly before Ms. Hamilton's death and its return to Jones with a broken car window and sand in the interior

According to the prosecution's motion, about one year after Ms. Hamilton's death, Jones told detectives that Carroll had stolen her car, shortly before Ms. Hamilton had disappeared, and that the car was seen with a broken window after Ms. Hamilton's death. (1 CT 141.) Carroll told investigators that, before Ms. Hamilton's death, he had stolen Jones's car, using a screwdriver

to start the ignition. (1 CT 141.) He had broken the window to get in the car when he had accidentally locked it. (1 CT 141.) Several people knew about the car theft, and their recollections of when Carroll had stolen it ranged from early to mid-April of 2001, with the latest date being Friday, April 20. (1 CT 141.) Carroll claimed that he had avoided Jones and the Zeober house after he stole the car. (1 CT 141.)

In April 2002, when detectives again interviewed Mr. Zeober, Mr. Zeober said that Carroll had taken Jones's car on the same night that Ms. Hamilton had left the house, after she had left, while Mr. Zeober was falling in and out of sleep. (1 CT 142.) Carroll had kept the car for about one week; when he returned it, his mustache had been shaved off and there was sand on the floorboard of the car. (1 CT 142.) Mr. Zeober recalled flirtatious comments that Carroll had made about desiring to have a relationship with Ms. Hamilton because he found her attractive. (1 CT 142.) Mr. Zeober thought he heard Carroll offer Ms. Hamilton a ride that Saturday night, but then said that he did not actually hear that but he had a suspicion Carroll was involved and this was what could have happened. (1 CT 142.) Mr. Zeober stated his recollection of events that weekend was

vague because he was under the influence of marijuana and methamphetamine. (1 CT 142.)

Interviewed again in December 2003, Mr. Zeober said that Carroll had been in their carport on Friday, April 20, breaking speakers in Carroll's own truck and he believed that was when Carroll stole Jones's car. (1 CT 143.) Carroll agreed he had broken his truck speakers in the carport but claimed that was weeks or months before Ms. Hamilton's death. (1 CT 143, fn. 6.)

Defense counsel sought to introduce evidence about Carroll, including his theft of Jones's car shortly before Ms. Hamilton's death and its return with a broken window and full of sand, presumably from the beach. (2 CT 430-431.) According to Jay Campbell, he was at the Zeober house on April 21, with Cindy Kinnaird, when Ms. Hamilton was leaving, and Campbell was with Jones. (2 CT 424-432.)

In response, as to Carroll's contemporaneous theft of Jones's car and its subsequently broken window and sandy interior, the prosecutor argued that the amount of sand in the car, if even sand, was questionable, and Carroll had been using a screwdriver in the ignition of the stolen car and had broken the window when someone had inadvertently locked the car. (2 CT

457-459.) Further, everyone in Ventura had sand in their cars. (2 CT 459.) The prosecutor also contended that Carroll was not near Ms. Hamilton or near Jones's house on the night of her death. (2 CT 446-464.)

ii) Carroll's shaving of his mustache and pubic hair shortly after Ms. Hamilton's death

According to the prosecution motion, about one year after Ms. Hamilton's death, Jones told police that Carroll had shaved his mustache and pubic hair shortly after Ms. Hamilton's death. (1 CT 140.) When asked about this by detectives, Carroll said he had shaved at Jones's request, to avoid discomfort during oral sex. (1 CT 141.) When asked about Carroll's statement by investigators, Jones agreed she had asked Carroll to shave himself. (1 CT 141.) According to Mr. Zeober, when Carroll returned Jones's stolen car one week after Ms. Hamilton's death, his mustache had been shaved off. (1 CT 142.)

According to the defense motion, Carroll had given inconsistent statements about his reasons to law enforcement and to the grand jury to explain why he had shaved his mustache and pubic hair immediately after a murder with sex offense allegations. (2 RT 429-430.)

iii) Carroll's letters to Jones from prison, in which he discussed what he called the murder and rape of Ms. Hamilton

According to the prosecution motion, in May 2001, Carroll was sent to prison for a parole violation. (1 CT 143.) On June 28, 2001, he wrote Jones that "I have so much to tell you but not anymore by mail except one thing Cystal [sic] is not dead she moved away." (1 CT 143.) Before the grand jury, Carroll explained that he had heard in prison that Ms. Hamilton's father had taken her away from her friends. (1 CT 144.) He also explained that what he had wanted to tell Jones was that there were some men in a camper at a state beach cooking methamphetamine and giving it to young girls, but he did not want to put that in a letter. (1 CT 144.)

On June 30, 2001, he wrote Jones, "Tell Britney I said stay cool. And thanks for keeping her mouth shut and don't worry about Cystal [sic] it will be taken care of." (1 CT 143.) He explained to the grand jury that he was thanking Brittany Mooney for keeping her mouth shut when he was hiding from police in Jones's bedroom in May 2001, after a warrant was issued for his arrest. (1 CT 143-144.) He also explained that he used being in prison to try to find out what happened to Ms.

Hamilton because Jones had been hurt over the unsolved murder. (1 CT 144.)

Defense counsel noted that there were a variety of admissions by Carroll regarding his knowledge as to the circumstances around Ms. Hamilton's death in Carroll's letters from prison to Jones. (2 CT 430.)

In response, the prosecutor claimed that there was no factual support for the defense argument that Carroll made admissions and that substantial evidence connected him to the rape and murder of Ms. Hamilton. The letters Carroll wrote from prison did not contain admissions or knowledge of the circumstances surrounding Ms. Hamilton's death; in one letter, he wrote that she was still alive. (2 CT 455-456.)

iv) Carroll's computerized voice stress analysis test results indicating deception

According to the prosecution, to further the investigation, sheriff's detectives had administered a Computerized Voice Stress Analysis ("CVSA") test to Carroll, asking a number of questions about the case, and opined that Carroll was being deceptive. (1 CT 146-147.) The prosecution claimed that the detective had failed to properly document Carroll's verbal

responses and that the CVSA test was crudely administered. (1 CT 146-147.) The prosecutor also argued that the CVSA test given to Carroll was inadmissible by law and had been shoddily administered and handled by the deputy who performed it. (2 CT 456.)

v) anyone's opinion that Carroll was involved in Ms. Hamilton's death

One year after Ms. Hamilton's death, Jones told friends and detectives that Carroll may have been involved in Ms. Hamilton's rape and murder. (1 CT 140.) Around the same time, Mr. Zeober told police that he thought Carroll had offered Ms. Hamilton a ride, but then said that he did not actually hear that but he had a suspicion Carroll was involved and this was what could have happened. (1 CT 142.)

The prosecution argued that these facts did not raise a reasonable doubt under *People v. Hall*, *supra*, 41 (and that the CVSA test was inadmissible in Court) but only showed motive and opportunity, rather than direct or circumstantial evidence linking the third party to actual perpetration of the crime. (1 CT 164, 166-167.) Citing *People v. Johnson* (1988) 200 Cal.App.3d 1553, the prosecution argued that the third-party culpability

evidence should also be excluded because, compared to the third-party culpability evidence, there was "weighty evidence showing the defendant's guilt," i.e., "overwhelming evidence of the defendant's guilt precludes anyone else on the planet as having raped and murdered Crystal Hamilton." (1 CT 171.)

Defense counsel opposed the motion to exclude third party culpability evidence, arguing that the evidence as to Carroll was relevant and thus admissible. (2 CT 424-433.) Defense counsel noted that the prosecution discussed each piece of evidence individually and then discounted each piece as marginal. (2 CT 431.) However, when all the pieces of evidence as to Carroll were examined in their totality, the evidence was sufficient to raise a reasonable doubt. (2 CT 431.)

b. Evidence Relating to Rachel Daniels and John Figueroa

The prosecution also sought to exclude testimony from or about Rachel Daniels and John Figueroa. Rachel Daniels had been one of Ms. Hamilton's closest friends and had spent the night at Ms. Hamilton's the week before her death. (1 CT 136.) Ms. Hamilton was more heavily into marijuana and methamphetamine, while Daniels used heroin. (1 CT 136.) Ms. Hamilton had told her father what Daniels was using and that

she did not want anything to do with Daniels any more. (1 CT 136.) According to the prosecution, Daniels led a promiscuous lifestyle, was a prostitute for drugs or money, and had sex with older men. (1 CT 136.) Twice in the time leading up to Ms. Hamilton's death, she and Daniels had gone to motels with men to do drugs, one time with 39-year-old John Figueroa. (1 CT 136.) Daniels had a relationship with Figueroa (1 CT 136), and the much-older Figueroa had taken 18-year-old Ms. Hamilton to a barbecue shortly before her death (1 CT 138). Figueroa was among those Ms. Hamilton called on April 21 while seeking a ride home, but he was in jail that weekend, so she just left message saying she had called. (1 CT 138, 173.)

The prosecution argued that any such evidence would only be an attempt to "smear Crystal with a tawdry image." (1 CT 173.) The prosecution also objected to admission of this evidence under Evidence Code section 352 as misleading and speculative if introduction was sought to show that Ms. Hamilton was promiscuous. (1 CT 174.)

The defense motion argued that Ms. Hamilton's relationship with her friend Rachel Daniels established that Ms. Hamilton liked to party and frequented hotel rooms to do so,

making it possible that she had chosen to do so that night rather than meeting her father. (2 CT 431.)

Finally, as to Rachel Daniels, the prosecutor claimed that the defense argument about Ms. Hamilton's friendship with Daniels and their partying in hotel rooms was a poorly veiled attempt to smear Ms. Hamilton with her friend's bad character. (2 CT 461.) The prosecutor also contended the evidence was inadmissible under Evidence Code section 1101, subdivision (a). (2 CT 461.)

c. Evidence Related to Jay Campbell

The prosecution also sought to exclude evidence related to Jay Campbell, a friend of Jones and of her roommate, Cindy Kinnaird. (1 CT 139.) When detectives searched Jones's house on Monday, April 23, they found wet, sandy Levi jeans in a bucket in the carport. (1 CT 139.) Jones did not know where the jeans came from. (1 CT 139.) DNA on the jeans matched that of Campbell. (1 CT 139.) One year after Ms. Hamilton's death, Kinnaird recalled going to the beach with Campbell around the time of Ms. Hamilton's death. (1 CT 139.) According to Kinnaird, Campbell changed at the beach, but he had no reason to put his jeans in a bucket in her carport. (1 CT 140.) Three years after

Ms. Hamilton's death, in July 2004, Campbell told an investigator that he recalled leaving jeans in the carport after a date at the beach with Kinnaird, although he could not recall when. (1 CT 139.)

The prosecution argued that any evidence was inadmissible because it was irrelevant and, under Evidence Code section 352, would be confusing for the jury. (1 CT 176-177.)

The defense motion argued that Campbell had told an investigator that he and Kinnaird were in the Zeober living room when Ms. Hamilton was leaving Jones's house, that there was a car outside, that he and Cindy told Ms. Hamilton not to leave, that she said her father was picking her up, and the next day her death happened. (2 CT 429-430.) Further, Campbell had admitted that sandy jeans discovered in Jones's carport the day after Ms. Hamilton's death belonged to him; he had worn them at the beach. (2 CT 431.)

In response, as to Campbell, the prosecutor argued that, during the interview in which Campbell said he was near Ms. Hamilton on the night of her death, Campbell's statements were so internally inconsistent, he was contradictory, vague, and disjointed that he could not be relied upon for meaningful

recollection, and his testimony was inconsistent with all other witnesses' statements. (2 CT 448-451.) The prosecutor construed Campbell's statement about Carroll being "with Robyn" as meaning Carroll was with Jones but not necessarily at Jones's house. (2 CT 453.) As to Campbell's statement he had been at the beach and had left his wet, sandy jeans in the carport, the prosecutor construed the statements of Campbell, Kinnaird, and Jones to mean that the jeans were left in the carport Sunday night. (2 CT 454-455.)

2. The Court's Ruling

At the hearing, the court indicated its tentative ruling was to exclude the third-party culpability evidence because it would not reasonably create a doubt of Mr. Dworak's guilt. (4 RT 553-554.) Defense counsel argued that each of the witnesses was not only relevant as to third-party culpability but also to explain possible actions Ms. Hamilton took that evening. Her father had stated that it was not unusual for him to arrive somewhere and find Ms. Hamilton not there. (4 RT 554.) Daniels, and John Figueroa, could also testify to other actions Ms. Hamilton might have taken, like not going directly to Ralphs, contacting another person to get a ride or going to a hotel room to party. (4 RT 554-

555.) Daniels could also provide context for statements made by Ms. Hamilton to her father that Daniels was hanging around dangerous people at this time. (4 RT 555.) Similarly, as to Carroll, his testimony would show the jury the types of things occurring at the home before and after Ms. Hamilton's death. (4 RT 556.)

As to Campbell's jeans, there was conflicting evidence as to when during the weekend the jeans were left in the carport. (4 RT 556.) However, the jeans were wet and sandy. (4 RT 556.) The jeans connected someone from Jones's house to the beach on the weekend when Ms. Hamilton was found floating in the ocean with sandy water in her lungs. (4 RT 556, 560.) Further, the evidence showed that Mr. Dworak had never been at Jones's house, so the wet, sandy jeans were not connected with him, but were connected to Ms. Hamilton, who had just left the house, and had drowned. (4 RT 561.) The wet sandy jeans not belonging to Mr. Dworak in a house he had never been to were exculpatory. (4 RT 561.) Counsel argued that the standard was whether the jury could look at the evidence and say, there's wet sandy jeans here, somebody's been in the water, who was it and how? (4 RT 561.) The evidence might not even mean that the person with the

sandy jeans killed Ms. Hamilton, merely that these people who had been partying, who had been taking drugs, might have been with Ms. Hamilton when she died. (4 RT 561-562.) The prosecution was claiming Ms. Hamilton endured a severe head wound, which could have occurred if her head had been shoved into the now-broken car window. (4 RT 562-563.) There were reasonable alternative hypotheses to Mr. Dworak's having murdered Ms. Hamilton: perhaps someone else did or perhaps she got injured by continuing to hang out with these people at the beach. (4 RT 563.) Counsel analogized to a situation where someone had died in a chlorinated pool, pants saturated with chlorinated water were found at the person's last known location, and the defendant had no connection to that location. (4 RT 564A.) Counsel argued that the evidence need only be sufficient to allow an inference that is inconsistent with the defendant's guilt of the crime charged. (4 RT 564E.)

The prosecutor argued that third-party culpability law required the court to weigh the third-party evidence (i.e., the jeans) against "the mountain of evidence on the other side of the equation, which is, namely, the defendant's semen in the victim, all the other evidence . . . ." (4 RT 564E.) The prosecutor also

maintained that the court was "obligated to protect an innocent third party person from being drug [sic] into these sorts of sordid proceedings as the defendant flails about attempting to point fingers at anybody he can by way of speculating that someone else could have done it." (4 RT 564E.)

The court granted the prosecution motion to exclude evidence regarding Daniels, Figueroa, Carroll, Campbell and Campbell's jeans. (2 CT 522; 4 RT 558, 564F.) The court applied the standard that the evidence need be capable of raising a reasonable doubt of the defendant's guilt. (4 RT 564F.) However, the court found, there must be direct or circumstantial evidence linking the third person to the actual perpetration of the crime, not merely evidence of motive or opportunity to commit the crime. (4 RT 564G.) As to the jeans, the court stated that, based on the pleadings, Campbell would testify he went to the beach with Kinnaird and put the jeans in the bucket, where they were discovered on Monday and putting that information before the jury was a "wild goose chase." (4 RT 564H.) All of the evidence was irrelevant and did not add anything to the determination of Mr. Dworak's guilt or innocence. (4 RT 564H.) The court also found the evidence subject to Evidence Code section 352 and

noted that "there is an abundance of evidence that explains all of these suspicious circumstances." (4 RT 564H.)

After trial, defense counsel again raised the issue in the motion for new trial, arguing under Penal Code section 1181, subdivision (5), that the court erred in its decision on third-party culpability and Ms. Hamilton's associations with parties of questionable repute. (4 CT 1006-1028 [defense motion], 1035-1043 [prosecution opposition], 1049-1061 [supplemental prosecution motion], 1065-1068 [supplemental defense motion]; 18 RT CT 3373-3390 [hearing].) The court denied the new trial motion. (4 CT 1065-1068; 18 RT 3395.)

C. Standard of Review.

Exclusion of evidence is reviewed for an abuse of discretion. (*People v. Viera* (2005) 35 Cal.4th 264, 292.) However, as this Court observed in *People v. Hall, supra*, 41 Cal.3d at p. 834:

> If the evidence is really of no appreciable value no harm is done in admitting it; but if the evidence is in truth calculated to cause the jury to doubt, the court should not attempt to decide for the jury that this doubt is purely speculative and fantastic but should afford the accused every opportunity to create that doubt. [Citation.]

D. The Trial Court Abused Its Discretion In Excluding Evidence As To Third Party Culpability And Other Relevant Evidence About Ms. Hamilton's Associates And Circumstances, Violating Mr. Dworak's Fifth, Sixth, And Fourteenth Amendment Rights To Present A Defense, Among Other Rights.

A defendant's right to due process, compulsory process, and confrontation under the federal Constitution includes the right to present witnesses and evidence in his own defense. (U.S. Const., 5th, 6th, 14th Amends.; *Washington v. Texas* (1967) 388 U.S. 14, 18-19 [87 S.Ct. 1920, 18 L.Ed.2d 1019]; *Chambers v. Mississippi* (1973) 410 U.S. 284, 302 [93 S.Ct. 1038, 35 L.Ed.2d 297] [few rights are more fundamental to fair trial and due process than right to present witnesses in one's own defense]; *Pennsylvania v. Ritchie* (1987) 480 U.S. 39, 56 [107 S.Ct. 989, 94 L.Ed.2d 40] [6th Amend. grants defendant right to put before jury evidence that might influence guilt determination]; Cal. Const., art. I, § 15; *People v. Lucas* (1995) 12 Cal.4th 415, 436.) "The right to offer the testimony of witnesses . . . is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies. . . . This right is a fundamental element of

due process of law." (*Washington v. Texas*, *supra*, 388 U.S. at p. 19.)

The right to present defense witnesses and testimony is not absolute and, in appropriate circumstances, must "bow to accommodate other legitimate interests in the criminal trial process." (*Michigan v. Lucas* (1991) 500 U.S. 145, 149 [111 S.Ct. 1743, 114 L.Ed.2d 205], quoting *Rock v. Arkansas* (1987) 483 U.S. 44, 55 [107 S.Ct. 2704, 97 L.Ed.2d 37] and *Chambers v. Mississippi*, *supra*, 410 U.S. at p. 295.) A state may not, however, arbitrarily deny a defendant the ability to present testimony that is "'*relevant* and *material*, and . . . *vital* to the defense.'" (*United States v. Valenzuela-Bernal* (1982) 458 U.S. 858, 867 [102 S.Ct. 3440, 73 L.Ed.2d 1193], quoting *Washington v. Texas*, *supra*, 388 U.S. at p. 16, emphasis original.) Nor may a state apply a rule of evidence "mechanistically to defeat the ends of justice." (*Chambers v. Mississippi*, *supra*, 410 U.S. at p. 302.) These rules apply not only where state law excludes an entire class of evidence, but also where, as here, a state trial court's exercise of discretion results in inadmissible evidence in a particular case. (*Green v. Georgia* (1979) 442 U.S. 95, 97 [99 S.Ct. 2150, 60 L.Ed.2d 738] [exclusion of reliable hearsay mitigating evidence

violates due process]; *Crane v. Kentucky* (1986) 476 U.S. 683, 687-691 [106 S.Ct. 2142, 90 L.Ed.2d 636] [exclusion of evidence regarding voluntariness of confession violates due process]; *Smith v. Illinois* (1968) 390 U.S. 129, 133 [88 S.Ct. 748, 19 L.Ed.2d 956] [denial of questions on cross-examination violates due process].)

In *Holmes v. South Carolina, supra*, 547 U.S. 319, the United States Supreme Court looked at a state rule barring admission of third-party culpability evidence in a capital case when the state had presented strong evidence, particularly strong forensic evidence, of the defendant's guilt. (*Id.* at pp. 330-331.) The high court held that a state court may not exclude third-party culpability evidence because the proffered defense evidence does not raise a reasonable inference of the defendant's innocence in light of the weight of the prosecution's incriminating evidence. (*Id.* at pp. 328-329.) Rather, a state court may exclude third-party culpability evidence only when the evidence "does not sufficiently connect the other party to the crime or does not tend to prove or disprove a material fact in issue at the defendant's trial." (*Id.* at p. 327.) In other words, a state may constitutionally exclude third-party culpability evidence only when it lacks relevance.

California state law is in accord. "[R]elevant evidence shall not be excluded in any criminal proceeding." (Cal. Const., art. I, § 28, subd. (d); Evid. Code, § 351 [all relevant evidence is admissible unless otherwise provided by statute].) Under this Court's rulings, evidence that someone other than the defendant may have committed the crime (third-party culpability evidence) is treated just like any other evidence. (*People v. Hall* (1986) 41 Cal.3d 826, 834.) It is admissible if relevant (Evid. Code, § 350) unless its probative value is substantially outweighed by the risk of undue delay, prejudice, or confusion (Evid. Code, § 352). (*People v. Hall, supra*, 41 Cal.3d at p. 834.) Any requirement that, to be admissible, the evidence constitute "substantial evidence tending to connect that person with the actual commission of the offense" is too high a standard. (*Id.* at pp. 831, 833.) Rather, the evidence need only be capable of raising a reasonable doubt of the defendant's guilt. (*Id.* at p. 833.) Thus, if there is "direct or circumstantial evidence linking the third person to the actual perpetration of the crime," the evidence is admissible. (*Id.* at p. 834.)

Relevant evidence is evidence "having any tendency in reason to prove or disprove any disputed fact that is of

consequence to the determination of the action." (Evid. Code, § 210.) Where an item of evidence tends to prove an issue, it is relevant "no matter how weak it may be." (*People v. Mobley* (1999) 72 Cal.App.4th 761, 793, overruled on other grounds in *People v. Trujillo* (2006) 40 Cal.4th 165; *In re Romeo C.* (1995) 33 Cal.App.4th 1838, 1843 [accord].) As this Court has explained, "[t]he test of relevance is whether the evidence tends 'logically, naturally, and by reasonable inference' to establish material facts such as identity, intent, or motive." (*People v. Garceau* (1993) 6 Cal.4th 140, 177, overruled on other grounds in *People v. Yeoman* (2003) 31 Cal.4th 93, 117-118; *People v. Babbitt* (1988) 45 Cal.3d 660, 681.) The standard for probativeness- --, any tendency in reason -- is very modest indeed.

Here, the third-party culpability evidence bore on the central question in the case and on Mr. Dworak's defense. There was direct evidence that Mr. Dworak had had sexual intercourse with Ms. Hamilton, but there was no direct evidence that he had raped her or that he had killed her. The prosecution attempted to compact the time between Ms. Hamilton's departure from the Zeober house and her death and the time between sexual intercourse with Mr. Dworak and Ms. Hamilton's death in order

to maximize its theory that no one besides Mr. Dworak could have killed Ms. Hamilton. Mr. Dworak's only possible defense was to explain how he could have had consensual sex with Ms. Hamilton but not have been the person who had later killed her or not have been present at her accidental drowning. As a result of the exclusion of third-party culpability, the defense had to rely upon accident as the cause of death, but could offer no evidence supporting the circumstances as to how that might have happened.

Whether evidence is reliable in the sense of being credible goes to weight, rather than relevance. (*People v. Torrez* (1995) 31 Cal.App.4th 1084, 1092, citing *Crane v. Kentucky*, *supra*, 476 U.S. at p. 688.) Here, the prosecutor's opposition to most of the third-party evidence was based on her personal assessment that the source of the evidence was not reliable or that the third-party evidence could be explained away by the third party or others. For example, although Carroll had shaved his mustache and pubic hair after Ms. Hamilton's nude body was recovered on the beach, Carroll explained that he did so because Jones had asked him to do so, and Jones, who had initially told police about the shaving but not that it was done at her request, now verified that

she had done so. The court relied upon the prosecutor's assessment in part, noting that Jay Campbell would testify he went to the beach with Kinnaird and put the jeans in the bucket, where they were discovered on Monday. (4 RT 564H.)

The prosecutor also labeled some of the evidence as speculative. Evidence is either relevant or irrelevant; if relevant, it is admissible, and if irrelevant it is inadmissible. Evidence is not rendered speculative and thus irrelevant simply because it may be subject to various interpretations. As long as one interpretation has a tendency to prove the fact for which the proponent offers it, the evidence is relevant. (*People v. Kraft* (2000) 23 Cal.4th 978, 1034.) One reasonable interpretation of the evidence is enough to make it relevant, even if other interpretations make it appear irrelevant.

The prosecutor also tried to have the evidence excluded based on the purported strength of the prosecution's case, arguing with some hyperbole that "overwhelming evidence of the defendant's guilt precludes anyone else on the planet as having raped and murdered Crystal Hamilton." (1 CT 171.) Similarly, the prosecutor argued that the court was required to weigh the third-party evidence (i.e., the jeans) against "the mountain of

evidence on the other side of the equation, which is, namely, the defendant's semen in the victim, all the other evidence . . . ." (4 RT 564E.) This logic, of course, was the very error condemned in *Holmes v. South Carolina, supra*, 547 U.S. at pp. 330-331, which held that the strength of the prosecution's case (or the prosecution's perception of the strength of its case) cannot be a premise to exclude third-party culpability evidence.

In *People v. Cudjo* (1993) 6 Cal.4th 585, the trial court had excluded evidence that an earlier suspect in the crime had told a third party that he committed the murder. (*Id.* at p. 609.) Reiterating that third-party culpability evidence need only be capable of raising a reasonable doubt of the defendant's guilt, this Court found the lower court had erred in excluding the evidence, because proof of the third party's guilt would have exonerated the defendant and the "evidence was highly necessary: although there was other evidence tending to cast suspicion [on the third party] there was no comparable direct evidence of [the third party's] guilt." (*Id.* at p. 610.)

The evidence here was highly necessary, more so than in *People v. Cudjo*, where there was other albeit non-direct evidence tending to cast suspicion on the third party. Here, without the

evidence defense counsel sought to admit, there was no evidence of any sort as to third party culpability for the murder.

The trial court erroneously applied the third-party culpability evidentiary rule to exclude crucial exculpatory evidence that would have supported Mr. Dworak's claim of innocence of murder and rape. Furthermore, the trial court erred when it excluded other relevant evidence about Ms. Hamilton's lifestyle, associations, and the circumstances of the weekend. Rachel Daniels had been Ms. Hamilton's best friend, at least until one week before Ms. Hamilton's death. Daniels was familiar with Ms. Hamilton's activities, including going to motel rooms to take drugs on more than one occasion. John Figueroa was an older man with whom Daniels and Ms. Hamilton socialized. Figueroa could also have established Ms. Hamilton's activities.

E. The Errors Were Prejudicial.

In *People v. Fudge* (1994) 7 Cal.4th 1075 ("*Fudge*"), this Court found that the trial court had excluded critical defense evidence, but there was no refusal to permit him to present a defense, only a rejection of "some evidence concerning the defense." (*Id.* at p. 1103.) The latter was governed by *People v.*

Watson (1956) 46 Cal.2d 818 ("*Watson*"), but errors of constitutional dimension fell under *Chapman v. California* (1967) 386 U.S. 18, 24 [87 S.Ct. 824, 828, 17 L.Ed.2d 705] ("*Chapman*"). (*Fudge, supra*, 7 Cal.4th at p. 1103.)

In *People v. Cunningham* (2001) 25 Cal.4th 926 ("*Cunningham*"), this Court reaffirmed the holding in *Fudge* and found that trial court rulings precluding defense questions were not of constitutional dimension because it did "not appear that, had the trial court permitted the inquires that defense counsel sought to make, the resulting testimony would have produced evidence of significant probative value to the defense . . . " (*Id.* at p. 999.) In *Cunningham*, as in *Fudge*, this Court utilized a test concerned with the effect of the ruling, rather than the basis of the erroneous ruling.

Here, the trial court did not merely make a slight mis-step like an erroneous evidentiary ruling, but completely precluded defense counsel from presenting any evidence about Carroll, Campbell (or his jeans), Daniels, or Figueroa, including both third-party culpability and relevant evidence about Ms. Hamilton's associates, lifestyle, and the possible circumstances of that weekend. The error was no "minor or subsidiary point."

(*Fudge, supra*, 7 Cal.4th at p. 1103.) Rather, the error excluded "evidence of significant probative value" essential to Mr. Dworak's third-party culpability defense and other evidence vital to rebut the prosecutor's false impressions about Ms. Hamilton, her associates, and what she would and would not do or have done. Because the exclusion of the evidence violated Mr. Dworak's right to a fair trial under the Fourteenth Amendment and his right to present a complete defense under the Sixth and Fourteenth Amendments, the appropriate standard of review is therefore *Chapman*. However, the result is the same when the error is evaluated under the state law standard, i.e., whether it is reasonably probable that the verdict would have been different had the jury heard the improperly excluded evidence. (*Watson, supra,* 46 Cal.2d at p. 818.)

Prejudice is intensified when an error adversely affects a crucial aspect of the defense case. (*Depetris v. Kuykendall* (9th Cir. 2001) 239 F.3d 1057, 1062 [erroneous ruling went to the heart of defense]; *People v. Vargas* (1973) 9 Cal.3d 470, 481 [error is more prejudicial where it touches live nerve in defense].) That is the situation here.

Prejudice is exacerbated where evidence of guilt appears closely balanced. (*In re Wilson* (1992) 3 Cal.4th 945, 956-958.) As the objective record in this case shows, the evidence against Mr. Dworak was anything but overwhelming. There was evidence that he had had sexual intercourse with Ms. Hamilton, but no evidence of genital or vaginal trauma (12 RT 2242-2243) and, in the opinion of the defense expert, no assaultive pattern or indication of a violent struggle indicative of rape (14 RT 2571-2572, 2633-2634, 2642-2643). There were no witnesses at the Zeober house, at Ralphs, at the beach, or anywhere else to establish how Mr. Dworak encountered Ms. Hamilton or whether the intercourse was consensual or forced. There was no clear evidence of homicide, as drowning is a diagnosis of exclusion and can be homicidal, accidental, or suicidal. (12 RT 2218, 2220.) Although the prosecution expert opined that she could have been strangled intermittently in sandy water (12 RT 2252), the defense expert gave six credible reasons why it could not be scientifically concluded that she had been manually strangled (14 RT 2576-2580). Although the prosecution expert identified some injuries as being "probably" pre-mortem by an hour (12 RT 2216, 2224, 2227-2229, 2232, 2237-2238), the defense expert explained

that timing an injury to death as the prosecution expert did is imprecise, because there are variables from person to person (12 RT 2582). Even the time of death could not be stated to a scientific certainty, according to the defense expert, because the relied-upon markers are crude and variable (12 RT 2575-2576), and, although the prosecution expert estimated the time of death between 11:00 p.m. and 3:30 a.m. (12 RT 2254-2257, 2282), even he admitted there were lots of variables that he did not know, such as how long she was in the water and whether she was in and out of it because of tidal action (12 RT 2254, 2283-2284). Although a forensic expert opined that the quantity of sperm in Ms. Hamilton's vagina was in an amount that had been deposited within a short time of her death (one hour, 15 minutes or less), his opinion was severely undermined by what he relied upon to form it. (13 RT 2447-2448.) There were only two studies on the subject in existence, both involving living subjects (13 RT 2446); he had not prepared his slides in accordance with the studies (13 RT 2457); he "assumed" Ms. Hamilton had been ambulatory to arrive at the one hour, 15 minute figure (13 RT 2458-2459); one study did not specify whether the women in it were ambulatory

(13 RT 2458-2459); and, if she was not ambulatory, the length of time could be 11 to 12 hours or more (13 RT 2447-2448).

There was no evidence what instrument was used for the pre-mortem injury. There was no physical evidence at the beach, on Ms. Hamilton's body, or under Ms. Hamilton's nails to link him to a crime. None of her clothes or possessions were ever found or linked to him. There was no physical evidence in Mr. Dworak's truck related to Ms. Hamilton and, although the examination was done two years after her death, it was extraordinarily thorough and would have found blood on component parts or the padding of fabrics; there was no evidence of scrubbing to conceal blood. (12 RT 2297-2298, 2304, 2303.)

Second, the United States Supreme Court has recognized that strong evidence of prejudice is shown by the prosecutor's reliance on evidence during closing argument as persuasive evidence of guilt. (*Kyles v. Whitley* (1995) 514 U.S. 419, 444 [115 S.Ct. 1555, 131 L.Ed.2d 490].) Here, the opposite is also true, as the prosecutor utilized evidence that the excluded evidence would have rebutted. "This Court has repeatedly made the same point. "There is no reason why we should treat this evidence as any less

'crucial' than the prosecutor -- and so presumably the jury -- treated it." (*People v. Powell* (1967) 67 Cal.2d 32, 57.)

The prosecutor argued that "Crystal Hamilton did not stand a chance. Young, naïve, perhaps. . . . She probably never really considered the dangers that truly lurk on a dark night for a beautiful teenage girl." (15 RT 2694.) The prosecutor further argued that Mr. Dworak was with Crystal Hamilton "and not because she wanted to be with him. No way. A beautiful 18-year-old girl is not going to look twice at this defendant. She was only with him because he forced her to be, because he was going to rape her." (15 RT 2728.)

The sad reality was that Ms. Hamilton abused methamphetamine and marijuana. The reality was that she associated with older men like Figueroa, from whom she had borrowed money the week before and whom she tried to call for a ride before she got hold of her father. The reality was not that she desperately wanted to be home, but that she had been told to leave Mr. Zeober's house by his mother. The reality was not that she immediately called her father for a ride home, but that she called many people, including Jason and some older men before she called her father. (11 RT 2058, 2126-2128, 2132-2133.) The

reality was that she was under the influence of metham-phetamine and that she took even more methamphetamine at an unknown time Saturday evening. (12 RT 2245; People's Exhibit No. 32.) The reality was that, according to her father, she had failed to be where she said she would be; her father was not overly concerned when she failed to appear at Ralphs because she had previously made arrangements to meet him at given places and had failed to turn up. (11 RT 2075.)

However, the defense was deprived of an opportunity to bolster the reality with additional evidence that would have provided alternatives to the state's theory that only Mr. Dworak could have raped and murdered Ms. Hamilton. The evidence would have raised the possibility that although Mr. Dworak had consensual sexual intercourse with her, she may have subsequently behaved as she had done before, perhaps going to the beach to ingest more methamphetamine and meeting with an accident.

The third-party culpability and other relevant evidence was vitally necessary to Mr. Dworak's defense. The proffered evidence would have undermined the state's entire approach to the case and may well have caused a juror to have a reasonable

doubt as to Mr. Dworak's guilt. (*People v. Reeder* (1978) 82 Cal.App.3d 543, 550 [error to exclude evidence of defendant's state of mind from which jury could have drawn an exculpatory inference]; see also 4 CT 915 [CALJIC No. 2.01, instructing jury that if circumstantial evidence permits two reasonable interpretations, one pointing to guilt and one to innocence, jury must adopt interpretation pointing to innocence].)

In a capital trial, violation of the right to present a defense, to compulsory process, and to confrontation also violate the right to a reliable penalty determination under the Eighth Amendment (*Lankford v. Idaho* (1991) 500 U.S. 110, 125, fn. 12 [111 S.Ct. 1723, 114 L.Ed.2d 173]; *McClesky v. Kemp* (1987) 481 U.S. 279, 306 [107 S.Ct. 1756, 95 L.Ed.2d 262] and to due process under the Fourteenth Amendment (*Rock v. Arkansas*, *supra*, 483 U.S. at p. 52; *Hicks v. Oklahoma* (1980) 447 U.S. 343, 346 [100 S.Ct. 2227, 65 L.Ed.2d 175].) The trial court's erroneous ruling also denied Mr. Dworak his Eighth Amendment right to a reliable sentencing determination. To assess error at the penalty phase of a capital trial, this Court determines whether there is a "reasonable possibility" that any of them affected the verdict. (*People v. Brown* (1988) 46 Cal.3d 432, 447.) Even if the jury had

still convicted Mr. Dworak of special circumstances murder, jurors could have considered the third-party culpability evidence as lingering-doubt evidence at the penalty phase. (See *People v. Terry* (1964) 61 Cal.2d 137, 145-146 [jury may determine guilt has been proven beyond reasonable doubt but still demand greater degree of certainty for imposition of death penalty], overruled on other grounds in *People v. Laino* (2004) 32 Cal.4th 878, 893.) Mr. Dworak was effectively prevented from presenting a potential mitigating factor in violation of the Eighth and Fourteenth Amendments. (See, e.g., *Eddings v. Oklahoma* (1982) 455 U.S. 104, 110 [102 S.Ct. 869, 71 L.Ed.2d 1]; *Lockett v. Ohio* (1978) 438 U.S. 586, 604 [98 S.Ct. 2954, 57 L.Ed.2d 973].)

F. Conclusion.

Mr. Dworak was denied an opportunity to present a defense when the trial court excluded evidence of third-party culpability and other evidence relevant to Mr. Dworak's defense. The error was grievously prejudicial. This Court should reverse the judgment and sentence.

II.

THE TRIAL COURT PREJUDICIALLY ERRED AND VIOLATED MR. DWORAK'S 5TH, 6TH, 8TH, AND 14TH AMENDMENT RIGHTS BY ADMITTING THREE PHOTOGRAPHS OF MS. HAMILTON, WHOLESOME AND SMILING, BUT DENIED THE DEFENSE REQUEST TO ADMIT HER BOOKING PHOTOGRAPH WHICH MAY HAVE MORE ACCURATELY SHOWN HOW SHE LOOKED THAT WEEKEND.

A. Introduction.

The trial court erred when it allowed the prosecution to admit three photographs of Ms. Hamilton, one of which was taken two years before her death and others which may have been taken within a couple years of her death. The three photographs depicted her as a well-scrubbed, cheery, and healthy younger teen-ager. However, the court denied a defense request to introduce Ms. Hamilton's booking photograph, showing her one year earlier in a disheveled state, shortly before she was sent to an out-of-state rehabilitation facility for substance abuse. As discussed below, the different appearance in the photographs would have undermined the prosecution's case that she was a sweet naïve teen and explained in part why Mr. Dworak might not have recognized the two photographs of her that he was shown during police interviews. The error deprived Mr. Dworak

of his right to present a defense, to confront and cross-examine witnesses, to due process of law and a fair trial, to a reliable guilt and penalty determination, and to be free from cruel and unusual punishment. (U.S. Const., 5th, 6th, 8th, 14th Amends.; Cal. Const., art. I, §§ 7, 15, 16, 17, 24, 28, subd. (d).)

B. Proceedings Below.

The prosecution moved to introduce three photographs of Hamilton while alive. (2 CT 361-378 [prosecution motion].) The prosecution argued that the photographs were relevant because detectives had shown two of them to Mr. Dworak during interviews and the third depicted Ms. Hamilton wearing jewelry that corroborated the witnesses or explained physical evidence. (2 CT 361-378.) The first photograph showed Ms. Hamilton from the waist up, outdoors, smiling and wearing a backpack. (2 CT 363, 373 [Grand Jury Exhibit No. 3A; later People's Exhibit No. 18].) The prosecutor represented that the photograph was taken a few weeks or months before her death while she was at a drug rehabilitation camp in New Mexico. (2 CT 363.) Before the grand jury, her father testified that the photograph was taken a few months before she died. (1 RT 41.)

The second photograph depicted Ms. Hamilton from the waist up, smiling and wearing a summery dress. (2 CT 375 [Grand Jury Exhibit No. 3B; later People's Exhibit No. 19].) This photograph was taken several months before the first photograph. (2 CT 363.)

The third photograph showed Hamilton holding a cat in front of a piano with family photographs. (2 CT 377 [Grand Jury Exhibit No. 3C; later People's Exhibit No. 16].) This photograph was taken when Ms. Hamilton was 16 years old. (2 CT 363; 1 RT 42.)

The defense opposed admission of the three photographs as irrelevant, cumulative, and prejudicial and sought to admit another photograph, Ms. Hamilton's booking photograph from one of her juvenile arrests. (2 CT 416-423.) Defense counsel argued that the prosecution photographs presumably showed Ms. Hamilton when she was not using drugs, although it was undisputed that she was under the influence on April 21, 2001. (2 CT 418.) Counsel argued that any probative value of the three prosecution photographs was far outweighed by their prejudicial nature and that the photographs were irrelevant to issues. (2 CT 418.) The first two photographs show the same type of image,

were not probative of a disputed issue, and were cumulative in nature. (2 CT 418.) The third photograph was irrelevant to show jewelry because that matter was not yet disputed and would provoke an excessively emotional response with the cat and family photographs. (2 CT 423.)

Defense counsel also sought to introduce a highly probative booking photograph of Ms. Hamilton at the time of her juvenile arrest on May 6, 2000, with the booking information removed. (2 CT 419-420, 423.) Counsel argued that, at the time of her death, Ms. Hamilton had begun using drugs again and had methamphetamine in her system, so the photograph was more probative of her appearance than the happy family photographs. (2 CT 419-420.) The defense proposed cropping the photograph to eliminate any booking information. (2 CT 420.)

The prosecution inaccurately argued that the photograph of Ms. Hamilton was taken when she was 15 years old and arrested for shoplifting. (4 RT 539.)

The court ruled the first two photographs of Ms. Hamilton offered by the prosecution were clearly admissible because they were photographs that Mr. Dworak had been shown during the investigation and he had denied recognizing the photographs. (4

RT 537; People's Exhibit Nos. 18, 19.) The court ruled that the third photograph was relevant to show the type of jewelry that Ms. Hamilton typically wore, but ordered the cat and family photographs excised from the photograph. (4 RT 537-538; People's Exhibit No. 16.) The court denied the defense motion to introduce Ms. Hamilton's booking photograph, stating that there was no indication that she was under the influence in the photograph, and, without that link, the photograph was excluded. (4 RT 540.)

The following evidence was then adduced. The three photographs were identified as Ms. Hamilton by her father, her sister, Corianne, and the friend she was with in the days before her death, Matt Zeober. (11 RT 2045-2047, 2085, 2095; People's Exhibit No. 16; 2 Supp. CT 342 [color image].) As to the photograph with the back pack, her father now testified that it was "probably taken within one year" or a couple of years of her death. (11 RT 2047; People's Exhibit No. 18; 2 Supp. CT 344 [color image].) As to the photograph of her in the summery dress, her father now testified that it was taken within a couple of years of her death. (11 RT 2047; People's Exhibit No. 19; 2 Supp. CT 389.)

Photographs of Ms. Hamilton had been shown to Mr. Dworak during the three police interviews. People's Exhibit No. 18 was shown in the first and third interviews (13 RT 2379 [Smith], 2402 [Montagna]), and People's Exhibit No. 19 was shown in the second interview (13 RT 2402 [Montagna]). In all three interviews, Mr. Dworak denied recognizing or knowing the women in the photographs he was shown and generally denied the women in the two photographs were any of the prostitutes he had frequented. (6 CT 1763-1764, 7 CT 1849, 1857.)

C. Standard Of Review.

An evidentiary ruling on the admission of photographs is reviewed for abuse of discretion. (*People v. Raley* (1992) 2 Cal.4th 870, 895.)

D. The Court Erred When It Excluded Ms. Hamilton's Booking Photograph.

The rights to due process of law, compulsory process, and confrontation encompasses a defendant's right to present evidence in his own defense. (U.S. Const., 5th, 6th, 14th Amends.; *Washington v. Texas*, supra, 388 U.S. at pp. 18-19; *Chambers v. Mississippi, supra,* 410 U.S. at p. 302 [due process and fair trial right to present witnesses]; *Pennsylvania v. Ritchie*,

supra, 480 U.S. at p. 56 [Sixth Amendment right to put evidence before the jury].) A fundamental element of due process of law is the right to present a defense, i.e., the defendant's version of the facts, not just the prosecution's version. (*Washington v. Texas*, *supra*, 388 U.S. at p. 19.)

The right to present defense evidence must, in appropriate circumstances, bend to accommodate other legitimate interests in the judicial system. (*Michigan v. Lucas, supra,* 500 U.S. at pp. 149; *Rock v. Arkansas, supra,* 483 U.S. at p. 55; *Chambers v. Mississippi*, *supra*, 410 U.S. at p. 295.) A defendant cannot be arbitrarily denied his right to present relevant, material, and vital evidence. (*United States v. Valenzuela-Bernal*, supra, 458 U.S. at p. 867; *Washington v. Texas*, *supra*, 388 U.S. at p. 16.) State rules of evidence may not be applied "mechanistically to defeat the ends of justice." (*Chambers v. Mississippi*, *supra*, 410 U.S. at p. 302.) These standards apply to exclusion of an entire class of evidence or, as here, where a trial court excludes evidence in an exercise of its discretion. (*Green v. Georgia, supra,* 442 U.S. at p. 97; *Crane v. Kentucky, supra,* 476 U.S. at pp. 687-691; *Smith v. Illinois*, *supra*, 390 U.S. at p. 133.) "[R]elevant evidence

shall not be excluded in any criminal proceeding." (Cal. Const., art. I, § 28, subd. (d); Evid. Code, § 351 [accord].)

Where a photograph of a victim while alive has a bearing on a contested issue in a case, the photograph may be admitted. (*People v. Zapien* (1993) 4 Cal.4th 929, 983.) The booking photograph of Ms. Hamilton bore on a contested issue. The prosecution presented 18-year-old Hamilton as a sweet naïve girl who would never have taken up with an older man like Mr. Dworak, who would never have worked as a prostitute, who was eager for her father to take her home, and who would never have changed plans, failed to show up, or let her father down. The young girl shown in the three prosecution photographs supported the prosecution theory, as they all showed Ms. Hamilton, smiling and demurely dressed, with her shining face well-scrubbed. Ms. Hamilton appears bright-eyed in all three photographs and not under the influence of drugs.

Admission of the booking photograph, on the other hand, would have shown how she had actually looked at other times and how she well might have looked that night. Toxicological tests showed a high amount of methamphetamine in her system, as well as marijuana by-products, and Mr. Zeober had testified

that she had smoked both drugs with him and other friends. (11 RT 2102; 12 RT 2245; People's Exhibit No. 32.) The prosecution conceded in closing argument that the methamphetamine level was so high that Ms. Hamilton had ingested sometime on Saturday evening, despite Mr. Zeober's denial that she had done so at his house. (15 RT 2725, 12 RT 2124-2125.) Her father had testified before the grand jury that, since her return from rehabilitation in February, she had begun using drugs again, that it was not unusual for her not to go home at night, and that he was not concerned when Ms. Hamilton was not at Ralphs because she had a history of being "flaky." (2 CT 487.) The photograph would have undermined the prosecution's theory that Ms. Hamilton wanted to go home so badly that she would never have changed plans or failed to meet her father.

The court's given explanation for not permitting the booking photograph to come in does not hold up under scrutiny. The court excluded the photograph because there was no evidence Ms. Hamilton was under the influence when the photograph was taken. (4 RT 540.) Whether someone is under the influence does not need expert opinion; lay opinion suffices. (*People v. Williams* (1988) 44 Cal.3d 883, 914-915 [manifestation

of drug intoxication are sufficiently common today that lay persons are capable of recognizing them].) The jury was perfectly capable of determining whether Ms. Hamilton looked intoxicated in the booking photograph. Further, Ms. Hamilton's father had testified before the grand jury that Ms. Hamilton abused alcohol, marijuana, and methamphetamine and, in October 2000, shortly after her arrest in the booking photograph, entered a court-ordered rehabilitation program in New Mexico. (2 CT 486.) The level of methamphetamine in Ms. Hamilton's blood meant that she had ingested methamphetamine sometime on Saturday evening, probably within six hours of her death, without Mr. Zeober's knowledge. (15 RT 2725, 12 RT 2112-2113, 2124-2125.)

But the defense did not need to prove Ms. Hamilton's disheveled appearance in the booking photograph was solely the result of ingesting drugs in order for the photograph to be admissible. Ms. Hamilton had left home Friday morning, smoked marijuana and ingested methamphetamine all day with Mr. Zeober and other friends, spent Friday night at Zeober's, wore the same clothes on Saturday as she had the day before, and commented on wanting a shower on Saturday. (11 RT 2102-2105.) In other words, she probably looked disheveled and as if

she was on drugs, much as she did in the booking photograph. It was sufficient for admissibility that it was a photograph of Ms. Hamilton at another time which presented a different image than the picture-perfect family photographs the prosecution was permitted to introduce.

In *People v. Zapien, supra*, 4 Cal.4th 929, this Court found a photograph of an attractive and well-dressed victim was relevant, where the motive for murder was the anger and jealousy of the defendant's sister over her husband's affair with the victim. (*Id.* at p. 983.) The photograph of the good-looking woman tended to show the grounds for jealousy. (*Ibid.*) In *People v. Cooper* (1991) 53 Cal.3d 771, this Court found photographs of the victims while alive relevant to assist the jury in determining whether one defendant alone could have killed two adults and one child. (*Id.* at p. 821.) Similarly, here, the booking photograph was relevant, where it showed Ms. Hamilton as she had in fact appeared at other times and might have appeared that weekend.

The photograph would also have undermined the prosecution's inference that Mr. Dworak must have been lying when, after seeing two different photographs of Ms. Hamilton, he

denied recognizing or knowing her, yet had had consensual sex with her. First, the two photographs were of unknown vintage, as her father gave differing dates on how recent they were. (11 RT 2045-2047.) The booking photograph could be specifically dated to one year before her death. The third photographs showed her at 16 years old; two years for an adolescent is significant.

Second, when pushed by police about whether the photograph of Ms. Hamilton might have been a prostitute he had frequented or a one-night stand, Mr. Dworak said he did not think she looked like the white prostitute, who "looked a little hard" (7 CT 1854) and "looked a lot worse than that" (7 CT 1863); according to him, almost all the prostitutes were on drugs. (7 CT 1816, 1863.) He did not think Ms. Hamilton's photograph looked like the white one, who "looked a little hard" (7 CT 1854) and "looked a lot rougher" than the picture of Ms. Hamilton (6 CT 1770). The white prostitute had "kind of a dirty brown, dirty blonde" hair (6 CT 1777) and was "[k]ind of short, kind of dirty. Ragged" (7 CT 1815) and "mid-twenty something" (7 CT 1816), although he later described her as having bleached blond hair (7 CT 1816). The booking photograph of Ms. Hamilton looks like

most of Mr. Dworak's descriptions of the white prostitute; the photograph showed a hard, ragged-looking young woman, possibly in her mid-20's, with dirty, unkempt brownish-blondish hair. However, Mr. Dworak had never been shown the booking photograph of Ms. Hamilton. Had the jury seen that Ms. Hamilton sometimes looked dirty, ragged, and unkempt, it would have made clear to the jury why he might not have recognized her as the wholesome and beaming girl in the two photographs he was shown.

E. The Error Was Prejudicial.

An error of constitutional dimension requires reversal unless the appellate court finds beyond a reasonable doubt that the error was harmless. (*Chapman, supra,* 386 U.S. at p. 24.) The burden of showing the harmlessness of the error rests on the party that benefited from the error, i.e., the prosecution. (*Ibid.*) Even if the error were considered one of state law, reversal is required because there is a reasonable probability that a result more favorable to the appellant would have been reached in the absence of the error. (*Watson, supra,* 46 Cal.2d at p. 836.) A reasonable probability is one sufficient to undermine confidence

in the outcome of the proceedings. (*Strickland v. Washington* (1984) 466 U.S. 668, 694; *In re Neely* (1993) 6 Cal.4th 901, 909.)

The impact of a trial court's evidentiary errors must be assessed in light of the overall strength of the prosecution's case. (*People v. Fudge, supra,* 7 Cal.4th at pp. 1075, 1103-1104.) As set forth in Argument I, (E), Prejudice, *ante*, incorporated herein by reference, the objective record in this case shows that the evidence against Mr. Dworak was anything but overwhelming. There were no eyewitnesses, no confessions, no genuine admissions, no definitive physical evidence of rape, no definitive cause of death, and no definitive homicidal manner of death.

Second, the prosecutor's argument added to the prejudice. The United States Supreme Court has recognized that strong evidence of prejudice is shown by the prosecutor's reliance on evidence during closing argument as persuasive evidence of guilt. (*Kyles v. Whitley, supra*, 514 U.S. at p. 444.) "Evidence matters; closing argument matters; statements from the prosecutor matter a great deal." (*United States v. Kojayan* (9th Cir. 1993) 8 F.3d 1315, 1323; *Horton v. Mayle* (9th Cir. 2005) 408 F.3d 570, 580.)

In closing argument, the prosecutor repeatedly criticized Mr. Dworak's story that he did not know Ms. Hamilton and had

not seen her before. (15 RT 2700, 2701.) The prosecutor argued that Mr. Dworak's use of prostitutes meant that he "had absolutely no reason to lie about never having seen Crystal Hamilton before, about not knowing her. We're not talking about Kobe Bryant here. We're not talking about somebody who was afraid to admit infidelity. He admitted that in spades. But he looked at Crystal Hamilton's picture, said, 'Nope, don't know her.' That's a guilty conscience." (15 RT 2714.) Later, she again and again reminded jurors that Mr. Dworak had looked at Ms. Hamilton's photographs and denied recognizing her. (15 RT 2732, 2733, 2771, 2773, 2774 ["denied, denied, denied knowing Crystal Hamilton"], 2777, 2778 ["he lied when looking at Crystal Hamilton's photograph"].)

In light of the significance the prosecutor attached to Mr. Dworak's denials that he recognized neither of the wholesome photographs of Ms. Hamilton and the prosecutor's use of that as consciousness of guilt, there is no reason to believe the jury would not have agreed with her. A jury permitted to view the booking photograph to see how Ms. Hamilton appeared at other times might not have characterized Mr. Dworak's denials as lies and might not have attributed consciousness of guilt to those denials.

Even if this Court deems the prejudice insufficient for reversal of the guilt phase, reversal of the penalty phase is required because the trial court's erroneous ruling also denied Mr. Dworak his Eighth Amendment right to a reliable sentencing determination. (See *People v. Terry, supra,* 61 Cal.2d at pp. 137, 145-146 [jury may determine guilt has been proven beyond reasonable doubt but still demand greater degree of certainty for imposition of death penalty].) Mr. Dworak was effectively prevented from presenting a potential mitigating factor in violation of the Eighth and Fourteenth Amendments. (See, e.g., *Eddings v. Oklahoma, supra,* 455 U.S. at p. 110; *Lockett v. Ohio, supra,* 438 U.S. at p. 604.) To assess error at the penalty phase of a capital trial, this Court determines whether there is a "reasonable possibility" that any of them affected the verdict. (*People v. Brown, supra,* 46 Cal.3d at p. 447.)

The prosecutor used Mr. Dworak's failure to recognize the pictures of Ms. Hamilton in the penalty phase argument as well, to urge the jury punish him for lack of remorse, arguing to the jury that, "[t]wo years later when the police talk to him about this crime, when they show him a picture of her, what does he do? Does he break down sobbing and apologizing for what he's done?

For what happened that night? Does he admit everything that we know he did to her but explain it in some way, give some explanation that in any way mitigates what he did to her? No, no, no, no. He lies. He lies and lies." (18 RT 3275.) There is a reasonable possibility the error affected the jury's penalty phase decision.

F. Conclusion.

The court prejudicially erred when it admitted three photographs of Ms. Hamilton, well-groomed and smiling, while denying admission of a photograph of Ms. Hamilton showing how she appeared at other times. Reversal is required.

III.

THE TRIAL COURT PREJUDICIALLY ERRED AND VIOLATED MR. DWORAK'S 5TH, 6TH, 8TH, AND 14TH AMENDMENT RIGHTS BY EXCLUDING RELEVANT EXCULPATORY EVIDENCE THAT DISCOVERY OF THE BODY WAS PUBLICLY KNOWN AT THE TIME HE WAS INTERROGATED.

A. Introduction.

Defense counsel sought to introduce local newspaper articles about the discovery of Ms. Hamilton's body, to show that her death was widely publicized, such that Mr. Dworak would have had an opportunity to know about it when he was interviewed by police on May 12, 2003 and referred to "a deceased victim." The evidence would also have helped to rebut the prosecution's argument that, because Mr. Dworak's remark showed that, since he knew Ms. Hamilton was dead without being told, he must have been the one who killed her.

The error deprived Mr. Dworak of his right to present a defense, to confront and cross-examine witnesses, to due process of law and a fair trial, to a reliable guilt and penalty determination, and to be free from cruel and unusual punishment. (U.S. Const., 5th, 6th, 8th, 14th Amends.; Cal. Const., art. I, §§ 7, 15, 16, 17, 24, 28, subd. (d).)

B. Proceedings Below.

After the defense had rested, defense counsel moved to introduce into evidence three newspaper articles dealing with Ms. Hamilton's death. (14 RT 2649.) The articles were from the *Ventura Star*, dated April 23, 2001 ["Unidentified female's body found"] (5 CT 1316); April 24, 2001 ["Body on beach was county woman; Woman found on beach was 18-year-old from Oxnard"] (5 CT 1317-1318); and April 25, 2001 ["Sheriff releases victim's photo"] (5 CT 1319). (Court's Special Exhibit No. 4; 5 CT 1316-1319.) The gist of all the articles was the same -- that a body had been discovered on a beach south of Mussel Shoals, that it had been quickly identified as that of Crystal Hamilton, that she had drowned, that investigators had not determined whether the drowning was criminal or accidental, that the Sheriff's Department was going to investigate as thoroughly as it could, and that authorities had not ruled anything out. (5 CT 1316-1319.)

Police had interrogated Mr. Dworak three times before arresting him, and tapes of those three interviews were played for the jury, including an audio tape of the first interview on May 12, 2003. (12 RT 2337, 2339-2340, 2373-2374, 2377-2378;

People's Exhibit Nos. 46 [tape], 46B [transcript]; 6 CT 1743-1783.) In the May 12, 2003 interview, the following colloquy occurred among Mr. Dworak and detectives Rubright and Smith:

> [RUBRIGHT]: . . . Because it's important because if we -- 'cause we are gonna continue this investigation.
>
> [SMITH]: Yeah. We're --
>
> [MR. DWORAK]: Well, yes it is if you have a deceased victim. Yeah, it's something you guys are gonna continue for as long as it takes. (6 CT 1766.)

Defense counsel argued that the articles were contained in a newspaper of general circulation through Ventura County, the *Ventura Star*, and that the information became "such a matter of notoriety that one can reason the defendant would have known about it." (14 RT 2650.) Defense counsel noted that the prosecution was relying upon Mr. Dworak's statement about the deceased victim as an admission, when the fact was a matter of common knowledge throughout the county. (14 RT 2651.) The prosecution opposed introduction of the articles for lack of foundation that those articles bore on the admission Mr. Dworak made during the interrogation. (14 RT 1651.) The court declined to admit the evidence, based on a lack of foundation. (14 RT 2653.)

C. Standard of Review.

Exclusion of evidence is reviewed for an abuse of discretion. (*People v. Viera, supra*, 35 Cal.4th 264, 292.)

D. The Court Erred When It Excluded The Evidence That Ms. Hamilton's Death Was Publicly Known At The Time Mr. Dworak Was Interrogated.

The right to due process, compulsory process, and confrontation under the federal Constitution includes the right to present witnesses and evidence in defense. (U.S. Const., 5th, 6th, 14th Amends.; *Washington v. Texas, supra,* 388 U.S. at pp. 18-19; *Chambers v. Mississippi, supra,* 410 U.S. at p. 302; *Pennsylvania v. Ritchie*, supra, 480 U.S. at p. 56.) The right to present the defendant's version of the facts is a fundamental element of due process of law. (*Washington v. Texas, supra*, 388 U.S. at p. 19.)

The state may curtail the right to present defense witnesses and testimony for legitimate reasons. (*Michigan v. Lucas, supra*, 500 U.S. at p. 149; *Rock v. Arkansas, supra*, 483 U.S. at p. 55; *Chambers v. Mississippi, supra*, 410 U.S. at p. 295.) The may not arbitrarily deny a defendant the presentation of testimony that is "'*relevant* and *material*, and . . . *vital* to the defense.'" (*United States v. Valenzuela-Bernal, supra,* 458 U.S. at p. 867, quoting *Washington v. Texas, supra*, 388 U.S. at p. 16,

emphasis original.) And, of course, a state may not apply a rule of evidence mechanistically. (*Chambers v. Mississippi*, *supra*, 410 U.S. at p. 302.) Such rules apply not only where state law excludes an entire class of evidence, but also, here, where a trial court's exercises discretion to exclude evidence. (*Green v. Georgia*, *supra*, 442 U.S. at p. 97; *Crane v. Kentucky, supra,* 476 U.S. at pp. 687-691; *Smith v. Illinois, supra,* 390 U.S. at p. 133.)

Here, the prosecution relied upon a remark by Mr. Dworak during one of his police interviews as an admission. i.e., a statement acknowledging a fact tying him to the murder. Deborah Rubright, the interviewing officer, testified that she had introduced herself as a detective and did not tell Mr. Dworak on what case she was working. (13 RT 2339.) Based on Mr. Dworak's remark during the interview that the officers would naturally continue working on the case "if you have a deceased victim" (6 CT 1766), the prosecution characterized Mr. Dworak's statement as an admission. To negate the admission, the defense relied in part on a statement by one detective earlier in the interview as tipping Mr. Dworak off that the investigation was a homicide investigation. When the detectives had shown Mr. Dworak a photograph of Ms. Hamilton, he had asked how old she

was, and Detective Smith said, "I think she's 19. She would have been." (6 CT 1763.) Mr. Dworak repeated the statement. (6 CT 1263.) Thus, the defense argued, the detective's use of the past continuous conditional -- saying Ms. Hamilton would have been 19, i.e., if she had lived -- made it clear to Mr. Dworak that they were speaking about a dead victim. (15 RT 2815-2818.)

However, the court's exclusion of the newspaper articles undercut a complete defense to this characterization of his statement as an admission. The fact that the local newspapers had carried multiple stories about the case *for two years* before police first interviewed Mr. Dworak and that the case was common knowledge in the community would have more fully subverted the prosecution's theory that Mr. Dworak could only have known the woman they were talking about was dead because he had killed her.

E. <u>The Error Was Prejudicial.</u>

An error of constitutional dimension requires reversal unless the appellate court finds beyond a reasonable doubt that the error was harmless. (*Chapman, supra,* 386 U.S. at p. 24.) Here, the burden of showing the harmlessness is on the state, because it benefited from the error. (*Ibid.*) Even if the error were

considered one of state law, reversal is required because there is a reasonable probability that a result more favorable to the appellant would have been reached in the absence of the error. (*Watson, supra,* 46 Cal.2d at p. 836.) A reasonable probability is one sufficient to undermine confidence in the outcome of the proceedings. (*Strickland v. Washington, supra,* 466 U.S. at p. 694; *In re Neely, supra*, 6 Cal.4th at p. 909.)

As set forth in Argument I, (E), Prejudice, *ante*, and incorporated herein by reference, the evidence of guilt was not overwhelming. Notably, there were varying expert opinions on key issues. Prejudice is exacerbated when an error is exploited, rather than muted, in the prosecutor's closing argument. (*People v. Lee* (1987) 43 Cal.3d 666, 677.) Here, the prosecution attached "smoking gun" significance to what it characterized as Mr. Dworak's admission, i.e., his statement that they were asking about someone who was dead. In closing argument, after summarizing much of the evidence against Mr. Dworak, including criminal propensity, the tide data, Ms. Hamilton's injuries, and the sperm deposit, the prosecutor argued:

> But you know what? The defendant himself gives you one of the absolutely best pieces of evidence in this case. In his very first interview with Detective

Rubright and Detective Smith, he makes a statement that should erase any question in your mind as to whether or not this defendant raped and murdered Crystal Hamilton.

If you recall, Detective Rubright testified that she just knew the defendant was going to be coming in for his sex offender registration. She passed through a couple of people, "Just let me know when he shows up." That was all she said.

She gets a phone call that he shows up. He shows up at the front desk. She walks out to him, "Hi, my name is Deborah Rubright. I'm a detective with the Sheriff's Department." That's it. "I'd like to talk to you about a case. Would you mind talking to me."

"Sure, not a problem." He walks with her into an interview room and everything else that is said between those two is picked up on tape. Absolutely everything.

You have the interview in evidence. Beginning of the interview they're just talking to him. It's very jovial. Detective Smith and Rubright are in there. He's talking about having sex with women besides his wife, he's talking about the prostitutes, et cetera, where he works, what kind of car he's driving, things of that nature.

And then he says, "So what's this case all about, ladies?"

All they do is put a picture down on the desk.

"Do you know her? Does she look familiar?"

"Nope. Never seen her."

The detectives back away. They talk some more about his marriage, they talk about his work, and

they come back to the picture again later on in the interview. And they say again:

"You know, is it possible she's one of the prostitutes that you were with?"

"No, no, the one I was with looked much harder than that, looked more rugged" he describes.

Okay. So they back away again. They come back to the picture yet again:

"Are you sure you don't know her? You're pretty good with the names. Does the name Crystal Hamilton ring a bell?"

"No, don't know her."

He talks about raping Cynthia, he talks about serving time in prison, talks about how he doesn't want to do that again, and the interview starts to wind down. He probably thinks he's doing great. He's admitted some things. He probably thinks the cops already know. He's denied knowing Crystal, which was a big one for him. He's acted cooperative. He's acted just like an innocent person would act he thinks.

He's about to walk out of there. He is walking out of there, and then the detectives thank him for coming in. Detective Rubright says:

"You know, we're going to be talking to a lot of people, because the case is important."

That's all she says. And what does he say?

"Well, yes, it is if you have a deceased victim."

Oops. They never told him that Crystal Hamilton was dead. They never told him what the nature of

> the case was. They never told him what department they worked for. All they said was they worked for the Sheriff's Department. They didn't say major crimes. They didn't say homicide. All Debbie Rubright said when she first met him at the door was she's a detective, talk to me about a case.
>
> And when he asked, "So what's this all about, ladies?" They just put a picture in front of him. They didn't tell him anything. He's a rapist. Why would he ever, ever say something like that? Why would he ever think to assume that Crystal Hamilton was dead?
>
> That, ladies and gentlemen, is called an admission. And that is called a guilty defendant.
>
> Those are the facts of this case proven beyond any reasonable doubt.
> (15 RT 2779-2781.)

The United States Supreme Court has recognized that strong evidence of prejudice is shown by the prosecutor's reliance on evidence during closing argument as persuasive evidence of guilt. (*Kyles v. Whitley, supra,* 514 U.S. at p. 444.) Statements from the prosecutor in closing arguments matters a great deal. (*United States v. Kojayan, supra,* 8 F.3d at p, 1323.) This Court agrees that a court assessing prejudice treat the evidence as the prosecutor, and consequently the jury, treated it. (*People v. Powell, supra,* 67 Cal.2d at p. 57.) Here, the prosecution assigned remarkable meaning to the significance of the admission. Had

the newspapers not been excluded, that significance would have been severely undermined.

Even if this Court deems the prejudice insufficient for reversal of the guilt phase, reversal of the penalty phase is required because the trial court's erroneous ruling also denied Mr. Dworak his Eighth Amendment right to a reliable sentencing determination. (See *People v. Terry, supra,* 61 Cal.2d at pp. 137, 145-146 [jury may determine guilt has been proven beyond reasonable doubt but still demand greater degree of certainty for imposition of death penalty].) Mr. Dworak was effectively prevented from presenting a potential mitigating factor in violation of the Eighth and Fourteenth Amendments. (See, e.g., *Eddings v. Oklahoma, supra,* 455 U.S. at p. 110; *Lockett v. Ohio, supra,* 438 U.S. at p. 604.) To assess error at the penalty phase of a capital trial, this Court determines whether there is a "reasonable possibility" that any of them affected the verdict. (*People v. Brown, supra*, 46 Cal.3d at p. 447.) The jurors having viewed the admission as the prosecutor did in the guilt phase -- like a television crime drama "gotcha" moment, there was a reasonable possibility that the admission carried over into the penalty phase and removed any lingering doubt.

F. Conclusion.

The court prejudicially erred when it excluded from evidence the local newspaper's articles from two years before Mr. Dworak's police interview where the prosecution claimed he had made a devastating admission, because the articles would have undercut the prosecution's claim. Reversal is required.

IV.

THE TRIAL COURT PREJUDICIALLY ERRED AND VIOLATED MR. DWORAK'S 5TH, 6TH, 8TH, AND 14TH AMENDMENT RIGHTS WHEN IT ADMITTED INFLAMMATORY OTHER CRIMES EVIDENCE UNDER EVIDENCE CODE SECTION 1108.

A. Introduction.

Over defense objection, the trial court admitted guilt phase evidence about an incident in Napa County in 1986, in which Mr. Dworak had been convicted of rape and sexual penetration with a foreign object involving Cynthia W. The evidence was admitted as propensity evidence under Evidence Code section 1108. The court erred when it admitted prejudicial other crimes evidence. First, although this Court has upheld Evidence Code section 1108, its provisions violated Mr. Dworak's rights to due process of law, a fair trial, and reliable guilt and penalty phase verdicts under the federal Constitution. Second, the evidence should have been excluded under Evidence Code section 352's balancing test. Third, the jury instruction (CALJIC No. 2.50.01) wrongly permitted the jury to rely upon criminal propensity to commit sexual offenses as proof Mr. Dworak committed murder. The

error violated Mr. Dworak's rights to due process of law, a fair trial, and reliable guilt and penalty phase verdicts under the federal constitution and concomitant state provisions. (U.S. Const., 5th, 6th, 8th, and 14th Amends.; Cal. Const., art. I, §§ 7, 15, 16, 17, 24, 28, subd. (d).)

B. Proceedings Below.

At the time of trial, Evidence Code section 1108 read, in pertinent part, as follows:

> [I]n a criminal action in which the defendant is accused of a sexual offense, evidence of the defendant's commission of another sexual offense or offenses is not made inadmissible by section 1101, if the evidence is not inadmissible pursuant to section 352.

Evidence Code section 1101 read, in pertinent part:

> (a) Except as provided in this section and in sections 1102, 1103, 1108, and 1109, evidence of a persons character or trait of his or her character (whether in the form of an opinion, evidence of reputation, or evidence of specific instances of his or her conduct) is inadmissible when offered to prove his or her conduct on a specified occasion. [¶] (b) Nothing in this section prohibits the admission of evidence that a person committed a crime, civil wrong, or other act when relevant to prove some facts such as motive, opportunity, and intent, preparation, plan, knowledge, identity, absence of mistake or accident, or whether a defendant in a prosecution for an unlawful sexual act or attempted unlawful sexual act did not reasonably and in good faith believe that the

victim consented, other than his or her disposition to commit such an act.

Before trial, the prosecution filed a motion seeking admission under sections 1101 and 1108 of offenses from 1986 in Napa, the forcible rape and penetration with a foreign object of Cynthia W., of which Mr. Dworak had been convicted following a trial. The prosecution filed a written motion, and defense counsel filed a written opposition. (1 CT 116-120, 149-154, 2 CT 379-400.) The court granted the prosecution's motion and admitted the evidence after a hearing. (4 RT 505-526.)

In its written motion, the prosecution argued that the uncharged crimes evidence was admissible under section 1108 as "'evidence of the defendant's disposition to commit such crimes, and for its bearing on the probability or improbability that the defendant has been falsely or mistakenly accused of such an offense.'" (1 CT 149-150, quoting *People v. Soto* (1998) 64 Cal.App.4th 966, 984.) The prosecution contended that the evidence of the rape of Cynthia W. and Mr. Dworak's consequent

incarceration gave Mr. Dworak "a new motive, an intent, a plan and knowledge: he would have to kill his next victim." (1 CT 151.) The prosecutor also contended that the prior conduct was evidence that Mr. Dworak could not have reasonably and in good faith believed that Ms. Hamilton consented to have sex with him. (1 CT 152.) The prosecutor further contended that any prejudice to Mr. Dworak was minimal, because the uncharged offenses were not remote, since he had served nine years in prison and three years on parole and had been off parole for one year, eight months when Ms. Hamilton died, and they were not inflammatory compared to the instant offense. (1 CT 152-153.) The prosecutor finally contended that any dissimilarities between the rape of Cynthia W. and that of Ms. Hamilton were irrelevant under section 1108 because such a requirement would reintroduce section 1101's requirements. (1 CT 154.) The prosecutor also claimed, without explication or analysis, that the prior act provided "proof of virtually every type of evidence enumerated in" section 1101, subdivision (b). (1 CT 152.)

Defense counsel argued in its written motion that uncharged acts evidence should not be admitted because there was no evidence that a rape had occurred, only evidence that Mr.

Dworak had sexual relations with Ms. Hamilton. (2 CT 382.) Defense counsel argued that the rape of Cynthia W. was not admissible under section 1101, subdivision (b)(1) to prove identity because there was no unusual and distinctive nature of the charged and uncharged offenses sufficient to eliminate the possibility that someone other than the defendant committed the offense (2 CT 387-388) or to prove intent because there were no shared marks of similarity between the charged and uncharged offenses (2 CT 384-385); or to prove common design, plan, or scheme, because there were no common features between the charged offenses to indicate the existence of common plan (2 CT 385-386). Defense counsel further argued that, because Evidence Code section 352 is what prevents sexual propensity evidence from violating time-honored standards of due process, there is no presumption of admissibility. (2 CT 388.) There were no similarities between the offenses in Napa and the ones in Ventura. Cynthia W. was substantially older than Mr. Dworak, whereas Ms. Hamilton was substantially younger than him; the offenses against Cynthia W. occurred at her home; and a knife was used in the Cynthia W. case, but there was no evidence of a weapon or its use as to Ms. Hamilton. (2 CT 393.)

At the hearing, defense counsel further objected on due process grounds, arguing section 1108 by its own terms was inapplicable to a homicide prosecution, even where there is a rape charge and a rape special circumstances allegation, because of the impact on the homicide charge. (4 RT 505-514.) The court found the Cynthia W. offenses admissible under section 1108 as propensity evidence.[21] (4 RT 505.) The court found the admission was not precluded by section 352, reasoning that the offenses were not remote (since Mr. Dworak had been imprisoned for nine years after the offense and on parole for four years), that it had been proved beyond a reasonable doubt that Mr. Dworak had committed the offenses, that their introduction would not mislead or confuse the jury, and that the offenses were less inflammatory than the alleged rape and murder of Ms. Hamilton. (4 RT 505.) The court ruled that Cynthia W. could testify and that the fact of the conviction and the prison sentence could be elicited but that the investigating officers and the medical doctor who examined Cynthia W. after the offenses could not testify and

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[21]Because the court admitted the evidence under section 1108 and the jury was never instructed to limit its use of the evidence as it would have been had the evidence been admitted for Evidence Code section 1101 purposes, admissibility under 1101 is not discussed here.

that Mr. Dworak's denial of the offense was to be excluded. (4 RT 506, 513-524.)

The following evidence was then adduced, over defense counsel's renewed objection. (10 RT 1767.) On the late afternoon of October 25, 1986, Cynthia W. was unloading her car trunk at her home on a private road in Napa, when she heard footsteps, turned around, and saw Mr. Dworak. (10 RT 1855, 1857-1859.) Mr. Dworak asked about someone living down the road, and Cynthia W. said she had never heard of them and resumed her unloading. (10 RT 1860.) Mr. Dworak grabbed her from behind, put his right hand around her neck, and put a six- to eight-inch knife to her throat. There was a brief struggle; Cynthia W.'s thumb got cut and her glasses fell off. (10 RT 1861-1862.) Mr. Dworak told her to get in the back seat and take her jeans off, which she did with his help, and he took her panties and bra off. (10 RT 1862-1865.) Mr. Dworak told her to put her shirt over her face, which she did. (10 RT 1866.) He unzipped his pants and told her to grab his penis and make him hard, which she did, although she was unable to make his penis erect. (10 RT 1868.) Mr. Dworak put his finger inside her. (10 RT 1868.) He raped her, ejaculating; it was not painful. (10 RT 1868.) Mr. Dworak

told her to wait four or five minutes before getting up or he would come after her. (10 RT 1871.) She later had surgery on her thumb. (10 RT 1873.) Cynthia knew Mr. Dworak's mother through a sorority, but Mr. Dworak was a stranger to her. (10 RT 1860, 1874, 1876.) At the time, she identified Mr. Dworak from photographs. (10 RT 1873-1874.)

Before and after Cynthia W.'s testimony, the court read CALJIC No. 2.50.01 to the jury. (10 RT 1852-1853, 1878-1880.) The court stated:

> The evidence you are about to hear is being introduced for the limited purpose of showing that the defendant engaged in sexual offenses on an occasion other than that charged in this case. A sexual offense includes conduct made criminal by Penal Code section 261, which defines rape, or Penal Code section 289, which defines the crime of forcible sexual penetration. The elements of those crimes will be provided to you at a later time.
>
> If you find that the defendant committed a prior sexual offense, you may, but are not required to, infer that the defendant has a disposition to commit sexual offenses. If you find that the defendant has this disposition, you may, but are not required to, infer he was likely to commit and did commit the crimes of which he is accused.
>
> However, if you find by a preponderance of the evidence that the defendant committed a prior sexual offense, that is not sufficient by itself to prove beyond a reasonable doubt that he committed the charged crimes.

> If you determine an inference properly can be drawn from this evidence this inference is simply one item for you to consider along with all other evidence ultimately received in this trial in determining whether the defendant has been proved guilty beyond a reasonable doubt of the charged crimes. Unless you are instructed otherwise you must not consider this evidence for any other purpose. (10 RT 1853-1854, 1878-1880.)

Certified copies of the information, abstract, sentencing minute order, abstract of judgment, and disposition of arrest/ court action showing the convictions were introduced. (People's Exhibit No. 5; 6 CT 1648-1654.)

Before deliberations, the court again read CALJIC No. 2.50.01 to the jury, along with other instructions. (4 CT 926; 15 RT 2671-2672.) The third paragraph now provided:

> However, if you find beyond a reasonable doubt that the defendant committed prior sexual offenses, that is not sufficient by itself to prove beyond a reasonable doubt that he committed the charged crimes. (4 CT 926.)

C. Standards of Review.

Trial court rulings on the admissibility of evidence under Evidence Code sections 352 and 1108 are reviewed for abuse of discretion. (*People v. Story* (2009) 45 Cal.4th 1282, 1295; *People v. Lewis* (2001) 25 Cal.4th 610, 637; *People v. Ashmus* (1991) 54

Cal.3d 932, 973, overruled on other grounds in *People v. Yeoman* (2003) 31 Cal.4th 93, 117.)

An error in jury instructions is evaluated based on whether the court fully and fairly instructed on the law, considering the instructions as a whole. (*People v. Partlow* (1978) 84 Cal.App.3d 540, 558; *People v. Yoder* (1979) 100 Cal.App.3d 333, 338.) Whether an instruction correctly states the applicable law is reviewed under a de novo standard. (*People v. Posey* (2004) 32 Cal.4th 193, 218; *People v. Andrade* (2000) 85 Cal.App.4th 579, 585.) "If ambiguity appears, the reviewing court inquire[s] whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way that violates the Constitution." (*Estelle v. McGuire* (1991) 502 U.S. 62, 72 [112 S.Ct. 475, 116 L.Ed.2d 385]; U.S. Const., 14th Amend.; *People v. Kelly* (1992) 1 Cal.4th 495, 525-526.)

D. Admission Of Prior Acts Evidence For Criminal Propensity Purposes Violated Mr. Dworak's Rights To Due Process Of Law, A Fair Trial, And Reliable Guilt And Penalty Phase Verdicts Under The Federal Constitution.

This Court has upheld section 1108 and the admission of prior sexual acts to infer criminal propensity for such acts. (*People v. Falsetta* (1999) 21 Cal.4th 903, 913 ("*Falsetta*").) For

three centuries, common law prohibited the use of evidence of other crimes committed by a defendant when offered to prove that he had a character or propensity shown by those prior crimes that made it more likely that he committed the charged crime ("criminal propensity evidence"). (*Ibid.*) That prohibition against criminal propensity evidence applied in every jurisdiction in the United States. (*People v. Ewoldt* (1994) 7 Cal.4th 380, 392; see also *McKinney v. Rees* (9th Cir. 1993) 993 F.2d 1378, 1380-1138 & fn. 2 [citing statutes and cases].) The reasons for excluding criminal propensity evidence are that character evidence (1) is of slight probative value and may be very prejudicial; (2) tends to distract the trier of fact from the main question of what actually happened and permits it to reward good men and punish bad men because of their characters; and (3) may result in confusion of the issues and require extended collateral inquiry. (1 Witkin & Epstein, Evid. (4th ed. 2000) § 42, p. 375.) Such evidence also imposes on a defendant the "often unfair burden" of defending against both charged offenses and uncharged offenses and impairs judicial efficiency with "mini-trials" on the uncharged evidence. (*Falsetta, supra*, 21 Cal.4th at pp. 915-917.)

Section 1108 establishes an exception to the general prohibition against criminal propensity evidence. (*Falsetta, supra*, 21 Cal.4th at pp. 913-914.) Section 1108 explicitly exempts one class of evidence from the ban on criminal propensity evidence, by permitting "the admission, in a sex offense case, of the defendant's other sex crimes for the purpose of showing a propensity to commit such crimes." (*Falsetta, supra*, 21 Cal.4th at p. 907.) Due process requires proof of the criminal charge beyond a reasonable doubt (*In re Winship* (1970) 397 U.S. 358 [90 S.Ct. 1068, 25 L.Ed.2d 368]), and procedures which undermine the integrity of the fact finding process are prohibited (*Ohio v. Roberts* (1980) 448 U.S. 56, 64 [100 S.Ct. 2531, 65 L.Ed.2d 597], overruled on other grounds in *Crawford v. Washington* (2004) 541 U.S. 36 [124 S.Ct. 1354, 158 L.Ed.2d 177], as is evidence which is unnecessarily suggestive and conducive to irreparable mistake (*Stovall v. Denno* (1967) 388 U.S. 293, 301-302 [87 S.Ct. 1967, 18 L.Ed.2d 1199], overruled on other grounds in *Griffith v. Kentucky* (1987) 479 U.S. 314, 316 [107 S.Ct. 708, 93 L.Ed.2d 649]), such as propensity evidence.

Defense counsel argued that section 1108 by its own terms was inapplicable to a homicide prosecution, even where there is a

rape charge and a rape special circumstances allegation, because of the impact on the homicide charge. (4 RT 505-514.) However, this Court has expanded its holding in *Falsetta* since the trial in this case, finding that section 1108 evidence is admissible where no sexual offense is actually charged if the charged offense is felony murder, as long as the felony underlying the murder is a sexual offense. (*Story, supra,* 45 Cal.4th at p. 1294; *People v. Lewis* (2009) 46 Cal.4th 1255, 1288.)

Mr. Dworak asks this Court to reconsider its holdings in *Falsetta* and *Story*.[22]

Despite this Court's decision in *Falsetta, supra,* 21 Cal.4th at p. 917 that section 1108 does not violate due process on its

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[22]Mr. Dworak accepts that this Court will probably not reverse its holdings in *Falsetta* or in *Story* and will likely find that the other crimes evidence was admissible for all purposes under section 1108. Claims that *Falsetta* and *Story* were incorrectly decided and that the other crimes evidence was inadmissible are raised to preserve them for any future review in federal court. (See *Duncan v. Henry* (1995) 513 U.S. 364, 366 [115 S.Ct. 8876, 130 L.Ed.2d 865].) Only a brief and straightforward exposition of the grounds for these claims is made, in accord with this Court's preference for presentation of preservation claims "without extensive exploration and discussion." (*People v. Schmeck* (2005) 37 Cal.4th 240, 303-304 ("*Schmeck*"), overruled on other grounds in *People v. McKinnon* (2011) 52 Cal.4th 610, 637, citing *Vasquez v. Hillery* (1986) 474 U.S. 254, 257 [106 S.Ct. 617, 88 L.Ed.2d 598.) Counsel will provide any additional briefing this Court wishes.

face, Mr. Dworak asserts that admission of sexual propensity under section 1108 does indeed violate due process of law. (U.S. Const., 14th Amend.; *Spencer v. Texas* (1967) 385 U.S. 554, 569-587 [87 S.Ct. 648, 17 L.Ed.2d 606] (conc. & dis. opn. of Warren, C.J.].) Admission of relevant evidence offends due process when the evidence is so prejudicial as to render the trial fundamentally unfair. (U.S. Const., 5th, 14th Amends.; *Estelle v. McGuire, supra,* 502 U.S. at p. 72.) State law error permitting admission of propensity evidence rendering a trial fundamentally unfair violates due process and the right to a fair trial. (*Ibid.*; see also, *Garceau v. Woodford* (9th Cir. 2001) 275 F.3d 769, 773, rev'd on other grounds in *Woodford v. Garceau* (2003) 538 U.S. 202 [123 S.Ct. 1398, 155 L.Ed.2d 363]; *McKinney v. Rees* (9th Cir. 1993) 993 F.2d 1378, 1384 [erroneous admission of irrelevant prior acts evidence was prejudicial].)

Story's holding -- that felony murder is a sexual offense to which section 1108 applies when the underlying felony is a sexual offense -- is based on circular reasoning. Here, and in *Story*, evidence about prior sex crimes was admitted based on the conclusion that the charged felony murder was a sexual offense, even though the primary proof that the underlying sexual assault

had occurred was that same evidence of prior sex crimes. (*Story*, *supra*, 45 Cal.4th at p. 1294.) This court, among others, has frequently criticized such circular reasoning. (See, e.g., *In re Shapiro* (1975) 14 Cal.3d 711, 715, fn. 4; *People v. Espinosa* (2002) 95 Cal.App.4th 1287, 1321; *People v. Erving* (1998) 63 Cal.App.4th 652, 663-664.)

Moreover, in *Story*, there was at least independent evidence that the charged crime involved a non-consensual sexual assault. (45 Cal.4th at p. 1285 [highly unlikely that menstruating murder victim would have placed used bloody tampon beside her on mattress if sexual encounter was consensual].) Here, there was evidence of sexual intercourse, i.e., Mr. Dworak's semen in Ms. Hamilton's vagina. The prosecutor frenetically attempted to tie Ms. Hamilton's pre-mortem physical injuries to rape and to narrow the timeframe during which Mr. Dworak's semen could have been deposited as well as the timeframe during which Ms. Hamilton could have died in order to create a narrow window of time involving the semen deposit and death. However, such attempts were weak and self-contradictory inferences. The same inference about pre-mortem physical injuries could have tied those injuries to her murder by another.

E. The Court Erred When It Failed To Exclude The Evidence Under Evidence Code Section 352's Balancing Test.

Because criminal propensity evidence is so prejudicial, its admission requires extremely careful analysis. (*People v. Ewoldt, supra,* 7 Cal.4th at p. 404.) The Legislature explicitly provided that section 1108 evidence is not prohibited "if the evidence is not inadmissible pursuant to Section 352." (Evid. Code, § 1108, subd. (a); see also *People v. Soto* (1998) 64 Cal.App.4th 966, 983 [noting § 1108's legislative history's express reference to balancing analysis].) This Court has described section 352 as a safeguard that "strongly supports the constitutionality of section 1108" and warns that courts "must engage in a careful weighing process under section 352." (*Falsetta, supra,* 21 Cal.4th at pp. 916-917.) A trial court should not merely admit or exclude every proffered sex offense but "must consider such factors as its nature, relevance, and possible remoteness, the degree of certainty of its commission and the likelihood of confusing, misleading, or distracting the jurors from their main inquiry, its similarity to the charged offense, its likely prejudicial impact on the jurors, the burden on the defendant in defending against the uncharged offense, and the availability of less prejudicial alternatives to its

outright admission, such as admitting some but not all of the defendant's other sex offenses, or excluding irrelevant though inflammatory details surrounding the offense." (*Falsetta, supra*, 21 Cal.4th at p. 917.)

The trial court weighed the probative value of the Napa offenses against potential prejudice, finding (1) the offenses were not remote (since Mr. Dworak had been imprisoned for nine years after the offenses and then on parole for four years), (2) it had been proven beyond a reasonable doubt that Mr. Dworak had committed the offenses, (3) their introduction would not mislead or confuse the jury, and (4) the offenses were less inflammatory than the alleged rape and murder of Ms. Hamilton. (4 RT 505.) The court admitted the testimony of Cynthia W. and evidence of the conviction and prison sentence, but declined to admit testimony from the investigating officers or medical doctor who examined her after the assault. (4 RT 506, 513-524.)

The trial court's balancing test was defective, as was its outcome. The court correctly considered the certainty of its commission, which had been proven beyond a reasonable doubt, but erred in its arithmetic about remoteness, skirted over the

prejudicial impact on jurors, and concluded cursorily that it would not confuse or mislead jurors.

As to remoteness, the court erred when it stated that, of the 15 years between the Napa offense and Ms. Hamilton's death, Mr. Dworak had been in prison for nine years and on parole for four years; the court overlooked the two years Mr. Dworak had been off parole. The fact that Mr. Dworak was on parole for four years without revocation and then off parole for two years makes his initial offense farther removed in time. A defendant is entitled to an exercise of discretion by a court fully informed as to the facts. (See, e.g., *Hicks v. Oklahoma*, *supra*, 447 U.S. 343; *United States v. Tucker* (1972) 404 U.S. 443, 447 [92 S.Ct. 589, 30 L.Ed.2d 592]; *People v. Belmontes* (1983) 34 Cal.3d 335, 348, fn. 8; U.S. Const., 14th Amend.)

As to the likely prejudicial impact on the jurors, the court only considered that the offenses were less inflammatory than the alleged rape of Ms. Hamilton, presumably because she had been murdered and Cynthia W. was not. The calculus is not a rote consideration, i.e., lesser crimes come in to prove more serious crimes and graver crimes cannot come in to prove lesser ones. The prejudice of section 352 is "evidence that poses an

intolerable risk to the fairness of the proceedings or reliability of the outcome." (*People v. Booker* (2011) 51 Cal.4th 141, 187-199.) The likely prejudice is something that tempts the trier of fact to decide the case on an improper basis. Here, the jury had to hear Cynthia W. relive her assault when she thought it was all over and done with and had put it in the back of her mind. (10 RT 1855.) She had been afraid she "was gonna die" during the assault. (10 RT 1868.) This Court has suggested that the jury's knowledge that a defendant had been punished for the other crimes evidence prevents the jury from trying to punish a defendant for past crimes. (*People v. Balcom* (1994) 7 Cal.4th 414, 427.) However, while the jurors knew Mr. Dworak had been punished with incarceration, they also knew he had only served nine years of his 18-year sentence. (6 CT 1772, 1774.) If they did not hear the evidence in his interview, they no doubt heard the prosecutor reminding them. (15 RT 2709.) This knowledge could have enticed jurors to make sure Mr. Dworak was *really* punished this time.

The court skimmed over the likelihood of confusing, misleading, or distracting jurors *from their main inquiry*. Although the testimony itself did not consume a substantial

amount of time, the prosecutor's heavy emphasis on criminal propensity dominated much of the trial -- she began her opening statements and closing arguments with criminal propensity. Cynthia W. was her first witness. The first closing argument theme was that it was inevitable and unavoidable that Mr. Dworak would rape again and the only real question was when and whom. (15 RT 2692.)

The court failed entirely to consider the lack of similarity between the Napa offenses and the charged offenses. The only similarity was rape. The sexual assault on Cynthia W. occurred in the afternoon, at her isolated, rural home, while she was unloading groceries from her car. The alleged assault on Ms. Hamilton began in a residential and/or shopping area of a city, in the middle of the night. Ms. Hamilton was presumably transported to the beach, while the assault on Cynthia W. occurred where she encountered Mr. Dworak. A knife was present and actually used in the assault against Cynthia W., while there is no evidence of any knife use as to Ms. Hamilton. At the time, Cynthia W. was much older than Mr. Dworak by at least a decade or so, while Ms. Hamilton was much younger, by 13 years or more.

The court failed to look at the burden on Mr. Dworak and his defense team. Defense counsel told the court before Cynthia W. testified that the testimony was "fraught with grave peril for the defendant, and in my opinion and the opinion of many colleagues I've consulted, it would be absolutely foolhardy to engage in any cross-examination. So she'll be getting on and off as quickly as possible." (10 RT 1852.) Mr. Dworak was on trial for his life, but there was no defense against the testimony about the prior acts in any meaningful way. More importantly, there was no sufficient defense against two *inferences* created by section 1108, except for argument. Given that the prior offense occurred and the defendant admittedly committed it, how does the defense disabuse the jury that commission of the earlier offense always creates an inference of criminal propensity to commit sexual offenses and that inference always creates an inference that the defendant committed the current sexual offense?

The trial court further erred when it failed to consider the availability of less prejudicial alternatives, as directed in *Falsetta*, *supra*, 21 Cal.4th at pp. 917-918. Defense counsel asked the court to avoid the emotional testimony of Cynthia W.

and use the fact of the prior conviction and the prison sentence to prove the offense. (4 RT 516.) Rather than considering that alternative in the section 352 balancing test, the court erroneously stated that the prosecution was "not required to prove the details of the prior offense based on paperwork only, that they are permitted to produce evidence from the person who was the victim of that crime in order to further shed light on the circumstances potentially of how Mr. Dworak operates" and the prosecution is "not required to present the least probative evidence on the commission of that offense but are entitled to present evidence from the victim who suffered that offense." (4 RT 516.) The trial court inappropriately exercised its discretion in favor of the prosecution's purported right to present the most damaging evidence, even if highly prejudicial, rather than following this Court's guidance in *Falsetta,* which set forth just what defense counsel was proposing as part of the section 352 calculus to ensure section 1108 is applied constitutionally.

Finally, the court's balancing under section 352 included the expectation that any evidence that Mr. Dworak had denied the Napa offenses during his police interviews would be excluded. (4 RT 514-515.) The court permitted Mr. Dworak's admissions

that he had committed the Napa offenses, but specifically excluded "evidence of his denial of having committed that offense." (4 RT 515.) That did not happen. Rather, as set forth in the Statement of Facts, footnote 13, *ante*, the three police interviews of Mr. Dworak all contained, from his own mouth and in his own words, how he gamed the system by going to trial in the Napa offenses, even though he was guilty, permitting the jury to infer the same thing was happening here.

F. The Court Erred When It Instructed The Jury With CALJIC No. 2.50.01 Which Permitted Them To Rely Upon Criminal Propensity To Commit Sexual Offenses As Proof Mr. Dworak Committed Murder.

As set forth earlier, the jury was instructed with CALJIC No. 2.50.01, which tells jurors how to use section 1108 evidence. (4 CT 926; 10 RT 1852-1853, 1878-1879, 15 RT 2671-2672.)

Defense counsel did not object to the instruction. However, no such objection was necessary. Even absent objection, a defendant has a right to appellate review of any instruction affecting his substantial rights. (§ 1259; *People v. Brown* (2003) 31 Cal.4th 518, 539, fn. 7.) This Court should reach the merits of the matter.

This Court has upheld CALJIC No. 2.50.01 against challenges that it misled the jury. (*People v. Reliford* (2003) 29 Cal.4th 1007, 1012 ("*Reliford*").) However, in *Reliford*, the defendant had argued that the instruction misled the jury concerning both the limited purpose for which they were to consider the propensity evidence and the prosecution's burden of proof. (*Id.* at p. 1012.) That issue is not the one raised here, and thus *Reliford* does not resolve it. (*Nolan v. City of Anaheim* (2004) 33 Cal.4th 335, 343 [cases are not authority for propositions not considered therein].)

The issue here is whether the instruction tells jurors that they may use the inference of criminal disposition to commit sexual offenses to convict a defendant of malice murder. In pertinent part, this instruction told Mr. Dworak's jury that, "[i]f you find that the defendant committed a prior sexual offense, you may, but are not required to, infer that the defendant has a disposition to commit sexual offenses. If you find that the defendant has this disposition, you may, but are not required to, *infer he was likely to commit and did commit the crimes of which he is accused.*" (4 CT 926; 10 RT 1852-1853, 1878-1879, 15 RT 2671-2672, emphasis added.) In other words, the jury was told

that, if it found that Mr. Dworak had raped or sexually penetrated Cynthia W., it could infer that he has a disposition to commit sexual offenses and, from that inference, infer that he committed rape and *murder* (the charged crimes in this case).

"Section 1108's language makes clear that it 'is limited to the defendant's sex offenses, and it applies only when he is charged with committing another sex offense.'" (*Story*, *supra*, 45 Cal.4th at p. 1291, quoting *Falsetta*, *supra*, 21 Cal.4th at p. 916.) In *Story*, this Court determined whether a defendant had been accused of a sexual offense within the meaning of section 1108. (45 Cal.4th at p. 1291.) The only theory of first degree murder presented at trial was first degree felony murder with rape and burglary. (*Ibid.*) This Court concluded that "[t]his type of first degree murder unquestionably involved conduct proscribed by Penal Code section 1291." (*Ibid.*) Therefore, the defendant was accused of a sexual offense as defined by section 1108. (*Ibid.*) Furthermore, where a killing is prosecuted as a rape felony murder and the rape is separately charged, section 1108 applies and evidence of other sexual offenses may be used not only to determine whether a defendant is guilty of rape but also to

determine whether he committed murder during the course of a rape. (*Id.* at p. 1294.)

Here, the rape was separately charged and section 1108 by its own terms would apply to the rape and, under *Story*, would apply to murder during the course of a rape. However, the prosecutor proceeded on two theories of murder, first-degree felony murder during commission of a rape and first-degree malice murder. (4 CT 938-940 [CALJIC Nos. 8.10, 8.11, 9.40]; see also 15 RT 2698 [prosecutor argues in closing that Mr. Dworak "is guilty of murder under two different theories of first degree murder"], 2790 [this is "premeditation and deliberation"], 2793 ["guilty of premeditated and deliberate murder"].) CALJIC No. 2.50.01 told jurors they could use an inference of criminal propensity to commit sexual offenses to infer the commission of the charged offenses, which would include malice murder.

The Legislature's intent in enacting section 1108 was based on the inference that "the willingness to commit a sexual offense is not common to most individuals" so evidence of commission of a prior sexual offense is probative of the commission of other sexual offenses. (*Falsetta*, *supra*, 21 Cal.4th at p. 912.) There is no indication that the Legislature meant that commission of a prior

sexual offense is probative of malice murder -- or any other nonsexual offense. The inference given to the jury here in CALJIC No. 2.50.01 was not intended by the Legislature.

G. The Errors Were Prejudicial.

An error of constitutional dimension requires reversal unless the appellate court finds beyond a reasonable doubt that the error was harmless. (*Chapman, supra,* 386 U.S. at p. 24.) The burden of showing the harmlessness of the error falls on the party benefiting, here, the state. (*Ibid.*) Even if the error were considered one of state law, reversal is required because there is a reasonable probability that a result more favorable to the appellant would have been reached in the absence of the error. (*Watson, supra,* 46 Cal.2d at p. 836.) A reasonable probability is one sufficient to undermine confidence in the outcome of the proceedings. (*Strickland v. Washington, supra,* 466 U.S. at p. 694; *In re Neely, supra,* 6 Cal.4th at p. 909.)

As set forth in Argument I, (E), Prejudice, *ante*, incorporated herein by reference, the evidence against Mr. Dworak was not overwhelming.

The criminal propensity evidence was central to the prosecution case. The prosecutor began the trial with the Napa

offenses in her opening statement, as Mr. Dworak's motive for murder ("in the vain hope that a dead victim would not testify against him the way his last victim did") and devoted the first section of her opening statement to the facts of the Napa offenses, 5-1/2 pages. (10 RT 1777-1782.) Cynthia W. was the very first witness heard by the jury. (10 RT 1855-1877.) The prosecutor devoted much of her closing argument and rebuttal to the crimes against Cynthia W. The prosecutor began by arguing that it was inevitable and unavoidable that Mr. Dworak was going to rape and murder, comparing him to a "drunk driver careening down the road. You know it's going to happen." (15 RT 2692.) She continued:

> Exactly where he strikes and who would be his victim are really the only questions, because he was going to rape again. He is a rapist. And because a rape victim had already testified against him, he knew the risks of raping. He was going to make sure, though that that didn't happen again. He wasn't going to spend another 20 years in prison. He was going to kill his next rape victim. (15 RT 2692.)

The prosecutor repeatedly brought the jury back to Mr. Dworak's criminal propensity as a rapist. (15 RT 2694, 2702, 2706-2707, 2776-2777, 2778.) She described the evidence of the prior rape as "very damning evidence" that told a lot about who Mr. Dworak is.

(15 RT 2707.) "It tells you what his propensities are. He's hard-wired to rape. He's a sex offender. The law recognizes this, and that's why you got to hear about it." (15 RT 2707.) At this point, the prosecutor told the jury the critical part of the propensity instruction (15 RT 2708), and, in her PowerPoint presentation, reiterated it: "If you find that the defendant had this disposition, you may but are not required to infer that he was likely to commit and did *commit the crimes of which he is accused.*" (2 Supp. CT 427, emphasis added.) The prosecutor continued, arguing that "you can use those prior sex offenses, the rape, the forcible penetration with a foreign object that was his finger, you can use those offenses to think about what this man's disposition is, what was the nature of that contact with Crystal Hamilton . . . . Sex offenders don't change." (15 RT 2708.) Returning again and again to the theme, she described Mr. Dworak as "a monster, a predator, an angry, sexually frustrated, convicted rapist" (15 RT 2694) and a rapist with a propensity to rape (15 RT 2733).

There is no reason for this Court to treat evidence as any less crucial than the prosecutor did or than the jury no doubt did at the prosecutor's urging. (*People v. Cruz* (1964) 61 Cal.2d 861, 868.) The prosecutor spent more time urging the jury that Mr.

Dworak was guilty of malice murder than on felony murder. (15 RT 2698, 2785-2790, 2792, 2793.) She neared her conclusion in closing argument by arguing, "This defendant, ladies and gentlemen, is guilty of first degree premeditated and deliberate murder. He's stuck. The facts are the facts are the facts. They're not going to change. And applying them to the law of murder and rape and special circumstances is really easy." (15 RT 2793.)

Even if this Court deems the prejudice insufficient for reversal of the guilt phase, reversal of the penalty phase is required because the trial court's erroneous ruling also denied Mr. Dworak his Eighth Amendment right to a reliable sentencing determination. (See *People v. Terry, supra,* 61 Cal.2d at pp. 137, 145-146 [jury may determine guilt has been proven beyond reasonable doubt but still demand greater degree of certainty for imposition of death penalty].) Mr. Dworak was effectively prevented from presenting a potential mitigating factor in violation of the Eighth and Fourteenth Amendments. (See, e.g., *Eddings v. Oklahoma, supra,* 455 U.S. at p. 110; *Lockett v. Ohio, supra,* 438 U.S. at p. 604.) To assess error at the penalty phase of a capital trial, this Court determines whether there is a

"reasonable possibility" that any of them affected the verdict. (*People v. Brown, supra*, 46 Cal.3d at p. 447.) Here, there is a reasonable probability that the propensity evidence caused the jury to sentence Mr. Dworak to death, as well as convict him.

H. Conclusion.

The trial court erred when it admitted criminal propensity evidence against Mr. Dworak. Although this Court has upheld Evidence Code section 1108, Mr. Dworak asks it to reconsider whether its decision, resulting in the admission of section 1108 evidence, violates Mr. Dworak's rights to due process of law, a fair trial, and reliable guilt and penalty phase verdicts under the federal Constitution. The trial court's balancing test under Evidence Code section 352 was both a mis-understanding and an abuse of discretion. The jury instruction (CALJIC No. 2.50.01) wrongly allowed the jury to rely upon criminal propensity to commit sexual offenses as proof Mr. Dworak committed malice murder. Reversal is required.

V.

THE TRIAL COURT PREJUDICIALLY ERRED AND VIOLATED MR. DWORAK'S 5TH, 6TH, 8TH, AND 14TH AMENDMENT RIGHTS WHEN IT PERMITTED COLLEAGUES OF MR. DWORAK'S WIFE TO TESTIFY TO HER MOOD DURING THE WEEKEND OF MS. HAMILTON'S DEATH.

A. Introduction.

Over defense objection, the court permitted two witnesses to testify to irrelevant evidence about Mrs. Dworak's demeanor during the weekend of April 20, 21, and 22, 2001, from which the prosecutor argued it could be inferred that she and Mr. Dworak had fought and that he was angry that weekend. The admission of the evidence deprived Mr. Dworak of his state and federal constitutional rights to present a defense, to due process of law and a fair trial, to a reliable guilt and penalty determination and to be free from cruel and unusual punishment. (U.S. Const., 5th, 6th, 8th, 14th Amends.; Cal. Const., art. I, §§ 7, 15, 16, 17, 24, 28, subd. (d).)

B. Proceedings Below.

Over defense objection, the prosecution permitted two colleagues of Mr. Dworak's wife, Susannah Dworak, to testify to

her demeanor; one, to her demeanor when she called in to work on Friday, April 20 and the other, to her demeanor during the weekend of April 21 and 22, when she attended a conference away from home, the same weekend that Ms. Hamilton died. The court erred in overruling the defense objection on hearsay, relevance, and Evidence Code section 352 grounds.

Betty Hosler, the office administrator for the oral surgery group where Mrs. Dworak worked during April 2001, testified that, Mrs. Dworak did not work on Friday, April 20. (11 RT 1936-1939.) Over defense objection as hearsay, Hosler was allowed to testify that Mrs. Dworak called Hosler, saying that she was taking a vacation day and would not be in to work. (11 RT 1940.) Over defense objection to relevance and on Evidence Code section 352 grounds, Hosler was further permitted to testify to Mrs. Dworak's demeanor during the call, which Hosler described as "upset" and "crying." (11 RT 1940-1942.)

Another coworker, Beth Martin, testified that she and two other employees had attended a job certification conference in Irvine with Mrs. Dworak. (11 RT 1943-1944.) The four employees, including Martin and Mrs. Dworak, drove together to Irvine on the night of Friday, April 20. (11 RT 1944-1945.)

Martin shared a room with Mrs. Dworak; the only time the four employees left the hotel on April 21 and 22 was to have dinner together Saturday night. (11 RT 1945.) They drove home on Sunday. (11 RT 1945.) Over defense objection on relevance and Evidence Code section 352 grounds, Martin was also permitted to describe Mrs. Dworak's demeanor. (11 RT 1945-1946.) According to Martin, Mrs. Dworak was "quite upset. She had a rough day Friday, evidently, and she was, you know, very upset, very emotional, and she showed signs of that." (11 RT 1946.) They tried to cheer her up. (11 RT 1946.)

C. Standard Of Review.

A trial court's ruling on admission of evidence is reviewed under an abuse of discretion standard. *(People v. Lewis, supra,* 25 Cal.4th 610, 637; *People v. Ashmus, supra,* 54 Cal.3d at p. 973.)

D. The Court Should Have Excluded Evidence About Mrs. Dworak's Demeanor That Weekend.

The court erred when it overruled defense counsel's objection to testimony about Mrs. Dworak's demeanor on Friday, April 20, Saturday, April 21, and Sunday, April 22. The

testimony was irrelevant and more inflammatory than probative under Evidence Code section 352.

"No evidence is admissible except relevant evidence." (Evid. Code, § 350.) Relevant evidence is evidence that has any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action. (Evid. Code, § 210.) Mrs. Dworak's absence from home and her attendance at an out-of-town conference was material. But Mrs. Dworak's mood when she called in to work on Friday and her demeanor at the two-day conference were not probative of any disputed fact. No evidence of why she was upset was elicited, precluded by hearsay rules. Thus, the reason that she was upset was not divulged. However, the prosecutor relied on the irrelevant fact that Mrs. Dworak was upset that weekend to create an untenable and unsupported inference that she and her husband had fought, so that the prosecutor could portray Mr. Dworak as angry and ready to rape.

The evidence was also unduly inflammatory, particularly given the use made of it by the prosecutor. Under Evidence Code section 352, a court may exclude evidence if its probative value is substantially outweighed by the probability that its admission

will create a substantial danger of undue prejudice, of confusing the issues, or of misleading the jury. Evidence is unduly prejudicial when its nature inflames the jurors' emotions, motivating them not to use the information to logically and dispassionately evaluate a relevant point, but to reward or punish one side because of an emotional reaction. (*People v. Scott* (2011) 52 Cal.4th 452, 491.) Here, there was zero probative value. But the prejudice was apparent. Despite the fact that there was no evidence that Mrs. Dworak's distressed demeanor was attributable to her husband, the prosecutor relied upon the evidence for that inference and the jury would likely speculate along the same lines. The potential prejudicial danger, the likelihood that the jury would use the evidence for an illegitimate purpose, substantially outweighed any probative value. Furthermore, as argued below, the probability of improper prejudice was realized by the prosecution's argument.

E. <u>The Error Was Prejudicial.</u>

Any trial error, including state evidentiary error, that infuses the trial with unfairness that denies due process of law violates the due process clause of the United States Constitution. (U.S. Const., 14th Amend.; *Estelle v. McGuire*, *supra*, 502 U.S. at

p. 72.) An error of constitutional dimension requires reversal unless the appellate court finds beyond a reasonable doubt that the error was harmless. (*Chapman, supra,* 386 U.S. at p. 24.) The burden of showing the harmlessness of the error rests on the party that benefited from the error, i.e., the prosecution. (*Ibid.*) Even if the error were considered one of state law, reversal is required because there is a reasonable probability that a result more favorable to the appellant would have been reached in the absence of the error. (*Watson, supra,* 46 Cal.2d at p. 836.) A reasonable probability is one sufficient to undermine confidence in the outcome of the proceedings. (*Strickland v. Washington, supra,* 466 U.S. at p. 694; *In re Neely, supra,* 6 Cal.4th at p. 909.)

First, as set forth in Argument I, (E), Prejudice, *ante*, incorporated herein by reference, the evidence of guilt was not inordinate. There were no clear evidence of homicidal manner, since drowning can be accidental or suicidal. There were no percipient witnesses. There was no physical evidence linking Mr. Dworak to a criminal act. Although his DNA was found in Ms. Hamilton, there were no vaginal or genital injuries, so, at most, that showed consensual sexual intercourse.

Second, the prosecutor exploited the evidence about Mrs. Dworak's mood in closing argument, which magnified the prejudice. (See *People v. Lee, supra,* 43 Cal.3d at p. 677.) In closing, the prosecutor repeatedly characterized Mr. Dworak as "angry." (15 RT 2694, 2699, 2710, 2711, 2733, 2790, 2889, 2890, 2906.) She added, "[a]nd you know that he and his wife got in a huge fight that weekend." (15 RT 2710.) She continued, "[s]he called in to work, crying and upset" and "Beth Martin told that that whole weekend Susannah was upset and they were trying to cheer her up. You know what all that means. You know that means she and the defendant got in a huge fight that weekend. That Friday, they got in a fight." (15 RT 2710.) Later, she again drew the jury's attention to the matter, tying the anger to rape, saying "You know also he is a rapist. He's got a propensity to rape. He's angry at his wife. They're in a big fight. Wife is out of town." (15 RT 2733.) Eventually, the prosecutor no longer refers to the fight, but just that "You know he's angry that weekend." (15 RT 2790.)

The trial court's erroneous ruling also denied Mr. Dworak his Eighth Amendment right to a reliable sentencing determination. Even if the jury had still convicted Mr. Dworak of

special circumstances murder, jurors could still have wanted greater certainty for imposition of the death penalty (see *People v. Terry, supra,* 61 Cal.2d at pp. 145-146). Mr. Dworak was effectively prevented from presenting a potential mitigating factor in violation of the Eighth and Fourteenth Amendments. (See, e.g., *Eddings v. Oklahoma, supra,* 455 U.S. at p. 110; *Lockett v. Ohio, supra,* 438 U.S. at p. 604.)

F. Conclusion.

The court prejudicially erred when it admitted irrelevant and inflammatory evidence of Mrs. Dworak's mood during the weekend of Ms. Hamilton's death. Reversal is required.

VI.

THE TRIAL COURT PREJUDICIALLY ERRED AND VIOLATED MR. DWORAK'S 5TH, 6TH, 8TH, AND 14TH AMENDMENT RIGHTS BY PERMITTING THE PROSECUTION TO ELICIT TESTIMONY FROM MS. HAMILTON'S FATHER ABOUT HER FUTURE PLANS IN VIOLATION OF STATE HEARSAY RULES.

A. Introduction.

Over defense objection, the court permitted Ms. Hamilton's father to testify about what Ms. Hamilton had told him about her future plans. The court erred because the testimony was hearsay, did not fall within a state hearsay exception, and therefore violated Mr. Dworak's right to confront and cross-examine witnesses, to due process and a fair trial, to a reliable guilt and penalty determination, and to be free from cruel and unusual punishment. (U.S. Const., 5th, 6th, 8th, 14th Amends.; Cal. Const., art. I, §§ 7, 15, 16, 17, 24, 28, subd. (d).)

B. Proceedings Below.

During the prosecutor's direct examination of Ms. Hamilton's father, the following colloquy occurred:

Q. Had she been talking to you about her future?

A. Yes, ma'am, she had.

Q. What did she say to you in that regard?

[Defense counsel]: Objection. Relevance and hearsay.
(11 RT 2049.)

Outside the presence of the jury, the prosecutor stated that, based on defense counsel's opening statement and cross-examination, it appeared that the defense would imply suicide or accidental death "wherein Crystal wandered off out into the ocean or did something to -- that amounts to taking her own life." (11 RT 2050.) The prosecution wanted to show that she was not planning on taking her own life, that she "made plans about going to college, getting a job, joining the military. She was a normal, happy kid." (11 RT 2050.) Defense counsel pointed out the testimony was still inadmissible as hearsay. (11 RT 2050.) The prosecutor contended that the statements were an exception to hearsay as a statement of intention. (11 RT 2050.) Defense counsel explained that a statement of intention deals with a statement of present intention to do a future act, not a statement of generalized intention about what one wants to do in the future, like go to medical school. (11 RT 2050.)

The court overruled the defense objection, finding that the evidence was probative because she was discussing her future plans to continue her education with her father, suggesting that she would not be a person inclined to hurt herself. (11 RT 2050-2051.) Defense counsel argued that the defense was not raising any issue as to suicide. (11 RT 2051.) The court then indicated it did not anticipate a "wealth of evidence in this area" and suggested that the prosecutor focus a question on future plans briefly but not draw out the evidence. (11 RT 2051.)

Defense counsel reiterated the hearsay objection, but indicated that its objection was also of constitutional dimension under state and federal constitutional provisions for confrontation and due process. (11 RT 2051-2052.)

The prosecutor then adduced evidence from Ms. Hamilton's father:

> Q. . . . she had been speaking to you about her intentions for the near future; is that right?
>
> A. Yes, ma'am.
>
> Q. What did she tell you during that time frame she was planning on doing?
>
> A. There were a couple of things she was looking at. One longer range was college. A shorter range, something in the medical field, and she thought

perhaps the Air Force, air evacuation, flight nurse basically.

Q. So she talked to you about joining the military?

A. Yes, she did. (11 RT 2055.)

C. Standard Of Review.

A trial court's ruling on admission of evidence is reviewed under an abuse of discretion standard. *(People v. Lewis, supra,* 25 Cal.4th at p. 637; *People v. Ashmus, supra,* 54 Cal.3d at p. 973.)

D. The Court Erred When It Permitted Ms. Hamilton's Father To Testify To Her Statements.

The court abused its discretion when it admitted the statements as probative because the statements suggested she would not be a person "inclined to do something to hurt herself," suggesting the prosecutor focus her questioning and be brief. (11 RT 2051.)

Even if the evidence were relevant, it was still hearsay. "'Hearsay evidence' is evidence of a statement that was made other than by a witness while testifying at the hearing and that is offered to prove the truth of the matter stated." (Evid. Code, § 1200, subd. (a).) Hearsay evidence is inadmissible except as provided by law. (Evid. Code, § 1200, subd. (b).) Furthermore, as

defense counsel argued, admission of the evidence violated the confrontation clause and due process of law. (U.S. Const., 5th, 6th, 14th Amends.; *Idaho v. Wright* (1990) 497 U.S. 805 [110 S.Ct. 3139, 111 L.Ed.2d 638].)

The prosecutor tried to justify adducing the statements as an exception to hearsay under Evidence Code section 1250. Statement of a declarant's then-existing mental or physical state is an exception to the hearsay rule under Evidence Code section 1250, which provides, in pertinent part:

> (a) Subject to Section 1252, evidence of a statement of the declarant's then existing state of mind, emotion, or physical sensation (including a statement of intent, plan, motive, design, mental feeling, pain, or bodily health) is not made inadmissible by the hearsay rule when:
>
> (1) The evidence is offered to prove the declarant's state of mind, emotion, or physical sensation at that time or at any other time when it is itself an issue in the action; or
>
> (2) The evidence is offered to prove or explain acts or conduct of the declarant.

Ms. Hamilton's statements to her father were not admissible as a statement of intention under Evidence Code section 1250 for several reasons. First, the statements were not material. (*In re Carson's Estate* (1920) 184 Cal. 437, 445

[evidence of mental state must be material to issue at trial].) As defense counsel indicated, the defense was not relying upon a theory that Ms. Hamilton committed suicide.

Second, even if Ms. Hamilton's state of mind was at issue, the statements were not probative of her state of mind *at a time* when her state of mind was at issue. If her state of mind was at issue in terms of whether she might have been suicidal, it was her state of mind on the weekend of her death, not her state of mind when she discussed her future plans with her father at some unknown point in the past. (See, e.g., *People v. Ireland* (1969) 70 Cal.2d 522, 530 [wife's state of mind on day of her death was not an issue, so error to admit her statement to friend that her husband was going to kill her and she just wished he would get it over with].)

Third, as defense counsel explained, a statement of intention is a present intention to do a future act, not a statement of generalized intention about what one wants or hopes to do in the future. (11 RT 2050.) Here, Ms. Hamilton's father testified that Ms. Hamilton was "looking at" a couple of things, some long range, like college, and some short range, in the medical field or military or air evacuation or nursing. (11 RT 2055.) The lack of

specificity negates her statements being statements of intent. (See, e.g., *People v. Majors* (1998) 18 Cal.4th 385, 403-405 [murder victim's statement he was about to conduct a drug deal with people from Arizona admissible]; *People v. Han* (2000) 78 Cal.App.4th 797 [defendant's statement expressing desire to arrange her twin sister's murder admissible]; *People v. Spector* (2011) 194 Cal.App.4th 1335 [defendant's statement that all women deserve a bullet in their heads admissible to prove intent to kill or conscious disregard].)

Furthermore, the evidence did not meet the prerequisite of admissibility in Evidence Code section 1252, which provides:

> Evidence of a statement is inadmissible under this article if the statement was made under circumstances such as to indicate its lack of trustworthiness.

The limitation expressed in section 1252 is viewed by this Court as a condition of admissibility. (*People v. Hamilton* (1961) 55 Cal.2d 881, 893, 895, overruled on other grounds in *People v. Wilson* (1969) 1 Cal.3d 431, 440; *People v. Alcalde* (1944) 24 Cal.2d 177, 187.) Here, the statements by Ms. Hamilton to her father were made under circumstances that indicate a lack of trustworthiness. Her father had testified before the grand jury

that she had entered court-ordered rehabilitation in New Mexico and, since her return in February, she had begun using drugs again. (2 CT 486-487.) Where the primary purpose of a statement suggests an ulterior motive, the requisites of section 1252 are not met. (*People v. Smith* (2003) 30 Cal.4th 581.) In *People v. Smith*, *supra*, the statements were considered untrustworthy because their primary purpose was to placate the defendant's wife. (*Id.* at pp. 628-629.) Here, Ms. Hamilton's primary purpose was placating her father, an Air Force lieutenant colonel who would no doubt have been pleased that she was considering the Air Force. (11 RT 2047-2048.) Her unsuccessful stint in out-of-state in-patient drug rehabilitation, her early return, and her known relapse had caused strains in their relationship. Talking to a parent about wonderful plans for the future, under these circumstances, usually has a conciliatory and even encouraging effect. In *People v. Jones* (1996) 13 Cal.4th 535, a mother's statement to her child that she was "going to Oakland with Troy" passed the section 1252 threshold test because there was nothing in the circumstances to show that the mother had spoken dishonestly to her daughter or had a motive to fabricate her stated destination. (*Id.* at p. 548.) Here, Ms.

Hamilton, who was using drugs and trying to hide it from her father, certainly had a motive to fabricate acceptable future goals.

Ms. Hamilton's statements to her father were hearsay and should not have been admitted under Evidence Code section 1250 because they did not qualify as a statement of intention. The statements to her father were not made under circumstances indicating trustworthiness as required under Evidence Code section 1252. The court erred when it found them admissible because they were probative.

E. The Error Was Prejudicial.

An error of constitutional dimension requires reversal unless the appellate court finds beyond a reasonable doubt that the error was harmless. (*Chapman, supra,* 386 U.S. at p. 24.) The burden of showing the harmlessness of the error falls on the party benefiting, here, the state. (*Ibid.*)

The error here was of constitutional dimension. Admission of hearsay evidence without sufficient indicia of reliability violated Mr. Dworak's right to confront and cross-examine witnesses. (See *Idaho v. Wright, supra,* 497 U.S. 805.) State law evidentiary error deprived Mr. Dworak of due process of law.

(U.S. Const., 5th, 14th Amends.; see *Estelle v. McGuire, supra,* 502 U.S. at p. 72.) The state court's clear misapplication of its own state or judicial decision deprived Mr. Dworak of federal due process. (*Hicks v. Oklahoma, supra,* 447 U.S. 343.)

Even if the error were considered one of state law, reversal is required because there is a reasonable probability that a result more favorable to the appellant would have been reached in the absence of the error. (*Watson, supra,* 46 Cal.2d at p. 836.) A reasonable probability is one sufficient to undermine confidence in the outcome of the proceedings. (*Strickland v. Washington, supra,* 466 U.S. at p. 694; *In re Neely, supra,* 6 Cal.4th at p. 909.)

As set forth in Argument I, (E), Prejudice, *ante,* incorporated herein by reference, the evidence against Mr. Dworak was not overwhelming.

Where a prosecutor relies on evidence as crucial, this Court sees no reason to consider it other than crucial. (*People v. Powell, supra,* 67 Cal.2d at p. 57.) Here, the testimony was key to the picture of Ms. Hamilton that the prosecutor wanted the jury to see and the prosecutor exploited it. In closing argument she described Ms. Hamilton as "A young girl with her whole life ahead of her who's thinking about joining the Air Force, going off

to college, waiting for her dad to pick her up, who reaches her dad, does make plans to get picked up, to go home, doesn't beat herself up, inject some complete stranger's semen into her -- in that order, by the way, after she's beaten herself up -- a stranger who just happens to be a convicted rapist . . . ." (15 RT 2698.) The prosecutor returned to this theme again, ridiculing the idea Ms. Hamilton's death was anything other than a homicide, rather than accident or suicide:

> Maybe she took off all of her clothes, beat herself up and flung herself into the ocean 16 miles away because she was upset over, I don't know, the Cheech and Chong ending in the film.
>
> This girl had been talking about going to college. She had been talking about joining the Air Force, maybe becoming a nurse in the Air Force, who spent all Saturday trying to call her dad to come get her and who does get in touch with her dad to come get her. She tells Matt she's going to be leaving soon. She wants to go home. Suddenly she decides to end it all? (15 RT 2750.)

Finally, the trial court's erroneous ruling also denied Mr. Dworak his Eighth Amendment right to a reliable sentencing determination. To assess error at the penalty phase of a capital trial, this Court determines whether there is a "reasonable possibility" that any error affected the verdict. (*People v. Brown*, *supra*, 46 Cal.3d at p. 447.) Even if the jury had still convicted

Mr. Dworak of special circumstances murder, jurors could have considered other evidence as lingering-doubt evidence at the penalty phase. (See *People v. Terry, supra,* 61 Cal.2d at pp. 145-146 [jury may determine guilt has been proven beyond reasonable doubt but still demand greater degree of certainty for imposition of death penalty].) Mr. Dworak was effectively prevented from presenting a potential mitigating factor in violation of the Eighth and Fourteenth Amendments. (See, e.g., *Eddings v. Oklahoma, supra,* 455 U.S. at p. 110; *Lockett v. Ohio, supra,* 438 U.S. at p. 604.)

F. Conclusion.

The trial court erred when it permitted the prosecutor to introduce evidence under Evidence Code section 1250 that Ms. Hamilton had told her father that she had plans for the future, because her state of mind was not at issue, the plans were too general for the state of mind exception, and there was indicia of untrustworthiness. Reversal is required.

VII.

THE TRIAL COURT COMMITTED PREJUDICIAL ERROR AND VIOLATED MR. DWORAK'S RIGHTS UNDER THE 5TH, 6TH, 8TH, AND 14TH AMENDMENTS BY INSTRUCTING JURORS WITH CALJIC NO. 2.03, PERMITTING THEM TO DRAW IRRATIONAL INFERENCES OF GUILT OF THE CRIMES AND ALLEGATION CHARGED, INCLUDING MR. DWORAK'S MENTAL STATE, BASED UPON AN INFERENCE OF CONSCIOUSNESS OF GUILT FROM FALSE STATEMENTS.

A. Introduction and Proceedings Below.

At the prosecutor's request, the trial court instructed the jury with CALJIC No. 2.03, which told the jury that it might consider false statements made by Mr. Dworak about the charged crimes as proof of his consciousness of guilt as to those crimes. (4 CT 917; 15 RT 2667.) As given here, CALJIC No. 2.03 provides:

> If you find that before this trial the defendant made a willfully false or deliberately misleading statement concerning the crimes for which he is now being tried, you may consider that statement as a circumstance tending to prove a consciousness of guilt. However, that conduct is not sufficient by itself to prove guilt, and its weight and significance, if any, are for you to decide. (4 CT 917; 15 RT 2667.)

It was error to give CALJIC No. 2.03 because the instruction is unnecessary, is improperly argumentative, permits the jury to draw irrational inferences against a defendant, and

interferes with the jury's role as factfinder. The instructional error deprived Mr. Dworak of his rights to due process, a fair trial, a trial by jury, equal protection, and a reliable jury determination on guilt and penalty.[23] (U.S. Const., 6th, 8th, 14th Amends.; Cal. Const., art. I, §§ 7, 15, 16, 17, 24, 28, subd. (d).)

B. Cognizability On Appeal.

Defense counsel did not specifically object to the instruction at issue. (13 RT 2476, 2536 [defense objects to all instructions].) Any jury instruction is reviewable on appeal even where no objection was made thereto in the lower court if the substantial rights of the defendant were affected thereby. (Pen. Code, § 1259; *People v. Brown* (2003) 31 Cal.4th 518, 539, fn. 7; *People v. Prieto* (2003) 30 Cal.4th 226, 247.)

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[23] Mr. Dworak accepts that this Court approves of CALJIC No. 2.03. (*People v. Page* (2008) 44 Cal.4th 1, 49; *People v. Arias* (1996) 13 Cal.4th 92, 142; *People v. Crandell* (1988) 46 Cal.3d 833, 871.) This Court is asked to reconsider those prior decisions. In accord with *People v. Schmeck*, *supra*, 37 Cal.4th at pp. 303-304, citing *Vasquez v. Hillery, supra,* 47 U.S. at p. 257, the grounds for the claim are presented in a brief and straightforward manner without extensive exploration and discussion in order to preserve the issue for federal review. Counsel will provide any additional briefing that this Court desires.

C. Standard Of Review.

An error in jury instructions is evaluated based on whether the court fully and fairly instructed on the law, considering the instructions as a whole. (*People v. Partlow, supra,* 84 Cal.App.3d at p. 558; *People v. Yoder, supra,* 100 Cal.App.3d at p. 338.) Whether an instruction correctly states the applicable law is reviewed under a de novo standard. (*People v. Posey, supra,* 32 Cal.4th at p. 218; *People v. Andrade, supra,* 85 Cal.App.4th at p. 585.) "If ambiguity appears, the reviewing court inquire[s] whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way that violates the Constitution." (*Estelle v. McGuire, supra,* 502 U.S. at p. 72; U.S. Const., 14th Amend.; *People v. Kelly, supra,* 1 Cal.4th at pp. 525-526.)

D. CALJIC No. 2.03 Is Extraneous To Other Instructions, Is Impermissibly Argumentative, Establishes An Unconstitutional Irrational Presumption of Guilt, And Intrudes On, And Distracts From, The Jury's Factfinding Function.

First, CALJIC No. 2.03 was unnecessary. This Court has held that trial courts should not give specific instructions about consideration of the evidence which simply reiterate a general principle upon which the jury has already been instructed. (See,

e.g., *People v. Lewis* (2001) 26 Cal.4th 334, 362-363; *People v. Ochoa* (2001) 26 Cal.4th 398, 444-445.) The jury here was instructed with three pattern jury instructions about circumstantial evidence and inferences, specifically, CALJIC Nos. 2.00, Direct and Circumstantial Evidence -- Inferences, 2.01, Sufficiency of Circumstantial Evidence -- Generally, and 2.02, Sufficiency of Circumstantial Evidence to Prove Specific Intent or Mental State. (4 CT 914-916; 15 RT 2664-2267.) These instructions clearly informed the jury that it could draw inferences about Mr. Dworak's state of mind from the circumstantial evidence. It was unwarranted to repeat that general principle in the guise of a permissive inference of consciousness of guilt, particularly since the trial court did not evenhandedly instruct on permissive inferences of reasonable doubt about guilt.

Second, CALJIC No. 2.03 was impermissibly argumentative. It directed the jury's attention to Mr. Dworak's statements allegedly showing consciousness of guilt, but not to the statements of anyone else. Argumentative instructions are considered improper, in part, because they present jurors with a partisan argument veiled as a neutral and authoritative

statement of the law. (*People v. Wright* (1988) 45 Cal.3d 1126, 1135-1137.) Argumentative instructions invite jurors to draw inferences favorable to one party, suggesting to the jurors that they should give special consideration to those facts. (*People v. Carter* (2003) 30 Cal.4th 1166, 1225.) Even where argumentative instructions are neutrally phrased, they still may ask jurors to give special consideration to specific evidence favorable to one party or imply a conclusion to be drawn from that one-sided evidence. (*People v. Nieto Benitez* (1992) 4 Cal.4th 91, 105, fn. 9; *People v. Daniels* (1991) 52 Cal.3d 815, 870-871.)

Third, CALJIC No. 2.03 establishes an irrational inference of guilt. Such an irrational inference undermined the reasonable doubt instruction (U.S. Const., 5th, 6th, 14th Amends.; *Sandstrom v. Montana* (1979) 442 U.S. 510 [99 S.Ct. 2450, 61 L.Ed.2d 39]; *Mullaney v. Wilbur* (1975) 421 U.S. 684 [95 S.Ct. 1881, 44 L.Ed.2d 508]; Cal. Const., art. I, §§ 7, 15, 16, 17, 24, 28, subd. (d)), violated Mr. Dworak's right to have a properly instructed jury find all the elements of all the charged crimes proven beyond a reasonable doubt (U.S. Const., 6th, 14th Amends.), denied his rights to a fair trial and due process of law (U.S. Const., 6th, 14th Amends.; Cal. Const., art. I, §§ 7, 15), and

deprived him of his right to a fair and reliable capital trial (U.S. Const., 8th, 14th Amends.; Cal. Const., art. I, § 17).

A permissive inference is one "on which the prosecution is entitled to rely as one not necessarily sufficient part of its proof." (*County Court of Ulster County v. Allen* (1979) 442 U.S. 140, 166 [99 S.Ct. 2213, 60 L.Ed.2d 777]; see also, *People v. Ashmus*, supra, 54 Cal.3d at p. 977.) A permissive inference is constitutional as long as it can be said "with substantial assurance" that the inferred fact is "more likely than not to flow from the proved fact on which it is made to depend. [Citation.]" (*County Court of Ulster County v. Allen, supra,* 442 U.S. at p. 166.) In other words, to comport with due process, the inference to be drawn -- from the facts found by the jury from the evidence and the facts inferred by the jury under the instruction -- must be rational. (U.S. Const., 14th Amend.; *County Court of Ulster County v. Allen, supra,* 442 U.S. at p. 166; *Francis v. Franklin* (1985) 471 U.S. 307, 314-315 [105 S.Ct. 1965, 85 L.Ed.2d 344]; *People v. Castro* (1985) 38 Cal.3d 301, 313.)

The inference set forth in CALJIC No. 2.03 is irrational. The facts found by the evidence are the defendant's false statements about the crime, and the fact inferred from those false

statements is his awareness of his guilt of the crime. Inferences must be grounded in experience and reasons. Consciousness of guilt of rape and murder is not more likely than not to follow from the proved fact on which they depend, a lie about the crime. Lying after the fact might logically create an inference of moral blameworthiness on Mr. Dworak's part or even commission of some substantive offense about which he had a sense of moral or legal guilt. But it does not rationally follow from these lies that he acted with premeditation and deliberation or that, for purposes of felony murder, he possessed the requisite intent before or during the killing. As this Court has explained, although consciousness-of-guilt evidence in a murder case may bear on a defendant's state of mind *after the killing*, it is irrelevant to his state of mind immediately *before or during the killing*. (*People v. Anderson* (1968) 70 Cal.2d 15, 32.)

Further, the jury was told that it could, in essence, isolate a single circumstance from the myriad circumstances presented and, if the jury believed the isolated fact, could infer another fact beyond a reasonable doubt. "[W]here intent is a necessary element of the crime, it is error for the court to instruct the jury that it may, but is not required to, infer the requisite intent from

an isolated fact." (*Baker v. United States* (9th Cir. 1962) 310 F.2d 924, 930-931. citing *Morisette v. United States* (1952) 342 U.S. 246, 275 [72 S.Ct. 240, 96 L.Ed. 288].) A jury is under a solemn duty to weigh all the evidence at trial. (*Id.* at p. 276 ["the jury must determine [intent], not only for the act of taking, but from that together with defendant's testimony and all of the surrounding circumstances"]; *United States v. Pelaes* (2d. Cir. 1986) 790 F.2d 254, 259 ["responsibility of the jury to consider all of the evidence . . . "].) Because such instructions focus on a few isolated facts, they can intrude on the jury's factfinding role and cause jurors to overlook exculpatory evidence or convict without considering all relevant evidence. (*United States v. Rubio-Villareal* (9th Cir. 1992) 967 F.2d 294, 299-300 (*en banc*).) The fact that CALJIC No. 2.03 indicated that the statements by themselves were not sufficient to prove guilt (and the jury was to determine the weight and significance of the evidence), the instruction did *not* explain that the statements were not sufficient to prove individual elements, such as Mr. Dworak's mental state, and did not tell jurors it must consider all the evidence presented at trial.

Moreover, CALJIC No. 2.03 tells jurors that they may use the defendant's false statements about the charged crimes to prove "consciousness of guilt." "Guilt" is the ultimate determination of the truth or falsity of the criminal charges. The phrase "consciousness of guilt" in CALJIC NO. 2.03 can only be viewed by jurors as equivalent to a confession, establishing the elements of the offense, including the requisite mental state.

This Court has held that CALJIC No. 2.03 limits the inference to a defendant's consciousness of psychological guilt of some wrongdoing, not consciousness of legal guilt of the specific crimes charged. (*People v. Crandell* (1988) 46 Cal.3d 833, 871.) However, there is no wording in CALJIC No. 2.03 which parses guilt into psychological guilt and legal guilt for jurors. Indeed, the next sentence tells jurors it cannot rely upon statements alone "to prove guilt," clearly a reference to legal guilt but not distinguished from the earlier reference to "guilt," which this Court in *Crandell* said can only be read to refer to psychological guilt. "Jurors do not sit in solitary isolation booths parsing instructions for subtle shades of meaning in the same way that lawyers might." (*Boyde v. California* (1990) 494 U.S. 370, 380-381 [110 S.Ct. 1190, 108 L.Ed.2d 316].) It is unrealistic to

assume that jurors looked for subtle shades of meaning in CALJIC 2.03's two uses of the word "guilt."

Because the consciousness-of-guilt instruction permitted the jury to draw an irrational inference, its use undermined the reasonable doubt requirement, denied Mr. Dworak his rights to a fair trial, due process, and equal protection, and violated his right to have a properly instructed jury find that all elements of the charged crimes and special circumstances had been proven beyond a reasonable doubt.

E. Instructing The Jury That It Could Draw An Irrational Inference From Mr. Dworak's False Statements Was Prejudicial.

Errors of constitutional dimension are tested under prejudice standard in *Chapman, supra,* 386 U.S. at p. 24. Reversal is compelled unless the government can prove the error harmless beyond a reasonable doubt. Here, the government cannot sustain its burden to show harmless error.

As set forth in Argument I, (E), *ante*, and incorporated here by reference, the objective record shows that the evidence was less than overwhelming.

A court considers the arguments of counsel in assessing the probable impact of instructions on the jury. (*People v. Young*

(2005) 34 Cal.4th 1149, 1202; *People v. Minifie* (1996) 13 Cal.4th 1055, 1071 [closing arguments of prosecutor can tip scale in favor of finding prejudice].) Here, the prosecutor argued that, because Mr. Dworak admitted using prostitutes, he "had absolutely no reason to lie about never having seen Crystal Hamilton before, about not knowing her. We're not talking about Kobe Bryant here. We're not talking about somebody who was afraid to admit infidelity. He admitted that in spades. But he looked at Crystal Hamilton's picture, said, 'Nope, don't know her.' That's a guilty conscience." (15 RT 2714.) The prosecutor argued that he lied when looking at Ms. Hamilton's photograph, lied about never having seen her before, and lied when he claimed later that he never had sex with her; the prosecutor contended "That's consciousness of guilt talking. That's what that is. Tremendous consciousness of guilt during the interviews." (15 RT 2778.)

F. Conclusion.

This Court should reconsider its approval of CALJIC No. 2.03 because the instruction is extraneous to other instructions, is impermissibly argumentative, establishes an unconstitutional irrational presumption of guilt, and intrudes on, and distracts from, the jury's factfinding function. Reversal is required.

VIII.

THE PROSECUTOR COMMITTED PREJUDICIAL MISCONDUCT WHEN SHE DENIGRATED DEFENSE COUNSEL AND THE DEFENSE EXPERT WITNESS AND THE TRIAL COURT PREJUDICIALLY ERRED AND VIOLATED MR. DWORAK'S RIGHTS UNDER THE 5TH, 6TH, 8TH, AND 14TH AMENDMENTS WHEN IT FAILED TO SUSTAIN DEFENSE COUNSEL'S OBJECTION TO THE MISCONDUCT.

A. Introduction.

In closing argument, the prosecutor committed prosecutorial misconduct. Over defense objection, the prosecutor repeatedly disparaged the defense expert (Dr. Bux), defense counsel, and Mr. Dworak himself. The prosecutor labeled Dr. Bux as "a hired mouthpiece, really, who would say what they pay him to say," accused the defendant and his defense counsel of buying a defense, stating that "[f]or $3,600, defendant bought an outrageous, antiquated & preposterous opinion about rape," and declared that Dr. Bux was being bought, stating "[w]ell, I guess for $3,600, people will say contradictory things."

The trial court overruled defense counsel's objections, telling the jury that attorneys were given wide latitude in argument. The court erred, because prosecutors are not permitted to disparage defense counsel, the defendant, or the

defense expert, to accuse the defense team of fabricating a defense, or to suggest perjury or subornation of perjury. The prosecutorial misconduct and the court's failure to correct it violated deprived Mr. Dworak of his state and federal constitutional rights to present a defense, to confront and cross-examine witnesses, to due process and a fair trial, to a reliable guilt and penalty determination, and to be free from cruel and unusual punishment. (U.S. Const., 5th, 6th, 8th, 14th Amends.; Cal. Const., art. I, §§ 7, 15, 16, 17, 24, 28, subd. (d).)

B. Proceedings Below.

During the prosecutor's cross-examination of Dr. Bux, Dr. Bux testified that the sperm had been deposited recently, but did not believe it could be meaningfully determined whether the deposit occurred within a few minutes or a few hours. (14 RT 2631-2632.) The court sustained defense counsel's objection to the next question the prosecutor asked, "And are you aware, sir, that there are in fact experts in this area, in fact, that Mr. Jones is one of the nations [sic] leading experts in the field of forensic pathology [sic]?" (14 RT 2632.) The prosecutor asked Dr. Bux his fees, to which he responded $250 per hour for review and

consultation and $1600 per day in court, plus expenses. (14 RT 2637-2638.)

Early in her closing arguments, the prosecutor told jurors "don't be misled by the defendant's lawyers into thinking that Crystal Hamilton was not the victim of a rape and murder." (15 RT 2699.) Defense counsel objected and moved to strike, and the court sustained the objection and struck the comment. (15 RT 2699.) The prosecutor soon returned to her theme, arguing that, "[g]iven [the DNA] evidence, the defense had to come up with something, so that's his defense. Maybe she wasn't raped and murdered. But it's really absurd." (15 RT 2699.)

During closing argument, the prosecutor stated that "[t]he defense elicited an opinion from their paid witness, Dr. Bux that Crystal wasn't raped." (15 RT 2733.) The prosecutor shortly thereafter argued:

> MS. TEMPLE: Now I submit to you that Dr. Bux has no idea whether or not Crystal Hamilton was a victim of a rape. He shouldn't have even been asked the question. The fact that he even offered an opinion just makes him a hired mouthpiece, really, who would say what they pay him to say.
>
> Dr. O'Halloran never testified to any --
>
> MR. POWELL: Objection, improper argument.

THE COURT: Overruled. Counsel is given wide latitude in argument.

MS. TEMPLE: Dr. O'Halloran never offered any such opinion. It wasn't asked of him. So what was bought by the defense in hiring Dr. Bux was someone who would offer an opinion without having all of information that you have.

Now, wouldn't it be nice if we could just give a case to a Dr. Bux. We could do away with juries altogether. We could just send everything to Dr. Bux and let him decide for us. But it doesn't work that way.

And he didn't have, ladies and gentlemen, any information about the forensic serology report. He didn't review Ed Jones's testimony. You heard Ed Jones testify. He doesn't know about any studies that talk about the timing of semen deposits. He didn't even think you could do such a thing.

Well, he should learn. Ed Jones is published in the Handbook of Forensic Science, sort of the bible of the forensic science field. He's the sole author of an entire chapter on that field, and Dr. Bux claims he doesn't know anything about it.

Dr. Bux doesn't know anything about the defendant's background and whether or not he even knows Crystal Hamilton. In fact, when I asked him whether or not that would be important for him to know whether or not Crystal knew the defendant, he said it may or it may not be. That's what he said. You can pull the transcripts if you want to rehash any of that. That was his answer to that question. And that's outrageous. I mean, that's a huge factor for you. She did not know this man. There's no reason why his semen would be inside of her. She didn't know him.

But according to Dr. Bux, a woman is only raped if she has vaginal injuries, if she has bruising on the

inner thigh. For $3,600, the defendant bought an outrageous, antiquated and preposterous opinion about rape.

MR. FARLEY: I'm going to object to the form of the argument, your Honor, purchasing.

THE COURT: Overruled. Again, counsel is given wide latitude in argument. [¶] You may proceed.

MS. TEMPLE: It's absurd to think that women are only raped if they have vaginal injuries. That's insulting. Tell that to Cynthia [W.], whose only injury was a nearly severed thumb. Tell that to the hundreds of women that Natalie Erickson has seen where they were beaten up on the outside but had no vaginal trauma. Tell that to the law that makes no such requirement. (15 RT 2734-2736.)

And Dr. Bux . . . said he did not see evidence of a violent struggle. Well, I guess for $3,600, people will say contradictory things. But that opinion, ladies and gentlemen, defies all common sense. It defies all logic. She is bruised and battered and has been beaten literally from head to toe.
(15 RT 2748-2749.)

C. Standard Of Review.

Claims of prosecutorial misconduct are reviewed under an abuse of discretion standard. (*People v. Alvarez* (1996) 14 Cal.4th 155, 213.) "When a claim of misconduct is based on the prosecutor's comments before the jury, "'the question is whether there is a reasonable likelihood that the jury construed or applied

any of the complained-of remarks in an objectionable fashion.' [Citation.]" (*People v. Friend* (2009) 47 Cal.4th 1, 29.)

D. The Prosecutor Committed Misconduct By Disparaging The Defense Expert And Defense Attorneys, And The Court Erred When It Failed To Sustain The Defense Objections And Admonish The Jury.

The prosecutor committed misconduct by attacking Mr. Dworak's defense expert and his defense team while vouching for her own witnesses. The court's error in not sustaining the defense objections to the misconduct exacerbated the misconduct. The prejudicial effect of mild misconduct might be dissipated by an instruction that the statements of the attorneys are not evidence. (*People v. Woods* (2006) 146 Cal.App.4th 106, 118.) Here, however, the court implicitly endorsed the erroneous representation by overruling defense counsel's objections, merely telling the jury that "counsel is given wide latitude in argument." (15 RT 2434, 2436.)

This Court has always been mindful that "[p]rosecutors . . . are held to an elevated standard of conduct. 'It is the duty of every member of the bar to "maintain the respect due to the courts" and to "abstain from all offensive personality." (Bus. & Prof. Code, § 6068, subds. (b), (f).) The higher standard to which

prosecutors are held derives from their unique function in representing the interests, and in exercising the sovereign power, of the state. (*People v. Hill* (1998) 17 Cal.4th 800, 819-820 ("*Hill*").) As the United Supreme Court has explained and as this Court has endorsed, the prosecutor represents "'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.'" (*Hill, supra,* 17 Cal.4th at pp. 819-820, quoting *Berger v. United States* (1935) 295 U.S. 78, 88 [55 S.Ct. 629, 79 L.Ed. 1314].) Statements from a district attorney assume great influence on the jury due to the prosecutor's appearance as an official, unprejudiced, impartial, and nonpartisan representative of the state. (See, e.g., *People v. Purvis* (1963) 60 Cal.2d 323, 341; *People v. Perez* (1962) 58 Cal.2d 229, 247.)

"'A prosecutor is allowed to make vigorous arguments and may even use such epithets as are warranted by the evidence, as long as these arguments are not inflammatory and principally aimed at arousing the passion or prejudice of the jury.' [Citation.]" (*People v. Young* (2005) 34 Cal.4th 1149, 1195.) However, attacks on a defendant's attorney are as prejudicial as

an attack on the defendant and are never excusable under legal ethics and decorum. (*Hill, supra*, 17 Cal.4th at p. 832.) Counsel may not "make personally insulting or derogatory remarks directed at opposing counsel or impugning counsel's motives or character." (*Cassim v. Allstate Ins. Co.* (2004) 33 Cal.4th 780, 796.) Uncalled-for aspersions on defense counsel directs attention to largely irrelevant matters and does not constitute comment on the evidence or argument as to inferences from it. (*People v. Redd* (2010) 48 Cal.4th 691, 749.) It is misconduct for a prosecutor to attack the integrity of defense counsel or cast aspersions on defense counsel. (*Hill, supra*, 17 Cal.4th at p. 832; see also *People v. Sandoval* (1992) 4 Cal.4th 155, 184 [denigration of defense counsel instead of the evidence is misconduct because personal attacks are improper and irrelevant].)

An expert witness may be asked about compensation in an attempt to show bias. (See *People v. Parson* (2008) 44 Cal.4th 332, at pp. 362-363.) "[H]arsh and colorful attacks on the credibility of opposing witnesses are permissible." (*People v. Arias, supra,* 13 Cal.4th at p. 162.) However, such attacks are limited to arguments "*from the evidence*, that a witness's

testimony is unbelievable, unsound, or even a patent 'lie.'" (*Ibid.*, emphasis added.)

Accusations that counsel fabricated a defense to deceive the jury are forbidden. (See *People v. Friend, supra*, 47 Cal.4th at pp. 30-31.) Here, the prosecutor stepped over the line when she suggested to the jury it should in effect disregard Dr. Bux's testimony because defense counsel had paid him to say what counsel wanted him to say.

The prosecutor's statements in closing argument -- (1) that Dr. Bux was "a hired mouthpiece, really, who would say what they pay him to say," (2) that Dr. Bux "was bought by the defense," (3) that "[f]or $3,600, defendant bought an outrageous, antiquated & preposterous opinion about rape," and (4) "[w]ell, I guess for $3,600, people will say contradictory things" -- were not arguments based on the evidence. There was no evidence that Dr. Bux said what he said because defense counsel paid Dr. Bux to say it. There was no evidence that defense counsel "bought" Dr. Bux or "bought" Dr. Bux's "opinion." There was no evidence that Dr. Bux said what he did "for $3,600."

Rather than arguing from the evidence, the prosecutor cast aspersions on the ethics of Dr. Bux (and, consequently, on his

competence as an expert), on the ethics of the three defense team members, and on the propriety of their defense of Mr. Dworak. And all of these aspersions vicariously reflected on Mr. Dworak.

"The unsupported implication by the prosecutor that defense counsel fabricated a defense constitutes misconduct. (*People v. Bain* (1971) 5 Cal.3d 839, 847.) It is egregious misconduct to infer that defense counsel suborned perjury. (*People v. Herring* (1993) 20 Cal.App.4th 1066, 1075.) Such arguments direct the jury's attention to irrelevant matters and away from a focus on the evidence and the legitimate inferences to be drawn from it. (*Ibid.*)

"If there is a reasonable likelihood that the jury would understand the prosecutor's statements as an assertion that defense counsel sought to deceive the jury, misconduct would be established." (*People v. Cummings* (1993) 4 Cal.4th 1233, 1302.) The jury here could only have understood the prosecutor's statements as an assertion that Mr. Dworak's defense attorneys -- or Mr. Dworak -- had fabricated a defense and paid Dr. Bux to perjure himself to present it.

In *People v. McLain* (1988) 46 Cal.3d 97 ("*McLain*"), a prison inmate had testified, somewhat inconsistently, in

corroboration of one aspect of the defendant's story. (*Id.* at p. 112.) In his penalty phase closing argument, the prosecutor argued in regard to the witness that "obviously what happened, [defense investigators] shopped around, found somebody who was willing to come in and lie, but they didn't get his story straight enough . . . ." (*Id.* at p. 113.) This Court, as well as the trial court, found the prosecutor's argument improper. (*Ibid.*, citing *People v. Bain* (1971) 5 Cal.3d 839, 847.) This Court in *McLain* found that any error, however, was cured by the trial court's admonition, which told the jury that the comment in question might have been subject to an inference that the defense countenanced false testimony, but

> You are admonished that no such inference was intended by the prosecution. You are further admonished that the defense has not in any way so conducted itself. You are the sole judges of the credibility of all witnesses who testify in this case. Counsel may argue to you the issue of the credibility of any witness. (*McLain*, *supra*, 46 Cal.3d at p. 112.)

Further, the prosecutor in *McLain* immediately renounced the implications of his comment after the admonition, telling the jury "I didn't mean to suggest that anyone connected with the defense suggested that he lie or encouraged him to do so or knowingly promote[d] his false testimony, and I am sure that no one

connected with the defense did do that or would do that." (*Ibid.*) Moreover, the argument was long, whereas the comment both was brief and went to a relatively insignificant matter in the determination of penalty. (*Id.* at p. 113.)

Here, in contrast to the events in *McLain*, the trial court twice overruled defense counsel's objections to the arguments and never admonished the jury in any way. The court's comments that attorneys were given wide latitude in argument actually endorsed the prosecutor's comments as proper insinuations. The court's error in not sustaining the defense objections to the misconduct exacerbated the misconduct. "[W]hen no rebuke of such false accusations is made by the court, when no response is allowed the vilified lawyer, when no curative instruction is given, the jurors must necessarily think that the false accusations had a basis in fact. The trial process is distorted." (*United States v. Rodrigues* (9th Cir. 1998) 159 F.3d 439, 451.)

Unlike the prosecutor in *McClain*, who quickly and sincerely recanted his suggestion that the defense had promoted false testimony, the prosecutor here "doubled down" after receiving the court's endorsement, continuing to repeat the defense had purchased Dr. Bux's false testimony. (15 RT 2434-

2436.) Moreover, although the prosecutor's argument in the instant case was long, her comments did not consist of one quick mis-statement, as in *McClain*, but were thematic. Furthermore, aspersions on Dr. Bux's integrity and testimony, and that of the defense team, were not insignificant, like the subject of the prosecutor's remark in *McClain*. Dr. Bux's testimony was critical to Mr. Dworak's defense. As the defense's main witness and its only expert, Dr. Bux had testified to multiple important points which supported Mr. Dworak's defense. First, he agreed with Dr. O'Halloran that drowning was the cause of death, but he disagreed that the manner of death could be characterized as a homicide rather than an accident, pointing out that drowning is a diagnosis of exclusion. (14 RT 2569-2570, 2589.) Second, he articulated six persuasive reasons why manual strangulation short of death had not occurred and disputed that the three horizontal marks on the neck were fingernail marks. (14 RT 2576-2580, 2591, 1598-2599.) Third, he pointed out the inherent imprecise in timing an injury in relation to death or to other injuries because of variables. (14 RT 2582-2594, 2617.) Fourth, he believed there were also too many crude and variable markers to accurately establish time of death. (14 RT 2575-2576.) Fifth,

he believed it could not be said whether Ms. Hamilton had been raped or not, because there was no genital or vaginal trauma and there was no assaultive pattern to the injuries; the presence of Mr. Dworak's semen established with certainty only that intercourse had taken place. (14 RT 2571, 2633-2634, 2642-2643.) Finally, although Dr. Bux stated he was not an expert on sperm, as a pathologist, he believed the sperm deposit had happened recently, but did not think it was possible to tell whether it was minutes or hours before death. (14 RT 2630-2632.)

While continuing to belittle Dr. Bux, the prosecutor exaggerated the credentials of her own witnesses, claiming that Ed Jones had written part of the "bible of the forensic science field." (15 RT 2735, 2761.) She further described Jones as "one of the leading scientists in the nation in the field of forensic serology." (15 RT 2761.) Dr. O'Halloran she described as "a published pathologist with impeccable credentials." (15 RT 2743.)

E. <u>The Misconduct Was Prejudicial.</u>

Prosecutorial misconduct violates the federal Constitution when the misconduct makes the trial unfair and the conviction a

denial of due process. (*Darden v. Wainwright* (1986) 477 U.S. 168, 181 [106 S.Ct. 2464, 91 L.Ed.2d 144]; *Donnelly v. DeChristoforo* (1974) 416 U.S. 637, 642 [94 S.Ct. 1868, 40 L.Ed.2d 431]; *People v. Riggs*, *supra*, 44 Cal.4th at p. 298.) To the extent the misconduct deprived Mr. Dworak of federal due process of law, the error is subject to the standard of *Chapman v. California* (1967) 386 U.S. 18, 24 [87 S.Ct. 824, 828, 17 L.Ed.2d 705] requiring the state to prove the error harmless beyond a reasonable doubt. (*People v. Bolton* (1979) 23 Cal.3d 208, 214.) If the prosecutor has merely used reprehensible or deceptive methods to persuade a jury, the state law test is applicable to those facts. (*People v. Green* (1980) 27 Cal.3d 1, 34-35.)

The nature of the prosecutor's misconduct implicated Mr. Dworak's federal constitutional rights here because it was "so egregious that it infect[ed] the trial with such unfairness as to make the conviction a denial of due process" (*People v. Harris* (1989) 47 Cal.3d 1047, 1083-1084). The prosecutor's misconduct rendered the entire proceeding fundamentally unfair, depriving Mr. Dworak of due process of law, the right to a fair trial, the right to effective assistance of counsel, and the right to a fair and reliable determination of guilt, capital eligibility, and penalty in

violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution. Because this was a capital case, the Constitution demands a heightened degree of reliability at both the guilt and penalty phases. (*Gilmore v. Taylor* (1993) 508 U.S. 333, 345 [113 S.Ct. 2112, 124 L.Ed.2d 306]; *Beck v. Alabama* (1980) 447 U.S. 625, 637-638 [85 S.Ct. 546, 13 L.Ed.2d 424].)

Prejudice is amplified where evidence of guilt appears closely balanced. (*In re Wilson. supra*, 3 Cal.4th at pp. 956-958.) As set forth in Argument I, (E), Prejudice, *ante*, incorporated here by reference, the objective evidence in this case was not compelling. Although there was direct evidence that Mr. Dworak had sexual intercourse with Ms. Hamilton, there was no direct evidence of rape. If Mr. Dworak had consensual sexual intercourse with Ms. Hamilton, any pre-mortem injuries and her death could have been at the hands or someone else or could have been accidental.

Prejudice is intensified when an error adversely affects a crucial aspect of the defense case, when it goes to the heart of the defense or touches a live nerve. (*Depetris v. Kuykendall, supra,* 239 F.3d at p. 1062; *People v. Vargas, supra,* 9 Cal.3d at p. 481.)

As set forth earlier, Dr. Bux was the main defense witness and its only expert countering the prosecution's two experts in this area. As pointed out earlier, his testimony was absolutely crucial to Mr. Dworak's defense. It was the only defense evidence to conclusively rebut a homicidal manner of death by drowning, as opposed to drowning in another manner. It was the sole evidence rebutting the prosecution's attempt to narrow the timeframe of death, injuries, and the sperm deposit. Even if jurors ultimately elected not to accept Dr. Bux's testimony, Mr. Dworak was entitled to their assessment of it on its merits.

Prejudice also resulted from the court's refusal to correct the prosecutor's misconduct, in that the defense attorneys had to spend valuable time during closing arguments correcting those aspersions on their characters and on their witness *before* trying to persuade jurors about the importance of Dr. Bux's testimony and the absence of compelling evidence against their client. (14 RT 2827.) In closing, defense attorney Powell argued that he, Ms. Duffy, and Mr. Farley had not suborned perjury and tried to point out that the prosecution witnesses were also paid for their work. (14 RT 2827-2830, 16 RT 2840.) However, lacking an

admonition from the court as a neutral arbiter, defense counsel's statements would have sounded self-serving and defensive.

Finally, the trial court's erroneous ruling also denied Mr. Dworak his Eighth Amendment right to a reliable sentencing determination. Even if the jury had determined for purposes of rape and murder that guilt had been proven beyond a reasonable doubt, in the penalty phase, jurors might have considered their lingering doubts based on Dr. Bux's crucial evidence. (See *People v. Terry, supra,* 61 Cal.2d at pp. 145-146.) Thus, Mr. Dworak was effectively prevented from presenting a potential mitigating factor in violation of the Eighth and Fourteenth Amendments. (See, e.g., *Eddings v. Oklahoma, supra,* 455 U.S. at p. 110; *Lockett v. Ohio, supra,* 438 U.S. at p. 604.)

F. Conclusion.

The prosecutor's closing remarks so infected the trial with unfairness as to make the resulting conviction a denial of due process. Reversal is required.

IX.

THE COLLECTIVE AND CUMULATIVE EFFECT OF THE ERRORS, AND THEIR CUMULATIVE PREJUDICE, UNDERMINED THE FUNDAMENTAL FAIRNESS OF THE TRIAL AS WELL AS THE RELIABILITY OF THE DEATH JUDGMENT.

Mr. Dworak know that he was not entitled to a perfect trial, but he was entitled to a fair one, one in which his guilt or innocence was fairly adjudicated. (*Hill, supra,* 17 Cal.4th at p. 844.) Cumulative errors may so infect "the trial with unfairness as to make the resulting conviction a denial of due process." (*Donnelly v. DeChristoforo, supra,* 483 U.S. at p. 764; U.S. Const., 14th Amend.) A series of errors, each of which may individually be harmless, may nevertheless "rise by accretion to the level of reversible and prejudicial error." (*Hill, supra,* 17 Cal.4th at p. 844; *Cooper v. Fitzharris* (9th Cir. 1978) 586 F.2d 1325, 1333 (en banc) ["prejudice may result from the cumulative impact of multiple deficiencies"].) Reversal is required unless it can be said that the combined effect of all the errors, constitutional and otherwise, was harmless beyond a reasonable doubt. (*Chapman, supra,* 386 U.S. at p. 24; *United States v. Necoechea* (9th Cir. 1993) 986 F.2d 1273, 1282 [combined effect of errors of

constitutional magnitude and of nonconstitutional errors should be reviewed under federal harmless-beyond-a-reasonable doubt standard]; *People v. Woods* (2006) 146 Cal.App.4th 106, 117 [accord]; *United States v. Rivera* (10th Cir. 1990) 900 F.2d 1462, 1470, fn. 6 [accord]; *United States v. Lynn* (9th Cir. 1988) 856 F.2d 430, 437 [accord]; *People v. Williams* (1971) 22 Cal.App.3d 58, 59 [applying *Chapman* standard to totality of errors when errors of federal constitutional magnitude occur with other errors].)

A reviewing court must look to the cumulative effect of errors to decide whether a jury would have reached a more favorable result. (*People v. Holt* (1984) 37 Cal.3d 436, 459.) The errors here, viewed together or in any combination "raise[] the strong possibility the aggregate prejudicial effect of such errors was greater than the sum of the prejudice of each error standing alone." (*Hill, supra,* 17 Cal.4th at p. 845; *In re Avena* (1999) 12 Cal.4th 694, 772, fn. 32.) Even if the prejudice from one error alone might not justify reversal, the cumulative and collective prejudice from the errors considered together does. (*People v. Criscione* (1981) 125 Cal.App.3d 275, 293; *People v. Kent* (1981) 125 Cal.App.3d 207, 217-218.) When more than one error occurs

at a trial, the errors are not isolated in the eyes of jurors. "[E]ven if no single error were [sufficiently] prejudicial, where there are several substantive errors, 'their cumulative effect may nevertheless be so prejudicial as to require reversal.'" (*Parle v. Runnels* (9th Cir. 2004) 387 F.3d 1030, 1045, quoting *Killian v. Poole* (9th Cir. 2002) 282 F.3d 1204, 1211.) 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 errors in the context of the evidence introduced at trial against the defendant. (*United States v. Wallace* (9th Cir. 1988) 848 F.2d 1464, 1476.)

As noted throughout the brief, this was a close case. In a close case, cumulative error is more likely because the errors collectively and individually are more likely to have influenced the verdict. (*People v. Vindiola* (1979) 96 Cal.App.3d 370, 386-388.) Respondent may not simply divide and refute each contention on a harmless error theory; lack of prejudice must be supported by the totality of the record. (*Ibid.*)

The government must convince this Court, beyond a reasonable doubt, that the combined errors did not contribute to the verdict. That showing cannot be made. First, without legal

cause, the trial court precluded the introduction of relevant, exculpatory defense evidence. The excluded evidence included third-party culpability, presenting an alternate theory of who might have been responsible for the murder (if any) or why Ms. Hamilton's lifestyle and associates may have resulted in her not meeting her father that night or in her meeting with an accident at the beach. Other excluded evidence would have defeated various aspects of the prosecution's case -- that Ms. Hamilton was a naïve young girl who just wanted to go home, that Ms. Hamilton would not have associated with or had consensual sexual relations with an older man like Mr. Dworak, that Mr. Dworak lied about not recognizing Ms. Hamilton from happy family snapshots of her. Prosecutorial misconduct exacerbated the effect of these errors, as the prosecutor denigrated defense counsel and the defense expert witness while impermissibly vouching for her own two experts.

The cumulative effect of these errors so infected Mr. Dworak's trial with unfairness as to make the resulting conviction a denial of due process. (U.S. Const., 14th Amend.; *Donnelly v. DeChristoforo*, *supra*, 41 U.S. at p. 643; Cal. Const., art. I, §§ 7, 15.) Mr. Dworak's convictions must be reversed.

(*Harris v. Wood* (9th Cir. 1995) 64 F.3d 1432, 1438-1439 [cumulative effect of deficiencies in trial counsel's representation requires habeas relief]; *United States v. Wallace* (9th Cir. 1988) 848 F.2d 1464, 1475-1476 [reversed for cumulative error]; *People v. Holt* (1984) 37 Cal.3d 436, 459 [capital murder conviction reversed for cumulative error].)

Furthermore, the death judgment must also be evaluated in light of the cumulative error occurring at both the guilt and penalty phases of this trial. (See *People v. Hayes* (1990) 52 Cal.3d 577, 644 [court considers prejudice of guilt phase instructional error in assessing error in penalty phase].) This Court has expressly recognized that evidence which may otherwise not impact the guilt determination can nonetheless have a prejudicial impact on the penalty trial. (*People v. Hamilton* (1963) 60 Cal.2d 105, 136-137; *People v. Brown, supra,* 46 Cal.3d at p. 466 [error occurring at the guilt phase requires reversal of penalty determination if there is a reasonable possibility that jury would have rendered a different verdict absent the error]; *In re Marquez* (1992) 1 Cal.4th 584, 605, 609 [error harmless at guilt phase but prejudicial at penalty phase].) Reversal of death judgment is mandated here because it cannot

be shown that these errors had no effect on the penalty verdict. (See, e.g., *Hitchcock v. Dugger* (1987) 481 U.S. 393, 399 [107 S.Ct. 1821, 95 L.Ed.2d 347]; *Skipper v. South Carolina* (1986) 476 U.S. 1, 8 [106 S.Ct. 1669, 90 L.Ed.2d 1]; *Caldwell v. Mississippi* (1985) 472 U.S. 320, 341 [105 S.Ct. 2633, 86 L.Ed.2d 231].)

The combined impact of the various errors in this case and the ensuring cumulative prejudice requires reversal of the judgment and death sentence.

X.

THIS COURT SHOULD CONDUCT A REVIEW OF THE SEALED MATERIAL RELATED TO WITNESS MARGARET ESQUIVEL TO INDEPENDENTLY DETERMINE WHETHER THE TRIAL COURT ERRED IN NOT FINDING ANY DISCOVERABLE MATERIAL.

A defendant's right to due process, compulsory process, and confrontation under the federal Constitution includes the right to present witnesses and evidence in his own defense. (U.S. Const., 5th, 6th, 14th Amends.; *Washington v. Texas, supra,* 388 U.S. at pp. 18-19; *Pointer v. Texas* (1965) 380 U.S. 400 [85 S.Ct. 1065, 13 L.Ed.2d 923] [right secured for state defendants]; *Chambers v. Mississippi, supra,* 410 U.S. at p. 302 [few rights are more fundamental to a fair trial and due process than right to present witnesses in one's own defense]; *Pennsylvania v. Ritchie, supra,* 480 U.S. at p. 56 [Sixth Amendment grants defendant the right to put before the jury evidence that might influence guilt determination].) A fundamental element of due process of law is the right to present the defendant's version of the facts. (*Washington v. Texas, supra*, 388 U.S. at p. 19.)

Although the right to present defense witnesses and testimony is not absolute and, in appropriate circumstances,

must "accommodate other legitimate interests in the criminal trial process" (*Michigan v. Lucas, supra,* 500 U.S. at p. 149; *Rock v. Arkansas, supra,* 483 U.S. at p. 55; *Chambers v. Mississippi, supra,* 410 U.S. at p. 295), a state may not arbitrarily deny a defendant the admission of relevant, material, and vital testimony (*United States v. Valenzuela-Bernal, supra,* 458 U.S. at p. 867) or apply a evidentiary rule "mechanistically" (*Chambers v. Mississippi, supra,* 410 U.S. at p. 302), whether such a rule excludes all such evidence or requires an exercise of individual discretion (*Green v. Georgia, supra,* 442 U.S. at p. 97; *Crane v. Kentucky, supra,* 476 U.S. at pp. 687-691; *Smith v. Illinois, supra,* 390 U.S. at p. 133).

Mr. Dworak had a constitutional right to confront his accusers, even where the exercise of such a right may conflict with the state's competing interest. (See *Davis v. Alaska* (1974) 415 U.S. 308, 319 [94 S.Ct. 1105, 39 L.Ed.2d 347] ("*Davis*").) In *Davis, supra,* 415 U.S. 308, the defendant was charged with burglary of a bar and stealing its safe. A prosecution witness testified that he had seen the defendant holding a crowbar and standing at the rear of a car. (*Id.* at p. 310.) The safe was later recovered near the place where the car had been parked; the car

trunk contained paint chips that could have come from the stolen safe. (*Ibid.*) The trial court refused to permit the defendant to cross-examine the witness regarding possible bias deriving from his being on probation from a juvenile court adjudication because Alaska state law protected the anonymity of juvenile offenders. (*Id.* at pp. 313-314, 318.) The United States Supreme Court acknowledged that Alaska had a valid interest in protecting its policy of maintaining the anonymity of juvenile offenders. (*Id.* at p. 319.) The defendant sought to introduce evidence to suggest the witness was biased and his identification of the defendant should not be believed. (*Ibid.*) The court found that, had the defendant been able to pursue bias, there would have been serious damage to the strength of the prosecution case. (*Ibid.*) The high court used a balancing test: "Whatever temporary embarrassment might result to [the witness] or his family by disclosure of his juvenile record . . . is outweighed by [the defendant's] right to probe into the influence of possible bias in the testimony of a crucial identification witness." (*Ibid.*) The defendant's right of confrontation was paramount to the state's policy of protecting juvenile offenders, because the latter could

not require yielding a constitutional right as effective as cross-examination for bias of an adverse witness. (*Id.* at p. 320.)

Davis applies to all state-created privileges. (*People v. Hammon* (1997) 15 Cal.4th 1117, 1119.) "[A] criminal defendant's right to confront adverse witnesses sometimes requires the witness to answer questions that call for information protected by state-created evidentiary privileges." (*Id.* at pp. 1123-1124.) "[A] defendant could not be prevented at trial from cross-examining for bias a crucial witness for the prosecution, even though the question called for information made confidential by state law." (*Ibid.*) "When a defendant proposes to impeach a critical prosecution witness with questions that call for privileged information, the trial court may be called upon, as in *Davis*, to balance the defendant's need for cross-examination and the state policies the privilege is intended to serve." (*Id.* at p. 1127.)

Evidence Code section 1014 protects from disclosure as privileged any confidential communication between a patient and psychotherapist. A diagnosis made in the course of the relationship is considered a confidential communication under Evidence Code section 1012. However, the psychotherapist-

patient privilege is not absolute. (*People v. Castro* (1994) 30 Cal.App.4th 390, 397; see also *People v. Stritzinger* (1983) 34 Cal.3d 505, 511.) The policy reasons behind the psychotherapist-patient privilege are to protect the patient's right to privacy and to encourage those in need of professional help to seek it, knowing their communication will be confidential. (*People v. Stritzinger*, *supra*, 34 Cal.3d at p. 511.) Where, as here, the defendant's need for cross-examination outweighs the state policies served by the privilege, the state-created evidentiary privilege must yield.

Before trial, the defense subpoenaed from Vista Del Mar Hospital all psychological and psychiatric records and documentation pertaining to former patient, Margaret Esquivel, Mr. Dworak's neighbor to be returned under seal to the court. (3 CT 645-647 [defense subpoena duces tecum], 666-667 [criminal subpoena]; 5 RT 656.) The prosecution did not oppose introduction of evidence that Esquivel had used Vicodin for five years, including the weekend of Ms. Hamilton's death, but the defense sought the Vista Del Mar records to determine Esquivel's treatments and medications, the severity of her addiction, her ability to perceive and reflect, and possible statements for

impeachment. (5 RT 656.) The prosecution moved to exclude any evidence of Esquivel's treatment as irrelevant, highly prejudicial and improper impeachment. (3 CT 636-642.) The court signed the subpoena. (5 RT 656.)

After the records were received, the court indicated it had gone through Esquivel's medical records and determined that, under *Hammon*, the defense was not entitled to pretrial discovery of the records. (10 RT 1771.) The court said it had balanced the right of cross-examination against the privilege. (10 RT 1771.) The court indicated that, depending on the course of the defense strategy with Esquivel, "there may be a very slight bit of information that would be of assistance to you in this matter, but I can't overemphasize how slight that information is." (10 RT 1771.) Later, the court stated that "there is one slight bit of evidence that potentially could be of assistance in your examination of her, but it will depend frankly on what she testifies to here in the courtroom and what information is or is not gleaned from that examination. (10 RT 1881.)

When Esquivel testified, defense counsel indicated that he needed Esquivel's medical records because, contrary to her testimony, Vicodin does not come in the milligrams she had

testified to. (11 RT 1947.) Counsel asked for the court to make an independent determination whether there is anything discoverable in those materials because Esquivel had been inconsistent in her statements and equivocated, so there were credibility issues that the records could shed light on. (11 RT 1947.)

The court stated that the records related to hospitalization records and did not contain prescription information. The court found that, having heard the testimony and opening statements, the material in the Vista Del Mar records "is of such slight value to the defense in terms of cross-examination of the witness that it is not -- that in balancing the right of the defense to her right of privacy, it is not something that would be discoverable under the facts of this case since it is apparently the stipulation between parties that there was, in fact, sexual intercourse between Mr. Dworak and the decedent in this matter." (11 RT 1948.) The court added that "the information that I alluded to yesterday -- and I'll make a record of this out of the presence of counsel, and it will be sealed for the record on appeal, if there is a conviction -- is of such slight probative value that it is not something that would

justify breaking the privilege of her confidentiality, her rights of privacy concerning that treatment." (11 RT 1948.)

Mr. Dworak requests that this Court independently review the trial court's conclusion by examining the sealed hospitalization records and the court's sealed comments to determine whether the records contain discoverable matter. If this Court finds the trial court should have released the records, Mr. Dworak asks to be permitted to further brief this issue.

ERRORS IN THE PENALTY PHASE

XI.

CALIFORNIA'S CAPITAL SENTENCING SCHEME IS UNCONSTITUTIONAL IN NUMEROUS RESPECTS THAT VIOLATED MR. DWORAK'S RIGHTS UNDER THE 5TH, 6TH, 8TH, AND 14TH AMENDMENTS.

A. Introduction.

In *People v. Schmeck, supra,* 37 Cal.4th 240, the capital defendant presented a number of attacks on the California capital sentencing scheme which had been raised and rejected in prior cases. As this Court recognized, a major purpose in presenting such arguments was to preserve them for further review. (37 Cal.4th at p. 303.) This Court acknowledged that in dealing with these systematic attacks in past cases, it had given conflicting signals on the detail needed in order for a defendant to preserve these attacks for subsequent review. (37 Cal.4th at p. 303.) In order to avoid detailed briefing on such claims in future cases, this Court held that a defendant could preserve these claims by "(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." (37 Cal.4th at p. 304.)

Pursuant to *Schmeck*, Mr. Dworak identifies the following systemic (and previously rejected) claims relating to the California death penalty scheme which require a new penalty phase in his case.

To the extent that respondent may argue that any of these issues is not properly preserved because Mr. Dworak has not presented them in sufficient detail to this Court, Mr. Dworak will seek leave to file a supplemental brief more fully discussing these issues.

B. California's Capital Punishment Scheme, As Construed By This Court And As Applied To Mr. Dworak, Violates the Eighth Amendment.

Before trial, the defense moved to bar imposition of the death penalty for failing to comply with the Eighth Amendment's narrowing requirement. (1 CT 21-34; see 1 CT 23 [citing study showing that 87 percent of first-degree murder cases qualify factually for special circumstances].) California's capital punishment scheme (Pen. Code, § 190.2, et seq.), as construed by this Court in *People v. Bacigalupo* (1993) 6 Cal.4th 475-477, and as applied, violates the Eighth Amendment and fails to provide a meaningful and principled way to distinguish the few defendants who are sentenced to death from the vast majority who are not.

(*People v. Edelbacher* (1989) 47 Cal.3d 983, 1023, citing *Furman v. Georgia* (1972) 408 U.S. 238, 313 [92 S.Ct. 2726, 33 L.Ed.2d 346] conc. opn. of White, J. [to be constitutional, capital punishment must provide meaningful basis to distinguish the few murders for which penalty is appropriate from many murders for which it is not].) Here, the facts of this case (murder in the course of rape by a defendant with a prior rape conviction) cannot be distinguished from the multitude of rape-murder cases where the defendant never faces the death penalty but instead faces or receives life without the possibility of parole.

This Court has already rejected this argument. (*Schmeck*, *supra*, 37 Cal.4th at p. 304; see also *People v. Stanley* (1995) 10 Cal.4th 764, 842-843; *People v. McKinnon* (2011) 52 Cal.4th 610, 692.) For the same reasons set forth by the defendant in *Schmeck*, *People v. Stanley*, and *People v. McKinnon*, this Court should reconsider its decision.

C. Imposition of The Death Penalty Constitutes Cruel And Unusual Punishment Prohibited Under The Eighth Amendment.

Before trial, the defense moved to bar imposition of the death penalty for failing to comply with the Eighth Amendment's prohibition against cruel and unusual punishment. (1 CT 19-36.)

The crux of the claim was a lack of proportionality of the punishment to the crime, because capital punishment no longer comported with contemporary values nor served a legitimate penalogical purpose. (1 CT 35.)

This Court has rejected this argument. (*People v. Moon* (2005) 37 Cal.4th 1, 47-48.) For the reasons set forth by the defendant in *People v. Moon*, this Court should reconsider its decision.

D. Imposition of The Death Penalty Is Unconstitutional Because The Scheme Lacks Intercase Proportionality Review And Its Application Is Grossly Disproportionate To Mr. Dworak's Individual Culpability.

The death penalty statute is unconstitutional for failing to provide intercase proportionality review. It is also unconstitutional because it is grossly disproportionate to Mr. Dworak's individual culpability.

This Court has rejected these arguments. (*People v. Stanley* (2006) 39 Cal.4th 913, 966-967.) For the reasons set forth by the defendant in *People v. Stanley*, this Court should reconsider its decision.

E. Application of Penal Code Section 190.3, Subdivision (a) To Mr. Dworak Violated the Eighth Amendment.

Penal Code section 190.3, subdivision (a) permits a jury to sentence a defendant to death based on the circumstances of the capital crime. The statute is being applied in a manner which institutionalizes the arbitrary and capricious imposition of death, in violation of the Eighth Amendment. The jury here was instructed in accordance with this provision. (18 RT 3223 [CALJIC No. 8.85 [in determining penalty jury shall consider, take into account and be guided by "the circumstance of the crime of which the defendant was convicted in the present proceeding and the existence of any special circumstance found to be true"].) The interpretation of "aggravating factors" related to the instant crime has created a situation where almost all features of every murder can be and have been characterized as aggravating.

This Court has rejected this argument. (*Schmeck*, *supra*, 37 Cal.4th at pp. 304-305; see also *People v. Kennedy* (2005) 36 Cal.4th 595, 641.) For the reasons set forth by the defendant in *Schmeck* and *People v. Kennedy*, this Court should reconsider its decision.

F. Failure To Instruct The Jury That The Burden Of Proof For Finding That The Aggravating Circumstances Outweighed The Mitigating Circumstances Was Beyond A Reasonable Doubt Violated the Fifth, Sixth, Eighth, and Fourteenth Amendments.

Even absent objection, a defendant has a right to appellate review of any instruction affecting his substantial rights. (Pen. Code, § 1259; *People v. Brown, supra,* 31 Cal.4th at p. 539, fn. 7.) Under the California law applicable to Mr. Dworak's case, once Mr. Dworak was convicted of first degree murder, he could not receive a death sentence unless the jury (1) found true one or more special circumstance allegations which rendered him death eligible and (2) found that the aggravating circumstances outweighed mitigating circumstances. (Pen. Code, § 190.3.) The court did not instruct the jury that the second decision had to be found beyond a reasonable doubt. Rather, the jury was told that it should consider the totality of the aggravating circumstances and the totality of the mitigating circumstances and that, "[t]o return a judgment of death, each of you must be persuaded that the aggravating circumstances are so substantial in comparison with the mitigating circumstances that it warrants death instead of life without parole." (18 RT 3227.)

The United States Supreme Court has clarified that the Sixth Amendment requires any fact other than a prior conviction used to support an increased sentence to be submitted to a jury and proved beyond a reasonable doubt. (*Apprendi v. New Jersey* (2000) 530 U.S. 466, 478 [120 S.Ct. 2348, 147 L.Ed.2d 435]; *Blakely v. Washington* (2004) 542 U.S. 296, 303-305 [124 S.Ct. 2531, 159 L.Ed.2d 403]; *Ring v. Arizona* (2002) 536 U.S. 584, 604 [122 S.Ct. 2428, 153 L.Ed.2d 556]; *Cunningham v. California* (2007) 549 U.S. 270, 280-282, 294 [127 S.Ct. 856, 166 L.Ed.2d 856].) The failure to instruct the jury that it needed to find that the aggravating circumstances outweighed mitigating circumstances beyond a reasonable doubt violated Mr. Dworak's rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments.

This Court has rejected this argument in *Schmeck*, *supra*, 37 Cal.4th at p. 304. (See also *People v. Anderson* (2001) 25 Cal.4th 543, 589, fn. 14 [imposition of death penalty does not constitute increased sentence within meaning of *Apprendi*]; *People v. Griffin* (2004) 33 Cal.4th 536, 595 [no factual findings required]; *People v. Prieto* (2003) 30 Cal.4th 226, 263 [*Apprendi* and progeny do not require reasonable doubt standard in capital

penalty proceedings]; *People v. Blair* (2005) 36 Cal.4th 686, 753 [no due process or 8th Amend. requirement the jury be instructed it must apply reasonable doubt standard and determine that death is appropriate penalty].) For the same reasons set forth by the defendants in *Schmeck* and in the other cases cited here, this Court should reconsider its decision.

G. The Court Instructed The Jury With CALJIC No. 8.85 In Violation of Mr. Dworak's Fifth, Sixth, Eighth, and Fourteenth Amendment Rights.

Even absent objection, a defendant has a right to appellate review of any instruction affecting his substantial rights. (Pen. Code, § 1259; *People v. Brown, supra,* 31 Cal.4th at p. 539, fn. 7.)

The jury here was instructed with CALJIC No. 8.85, which told the jury that:

> In determining which penalty is to be imposed on the defendant, you shall consider all of the evidence which has been received during any part of the trial of this case. You shall consider, take into account and be guided by the following factors, if applicable:
>
> (a) The circumstances of the crime of which the defendant was convicted in the present proceeding and the existence of any special circumstance found to be true;
>
> (b) The presence or absence of criminal activity by the defendant other than the crimes for which the defendant has been tried in the present proceedings which involve the use or attempted use of force or

violence or the express or implied threat to use force or violence;

(c) The presence or absence of any prior felony conviction other than the crimes for which the defendant has been tried in the present proceedings;

(d) Whether or not the offense was committed while the defendant was under the influence of extreme mental or emotional disturbance;

(e) Whether or not the victim was a participant in the defendant's homicidal conduct or consented to the homicidal act;

(f) Whether or not the offense was committed under circumstances which the defendant reasonably believed to be a moral justification or extenuation for his conduct;

(g) Whether or not the defendant acted under extreme duress or under the substantial domination of another person;

(h) Whether or not at the time of the offense the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental disease or defect or the effects of intoxication;

(i) The age of the defendant at the time of the crime;

(j) Whether or not the defendant was an accomplice to the offense and his participation in the commission of the offense was relatively minor; and

(k) Any other circumstance which extenuate 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.
>
> You must disregard any jury instruction given to you in the prior phase of this trial which conflicts with this principle.
>
> Sympathy for the family of the defendant is not a matter that you can consider in mitigation. Evidence, if any, of the impact of an execution on family members should be disregarded unless it illuminates some positive quality of the defendant's background or character.
> (18 RT 3223-3225.)

The giving of the instruction to Mr. Dworak's jury was constitutionally flawed because (1) it failed to delete inapplicable sentencing factors; (2) it failed to delineate between aggravating and mitigating factors; (3) it contained vague and ill-defined factors; and (4) it limited some mitigating factors by adjectives such as "extreme" and "substantial" in factors (d), (g). These errors, taken singly or in combination, violated Mr. Dworak's Fifth, Sixth, Eighth, and Fourteenth Amendment rights.

This Court has rejected these arguments in *Schmeck*, *supra*, 37 Cal.4th at pp. 304-305. (See also *People v. Farnam* (2002) 28 Cal.4th 107, 191-192 [deletion of inapplicable factors]; *id.* at p. 192 [no duty to advise as to which factors are mitigating and which are aggravating]; *People v. Ray* (1996) 13 Cal.4th 313,

358-359 [no definition needed where there is core common-sense meaning]; *People v. Perry* (2006) 38 Cal.4th 302, 319 [use of "extreme" does not unconstitutionally limit consideration of mitigating evidence].)

This Court should reconsider its decisions in *Schmeck* and the other cases cited herein.

H. California's Death Penalty Law Violates International Law.

California's death penalty law violates international law, including the International Covenant of Civil and Political Rights.

This Court has rejected this argument in *Schmeck*, *supra*, 37 Cal.4th at p. 305. (See also *People v. McKinnon* (2011) 52 Cal.4th 610, 698.) This Court should reconsider its decisions.

I. Conclusion.

Pursuant to *Schmeck*, Mr. Dworak asks this court to reconsider its decisions as to the systemic claims identified herein, claims which require a new penalty phase trial in his case.

XII.

THE ADMISSION OF VICTIM-IMPACT EVIDENCE ABOUT THE CAPITAL CRIME AND THE NONCAPITAL CRIME VIOLATED MR. DWORAK'S 5TH, 6TH, 8TH, AND 14TH AMENDMENT RIGHTS.

A. Introduction.

Over defense objection, the trial court permitted the prosecution to introduce victim-impact evidence in the penalty phase of the trial. The victim-impact evidence included (1) testimony from Ms. Hamilton's father and grandfather about the impact of the capital crime on them, on her now-deceased grandmother, and on her younger brother and sister and (2) testimony from a sheriff's deputy about the impact of the 1986 rape in Napa on Cynthia W. in the form of his observations of her that day. The admission of that evidence was both state law error and a violation of Mr. Dworak's rights under the federal constitution to due process of law, a fair trial, cross-examination and confrontation of adverse witnesses, presentation of evidence in his own defense, and effective assistance of counsel under the Fifth, Sixth, Eighth, and Fourteenth Amendments, requiring reversal.

Mr. Dworak acknowledges that the impact of a defendant's acts on friends and family of the victim is not categorically barred by the Eighth or Fourteenth Amendments to the federal constitution. (*Payne v. Tennessee* (1991) 501 U.S. 808, 825-827 [111 S.Ct. 2597, 115 L.Ed.2d 720].) He also acknowledges that, under California law, "victim impact evidence is admissible at the penalty phase under section 190.3, factor (a), as a circumstance of the crime, provided the evidence is not so inflammatory as to elicit from the jury an irrational or emotional response untethered to the facts of the case." (*People v. Pollock* (2004) 32 Cal.4th 1153, 1180; see, e.g., *People v. Edwards* (1991) 54 Cal.3d 787, 835.) Mr. Dworak here argues specifically: first, that victim-impact testimony must be limited to witnesses who were present at the crime, acknowledging that this Court has rejected that argument (*People v. Thomas* (2011) 51 Cal.4th 449, 508); second, that victim-impact testimony must be limited to characteristics of the victim known to the defendant at the time of the crime, or those that reasonably should be known, acknowledging that this argument, too, has been rejected by this Court (*People v. Williams* (2013) 56 Cal.4th 165, 197; *People v. Weaver* (2012) 53 Cal.4th 1056, 1082); and third, that victim impact testimony

must be restricted to testimony relating to the victim of the capital crime, an argument this Court has also rejected (*People v. Nelson* (2011) 51 Cal.4th 198, fn. 2, 221; *People v. Demetrulias* (2006) 39 Cal.4th 1, 39.)

Pursuant to *Schmeck, supra,* 37 Cal.4th 240,[24] as to the first three points of error in admitting the victim impact evidence Mr. Dworak asks this Court to reconsider its prior decisions as to the claims raised here, for the reasons given in the cited cases and herein.

B. Proceedings Below.

1. Victim-Impact Evidence, Circumstances Of The Capital Crime.

The prosecution gave notice of the penalty phase evidence in aggravation which it sought to admit under Penal Code section

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[24] In *Schmeck, supra,* 37 Cal.4th 240, as explained in Argument XII, *ante*, this Court has acknowledged that, in dealing with systematic attacks in past cases, it had given conflicting signals on the amount of detail need to preserve these attacks for subsequent review. (*Id.* at p. 303.) To avoid detailed briefing while still providing preservation of claims, this Court held that preservation was ensured by a defendant's identifying the claim in the context of the facts, noting the previous rejection of the same claim, and asking this court to reconsider its decision. (*Id.* at p. 304.) To the extent that respondent argues that these issues are not properly preserved because Mr. Dworak has not presented them in sufficient detail to this Court, Mr. Dworak will ask to file a supplemental brief discussing these issues in full.

190.3. (1 CT 105-108 [notice], 3 CT 794-796 [amended notice].) As to factor (a) evidence, circumstances of the crime, the prosecution planned to produce victim-impact testimony about the capital crime, including that of Ms. Hamilton's father (Michael Hamilton), grandfather (C. William Hamilton), and aunt (Teresa Hayden). (3 CT 794-796.) The prosecution indicated its intent to introduce descriptions of Ms. Hamilton's musical and artistic abilities and of her relationships with her father, grandfather, younger brother, and younger sister, as well as photographs of Ms. Hamilton and her paintings. (3 CT 794-796.)

Defense counsel moved to exclude victim-impact evidence from the penalty phase, arguing that the introduction of victim-impact evidence violated Mr. Dworak's right to a fair trial and due process of law, his right to cross-examination and confrontation of adverse witnesses, his right to affirmatively present evidence in his own defense, his right to the effective assistance of counsel, and his right to a reliable verdict and sentence. (1 CT 278-302 [defense motion], citing U.S. Const., 5th, 6th, 8th, 14th Amends.; *Payne v. Tennessee*, *supra*, 501 U.S. at pp. 824-825; Cal. Const., art. I, §§ 7, 15, 16, 17, 24, 28, subd. (d);

Pen. Code, § 190.3; Evid. Code, § 210, 352; 3 CT 829-833 [supplemental defense motion].) Defense counsel specifically sought exclusion of the testimony of any family member who was not personally present at the homicide as well as any testimony about matters not foreseeable to Mr. Dworak at the time of the offense. (1 CT 300, 3 CT 831.) Defense counsel also asked for the exclusion of emotional testimony, any minor's testimony, and testimony from more than one witness concerning the victim, as well as testimony which would permit a verdict based on passion, not deliberation. (1 CT 300, 3 CT 833.)

The court permitted the testimony of Ms. Hamilton's father and grandfather about how Ms. Hamilton's loss had affected them and their families, including descriptions of her unique qualities as a person such as her artistic and musical abilities. (16 RT 2940.) The court also permitted the introduction of one photograph of Ms. Hamilton playing the piano and two pieces of her artwork. (16 RT 2960-2961.)

The jury then heard from two victim-impact witnesses about the circumstances of the capital crime, Ms. Hamilton's grandfather and father. Her grandfather testified that her father and her two grandmothers had delivered her, and he, the

grandfather, had held her ten minutes later; she was "the most precious thing that ever happened." (16 RT 3008.) He and his wife saw Ms. Hamilton for the weekend almost every week. (16 RT 3009.) They traveled with Ms. Hamilton through 42 states and Canada. (16 RT 3010.) She was a "brilliant" youngster with an almost photographic memory. (16 RT 3010-3011.) She had a beautiful voice and learned to play the piano quickly. (16 RT 3011, 3013.) She swam and was good at all sports, soccer, softball, outriggers, golf. (16 RT 3014-3015.) She made drawings, cards, and verses. (16 RT 3016.) He spoke to her on the Thursday before her death, and the last thing she said to him was, "I love you, Gramps." (16 RT 3017.) Ms. Hamilton was very close to her grandmother, who was devastated and almost passed out when they learned Ms. Hamilton had been murdered. (16 RT 3020.) His wife had leukemia, but everything had been going well before the phone call; his wife died in 2002. (16 RT 3017, 3019.) The jury, which had already seen three photographs of Ms. Hamilton in the guilt phase (People's Exhibit Nos. 16, 18, 19), saw another photograph of her playing the piano (People's Exhibit No. 1 [penalty phase]) and identified by her grandfather and father. (16 RT 3013-3014, 3037-3038.)

Ms. Hamilton's father testified that Ms. Hamilton, who was a talkative, extremely friendly, and inquisitive young child, was close to her younger brother. (16 RT 3023-3024.) The family hiked and played games like baseball and football. (16 RT 3025, 3030.) Ms. Hamilton loved doing anything with her family. (16 RT 3030.) She earned a green belt in karate, rowed, ran cross-country, and played softball and chess with her father. (16 RT 3030, 3033.)

The family had dogs and turtles; Ms. Hamilton loved animals and talked about being involved in veterinary medicine. (16 RT 3026.) Ms. Hamilton was extremely close to her grandmother and spent a lot of time with her grandparents. (16 RT 3027.) Her younger sister was only 13 years old when Ms. Hamilton died, and the murder was hard on her. (16 RT 3025-3026.) Although Ms. Hamilton never took lessons, she drew with pencil, charcoal, watercolors and oil paints. (16 RT 3027.)

The jury, which had already seen one example of the artwork in the guilt phase (People's Exhibit No. 22), saw her father identify two more examples of her artwork (People's Exhibit Nos. 2, 3, [penalty phase]). (16 RT 3028-3029.) One

painting hung in their house, and the other one hung in her little sister's room. (16 RT 3029.)

Recalling his last phone call with Ms. Hamilton, her father blamed himself for what happened in part and for letting her down. (16 RT 3036.) Having to bury his daughter changed everything for the rest of his life. (16 RT 3037.) Something which cannot be replaced has been taken away; there will be good times, but there will always be a hole in those good times. (16 RT 3037.) During the trial, he learned what had happened to his daughter in detail, and the hardest part was thinking what she went through and that he wasn't there to stop it. (16 RT 3038.)

Ms. Hamilton developed school problems in her teens and became rebellious, but never to her father. (16 RT 3039.) He chose to send her to boarding school to develop discipline. (16 RT 3040.)

2. Victim-Impact Evidence About The 1986 Convictions.

The prosecution also indicated its intent to introduce the 1986 convictions in Napa as factor (b) and factor (c) evidence. (1 CT 106, 3 CT 796.) It further sought to admit under factor (a) "victim-impact evidence for past offenses," i.e., as to Cynthia W. for those prior offenses, presented by a deputy sheriff who saw

Cynthia W. on that day. (1 CT 106, 3 CT 794-796.) Defense counsel sought the exclusion of victim-impact evidence concerning any offense other than the capital crime. (1 CT 300-301.) Defense counsel argued that victim-impact testimony about the prior offenses was prejudicial, cumulative to Cynthia W.'s testimony in the guilt phase, and irrelevant because "victim impact should be properly limited to the introduction of evidence, if any, to the victim of this offense, the family of this offense." (16 RT 2937-2939.)

The prosecution argued that it was "entirely proper to include the impact of the defendant's prior crimes on other victims. We're not just talking about the impact on Crystal Hamilton and her immediate family but the impact on Cynthia W. [¶] Bringing in the observations made of Cynthia as to her shaking, as to her having this wide-eyed stare, looking as though she was a scared little puppy is the way the detective will describe her." (16 RT 2938.) If the Court were to deny Brambrink's testimony, the prosecutor asked to allow testimony from Cynthia W. without the limits placed on her during the guilt phase. (16 RT 2938.) The court believed there was authority for victim-impact evidence for victims or prior crimes and permitted

Brambrink's testimony about his observations. (16 RT 2939-2940.)

The following victim-impact testimony was then adduced in the penalty phase from Allen Brambrink, a Napa County Sheriff's Department employee. (16 RT 3041-3042.) On April 25, 1986, he collected crime scene evidence from Cynthia W.'s car. (16 RT 3042-3043.) He knew Cynthia W. as a fellow county employee. (16 RT 3043.) Back at his office, between 10:30 and 11:30 p.m., an officer drove up with Cynthia W. (16 RT 3044.) Her hand was covered with a large bandage. (16 RT 3044.) She was quiet and sullen and appeared quiet and confused. (16 RT 3046-3047.) He put his arm around her and she hugged him; he could feel her tremor. (16 RT 3046.) He dropped his hands to his sides, and she still clung to him. (16 RT 3046-3047.) In his 31 years in the sheriff's department, he has never hugged any victim before or since. (16 RT 3048.) There was something about her demeanor; she needed something and he responded. (16 RT 3048.)

C. The Court Erred In Admitting Victim-Impact Testimony About The Capital Crime.

The court in *Payne v. Tennessee, supra*, 501 U.S. 808, held that the Eighth Amendment did not prevent states from permitting victim-impact evidence. (*Id.* at p. 827.) In California, the admission of victim-impact testimony is permitted only to the extent that it is related to the "circumstances of the crime" under factor (a) of Penal Code section 190.3. (*People v. Edwards, supra*, 54 Cal.3d at pp. 835-836.) However, the "circumstances of the crime" should be understood "to mean those facts or circumstances either known to the defendant when he or she committed the capital crime or properly adduced in proof of the charges adjudicated at the guilt phase." (*People v. Fierro* (1991) 1 Cal.4th 173, 264 (conc. & dis. opn. of Kennard, J.).) The "circumstances of the crime" does not convert any adverse impact of a capital murder victim's family into an aggravating factor. On the contrary, the Supreme Court's Eighth Amendment jurisprudence continues to prohibit states from labeling as "aggravating" any factor common to all murders or applicable to every defendant eligible for the death penalty. (*Arave v. Creech* (1993) 507 U.S. 463, 474 [113 S.Ct. 1534, 123 L.Ed.2d 188] ["If

the sentencer fairly could conclude that an aggravating circumstance applies to *every* defendant eligible for the death penalty, the circumstance is constitutionally infirm."], citing, et al., *Maynard v. Cartwright* (1988) 486 U.S. 356, 364 [108 S.Ct. 1853, 100 L.Ed.2d 372] [invalidating aggravating circumstance that appeared to describe "every murder"].) Every murder presumably has an adverse impact on the victim's family. "When [murder] happens, it is always to distinct individuals, and, after it happens, other victims are left behind . . . . [H]arm to some group of survivors is a consequence of a successful homicidal act so foreseeable as to be virtually inevitable." (*Payne v. Tennessee*, *supra*, 501 U.S. at p. 838 (conc. opn. of Souter, J.).) Adverse impact on a victim's family that was neither foreseen nor foreseeable by the defendant at the time of his crime has no logical bearing on his blameworthiness and does not easily fit within the definition of any statutory factor in aggravation. (*People v. Fierro*, *supra*, 1 Cal.4th at p. 264 (conc. & dis. opn. of Kennard, J.).)

Here, the victim-impact evidence related to testimony regarding Ms. Hamilton's personal characteristics, including her relationship to her father, younger brother and sister,

grandfather and grandmother and her potential as an artist and a musician, all facts that were unknown to appellant at the time of the crime and was elicited from witnesses who were not present at the scene of the crime. Thus, it was improperly admitted. Mr. Dworak respectfully urges this Court to reconsider its prior cases holding otherwise.

D. The Court Erred In Admitting Victim-Impact Testimony About The Non-Capital Crime.

This Court has held the circumstances of uncharged violent criminal conduct, including its direct impact on the victim or victims of that conduct, is admissible under factor (b). (*People v. Nelson* (2011) 51 Cal.4th 198, 203, fn. 2, 221; *People v. Demetrulias* (2006) 39 Cal.4th 1, 39.) Under factor (b), prior violent acts may be shown in context, to fully illuminate their seriousness.[25] (*People v. Holloway* (2004) 33 Cal.4th 96, 143; *People v. Melton* (1988) 44 Cal.3d 713, 757.)

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[25]Victim-impact evidence about the 1986 offenses was erroneously admitted as factor (a) evidence. (See, e.g., 1 CT 106, 3 CT 796; 16 RT 2939-2940.) Factor (a) evidence is permissible "if related directly to the circumstances of the capital offense." (*People v. Williams* (1992) 1 Cal.4th 1027, 1063 [approving victim-impact testimony by store employee shot during robbery where killing of store owner was capital crime].) This Court has never approved admission of the circumstances of factor (b) conduct or factor (c) convictions as factor (a) evidence. As noted,

This Court relied upon the underlying rationale of the *Payne v. Tennessee* decision when this Court reversed its prior view that victim-impact evidence about the capital crime was not admissible in California penalty trials. (*People v. Edwards*, *supra*, 54 Cal.3d at p. 833.) That rationale does not support this Court's view on evidence about a crime's impact on the victim of a prior conviction. The United States Supreme Court based its decision in large part on the premise that allowing the prosecution to present evidence about the impact of the capital crime on the victim was an appropriate "symmetrical response" to the broad-ranging mitigation evidence that capital defendants are permitted to present. (*Payne v. Tennessee*, *supra*, 501 U.S. at pp. 826-827.) No such symmetry is achieved by permitting the prosecutor to present evidence about the impact of prior criminal convictions.

States are required to adopt procedures calculated to promote *greater* reliability and fairness in capital cases and to ensure *heightened* protection of a defendant's due process and fair trial rights. (*Murray v. Giarratano* (1989) 492 U.S. 1, 8-9

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this Court has upheld the admission of victim-impact evidence from a prior violent crime. (*People v. Nelson, supra,* 51 Cal.4th at pp. 203, fn. 2, 221.)

[109 S.Ct. 2765, 106 L.Ed.2d 1]; *Beck v. Alabama* (1990) 447 U.S. 625, 638 [100 S.Ct. 2382, 65 L.Ed.2d 392].) Those fundamental requirements are not advanced by the ever-expanding use of inherently inflammatory and largely unnecessary victim-impact evidence about prior crimes.

Mr. Dworak maintains that such evidence not admissible under *Payne v. Tennessee, supra*, 501 U.S. at pp. 826-827. Furthermore, Mr. Dworak maintains that the impact on the victim of the non-capital crimes should not be deemed admissible as factor (b) or factor (c) evidence. Mr. Dworak respectfully urges this Court to reconsider its prior cases.

E. The Errors Were Prejudicial.

Because the errors at issue occurred at the penalty phase of a capital trial, this Court must determine whether there is a "reasonable possibility" that any of them affected the verdict. (*People v. Brown, supra*, 46 Cal.3d at p. 447.) And because the errors violated Mr. Dworak's rights under the federal constitution, the government must prove that each of them was harmless beyond a reasonable doubt. (*Chapman, supra*, 386 U.S. 18, 24.) Respondent cannot meet that burden.

First, although the crime involved in the present case was a capital one, the circumstances do not present the type of unusually egregious crimes the court often sees giving rise to a death sentence. (See, e.g., *In re Carpenter* (1995) 9 Cal.4th 634 [defendant sentenced to death for murdering five people]; *People v. Bitaker* (1989) 48 Cal.3d 1046 [defendant sentenced to death for kidnapping, raping, sodomizing and murdering five teen-age girls]; *People v. Bonin* (1989) 47 Cal.3d 808 [defendant sentenced to death after murdering 10 people].) Nor does this case involve a defendant with the extensive criminal history this Court often sees in death penalty cases. (See e.g., *People v. Ray* (1996) 13 Cal.4th 313, 330-331 [defendant had two prior murder convictions]; *People v. Nicolaus* (1991) 54 Cal.3d 551, 567 [defendant convicted of murder in 1985 had killed his three children in 1964, for which he had been on death row]; *People v. Hendricks* (1987) 43 Cal.3d 584, 589 [defendant had two prior murder convictions].)

Second, any victim-impact evidence is especially emotional and evocative. The evidence does not really say anything about a defendant's individual culpability when the victim-impact information is unknown to him when the crime was committed.

However, jurors who no doubt share similar family experiences, like being grandparents or enjoying outdoor family activities together, would let the telling of such experiences tug at their heartstrings. Here, in particular, jurors heard that a grandmother who had helped deliver her granddaughter at birth collapsed in anguish when she heard the girl had been murdered at 18 years old. A grandfather recalled his granddaughter's last "I love you." Contrary to the prosecutor's argument, Ms. Hamilton's drawings had no great artistic promise, but it was their very naiveté and childishness which made them touching. In deciding on a sentence in a capital trial, emotion must not reign over reason, and evidence should not invite an irrational, rather than reasoned, response. (*People v. Dykes* (2009) 46 Cal.4th 731, 784-785.) But that is what happened here.

The victim-impact evidence as to the noncapital crime was equally evocative. A hardened 31-year veteran deputy, who had never hugged any victim in his long career, saw something in Cynthia W. that needed serious comfort.

Third, the prosecutor emphasized the victim-impact evidence during closing argument. For example, the prosecutor related all of the things that Ms. Hamilton would never do again,

and all of the things that her grandfather, father, and sister would never experience with her again. (18 RT 3318.) "Evidence matters; closing argument matters; statements from the prosecutor matter a great deal." (*United States v. Kojayan, supra,* 8 F.3d at p. 1323.) Although the prosecutor did not belabor victim-impact as to Cynthia W. in closing, she did talk in her opening statement about her being terrorized and looking like a wet, cold little puppy. (16 RT 2990-2991.)

The improper admission of each type of victim impact evidence, taken individually or in any combination, was prejudicial.

F. Conclusion.

Pursuant to *Schmeck*, Mr. Dworak asks this court to reconsider its decisions as to the systemic claims identified herein, claims which require a new penalty phase trial in his case.

XIII.

THE ADMISSION OF PROSECUTORIAL ARGUMENT THAT MR. DWORAK LACKED REMORSE, AND THAT HE HAD SPECIFICALLY FAILED TO SHOW REMORSE TWO YEARS AFTER THE OFFENSES, WHEN POLICE INTERVIEWED HIM DEPRIVED HIM OF HIS 5TH, 6TH, 8TH, AND 14TH AMENDMENTS.

A. Introduction.

Over defense objection, the court permitted the prosecutor to ask Mr. Dworak's wife and mother-in-law whether Mr. Dworak had laughed, joked, and been happy between April 2001 when the crimes occurred and July 2003 when he was arrested. Over defense objection, the court permitted the prosecutor to argue, as an aggravating factor, that Mr. Dworak lacked remorse for the crimes. The testimony and argument violated Mr. Dworak's right to remain silent, as well as his rights to a fair trial, due process of law, a reliable penalty determination, and deprived him of his state-created liberty interest regarding statutory aggravating factors. (U.S. Const., 5th, 6th, 8th, 14th Amends.; Cal. Const., art. I, § 7, 15, 16, 17, 24, 28, subd. (d).)

B. Proceedings Below.

Before the penalty phase, defense counsel filed a motion to exclude the prosecution from arguing that Mr. Dworak lacked

remorse. (3 CT 824-828.) Counsel objected to "any argument on the part of the prosecutor regarding remorse." (3 CT 827.) Counsel argued that lack of remorse was a nonstatutory factor outside the permissible scope of Penal Code section 190.3 and that lack of remorse was too speculative and unreliable to be permitted to influence capital sentencing determinations. (3 CT 826-828.) Any inference of lack of remorse inferred from a plea of not guilty, from a steadfast denial of guilt at the guilt and penalty phases, or from an absence of affirmative demonstrations of remorse, violates a defendant's right to due process, a fair trial, and a reliable judgment and sentence. (3 CT 826, citing *Gardner v. Florida* (1977) 430 U.S. 349, 358 [97 S.Ct. 1197, 51 L.Ed.2d 393] [death sentence must be and appear to be based on reason]; *Estelle v. Smith* (1981) 451 U.S. 454, 468, fn. 11 [101 S.Ct. 1866, 68 L.Ed.2d 359] [capital sentencing procedures must be "unusually reliable"].) Because counsel was not offering his remorse as a nonstatutory mitigating factor, counsel argued that the prosecutor could not debate the inapplicability of that factor. (3 CT 827.)

The court ruled the prosecution could argue lack of remorse, citing *People v. Lewis* (2001) 25 Cal.4th 610. (3 CT 837-838; 16 RT 2951-2953.)

During the penalty-phase cross examination of Mr. Dworak's mother-in-law, Virginia Foster, the prosecutor elicited testimony, over defense objection on relevance grounds, that Mrs. Foster had seen Mr. Dworak "laugh and joke and be happy between April of 2001 and July 2003." (17 RT 3174.) During cross-examination of Mr. Dworak's wife, Susannah Dworak, the prosecutor elicited testimony, over defense objection on relevance and Evidence Code section 352 grounds, that, after April 2001, Mr. Dworak had laughed and joked with her. (17 RT 3204, 3206.) The prosecutor further elicited testimony that, since that weekend, nothing "about his behavior at home" had indicated that he had committed a "horrible crime." (17 RT 3204-3205.) Defense counsel objected, and the court sustained the objection, when the prosecutor asked Mrs. Dworak whether "between April 22nd of 2001 and July of 2003 [you] saw any sign of what you would call remorse in your husband?" (17 RT 3206.)

During closing argument, the prosecutor argued several times that Mr. Dworak had been laughing and happy, playing games with his mother-in-law and wife:

> You heard Virginia Foster talk about the happy times she's had with the defendant, up until he was arrested in July of 2003, that is, after he snatched Crystal Hamilton up off the street, beat her up, raped her, drowned her in the Pacific Ocean. He was just a pleasure for Virginia Foster to be around, even after committing that deed. Never once did he appear not to be happy and jovial and helpful.
>
> While Crystal Hamilton's nude, battered body is being carried up out of the ocean on a backboard and while her family is wracked in grief over what this defendant did to her, the defendant goes back to Oak View to play checkers with his mother-in-law. How Charming. What a wonderful person. What a wonderful son-in-law.
> (18 RT 3248-3249.)
>
> And then while Crystal Hamilton is drifting along in the Pacific Ocean here where her body was found the next morning, he goes back to his life. While she's being carried up on the backboard out of the ocean and being cut open at an autopsy to see what happened to her, the defendant goes and picks up his wife from that conference. And while Crystal Hamilton's father is making that awful phone call to her grandparents telling them what had happened to her, the defendant's in Oak View playing checkers with his mother-in-law telling jokes.
> (18 RT 3274-3275.)
>
> Two years later when the police talk to him about this crime, when they show him a picture of her, what does he do? Does he break down sobbing and apologizing for what he's done? For what happened

> that night? Does he admit everything that we know he did to her but explain it in some way, give some explanation that in any way mitigates what he did to her? No, no, no, no. He lies. He lies and lies. Turns on the manipulation, turns on the charm, 'cause that's his character.
>
> And those are the circumstance of this crime, and that's what you must consider in determining what penalty to now impose on the defendant.
> (18 RT 3275.)
>
> Well, he didn't beat himself up over his last crime. He engaged in a campaign to convince everybody he was innocent. He told jokes, he got visits, manipulated another woman into marrying him.
> (18 RT 3318.)

Pursuant to *Schmeck, supra,* 37 Cal.4th 240,[26] Mr. Dworak asks this Court to reconsider its prior decisions as to the admissibility of testimony and argument about lack of remorse in general, for the reasons given in the cited cases and herein.

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[26] In *Schmeck, supra,* 37 Cal.4th 240, as explained in Argument XII, *ante*, this Court has acknowledged that, in dealing with systematic attacks in past cases, it had given conflicting signals on the amount of detail need to preserve these attacks for subsequent review. (*Id.* at p. 303.) To avoid detailed briefing while still providing preservation of claims, this Court held that preservation was ensured by a defendant's identifying the claim in the context of the facts, noting the previous rejection of the same claim, and asking this court to reconsider its decision. (*Id.* at p. 304.) To the extent that respondent argues that these issues are not properly preserved because Mr. Dworak has not presented them in sufficient detail to this Court, Mr. Dworak will ask to file a supplemental brief discussing these issues in full.

Furthermore, under this Court's precedent, the trial court erred in admitting any evidence of, or any argument regarding, Mr. Dworak's remorseless in the two years following the crimes.

C. The Trial Court Erred When It Permitted The Prosecutor To Elicit Testimony And To Make Argument About Lack Of Remorse.

This Court has held that, as long as a prosecutor's argument about lack of remorse does not amount to a direct or indirect comment on the defendant's invocation of the right to silence at the penalty phase, such argument does not violate constitutional principles. (*People v. Lewis*, *supra*, 25 Cal.4th at p. 674; *People v. Bemore* (2000) 22 Cal.4th 809, 855; *People v. Stansbury* (1993) 4 Cal.4th 1017, 1067-1068, rev'd on another ground *sub nom. Stansbury v. California* (1994) 511 U.S. 318 [114 S.Ct. 1526, 128 L.Ed.2d 293].)

This Court should reconsider its holding because the testimony and argument violated Mr. Dworak's right to remain silent, as well as his right to a fair trial, due process of law, and a reliable penalty determination.

D. The Trial Court Erred When It Permitted The Prosecutor To Elicit Testimony And Make An Argument That Mr. Dworak's Failure To Show Remorse During The Two Years Following The Crimes Was An Aggravating Factor.

A prosecutor may not present evidence in aggravation that is not relevant to the statutory factors enumerated in Penal Code section 190.3. (*People v. Crittenden* (1994) 9 Cal.4th 83, 148; *People v. Boyd* (1985) 38 Cal.3d 762, 772-776.) Lack of remorse is not a statutory aggravating factor. (See Pen. Code, § 190.3; *People v. Ochoa* (2001) 26 Cal.4th 398, 449, abrogated on another point in *People v. Prieto* (2003) 30 Cal.4th 226, 263, fn. 14.)

"Conduct or statements *at the scene of the crime* demonstrating lack of remorse may be considered in aggravation as a circumstance of the capital crime under section 190.3, factor (a)." (*People v. Pollock* (2004) 32 Cal.4th 1153, 1184, emphasis added, citing *People v. Gonzalez* (1990) 51 Cal.3d 1179, 1231-1232.) Post-crime lack of remorse, however, does not fit within any statutory sentencing factor and therefore cannot be used as aggravating evidence. (*People v. Gonzalez, supra*, 51 Cal.3d at p. 1232 ["post-crime evidence of remorselessness does not fit within any statutory sentencing factor, and thus should not be urged as aggravating"]; *People v. Boyd, supra*, 38 Cal.3d at pp. 771-776.)

Where a defendant has not offered remorse as a mitigating factor, permitting a prosecutor to negate something never asserted in mitigation constitutes a judicially-created aggravating factor in violation of California law. Such arbitrary denial of a state-created right to due process violates federal due process under the Fourteenth Amendment. (*Hicks v. Oklahoma*, *supra*, 447 U.S. at p. 346.) Where, as here, the state has established a statutory right to a penalty phase trial where the prosecution is limited to statutory aggravating factors, the state's denial of that right is not a mere matter of state concern but of federal concern because the Fourteenth Amendment prevents arbitrary deprivation of liberty interests by the state. (*Ibid.*)

Here, the prosecutor did not limit the testimony or her argument about lack of remorse to the scene of the crime or events in temporal proximity to the crime. Rather, the prosecutor sought to paint a broad picture of Mr. Dworak's laughing, joking, and being happy between the time of the crimes and his arrest two years later.

E. The Error Was Prejudicial.

This Court must determine whether there was a "reasonable possibility" that the errors affected the verdict.

(*People v. Brown, supra,* 46 Cal.3d at p. 447.) The errors are of constitutional dimension, and the government's burden is to prove each error was harmless beyond a reasonable doubt. (*Chapman, supra,* 386 U.S. 18, 24.) Respondent cannot do so on these facts.

First, as set forth in Argument XII, E, Prejudice, *ante*, the circumstances of the crime, a rape-murder, do not present the type of unusually egregious crimes the court often sees giving rise to a death sentence nor does Mr. Dworak share the extensive criminal history this Court often sees in death penalty cases.

Second, the prosecutor's repetitive references to Mr. Dworak's being happy, laughing, and joking for every day between the crimes and his arrest more than two years later must have made an impression on jurors, particularly when she contrasted his joviality with the unhappiness of the Hamilton family. The prosecutor's dramatic expectation that Mr. Dworak should have broken down and confessed when confronted with Ms. Hamilton's picture during a police interview two years later would have resonated as remorselessness with jurors.

F. Conclusion.

Pursuant to *Schmeck*, Mr. Dworak asks this court to reconsider its decisions as to the claims identified herein, claims which require a new penalty phase trial in his case.

CONCLUSION

For the reasons given herein, this Court should reverse the judgment of conviction and penalty of death.

Dated: February 3, 2014

Respectfully submitted,

/s/ Diane Nichols

Diane Nichols
Attorney for
DOUGLAS EDWARD DWORAK

CERTIFICATION OF WORD COUNT

Pursuant to California Rules of Court, rules 8.360(b) and 8.630(b), I hereby certify the number of words in Appellant's Opening Brief is 55,051, based on the calculation of the computer program used to prepare this brief. The applicable word count limit is 102,000.

Dated: February 3, 2014 */s/ Diane Nichols*

Diane Nichols

DECLARATION OF SERVICE

PEOPLE OF
THE STATE OF CALIFORNIA
v. **DOUGLAS E. DWORAK** SUPREME COURT NO. **S135272**

The undersigned declares: I am an attorney duly licensed to practice in the State of California and am not a party to the subject cause. My business address is P.O. Box 2194, Grass Valley, California 95945-2194. I served the attached **APPELLANT'S OPENING BRIEF** by placing a true and correct copy thereof in a separate envelope for each addressee named hereafter, addressed as follows:

California Appellate Project
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Each envelope was then sealed and with the postage thereon fully prepaid deposited in the United States mail by me at Grass Valley, California on **FEBRUARY 3, 2014**.

I declare under penalty of perjury the foregoing is true and correct and this declaration was executed at Grass Valley, California on February 3, 2014.

/s/ Diane Nichols

Diane Nichols