IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. CALVIN LAMONT PARKER, Defendant and Appellant.	**CAPITAL CASE** No. S113962 (San Diego County Superior Court No. 154640)

APPELLANT'S REPLY BRIEF

On Automatic Appeal From a Judgment of Death
of the Superior Court of the State of California
for the County of San Diego

HONORABLE MICHAEL D. WILLINGTON, PRESIDING

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INTRODUCTION

The central issue at the guilt phase of this trial was not who killed Patricia Gallego, who surely did not deserve to die; but rather, the intent and circumstances at the time she was killed. The defense was that this was a case of manslaughter, not murder, and there was credible evidence supporting that defense. Because the prosecution case was weak, the trial prosecutor chose to stack the deck in as many ways as possible, and the trial judge repeatedly failed to prevent governmental over-reaching.

Among many other issues, the trial court failed to declare a doubt as to Mr. Parker's competence to stand trial, and failed to appoint experts to investigate that strong possibility; failed to restrict the admission of a great quantity of so-called "porn" evidence, despite its irrelevance; failed to prevent the prosecution from presenting patently unproven and unsubstantiated

testimony by a dentist unqualified to give such testimony, which supposedly supported the theory that the victim was handcuffed; failed to provide to the defense videotapes of prosecutors discussing this case, originally taped for a "reality" show with the full permission of the prosecution; admitted alleged "reconstruction" post-autopsy photographs involving a completely random set of handcuffs taken from the evidence locker and this victim's dead body (post-autopsy); permitted the prosecution to argue that this was a case of rape, based on "evidence" consisting of one sperm cell found inside a banana peel in the trash; limited defense presentation of impeachment evidence challenging the credibility and veracity of testimony from a jailhouse informant, as well as the reliability of the detective who cultivated that witness; and gave instructions lightening the prosecution's burden of proof.

Respondent's counsel continues that approach in its brief, stressing irrelevant and prejudicial evidence that appellant Parker created cut and paste collages of Ms. Gallego and other subjects, using commercially available photographs from adult magazines. That material, which had no logical or factual relevance to the elements of the crimes charged, was referenced repeatedly as "porn" during the trial and is again being used by respondent's counsel in an effort to legitimize the state's overreaching in this case. (Respondent's Brief [RB] at p. 26.) That material was improper and prejudicial, and fails to elevate this tragic killing from manslaughter to murder, nor prove the special

circumstances that led to appellant's capital conviction and death sentence.

Many additional errors occurred at the penalty phase, where the prosecution continued its overly zealous approach, and the trial court itself undermined the traditional constitutional protections afforded capital defendants, including but not limited to the right to counsel. The trial court not only appointed separate counsel to investigate defendant's complaints about defense counsel, but required appointed counsel to maintain representation despite complaints against them. Moreover, in an unprecedented ruling, the trial court placed in the public record extensive personal writings of the defendant, which were not endorsed by his counsel, who were still endeavoring to represent him despite the burdens imposed by clear conflicts of interest.

Based on the numerous and egregious errors committed by the prosecution and the trial court, appellant's conviction and sentence should not be allowed to stand. Trial courts must not conduct themselves as this trial court did; nor may they endorse prosecution conduct as egregious as was seen in this case. Reversal is required.

* * * * * *

STATEMENT OF THE CASE

Appellant refers to and incorporates his statement of the case in Appellant's Opening Brief. (AOB, pp. 2-24.)

STATEMENT OF FACTS

Appellant refers to and incorporates his statement of facts in Appellant's Opening Brief. (AOB, pp. 24-73.)

* * * * * *

ARGUMENTS

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

As set forth more fully in Argument 1 of Appellant's Opening Brief (AOB, pp. 74-106), incorporated herein, reversal is required because the trial court failed to declare a doubt as to appellant Parker's competence despite numerous indicators that he was, in fact, incompetent to stand trial.

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

> If, during the pendency of an action and prior to judgment, a doubt arises in the mind of the judge as to the mental competence of the defendant, he or she shall state that doubt in the record and inquire of the attorney for the defendant whether, in the opinion of the attorney, the defendant is mentally competent. If the defendant is not represented by counsel, the court shall appoint counsel. At the request of the defendant or his or her counsel or upon its own motion, the court shall recess the proceedings for as long as may be reasonably necessary to permit counsel to confer with the defendant and to form an opinion as to the mental competence of the defendant at that point in time.

Here, the trial court failed to order a hearing to inquire into whether Parker was mentally competent to stand trial in the face of substantial evidence of his mental incompetence.

Abundant background and references to the record are set forth in the Opening Brief (AOB, pp. 75-95), and will not be repeated here in full. Appellant Parker, while never overtly disruptive in the courtroom, nonetheless manifested a severe mistrust of counsel which grew in urgency throughout the case, and the fixed belief that all involved – the prosecutor, the judge, the medical examiner, the police, and even his own counsel – were joined in a conspiracy to fabricate evidence and secure a death sentence against him.[1] In camera hearings were held on numerous occasions as a consequence, as set forth more fully in the AOB.

Following the death verdict, alternate counsel was appointed to investigate Mr. Parker's allegations concerning his counsel; however, appointed counsel were not relieved in spite of the obvious conflict of interest.[2] (55 RT 7832-7833; see also Arguments 24 and 25.) Counsel had been accused by their client of misconduct and betrayal; appellant was permitted to argue himself at sentencing, and the trial court admitted to the public trial record abundant, arguably privileged and highly prejudicial

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

materials submitted directly by appellant over trial counsels' objection; and still, his appointed counsel were left to do their best to mitigate the incoherent strategy of their client, which was in conflict with their own.

The trial court's error in appointing separate counsel while forcing trial counsel to continue representation in no way resembles the right to counsel contemplated by the Constitution.[3] The extraordinary measure of permitting simultaneous dual representation by two different sets of trial counsel, while requiring the counsel Mr. Parker rejected to still continue representation, caused enormous conflicts of interest which were not resolved by the trial court. This error was exacerbated further

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

[3] The right to counsel is nowhere more urgent than in a capital case, where the defendant's very life hangs in the balance. *Gideon v. Wainwright* (1963) 372 U.S. 335, established that indigent criminal defendants have a constitutional right to counsel under the Sixth and Fourteenth Amendments to aid and assist them in defending against charges. The provision of counsel is critical to the fairness of a criminal trial:

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

(*Strickland v. Washington* (1984) 466 U.S. 668, 685.)

by the trial court's decision to grant Mr. Parker pro se status, permitting him to speak and file documents over trial counsels' strenuous objections.

Mr. Parker's case presents a series of errors unlike any previously seen by appellant's counsel. The issues are complex. Respondent writes this argument off with little thought to the constitutional issues implicated by the trial court's rulings, focusing instead on why Mr. Parker's crime was bad, and noting that he had done well in past endeavors, as if that resolves the multitude of constitutional violations raised by appellant. (See RB, p. 74.)

Respondent's Brief (RB, pp. 71-75) basically acknowledges the underlying law regarding incompetence (RB, pp. 71-72), but contends that "The record is devoid of any evidence that appellant was at any time unable to understand the nature of the proceedings or to assist his counsel in a rational manner." (RB, p. 73; see also RB, p. 75.)

Respondent essentially ignores all of the evidence in the record indicating a severe disruption in appellant Parker's ability to rationally understand these capital proceedings, and his ability to cooperate in a meaningful way with counsel; and Respondent fails entirely to address the conflicts of interest imposed on counsel by the trial court, when it appointed separate counsel to investigate them, but failed to resolve them. (See also AOB, Arg. 24, incorporated herein.) Respondent's argument utterly fails to address or refute the legal or factual assertions of Appellant's Opening Brief.

Reversal is required.

* * * * * *

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

As set forth more fully in Argument 2 of Appellant's Opening Brief (AOB, pp. 107-139), incorporated herein, reversal is required because the trial court unreasonably permitted the prosecution to introduce, at both the guilt and penalty phases, graphic materials of a sexual nature, and permitted the prosecution to repeatedly refer to those materials as "porn" or "pornography,"[4] suggesting they sufficed as proof of premeditation and deliberation as well as intent to commit rape.

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

Throughout the trial, and beginning well before trial, the prosecution characterized as "porn" or "pornography" both

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

commercial explicit images and images created by Mr. Parker (often a combination of commercial images, photographs, and sometimes drawing or writing). That characterization was thoroughly embedded in the trial record, affecting not only jurors, but also the trial court, court personnel and other participants in the proceedings.

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

In *Dawson v. Delaware* (1992) 503 U.S. 159, 112 S.Ct. 1093, 1099, the United States Supreme Court held that the Constitution prohibited the State of Delaware from introducing evidence of the appellant's racist associations and abstract beliefs as aggravating circumstances, when the associations and beliefs were unrelated to the crimes. Appellant respectfully submits that, like Dawson, the trial court here permitted the prosecution to introduce evidence of constitutionally- protected personal materials to inflame the jury's passions against appellant, precluding it from properly determining the appropriate sentence.

As demonstrated below, the quantities of sexually graphic material seized from appellant's apartment were improperly, inaccurately and repeatedly described and presented to the jury

as pornographic when in fact, these materials were not "obscene" within the meaning of the law. More significantly, these materials had no relevance to proof of appellant's guilt, nor to permissible sentencing factors under California's capital punishment scheme. They were, however, highly inflammatory – exacerbated by the fact that at that time in San Diego, trial was underway in a notorious high-profile child homicide that also included child pornography allegations. The prosecution exploited the alleged "pornography" before and during trial, thoroughly infecting the proceedings with what amounted to a distasteful but perfectly legal hobby of viewing and hand-crafting crude and juvenile graphic images.[5]

The government may not prohibit or punish the expression of an idea simply because society finds the idea itself offensive or

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

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

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

disagreeable.[6] Instead, the First Amendment prevents the government from proscribing speech or expressive conduct because of its disapproval of the ideas being expressed, and therefore, the government generally has no power to restrict expression because of its message, ideas, subject matter, or content.[7]

As set forth more fully in the AOB, the material that became such a focus of the trial prosecutor's case was not legally "obscene," nor was this private material legally relevant to issues in the trial.

On July 25, 2019, this Court unanimously decided, in another case from San Diego, that protected free speech cannot be a basis for the prosecution to urge the imposition of a death sentence. (*People v. Young* (No. S148462, July 25, 2019) ___ Cal.5th ___ [2019 WL 3331305].) In the *Young* case, the prosecution heavily emphasized the defendant's numerous racist

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

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

tattoos, suggesting they bore on the defendant's character and should be considered. This Court held:

> In sum, the prosecutor openly and repeatedly invited the jury to do precisely what the law does not allow: to weigh the offensive and reprehensible nature of defendant's abstract beliefs in determining whether to impose the death penalty. We cannot ignore the possibility that the jury accepted that invitation in returning its verdict on the penalty retrial. (Cf. *Dawson v. State* (Del. 1992) 608 A.2d 1201, 1205 [concluding, on remand from the U.S. Supreme Court, that where state had woven evidence of Dawson's Aryan Brotherhood membership into a "central theme that Dawson had an incorrigible character with his entire life showing repeated decisions to reject any redeeming paths," it would be "impossible" to conclude that the error in admitting the evidence did not contribute to the death sentences].) The trial court's error in allowing the prosecution to use evidence of defendant's abstract beliefs in this fashion was prejudicial, and the resulting penalty judgment must therefore be reversed.

(*People v. Young, supra*, 2019 WL 3331305, at *29.)

Under California Evidence Code section 352, a trial court "may exclude evidence if its probative value is substantially outweighed" by the probability that it will "create substantial danger of undue prejudice, of confusing the issues, or misleading the jury." In recognition of the severely biasing effect of bad character and irrelevant bad conduct evidence, California Evidence Code section 1101 prohibits admission of evidence of bad character and conduct to prove conduct on a specific occasion. (See, e.g., *People v. James* (2000) 81 Cal.App.4th 1343, 1354

[noting that "three hundred years of jurisprudence recognizes" the biasing effect of propensity evidence on unguided jurors; see also, *Garceau v. Woodford* (9th Cir. 2001) 275 F.3d 769, 776 (reversed on other grounds, *Woodford v. Garceau* (2003) 538 U.S. 202).) The arbitrary deprivation of the state law protections of Evidence Code section 1101 amounts to an independent federal due process violation. (*Hicks v. Oklahoma* (1980) 447 U.S. 343, 346-47.) This state law evidentiary error "so infused the trial with error as to deny due process of law." (*Estelle v. McGuire* (1991) 502 U.S. 62, 75.)

Such "propensity" conduct is prohibited independently on federal constitutional grounds, as it creates an undue danger of prejudice in contravention of the right to due process of law. (*Michelson v. United States* (1948) 335 U.S. 469, 475-76.) The fact that appellant Parker created collages reflecting thoughts that might be reprehensible or unappealing to others, but were unconnected to the offense, was his First Amendment right. (*Dawson v. Delaware*, *supra*, 503 U.S. 159, 163.) The Eighth and Fourteenth Amendments to the federal constitution require heightened standards of reliability in capital cases. (*Woodson v. North Carolina* (1976) 428 U.S. 280, 305.)

Respondent addresses this issue at pages 75-95 of its brief. (RB, pp. 75-95.) Respondent's basic contention is that "his altered photographs of Gallego were relevant to demonstrate that appellant had sexually sadistic fantasies of her and was obsessed with her." (RB, p. 75.) Respondent then devotes a number of

pages to recounting, from the record, instances in which the prosecution urged that theory. (RB, pp. 75-89.)

Respondent's argument is long on inflammatory facts, but short on legal justification; predictably, it ends with an argument that any error was harmless. (RB, pp. 89-95.) Respondent argues that the admission of this very inflammatory evidence was within the trial court's discretion under Evidence Code sections 210 and 352 (RB, p. 90), and suggests that this Court need not bother considering the adverse impact on jurors of the nature and quantity of this evidence out of deference to the trial court's broad discretion. (RB, pp. 90-91.)

Appellant's counsel is at a loss to understand Respondent's references to cases involving sexual acts with minors. (RB, p. 91, citing *People v. Page* (2008) 44 Cal.4th 1, 40; and *People v. Memro* (1995) 11 Cal.4th 786.) *Page* involved sexual acts on and the killing of a 6-year-old girl. In the *Memro* case, involving the deaths of young boys, some evidence was admitted to indicate a sexual interest in young boys. This case is in no way analogous to either. Adult male heterosexual interest in adult females is not a secret; it is not illegal; and the adult magazines serving as a foundation for the alleged "porn" are widely available to any adult.

The alleged "porn" strewn so broadly across this trial record arguably indicates a romantic interest in Ms. Gallego, but fails to establish appellant's alleged homicidal intent. The items involving photographs of other adult women similarly have nothing to do with an intent to kill, or intent to rape; they

likewise reflect no legally viable theory having to do with this case. These graphic items were introduced and paraded as "porn" for one reason only, to inflame jurors, take this case out of the manslaughter category, and unfairly tip the scales in favor of first degree murder and the death sentence.

Appellant's counsel is also at a loss to understand why Respondent urges appellant's alleged "ability to hide his sexually sadistic fantasies" from Gallego, and from Marilyn Powell, as a reason that those images were admissible. (RB, p. 92.) In fact, none of these images was admissible to prove elements of the crimes charged. The fact that a lot of other images were excluded (RB, p. 92) only demonstrates that the prosecution came in with a lot of material. It does not actually justify the admission of all the inflammatory images about which appellant complains, nor the constant argument by the prosecutor along the lines of "porn." There is no justification.

Having nothing else, respondent moves along to "harmless error." (RB, pp. 93-95.) Drawing heavily on the trial prosecutor, Respondent repeats the inflammatory and speculative theories of the prosecution. However, the only legal reference is to *People v. Watson* (1956) 46 Cal.2d 818.

Appellant respectfully refers this Court to the legal discussion in his Opening Brief (AOB, pp. 131-139), in which he argues that prejudice must be presumed for a constitutional error of this magnitude. (AOB, pp. 136-139.) Under *Chapman v. California* (1967) 386 U.S. 18 (*Chapman*), a constitutional violation requires reversal unless the prosecution can prove,

beyond a reasonable doubt, that the error did not affect the result. Respondent has not even tried to argue that; it continues to recite the trial prosecution theory, and does no more.

Reversal is required.

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

Appellant Parker refers to and incorporates herein the factual and legal allegations of Argument 3 of Appellant's Opening Brief.

As set forth in that brief, the trial court unreasonably permitted the prosecution to introduce scientifically insupportable testimony by Dr. Norman Sperber, a forensic dentist, purporting to identify marks on the victim's back and wrist as being created by handcuffs. Dr. Sperber was recruited by the state to perform an examination some time after autopsy. The testimony he gave was neither endorsed nor testified to by the Medical Examiner who performed the autopsy, whose findings did not support the prosecution theory that the marks in question were created by handcuffs. The erroneous ruling by the trial court allowed the prosecution to create, out of whole cloth and with no other supporting evidence, a highly inflammatory and prejudicial theory that the victim was handcuffed during the events surrounding her death. In fact, the medical examiner who conducted the autopsy never concluded that handcuffs created the marks found on the victim's body.

There were no witnesses to the homicide. No handcuffs were found. On the basis of witness reports that, at time long

prior to and unconnected with the capital crime, appellant formerly used handcuffs to lock his bike (34 RT 4280; 41 RT 5459), an investigator selected a random pair of handcuffs from a box in the police evidence room, which Dr. Sperber used to bolster his false and unsubstantiated testimony.

The forensic discipline of bite mark identification by forensic dentists – in which Dr. Sperber had been found qualified in previous cases – has been debunked and rejected by the scientific community as "junk science". (See National Academy of Sciences, Committee on Identifying the Needs of the Forensic Sciences Community, *Strengthening Forensic Science In The United States: A Path Forward* (2009) (NAS Report), attached to Appellant's Opening Brief as Appendix 13.) Dr. Sperber's technique in purporting to identify "tool marks" on the body of the victim here is even less reliable, and should not have been permitted by the trial court.

Respondent argues that this report is irrelevant because it issued after appellant's trial (RB, p. 101), as if the timing of the report somehow negates the substantive finding of the scientific community that such evidence is unreliable.

Appellant's trial counsel presented substantial and meritorious arguments that Dr. Sperber that Dr. Sperber should not be permitted to testify as to "tool marks" allegedly caused by handcuffs, for the following reasons, among others (AOB, pp. 140-141):

- That Dr. Sperber's proposed testimony was beyond his expertise, under Evidence Code section 710, as his experience is in forensic odontology, and his

proposed testimony was to be on the origin of a mark on the victim's skin. (3 CT 658-659.)

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

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

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

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

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

(3 CT 664; emphasis in original.)

Respondent attempts to defend the lax procedures used at trial, arguing that any error was harmless in light of other

evidence in the case. (RB, pp. 99-103.) In a case featuring so many errors, singling them out one after another as "harmless" in light of other issues (also claimed as errors) is hardly a thoughtful or adequate response.

What respondent conveniently overlooks, however, is the extreme prejudice arising from a speculative prosectuion theory completely unsupported by the evidence and the facts and presented by an "expert" whose opinion lacked scientific reliablity and validity. This error was exacerbated by the extremely inflammatory set of photos introduced via this witness, in which the dead and previously autopsied body of the victim was set up in a macabre alleged "re-enactment" of this theory.

No capital defendant should be convicted and sentenced to death when such improper evidence is presented to a jury, regardless of respondent's claims that such an error is "harmless." This Court should reject respondent's argument, and reverse appellant's conviction.

* * * * * *

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

Appellant Parker refers to and incorporates herein the factual and legal allegations of Argument 4 of his Appellant's Opening Brief (AOB, pp. 159-176.)

As set forth in the opening brief, the trial court unreasonably refused to disclose to defense counsel videotapes concerning the prosecution of this case, which were prepared by a television production company with the full cooperation of the prosecution. Curiously and inexplicably, they are part of the trial record, but remain under seal — available to the courts and to the Attorney General, but not to the defense.

In essence, the trial court's rulings, both pretrial and during record correction and completion, demonstrated a preference for the proprietary interest of the television production company, and it determined that appellant's legal and constitutional rights *as a defendant facing capital punishment* are subsidiary. That result is at complete odds with the constitutional protections meant to safeguard the fairness of capital proceedings, and the rights of capital defendants.

One of the sealed videotapes is of the meeting in the District Attorney's office, to discuss and determine whether to capitally charge Mr. Parker. Appellant's counsel has never heard of such a meeting being open to third parties (such as the

television production company invited in this case), much less of the trial court holding a videotaped recording of such a meeting under seal.

In Argument 21 of the opening brief, incorporated herein, appellant raises the issue of arbitrary and capricious charging practices, varying from county to county within California. That argument asserts that the California statute is overbroad and capriciously applied. The sealed videotapes, especially of the charging decision, potentially supports appellant's argument, but his counsel is prohibited from seeing it, thus denying appellant access to material relevant and pertinent to his appeal.

A review in chambers by this Honorable Court is not a substitute for the right to counsel, a trained professional to advocate on behalf of a defendant, to which appellant is entitled. Please see subsection 4 of Argument 4 in Appellant's Opening Brief, incorporated herein.

The automatic appeal is the forum in which to raise legal issues that are contained within the trial record on appeal. These videotapes, particularly the one in which it was decided to pursue capital charges, are part of the trial record. They were not made available to trial counsel or current counsel, and they should have been, so that both current counsel and this Honorable Court might properly discharge our respective obligations.

Respondent addresses this issue summarily, at pp. 103-108 of its brief. Its basic contention is that appellant's trial counsel "failed to make the requisite showing that the videotape footage would materially aid his defense." (RB, p. 103.) A recitation of

record facts follows (RB, pp. 103-106), highlighting the fact that the tapes were withheld from trial counsel because of the objections of the reality show production company, which sought to protect its proprietary rights and to subjugate appellant's rights to a fair trial. The refusal to provide this critical material to appellant also violates his right to challenge his capital conviction and death sentence on appeal.

Respondent's "substantive" argument addresses only the Reporter's Shield Law (RB, pp. 106-108), and fails to address any of appellant's legal and constitutional rights as a defendant facing capital punishment. The circular argument essentially boils down to asserting that the defendant couldn't show that the evidence his counsel had not been allowed to see was "material." This circular logic brings the gravity of the error into sharp relief.

Reversal is required because the trial court erred in refusing to provide trial counsel with these critical tapes, depriving trial counsel of the ability to fully present his case and litigate issues at the trial level.

Post-conviction counsel for Mr. Parker respectfully requests that this Court order that these videotapes, part of the record before this Court on automatic review, be copied and provided to counsel under seal, with instructions that they may not be released to persons other than members of the post-conviction defense team, and may only be used for purposes of pursuing post-conviction review of appellant's conviction and sentence. In addition, counsel requests that this Court permit appellant an

opportunity to present additional briefing on issues contained in this part of the record that has not been disclosed.

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

Appellant Parker refers to and incorporates herein the factual and legal allegations of Argument 5 of his Appellant's Opening Brief (AOB, pp. 177-182.)

Appellant also refers to and incorporates herein the factual and legal assertions of Argument 3 of the AOB and this brief, regarding unreliable and inadmissible "tool mark" evidence testified to by Dr. Sperber, which included highly inflammatory and gruesome photographs taken when this forensic dentist endeavored to "match" a random pair of handcuffs with marks on the victim's body. The random handcuffs were placed over the area where a sample had been cut from the bruise during autopsy, and the photograph thus posed also prominently displayed the victim's hands and the absence of fingertips (removed post-mortem). There was no other evidence of handcuffs. Photographs taken during this experiment were introduced not so much to "prove" the use of handcuffs in the absence of all other proof, but to produce a strong visceral reaction in jurors.

As set forth more fully in the opening brief, the trial court abused its discretion by admitting gory, gruesome and inflammatory photographs, which were irrelevant, cumulative and highly prejudicial because the matters for which the state introduced them were not only not at issue, but added no probative evidence to the state's. (*People v. Gallego* (1990) 52 Cal.3d 115, 197.)

These photographs were prejudicial because they were unrelated to a material disputed issue; they were cumulative; and the trial court failed to conduct a proper balancing test, thus violating appellant's rights on numerous fronts.

Photographs admitted despite the defense objections included: Exh. 1 (photoboard of the victim); Exhs. 5 – 9 (photos, Petsmart location and dumpsters); Exh. 6 (3 photos, large trash can); Exh. 8 (2 autopsy photos, bruised left wrist + ruler); Exh. 9 (2 photos, "handcuff mark comparison"); Exh. 10 (2 photos, handcuff mark comparison with overlay, see 33RT 3915-4099); Exh. 15 (3 photos of trash can and body in bag); Exh.16 (2 autopsy photos, head and neck); Exh. 17 (autopsy photo, full body); Exh. 18 (autopsy photo, 4 severed fingertips); Exh. 22 (3 autopsy photos, head and skull, see 34 RT 4100-4295); Exh. 61 (autopsy photo, victim's back; Exh. 62 (victim's back and handcuffs on wrists); Exh. 74 (photoboard, closeups of items 83, 85, 87, 98, 99; see 37 RT 4681-4902); Exh. 112 (photo depicting wrist area, see RT 41:5399-5625); Exh. 115 (3 autopsy photos, victim's face and hands, see 51 RT 6962-6961, 6973-7148).

Respondent addresses this argument at pp. 109-115 of its brief. Its basic argument is that "the photographs at issue are not as 'gory' or 'gruesome' as appellant describes them in the opening brief." (RB, pp. 110-111.) Respondent's major theme is that there was not a lot of blood on Ms. Gallego's body (*ibid.*), and that a trial court has broad discretion to admit autopsy photographs . (RB, pp. 111-112.) Respondent claims that all of these photographs were admissible to prove intent to "handcuff [Ms.]

Gallego, gag her, rape her, or kill her." (RB, p. 112.) Respondent's discussion, however, veers into general propositions, and not very much into the particular complaints raised by appellant.

There is no real dispute about whether Ms. Gallego suffered neck injuries. (RB, p. 112.) There is, however, a true dispute about whether forensic dentist Dr. Sperber's testimony was valid and credible as proof of handcuffing, as respondent asserts. (RB, p. 112.) As set forth more fully in Arguments 3 and 10 of this brief and the Appellant's Opening Brief (AOB, p. 140 et seq.; p. 198 et seq.), incorporated herein, the prosecution in this case improperly argued, and the trial court improperly allowed, the junk science "tool mark" testimony of a forensic dentist in support of its theory that handcuffing accounted for marks on Ms. Gallego's back. Not only was this evidence false and incredible, but the state added insult to injury when it proffered as proof of the so-called "reconstruction" of this alleged event by the dentist post-mortem, using random handcuffs borrowed from a box of extra handcuffs in the evidence locker. The Medical Examiner did not testify to or endorse this theory. The photographs taken during this procedure on the body of Ms. Gallego featured prominently her handcuffed hands behind her dead body, presumably aimed at creating the inference that Mr. Parker cut off the victim's fingers during the murder, and inclining the jurors in favor of both conviction and a death sentence. Yet, it is undisputed that Mr. Parker removed portions of Ms. Gallegos' fingers after her death, not before. (Cites.) The admission of those photos was clearly inflammatory.

Respondent next turns to the relevance of crime scene photographs (RB, pp. 112-114). In its brief, the photographs addressed by respondent were of the fingers severed after death, and left at the Petsmart location. Appellant contends that the information about that discovery was described well enough in testimony, and that repeated visual evidence was redundant and inflammatory; particularly in combination with the testimony (and visual support thereof) from the forensic dentist.

This is a case in which the prosecution went to extreme measures to support its theory in a case that might well have concluded with a manslaughter verdict, had Mr. Parker received a fair trial. Respondent has not adequately or substantively addressed the issues raised.

As set forth more fully in Argument 2 of this brief and the Appellant's Opening Brief (AOB, p. 107 et seq.), incorporated herein and in a similar vein, the prosecution in this case improperly argued, and the trial court improperly allowed, alleged "porn" to support its theory of rape.

As set forth more fully in Argument 7 of this brief and the Appellant's Opening Brief, incorporated herein, the prosecution argued and was allowed to admit evidence of a single sperm cell found inside a banana peel, in trash discarded after the homicide, in support of its theory of rape. This Court can and should reasonably conclude that this particular prosecution team went to great lengths to present unsupported theories to the jury, solely for the purpose of inflaming the jurors' passions against him and in favor of death.

Details about the misconduct of the prosecution are more fully set forth in Arguments 20 (guilt phase; AOB, p. 253 et seq.) and 22 (penalty phase (AOB, p. 278 et seq.) of this brief and Appellant's Opening Brief on Appeal, incorporated herein.

For all of these reasons, reversal is required.

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6. THE TRIAL COURT ERRED IN FAILING TO PRECLUDE PROSECUTION ARGUMENT IN OPENING STATEMENT.

Appellant Parker refers to and incorporates herein the factual and legal allegations of Argument 6 of his Appellant's Opening Brief (AOB, pp. 183-185.)

As set forth in the opening brief, the trial court unreasonably refused to preclude prosecution argument during opening statement. Opening statement is to permit the parties to outline the evidence they expect to present, not editorialize and push jurors toward a conclusion before the evidence has even been presented.

On February 25, 2002, appellant's counsel filed Motion No. 23, a Motion in Limine to Preclude Argument in Opening. (4 CT 797-800.) The motion specifically requested that – due to the lack of evidence – the prosecutor be prohibited from characterizing the victim's loss of blood as "draining blood"; that the prosecutor be precluded from describing the victim as "gagged" by a scarf found loosely tied around her neck[8]; and that the prosecutor not be

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[8] As noted in appellant's Argument 5 of this brief, incorporated herein, Respondent continues to argue that Ms. Gallego was allegedly "gagged." (RB, p. 112.)

At trial, the defense noted that the words "gag" or "gagging" were speculative and inflammatory, not supported by evidence from the medical examiner, or evidence that saliva was found on the scarf. Nor is there evidence the scarf could have been used as a ligature. (17 RT 1598-1600, 1605.) Curiously, the prosecutor posited that the lack of forensic evidence does not mean it did not happen that way. The prosecution affirmatively

allowed to describe the victim as "tortured," particularly since the torture allegation was dismissed. (4 CT 797-800.)

The trial court refused to preclude prosecution argument on these points during opening statement. (17 RT 1607.) In her opening statement, the prosecutor argued that the victim lost her hopes and dreams as the defendant "drained" the life from her. (33 RT 3932-3933.)[9] She advised jurors that all the victim's blood had been "drained" out. (33 RT 3940, 3943.) The prosecutor argued that we "**know**" the victim was raped, "gagged," and handcuffed, and that a "gag" was found around her neck. (emphasis added; 33 RT 3931, 3936, 3940, 3942.) In addition, the prosecutor argued that the victim was raped and "tortured." (33 RT 3942.) The prosecutor made these assertions as fact, when there was no evidence to support them.

Respondent addresses this issue at pp. 115-122 of its brief, arguing essentially that "Appellant's contention is without merit because the prosecutor's statements were based on the evidence." (RB, p. 116.) As noted elsewhere in the Appellant's Opening Brief and other arguments in this brief, the prosecution took exceptional liberties with the evidence it offered at trial, and the

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argued that gagging occurred because appellant "could" have gagged the victim to muffle her screams. (17 RT 1602-1603.) Respondent's endorsement of this view on appeal regarding relevant evidence is startling, and inconsistent with the law.

[9] The victim had a massive neck wound inflicted by a sharp object, which would have bled copiously and resulted in her death within a short time, thus undermining the prosecutor's claims of torture and gagging. (34 RT 4183.)

trial court failed to sufficiently constrain the prosecution. (See, e.g., Arguments 20 and 22, and the other arguments referenced therein, incorporated herein by reference.)

Respondent's factual arguments are specious. (RB, pp. 116-121.)

Respondent begins with the "draining of blood" (RB, 116-117), relying on the fact that blood was not found on her body and that she had lost a lot of blood. Although the trial judge allowed how he would not permit evidence about "hanging the victim like cattle to drain the blood," and asked for the prosecutor's assurance that picture would not be painted, (RB, pp 116-117, citing 17 RT 1595.), respondent specifically quotes the trial judge's feeling that "it would be a fair statement that her blood had been drained out. (17 RT 1594-1595.)" (RB, p. 116.) Rather than proof, the trial court blithely adopted the state's unsubstantiated theories aimed at painting the most horrific picture of the crime and of Mr. Parker and allowed the state to make rhetorical arguments in opening statement articulating theories which could not be proven.

Appellant is at a loss to how the trial judge came up with that particularly vivid scenario, from the lack of blood on Ms. Gallego's body and absolutely no indication that anything of that sort had happened. Nevertheless, in the opening statement, the prosecutor argued "draining" of the victim's blood, despite no evidence at all that there was any intentional "draining." This Court has no doubt seen many cases in which massive blood loss follows from the kind of neck injury suffered by Ms. Gallego. That

type of blood loss with such an injury is a physiological fact. But the prosecutor's argument in opening statement framed it as an *intentional act to drain blood*, despite the lack of any evidence supporting that kind of intent. The trial court failed unreasonably to restrain the prosecution's vivid imagination, as conveyed to the jury at the very start of the trial itself.

Next, Respondent turns to the prosecution's bold assertion during opening statement that Ms. Gallego had been "gagged." (RB, p. 117.) It cited only what the trial judge said during pretrial discussions of the motion, that there was a scarf loosely looped around the victim's neck (17 RT 1595), and that *in his opinion concerning fashion choices*, he had never seen a woman "tie a scarf like that for fashion purposes" and was therefore inclined to allow the prosecutor to "urge the jury to consider that Gallego was gagged." (17 RT 1595)" (RB, p. 117.)

As this Court is aware, "gagging" has a particular meaning[10]; and this prosecutor did not have <u>any</u> evidence that the victim was restrained from outcry by some restraint around her mouth. As noted in Appellant's Opening Brief:

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[10] The first definition given by the Merriam-Webster dictionary is: "to restrict use of the mouth of by inserting something into it to prevent speech or outcry." (See https://www.merriam-webster.com/dictionary/gag.)

See also the Oxford American Dictionary, which gives the first definition as follows: "something put into a person's mouth or tied across it to prevent him from speaking or crying out." (*Oxford American Dictionary* (1980), published by Avon Books, at p. 266.)

> The defense noted that the word "gag" or "gagging" was likewise speculative and inflammatory, not supported by evidence from the medical examiner, or evidence that saliva was found on the scarf. Nor is there evidence the scarf could have been used as a ligature. (17 RT 1598-1600, 1605.)

(AOB, p. 184.) Appellant's counsel is dumbstruck by the idea that a trial judge's personal opinions about women's fashion could be relied upon to justify granting permission for the prosecutor to argue, in opening statement, the inflammatory assertion that the victim was "gagged." That assertion was and is totally unsupported by the record ; and Respondent makes no effort to defend it beyond citing the trial court's strange musings about fashion. The trial court's and the Respondent's positions cannot possibly be a standard endorsed by our State's highest court.

Moreover, despite the fact that the torture murder special circumstance had been stricken for lack of evidence, Respondent attempts to justify the trial court's ruling allowing the prosecutor to argue during opening statement – stating that "the court understood torture would be used in a colloquial sense (17 RT 1595.)" (RB, p. 117.) Respondent goes so far as to explain that the trial court advised the prosecution that, if a torture murder theory was not being offered, "it would become easier to say the word 'torture' in the colloquial sense. (17 RT 1596.)" (RB, p. 117, with further argument at RB, p. 118.)

Again, it is simply astonishing that Respondent argues before this Honorable Court that when torture allegations were disallowed for lack of evidence to support them, it is nonetheless

permissible for a prosecutor to inform the jury about a fanciful theory which could not be proven, and therefore was stricken from formal charges.

As Respondent itself states, quoting *People v. Millwee* (1998) 18 Cal.4th 96, 137:

> The purpose of the opening statement is to inform the jury of the evidence that the prosecution intends to present, and the manner in which the evidence and reasonable inferences relate to the prosecution's theory of the case.

(RB, p. 121.) The problem here is that the prosecution asserted theories during opening statement which it *knew* it could not prove, and the trial court allowed that despite also knowing these could not be proven – that the victim's blood was "drained"; that she was "gagged"; and that she was "tortured." Appellant's trial counsel objected to all of this and more; the objections are properly preserved.

Respondent's final assertion that any error was "harmless" (RB, p. 123) ignores all of this, and, at the very start of a death penalty case, invites prosecutors to engage in, and trial courts to allow, any speculative and inflammatory theories within the imagination of the prosecution to be presented and treated as substantive proof. That idea cannot be allowed to stand if we are to have a functioning system of justice, and reversal is required.

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7. THE TRIAL COURT ERRED IN ADMITTING IRRELEVANT AND INFLAMMATORY EVIDENCE THAT A SINGLE SPERM CELL WAS FOUND ON THE INSIDE OF A BANANA PEEL.

Appellant Parker refers to and incorporates herein the legal and factual allegations of this claim in the Appellant's Opening Brief, pp. 186-189.

The prosecution sought to and was permitted to admit evidence of a single unidentified sperm cell, found on the inside of a banana peel in a bag of garbage. The trial prosecutor 's primary factual argument was that there was reference to a cucumber on what she dubbed a "to do list," and no cucumber was found, so this was close enough. (See, e.g., 23 RT 2478.) Curiously, and without legal or factual foundation, the trial court decided that the one sperm cell on the inside of a banana peel was relevant to planning. (25 RT 2560-2561.)

As respondent notes (RB, pp. 127-128), it was not possible to conduct DNA testing on the banana peel, as at least 100 sperm cells would be required, and only one sperm cell was found. (39 RT 5081-5082.) The examiner also testified that he found no other cellular material on the banana peel; did not find blood or semen on the peel; did not find any epithelial cells that might have come from the victim; and had no evidence that the one sperm cell belonged to appellant. (40 RT 5158-5159.)

The average number of sperm cells in a normal ejaculation is three billion, so a single sperm cell is rare indeed. (40 RT 5150.) As defense counsel argued at trial, human cells in a mixed bag of garbage might easily transfer among items, and this

record contains no evidence on how a determination of "relevance" was reached, or whether any investigation or evaluation was done to determine if that one lone unidentified sperm cell came from another source. (25 RT 25 RT 2552-2553, 2557.)

Astonishingly, respondent argues that this paltry piece of evidence, not connected to appellant except by proximity to other items in the trash bag, was relevant and admissible, and by implication, that it somehow established evidence of planning. (RB, pp. 128-130.) The trial prosecutor used this one sperm cell to suggest to jurors that a rape by object had occurred, a factually unproven, but overwhelmingly prejudicial assertion. Had the banana been used as argued by the prosecutor, there would have been far more cellular matter – likely identifiable to the victim, the perpetrator, or both – that could have been tested. Clearly, this one unidentified sperm cell was introduced for the exclusive purpose of inflaming the jury, and to shore up an unsubstantiated prosecution theory that was long on speculation and short on proof.

This Court's opinions provide necessary guidance to lower courts, prosecutors, and defense counsel. The trial court abused its discretion in allowing admission of this irrelevant and highly prejudicial evidence and, in doing so, allowed the prosecution to unfairly and improperly bolster a weak and speculative prosecution case. Reversal is required.

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8. THE TRIAL COURT ERRED IN ADMITTING AT THE GUILT PHASE A PHOTOGRAPH OF THE VICTIM AND HER DOG.

Appellant Parker refers to and incorporates herein the allegations of Argument 8 in his Appellant's Opening Brief, pp. 189-192.

At an in limine hearing on the admissibility of photographs, the prosecution sought to introduce a photograph of Ms. Gallego and her dog. Defense counsel objected. (32 RT 3876-3877.) Counsel noted that Ms. Gallego's body had been identified using an identification card and a fingerprint, not this photograph. (32 RT 3879.) The prosecutor said that she selected this one in order to humanize the victim. (32 RT 3878.) The trial court permitted the prosecutor to use the photograph at the guilt phase. (32 RT 3880.)

The trial court immediately noted that it was a nice looking dog, and asked what happened to it after Gallego's death. (32 RT 3876.)[11] In ruling to admit the photo, the trial court noted that it was a nice dog, and that he liked dogs (32 RT 3880.), betraying a lack of impartiality that undoubtedly inured to appellant's detriment and prejudice. Many members of the public, including appellant's jurors, also like dogs, and would respond viscerally as the trial judge did, to worry about the dog. Nonetheless, the fact

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[11] The photograph was taken in Brazil, where the dog remained after she came to the United States. The prosecutor believed the dog to be deceased by the time of trial. (32 RT 3876.)

that Ms. Gallego once loved a dog was not relevant to any issue in this case.

This Court has held that a trial court errs when it admits a photograph of a murder victim while alive if the photograph "... has no bearing on any contested issue in the case." (*People v. Hendricks* (1987) 43 Cal.3d 584, 594; *People v. Ramos* (1982) 30 Cal.3d 553, 578; see also *People v. Cooper* (1991) 53 Cal.3d 771, 821.) Here, as in those cases, the victim's identity was not in dispute; and this photograph was not used to establish her identity. The prosecutor's use of this photo amounted to prosecution misconduct (AOB, pp. 191-192), and should not have been permitted by the trial court.

Respondent argues in its brief that the photograph was relevant and admissible, and if there was any error, it was harmless. (RB, pp. 133-134.) Veering seriously off topic, Respondent also argues that certain altered images created by appellant were far more inflammatory. (RB, p. 134, referencing Argument II of its brief.) As set forth in Argument 2 of this brief and the AOB, the admission of those photographs was indeed prejudicial – to the defendant. The addition of this photograph of the victim and her dog, in life, in no way negated or mitigated the other prejudice arising in this case.

If there is to be any limit on the use of photographs of a victim taken during life, as this Court has ruled before, surely a sentimental photo of the victim and her beloved pet, which had no relevance to the issues in the case, must be a place where this Honorable Court draws a line. Reversal is required.

9. THE TRIAL COURT IMPROPERLY LIMITED IMPEACHMENT THAT THE DEFENSE COULD OFFER REGARDING THE RELIABILITY OF STATEMENTS TO WHICH JAILHOUSE INFORMANT EDWARD LEE TESTIFIED.

As set forth more fully in Appellant's Opening Brief, Argument 9, incorporated herein by reference, the trial court unreasonably and improperly placed limitations on the cross-examination and impeachment evidence that defense counsel proffered regarding the unreliability of a jailhouse informant. (AOB, pp. 192-198.)

The record strongly suggests that witness Lee, the jailhouse informant, was cultivated by police officers, aided by his own then-pending legal problems, to tell a version of the facts in conformity with the state's case. (See AOB, pp. 192-196.) Lee was clearly a biased witness, seeking to leverage his "information" for more lenient treatment for himself. Yet, on cross-examination, appellant Parker's counsel was precluded from exploring the following:

- Prior violent criminal activity, including Lee's convictions for robbery and burglary. (38 RT 4972.)
- The full extent of Mr. Lee's drug history and related arrests.
- The specifics of Mr. Lee's arrest for violating a restraining order obtained by Mr. Lee's mother. Lee testified that he was home with his mother all the time since that arrest. (40 RT 5352.) Lee violated the restraining order, issued another threat to kill his mother, and was convicted of violating the order. (38 RT 4951-4953.)

- Counsel were not permitted to inquire about Lee's representation on a different matter, which was pending at the time he was contacted by the prosecution seeking his help prosecuting appellant's case. (40 RT 5366, cited in the AOB, p. 195.)

Appellant Parker also refers to and incorporates herein the allegations of Argument 11 of the AOB and this brief, regarding the trial court's error in precluding cross-examination of Det. Ott regarding deviations from standard police practices in three other cases to which he was assigned. These deviations from practice bore directly on his credibility and reliability and denied the jurors the complete context in which to consider his testimony. Similarly, to the extent Ott was involved in procuring Edward Lee's statements, his deviations from protocol also bore on the reliability of jailhouse informant Edward Lee's testimony regarding alleged statements attributed to appellant Parker.

Appellant also refers to and incorporates herein the allegations of Argument 20 of the AOB and this brief, regarding an overwhelming pattern of prosecution misconduct in Mr. Parker's case. The conduct of police officers, particularly a lead investigator, is part of that pattern.

Respondent's response is at pages 135-141 of its brief, and argues that "Appellant's contention is without merit because the trial court properly limited the impeachment of [jailhouse snitch] Lee's testimony. (RB, p. 135.) The majority of the State's argument is the factual summary, at pp. 135-139 of its brief.

Turning to the legal merits, Respondent concedes that "[a] witness may be impeached with any prior conduct involving

moral turpitude whether or not it resulted in a felony conviction...." (RB, p. 139.) Respondent therefore banks its case on the discretion of the trial court in determining what is and is not admissible under Evidence Code section 352. (*Ibid*.) It argues that prior felony convictions were "too remote" (RB, p. 140), ignores the fact that this witness' own mother had to take out a restraining order against him, does not discuss the overwhelming pattern of prosecution misconduct in this case, and argues that any error was harmless. (RB, pp. 140-141.)

Reversal is required. Mr. Parker does not yet have habeas corpus counsel, and there is no timeline on when someone might be appointed to represent him on extra-record matters. But this record alone shows serious factual reasons to believe that the trial court gave undue deference to the prosecution and police officers, and unreasonably limited the ability of the defense to confront the questionable evidence against Mr. Parker. This Honorable Court should not endorse that degree of deference in the face of a record showing so many errors.

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10. THE TRIAL COURT ERRED IN PERMITTING THE PROSECUTION TO SHOW A WITNESS A HIGHLY INFLAMMATORY PHOTOGRAPH TAKEN DURING DR. SPERBER'S EXPERIMENT WITH THE VICTIM'S BODY, SUPPOSEDLY AS A MEANS OF HAVING THE WITNESS IDENTIFY THE RANDOM HANDCUFFS USED IN THAT EXPERIMENT.

Appellant Parker refers to and incorporates herein the factual and legal allegations of Arguments 10 (AOB, pp. 198-201) and 3 (AOB, pp. 140-159) of his Appellant's Opening Brief, and Argument 3 of this brief.

As set forth more fully in those arguments, the trial court unreasonably permitted the prosecution to introduce scientifically insupportable testimony by Dr. Norman Sperber, a forensic dentist, purporting to identify marks on the victim's back and wrist as being created by handcuffs. This prosecution theory was neither endorsed nor testified to by the Medical Examiner who performed the autopsy.

In the course of Dr. Sperber's examination of the victim's body, he purported to "re-enact" a scenario, placing a random pair of handcuffs on the victim's wrists behind her back. Photographs were taken, and over the objection of the defense (Arg. 5 of the AOB and this brief), those gruesome photographs were shown to the jury.

The prosecution did not stop there. On June 28, 2002, the trial court considered the defense objection to the prosecution showing witness Marilyn Powell a pair of handcuffs arranged on the victim's body by Dr. Sperber. Defense counsel argued that no handcuffs were found, that Mr. Parker did not handcuff Ms.

Gallego, and an objection was interposed on grounds of relevance and Evidence Code section 352. (41 RT 5402-5403.) The prosecution stated that witness Powell had described Mr. Parker locking his bicycle using heavy handcuffs joined with a metal chain. (41 RT 5403-5404.) Defense counsel suggested using the bailiff's handcuffs as a demonstrative aid instead, arguing that it was unnecessary to show an emotional witness such a prejudicial photograph, and one with such tenuous relevance. (41 RT 5404-5406.)

Trial counsel also submitted that this was just another attempt to get gratuitous and prejudicial material before the jury. (41 RT 5410.) The trial court ruled that the photo was not a problem because it had already been shown to the jury, and that this photograph was the least offensive of those prepared by Dr. Sperber. (41 RT 5409-5410.)

This evidence was irrelevant under state law, and its admission violated the constitutional protections afforded all criminal defendants. The only purposes in displaying random handcuffs in this way were to horrify this lay witness and to inflame the jurors. Those are not legitimate prosecution purposes, and violated the precepts of due process and fundamental fairness that are the touchstones of our adversarial system.

Respondent's argument that this material was relevant and admissible (RB, pp. 144-145) is incorrect. Respondent's alternative argument that any error was harmless (RB, p. 145) is

also wrong; a series of other errors in this case does not supply a rational basis for finding all of them harm-free.

Reversal is required.

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11. THE TRIAL COURT ERRONEOUSLY PRECLUDED DEFENSE COUNSEL FROM QUESTIONING DET. OTT ABOUT HIS RECORD OF DEVIATIONS FROM STANDARD POLICE PRACTICE, PREVENTING JURORS FROM ASSESSING HIS CREDIBILITY AND COMPETENCE.

As set forth more fully in Appellant's Opening Brief, Argument 11, incorporated herein by reference, the trial court unreasonably and improperly precluded defense counsel from questioning Det. Ott about his record of deviations from standard police practice, preventing jurors from properly assessing his credibility and competence. (AOB, pp. 202-208.)

The error impermissibly lessened the prosecution's burden of proof by inviting jurors to assume, although evidence existed to the contrary, that the detective was particularly trustworthy and well-trained. (AOB, p. 202.)

The three instances in which the detective deviated from standard police practice involved (1) the *Westerfield* case, which was then being tried in the same courthouse, right down the hallway; (2) the Reginald Curry case, in which an arrest warrant affidavit prepared by Ott overplayed the certainty of the alleged eyewitness identification; and (3) the Zavala case [in which a suspect interview was not videotaped in its entirety, but Ott's police report misrepresented that it was]. (42 RT 5735- 5737.)

The defense in this case contended that Mr. Parker denied making statements to the jailhouse informant Ed Lee, who already seemed to know certain facts in Mr. Parker's case. (42 RT 5737.) Parker's counsel also asserted that there are gaps in the recorded interview of Mr. Parker by Det. Ott, who had already

interviewed jailhouse snitch Lee alone, before conducting an interview with Parker accompanied by another detective. (42 RT 5738-5739.) There is reason to suspect that Ott "briefed" jailhouse informant Lee before the formal recorded interview of Lee as a witness in this case. (42 RT 5740-5741.)

As set forth throughout this brief and the Appellant's Opening Brief, the extent of prosecution overreaching – and the extent to which that was permitted by the trial court – was extraordinary. Appellant refers to and incorporates herein the factual and legal bases for Arguments 20 and 22 of the AOB and this brief, and the other arguments incorporated by reference therein.

Respondent argues that cross-examination was properly precluded by the trial court. (RB, pp. 145-152.) It asserts that "the alleged deviations from standard police practices in other criminal matters would only have led to irrelevant and inadmissible matters ... [and] would have resulted in a substantial danger of undue prejudice, confused the issues, and misled the jury." (RB, pp 145-146.) Given the extent to which the trial prosecution endeavored to do just that – introduce irrelevant and inadmissible matters, mislead the jury, and create undue prejudice and confusion in this very case – and the extent to which the prosecution was aided by the erroneous rulings of this trial court, respondent's position is disingenuous and aimed at securing an affirmance at all costs, despite considerable reasons to question the conduct of the trial court and the prosecution.

Most of Respondent's argument is devoted to its recitation of factual background. (RB, pp. 146-151.) It avoids discussion of appellant's assertion that:

> The defense noted that jailhouse snitch Ed Lee made a statement to prosecutor Bowman that Det. Ott came and told him about Mr. Parker's case. (42 RT 5755.) Jailhouse informant Lee was controlling the flow of interviews of himself. (42 RT 5756.) It is reasonable to assume, the defense argued, that Det. Ott was saving the taping for after he got a "hit"; after all, Det. Ott also contacted another witness, Leilani Kaloha (initially a defense witness), and tried to get a statement directly from her. (42 RT 5757.)

(AOB, p. 204.) The trial court had the ability to conduct further pretrial evidentiary inquiries — given the information that this informant told a prosecutor that he was told in advance about Mr. Parker's case — but it did not. Respondent is content with that state of affairs. The trial court should not have been, nor should this Honorable Court.

Reversal is required. The state cannot show beyond a reasonable doubt that the errors were harmless. (*Chapman, supra,* 386 U.S. at p. 23.)

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12. THERE IS INSUFFICIENT EVIDENCE TO SUPPORT THE LYING IN WAIT MURDER CHARGE AND LYING IN WAIT SPECIAL CIRCUMSTANCE, AND THAT SPECIAL CIRCUMSTANCE IS UNCONSTITUTIONALLY VAGUE AND OVERBROAD.

As set forth more fully in Appellant's Opening Brief, Argument 12, incorporated herein by reference, there is insufficient evidence to support the lying in wait murder charge and lying in wait special circumstance, and that special circumstance is unconstitutionally vague and overbroad. (AOB, pp. 208-215.)

As presented by trial counsel, an interruption between an alleged plan and the actions of a defendant may show abandonment of the lying in wait, which may have been superseded by a later plan or subsequent actions. (10 RT 810.) Moreover, during the alleged period of lying in wait, intent to kill is required. (10 RT 810-811.) Here, all that is presented by the state is the letter requesting time off from appellant's job; circumstantial evidence contained in other writings, such as the alleged to do list, is undated. (10 RT 811.) There is no evidence of concealment of purpose until August 12, presumably after the lethal events. (10 RT 812.) The trial court nonetheless allowed the prosecution to proceed on a lying-in-wait murder theory and a lying-in-wait special circumstance.

Respondent asserts that substantial evidence supports the first degree murder theory and the special circumstance allegation. (RB, pp. 153-156.) Respondent points to appellant's "sexual obsession" with the victim, alleged pornographic images,

and the so-called to do list. (RB, p. 156.) Additionally, respondent contends that "appellant had planned to take all of Gallego's money after he killed her. He admitted this to Edward Lee in county jail. (40 RT 5334-5335.)"[12] (RB, p. 156.)

Respondent also asserts that the special circumstance is not unconstitutionally vague or overbroad. (RB, pp. 157-158.) Appellant nonetheless asks this Honorable Court to reconsider its prior rulings on similar issues in other cases.

The trial court erred in failing to grant the motion to dismiss the lying in wait special circumstance, and allowing a true finding by the jury to stand. For the reasons set forth above and throughout other arguments set forth in this brief, all of which are incorporated herein, reversal of the true finding on the lying in wait special circumstance and the penalty phase death verdict are required.

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[12] Appellant refers to and incorporates herein the allegations of Arguments 9 [improper limitations on impeachment of jailhouse informant Lee] and 11 [erroneous preclusion of questioning about Det. Ott's deviations from standard police practices], as set forth in this brief and the Appellant's Opening Brief. The reliability of Mr. Lee's testimony, and that of the detective who cultivated Mr. Lee's assistance, are in serious question.

13. THE JURY WAS MISLED AS TO LYING IN WAIT BY THE INSTRUCTIONS AND ARGUMENT.

As set forth more fully in Appellant's Opening Brief, Argument 13, incorporated herein by reference, the trial court's instructions and the prosecutor's argument misled the jury as to the lying in wait theory of murder, and the lying in wait special circumstance. In essence, the prosecution was permitted to use a factually unsupported and uniquely crafted theory of lying in wait, both as a theory of first-degree murder, and as a special circumstance elevating that murder charge to a capital charge. Jurors were not provided with guidance in how to meaningfully limit application of this theory and this special circumstance; the trial court's failure to provide this guidance, especially in a capital case, clearly shows that the overbreadth reflected in the use of the lying in wait theory of murder and the same underlying facts to support the lying in wait special circumstance and lack of guidance cannot comport with the requirements of the state or the federal Constitution. (AOB, pp. 216-222.)

Appellant refers to and incorporates herein Argument 12, regarding the unconstitutional overbreadth and vagueness of the lying in wait special circumstance; and Argument 20, regarding the overwhelming pattern of prosecution misconduct in this case.

The trial prosecutor purposefully exploited the constitutional infirmity in the instructions. In her opening statement, the prosecutor argued that jurors could only come to one conclusion, that appellant Parker was not only guilty of murder, but of methodically planning to take Gallego by surprise,

lying in wait; that he did this to rape her and get all her money. (AOB, p. 218, citing 33 RT 3953.)

Respondent asserts that neither the instructions nor the prosecutor's closing argument misled the jury as to lying in wait. (RB, pp. 158-172.) Respondent argues that this Court has "found the use of similar application of [sic] lying in wait murder theory and special circumstance instructions to be appropriate." (RB, p. 159.)

Following its recitation of facts (RB, pp. 159-169), Respondent argues that the jury instructions correctly informed the jury on lying in wait. (RB, pp. 169-173.) Relying principally on this Court's decisions in *People v. Combs* (2004) 34 Cal.4th 821 and *People v. Morales* (1989) 48 Cal.3d 527, Respondent argues that this case is factually similar to other cases in which sufficient evidence of lying in wait was found. (RB, p. 172.) Respondent is incorrect.

Combs featured the defendant and an accomplice luring the victim into driving them to the desert, where she was strangled and beaten. *Morales* also involved luring the victim into a car, waiting until the car was in a place of isolation and, again, strangulation and beating.

In this case, by contrast, there is no suggestion of luring the victim to a place of isolation. The record is clear that Mr. Parker and Ms. Gallego were roommates; and that the fatal encounter occurred in their shared home. There was evidence that Mr. Parker and Ms. Gallego had agreed to marry, in order for her to become a United States citizen. (See, e.g., 36 RT 4638; 42 RT

5637-39.) The defense case at trial was that the evidence proved only manslaughter, and that Mr. Parker acted in the heat of passion after a final falling out.

Respondent's essentially unlimited view of lying in wait, given the facts of this case, would mean that any homicide at all involving people in their ordinary places at the time of the event – and all household homicides – would automatically qualify for both the lying in wait theory of first degree murder, and the lying in wait special circumstance as well.

Respondent has not presented any case that is actually close to the facts in the instant case and, instead, essentially relies on an alleged concealment of purpose and waiting for an opportune time to establish lying in wait. (RB, pp. 172-173.) As this Court has stated itself, concealment of purpose is not by itself "sufficient to establish lying in wait" because "many 'routine' murders are accomplished by such means." (*People v. Morales*, *supra*, 48 Cal.3d at p. 557.)

Reversal is required. The state cannot show beyond a reasonable doubt that the errors were harmless. (*Chapman, supra,* 386 U.S. at p. 23.)

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14. THE TRIAL COURT ERRED IN PERMITTING THE JURY TO CONSIDER THE FINANCIAL GAIN SPECIAL CIRCUMSTANCE.

As set forth more fully in Appellant's Opening Brief, Argument 14, incorporated herein by reference, the trial court unreasonably permitted the jury to consider the special circumstance of intentional murder carried out for financial gain (§ 190.2, subd. (a)(1); AOB, pp. 223-224.)

The evidence showed that appellant obtained identity and banking information belonging to the victim, cashed one check and attempted to cash another, and submitted credit card applications using variations on the victim's name. Following Parker's arrest, the police made an exhaustive search of the apartment he and Gallego had shared. (37 RT 4762.) There was a manila envelope containing identification, papers, and photos of Ms. Gallego. (37 RT 4768-69.)

The prosecution's theory supporting the financial gain special circumstance was essentially theft or identity theft. It was not akin to murder for life insurance proceeds, or murder for hire, where the homicide is essential to gain access to a financial reward. (AOB, p. 224, cited by respondent at RB, p. 174.)

Respondent's argument (RB, pp. 173-175) relies on this Court's opinion in *People v. Sapp* (2003) 31 Cal.4th 240, 281, stating in essence that it does not matter if financial gain was the only or dominant motive; nor does it matter if the defendant actually profited from the killing. The core question is whether he had "an expectation of financial benefit at the time of the killing." (*Id.* at p. 282.) None of the information cited by the prosecution at

trial, or by Respondent here, demonstrates that appellant had such an expectation in advance of Ms. Gallego's death. (RB, p. 175.)

In *People v. Adcox* (1988) 47 Cal.3d 207 – not addressed by Respondent in its brief -- this Court construed the financial gain special circumstance to exclude murder in the course of a robbery, stating:

> The jury found true two special circumstances: felony-murder-robbery (§ 190.2, subd. (a)(17)(I)) and that "[t]he murder was intentional and carried out for financial gain" (§ 190.2, subd. (a)(1)). Defendant correctly contends that the latter special circumstance finding is invalid on these facts.
>
> In *People v. Bigelow* [(1984)], *supra*, 37 Cal.3d 731, "We adopt[ed] a limiting construction under which the financial gain special circumstance applies only when the victim's death is the consideration for, or an essential prerequisite to, the financial gain sought by the defendant." (*Id.*, at p. 751.)
>
> The present case does not fall within the financial-gain special circumstance as so limited. Orozco was robbed of his wallet and car and murdered in the course of the robbery. It cannot be said that the murder was an "essential prerequisite" to the robbery. The financial-gain special circumstance must therefore be set aside.

(*People v. Adcox*, *supra*, 47 Cal.3d 207, 246; see also *People v. Mickey* (1991) 56 Cal.3d 612.)

Respondent seeks in this case to stretch the limitations on the financial gain special circumstance to the point of nullity.

Reversal of the alleged financial gain special circumstance is required. Reversal of penalty is also required, because the jury's consideration of this alleged special circumstance was clearly prejudicial.

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15. JURY INSTRUCTIONS IMPROPERLY RELIEVED THE PROSECUTION OF ITS BURDEN TO PROVE ALL CHARGES BEYOND A REASONABLE DOUBT.

As set forth more fully in Appellant's Opening Brief, Argument 15, incorporated herein by reference, the prosecution was aided in its efforts by repeated instructions requiring jurors to accept as true the more "reasonable" interpretation of the facts, a standard far below the constitutionally required standard of proof beyond a reasonable doubt. (AOB, pp. 225-232.)

In Mr. Parker's trial, the defense presented was that the crime was manslaughter, not capital murder. The basic evidence truly was susceptible of different interpretations[13], but the prosecution pressed heavily and vociferously for the most incriminating interpretation of the actual facts, and weighted its presentation with as much irrelevant information and sheer speculation as possible. Appellant refers to and incorporates other arguments in this brief and the AOB, bearing on the over-reaching of the prosecution at trial, including but not limited to Arguments 3, 4, 6, 7, 8, 9, 10, 12, 13, 20, and 22, incorporated herein.

The trial court gave four related instructions, two of which discussed reasonable doubt's relation to circumstantial evidence, and the other two of which addressed proof of specific intent or mental state. (CALJIC Nos. 2.01 (8 CT 1774) & 8.83 (8 CT 1838)

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[13] The defense presented was that the homicide occurred in the heat of passion. (See, e.g., 45 RT 6407.)

[re circumstantial evidence], and 2.02 (8 CT 1801) and 8.83.1 (8 CT 1839) [re specific intent/mental state].) Although each of the four addressed different evidentiary points, they all identically stated that if one interpretation of the evidence "appears to you to be reasonable" and another interpretation unreasonable, it would be the jury's duty to accept the reasonable.

The instructions promoted repeatedly the concept that the jurors were bound to accept a "reasonable" appearing interpretation of the evidence, which is fundamentally at odds with the core constitutional requirement that the state bear the burden of proving its case beyond a reasonable doubt. Jurors were instructed pursuant to CALJIC No. 2.01, regarding the sufficiency of circumstantial evidence to show guilt, that "if the circumstantial evidence as to any particular count or special circumstance permits two reasonable interpretations" and "one interpretation of this evidence appears to you to be reasonable and the other interpretation to be unreasonable, you must accept the reasonable interpretation and reject the unreasonable." (8 CT 1774.)

Respondent essentially ignores the argument in the AOB, and the particular circumstances of this case. (RB, pp. 176-177.) It simply argues that this Court has upheld these kinds of instructions before. (RB, p. 177.) It ignores the circumstances of this particular case, in which the prosecution went to extraordinary lengths to place inflammatory arguments and material before jurors.

The state cannot establish, beyond a reasonable doubt, that the multiple, repeated instructions emphasizing the jury's duty to blithely accept purportedly reasonable interpretations of evidence that pointed toward guilt made no contribution to the jury's verdicts of first-degree murder and/or of the special circumstances. A reasonable juror may well have held doubts about appellant's guilt of murder and his culpability for alleged special circumstances. These prejudicial instructions. repeatedly emphasizing the jury's duty to accept so-called reasonable interpretations of evidence that pointed toward guilt, improperly lightened the prosecution's burden of proof, and skewed the jury's task to favor the prosecution. When the wrong standard is used to assess guilt, the deference normally given the factfinder's judgment is inappropriate. (*Gray v. Mississippi* (1987) 481 U.S. 648, 661, fn. 10; *In re Carmaleta B.* (1978) 21 Cal.3d 482, 496.) Reversal is required.

* * * * * *

16. THE TRIAL COURT IMPROPERLY DENIED A DEFENSE REQUEST FOR INSTRUCTION THAT THE PROSECUTION HAS THE BURDEN OF PROVING, BEYOND A REASONABLE DOUBT, THAT EVIDENCE WAS NOT TAMPERED WITH OR CONTAMINATED.

Appellant Parker's trial counsel submitted a proposed instruction reading as follows:

> The prosecution has the burden of proving to you beyond a reasonable doubt that none of the evidence they have presented was tampered with or contaminated. You may consider any breaks in the chain of custody of any of the evidence collected, transported and thereafter evaluated in determining whether the prosecution has met their burden.

The trial court erroneously refused to give this proposed instruction on July 8, 2002. (7 CT 1748.) Appellant refers to and incorporates the allegations of Argument 16 of his Opening Brief. (AOB, pp. 233-235.)

Respondent contends this important instruction was properly refused. (RB, pp. 177-181.) Evidently, Respondent considers chain of custody issues relevant only if they pertain directly to a defense theory of the case – and trifling if they pertain only to the jury's proper assessment of conflicts in the prosecution's case for guilt. (RB, p. 180, stating that the defense is not entitled to have jury instructions highlighting "specific evidence.")

Startlingly, Respondent further contends:

> The prosecution does not bear the burden of proving to the jury beyond a reasonable doubt

> that the evidence had not been tampered with or contaminated. The prosecution's burden of proof pertains to the elements of a charged crime and not to the chain of custody of evidence. ([*People v.*] *Catlin* [(2001)] 26 Cal.4th [81], 134.)

(RB, p. 180.) In any event, Respondent contends, any error "was harmless because substantial evidence supports appellant's conviction and the true findings on the special circumstance allegations." (RB, p. 181.)

As set forth throughout this brief and the AOB, there are numerous, serious legal questions about the adequacy of the evidence to prove first degree murder, as compared to sufficiency of the evidence to establish manslaughter, as well as about the conduct of the prosecution and the rulings of the trial court.

While the trial court here may have been persuaded there was sufficient reliability to *admit the evidence*[14], it was error to refuse the instruction that would have informed jurors that they must determine that the prosecution showed the chain of custody was intact and therefore that the evidence was reliable. Reversal is required.

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[14] It is unclear that the trial court actually considered the law applicable to the chain of custody issue; instead, it appears he mistakenly assumed that reliability was solely a matter for arguments of counsel. (44 RT 6100.-6105)

17. THE TRIAL COURT ERRONEOUSLY REFUSED TO MODIFY CALJIC NO. 2.70 TO ELIMINATE REFERENCES TO "CONFESSION" IN A CASE WHERE THERE WAS NO CONFESSION.

During discussions of jury instructions, the trial court erred in deciding that Mr. Parker's alleged statements "could be taken" as a confession. (44 RT 6124.) The trial court erroneously refused to modify CALJIC No. 2.70 to eliminate references to a confession, in a case where there was no confession, and therefore erroneously left the "confession" language in the version of CALJIC No. 2.70 given to the jury. (AOB, pp. 236-237, citing 8 CT 1792.) This error suggested to jurors that they could regard other statements of appellant as a confession. Appellant refers to and incorporates Argument 17 of his Opening Brief. (AOB, pp. 235-238.)

At issue were statements that appellant Parker allegedly made to a jailhouse snitch, whose reliability was suspect. Moreover, the snitch was groomed and interviewed by Detective Ott, who in turn had a pattern of deviating from police practices designed to ensure reliability of evidence. Appellant refers to and incorporates herein Argument 9 of this brief and the AOB, regarding the limitations on impeachment of jailhouse informant Ed Lee, and Argument 11 of this brief and the AOB, regarding the trial court's refusal to permit full examination of Det. Ott regarding his deviations from standard police practices.

Respondent argues that the alleged statements to a jailhouse informant constituted confessions, and that any error was harmless. (RB, pp. 182-185.) Even if reliable, however, the

account of the jailhouse snitch at most would only be admissions, not a confession. In any event, But there is considerable reason to doubt the reliability of this jailhouse informant. His testimony should be rejected and the state's reliance on it should not be countenanced.

Reversal is required. The state cannot show beyond a reasonable doubt that the errors were harmless. (*Chapman, supra,* 386 U.S. at p. 23.)

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18. THE JURY WAS ERRONEOUSLY INSTRUCTED WITH CALJIC NO. 2.15, WHICH PERMITTED THE JURY TO FIND GUILT OF FIRST DEGREE MURDER IF IT FOUND POSSESSION OF STOLEN PROPERTY.

As set forth more fully in Argument 18 of the Opening Brief (AOB, pp. 238-248), incorporated herein, appellant's jury was told it could convict Mr. Parker of murder if the state proved that (1) appellant had been in possession of recently stolen property and (2) there was "corroborating evidence" which "need only be slight, and need not by itself be sufficient to warrant an inference of guilt.." (8 CT 1778; 45 RT 6254-6255.)

This theory of culpability was based on standard CALJIC No. 2.15 instruction.

According to the use note which accompanies that instruction, it is to be used only as to theft-related offenses. (See CALJIC No. 2.15, Use Note.) In this case it was given, not in connection with burglary or robbery charges, but instead, linked directly to the murder charge. Thus, at the state's request, the jury was told that if the state proved possession of stolen property with slight corroboration, that was "sufficient to permit an inference that the defendant is guilty of the crime of murder." (45 RT 6255.) The bulk of Respondent's argument consists of pointing to other evidence that the state contends proves Appellant's guilt. (RB, 189-193.) The recitation includes numerous matters that are highly contested elsewhere in this brief and the Opening Brief.

Respondent argues that "other instructions properly informed the jury of its duty to weigh the evidence, what evidence it might consider, how to weigh that evidence, and the burden of proof. [citations omitted.]" (RB, p. 193.)

Respondent addresses the challenge to CALJIC No. 2.15 by arguing only that any error was "harmless." (RB, pp. 185-192.) This Court must reject Respondent's claim and treat Respondent's argument as a concession that giving this instruction was erroneous. It should be considered in the full context of all the egregious errors in this extraordinary case.

As the Supreme Court has held, a correct instruction does not remedy a constitutionally infirm instruction if the jury could apply either instruction to arrive at a verdict. (*Francis v. Franklin* (1985) 471 U.S. 307, 319-320.) That is just the situation here; this Court has no way of knowing whether Mr. Parker was convicted on the basis of CALJIC No. 2.15 or other instructions.

An error which lessens the prosecution's burden is structural and requires automatic reversal. (*Sullivan v. Louisiana* (1993) 508 U.S. 275, 279.) This is because, when the jury receives instructions which permit it to convict without applying the reasonable doubt burden of proof, "there has been no jury verdict within the meaning of the Sixth Amendment [and] the entire premise of [a *Chapman* harmless error] review is simply absent." (*Id.* at p. 280.)

Appellant refers to and incorporates herein the other Arguments of his Opening Brief and this brief. The scales of justice were tipped toward conviction by the overreaching of the

prosecutor (see Arg. 20 and other arguments referenced therein), and the numerous erroneous rulings of this trial court.

Reversal is therefore required.

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19. THE TRIAL COURT ERRONEOUSLY GAVE CALJIC INSTRUCTIONS ON VOLUNTARY MANSLAUGHTER SUGGESTING THAT CERTAIN MENTAL STATES CAN "REDUCE" A MURDER TO MANSLAUGHTER AND "EXCUSE" MALICE, IMPLYING THAT MURDER IS THE DEFAULT AND THAT THE DEFENSE HAS A BURDEN OF PRODUCING EVIDENCE OF THE LESSER CRIME.

Appellant refers to and incorporates herein the allegations of Argument 19 of his Opening Brief. (AOB, pp. 249-252.) The instructions the court gave on voluntary manslaughter suggested that certain mental states can "reduce" a murder to voluntary manslaughter and "excuse" malice, implying that murder is the default offense, and, further, that the defense has the burden of producing evidence of the lesser crime. This impermissibly and unconstitutionally lightened the state's burden of proof. The trial court's instructions failed to make clear that the prosecution alone bore the burden of proof to establish guilt and precluded jurors from beginning deliberations with an open mind as to guilt or innocence of each charge, impermissibly relieving the prosecution of its burden of proof on substantive charges. (See, *Francis v. Franklin, supra,* 471 U.S. at pp. 317-318; *Sandstrom v. Montana* (1979) 442 U.S. 510, 523-524.)

Appellant Parker refers to and incorporates herein Argument 15 of this brief and Appellant's Opening Brief, asserting that the instructions regarding circumstantial evidence undercut the requirement that the state prove its case beyond a reasonable doubt, by directing jurors that they needed only to adopt a "reasonable" interpretation of the evidence to find

defendant guilty. That erroneous set of instructions amplified the error with the instructions on voluntary manslaughter.

Respondent's position is that appellant's jury was properly instructed. (RB, pp. 193-198.)

Respondent also complains that trial counsel did not make the same objection at trial. (RB, p. 194.) Respondent surely is aware, despite the lack of mention in its brief, that Penal Code section 1259 provides: "The appellate court may . . . review any instruction given, refused, or modified, even though no objection was made thereto in the lower court, if the substantial rights of the defendant were affected thereby." Nothing could be more substantial, or fundamental, than that the constitutional requirement that the burden of proof rest with the prosecution.

Reversal is required. The state cannot show beyond a reasonable doubt that the errors were harmless. (*Chapman, supra,* 386 U.S. at p. 23.)

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20. THE PROSECUTOR COMMITTED MISCONDUCT THROUGHOUT THE GUILT PHASE OF MR. PARKER'S CAPITAL TRIAL.

As set forth more fully in Appellant's Opening Brief, incorporated herein, the prosecution engaged in a pervasive, purposeful, intentionally improper, and consistent pattern of misconduct at the guilt phase of that was designed to and did in fact prejudicially deprive Mr. Parker of the foregoing constitutional rights. The constitutional error is both clear and fundamental, and strikes at the heart of the trial process. (AOB, pp. 253-275.)

In a capital case, prosecutorial misconduct is all the more egregious, because the Eighth Amendment to the United States Constitution requires heightened reliability, and due process to ensure that reliability, whenever death is a possible outcome. *(Woodson v. North Carolina*, *supra*, 428 U.S. at pp. 288-301.) The conduct of the prosecution in this case is truly extraordinary; as was the failure of the trial court to adequately reign in that conduct to ensure a fair trial.

Appellant refers to and incorporates by reference the following related arguments in this brief and the Opening Brief:

* Argument 2, regarding quantities of material repeatedly referenced (erroneously) as "pornographic";

* Argument 3, regarding the proffer of a thoroughly unreliable opinion of an unqualified prosecution "expert" – a forensic dentist, who used random handcuffs taken from the police evidence locker and placed them upon the dead body of the victim, allegedly to establish that appellant used handcuffs in the commission of the offense, despite the complete lack of evidence in this regard;

* Argument 4, regarding the refusal of the trial court to disclose videotapes in sealed court files about the prosecutor and other prosecution staff discussing this very case;

* Argument 5, regarding the improper admission of gruesome photographs;

* Argument 6, regarding the trial court's refusal to preclude argument in the opening statements;

* Argument 7, regarding the refusal of the trial court to exclude the utterly improper and factually worthless evidence of one single sperm cell found on a banana peel in a bag of trash.

* Argument 8, regarding the refusal of the trial court to exclude evidence of a photograph of the victim while alive, with the dog she had earlier in life;

* Argument 9, regarding the unreliability of snitch Edward Lee, and the trial court's refusal to permit full cross examination;

* Argument 10, regarding the egregious and inflammatory display of photographs to a lay witness who was not a witness to the offense or its aftermath, depicting the arrangement of random handcuffs on the victim's dead body by Dr. Sperber;

* Argument 11, regarding the preclusion of cross-examination of Det. Ott, whose multiple deviations from standard police practices called into question the reliability of Det. Ott's reports of his contacts with jailhouse informant Lee;

* Argument 12, regarding the unconstitutional overbreadth of lying in wait special circumstances as charged in this case;

* Argument 13, regarding the improper instructions and argument about lying in wait murder;

* Argument 19, regarding the improper framing of voluntary manslaughter as a "reduction" from the murder charge, suggesting that the burden of proof was on the defense to prove the lesser offense.

In addition, trial prosecutor committed misconduct by presenting to the jury introducing unfounded and prejudicial information to the jury against Mr. Parker. For example, the prosecutor asked Det. Hergenroether a question that elicited his opinion that Ms. Gallego was gagged and handcuffed. Defense counsel objected and in a sidebar discussion, the trial court reminded the prosecutor that he had ruled inadmissible that opinion testimony that the victim was gagged. The trial court scolded her for eliciting this improper evidence in the face of his clear ruling. The trial court struck the answer regarding gagging, and admonished jurors to disregard it. (Testimony, 39 RT 5022; sustaining of objection and sidebar, 39 RT 5023.) Appellant asserts that the admonition was insufficient and did not un-ring the bell. (AOB, pp. 264-266.)

Also, as set forth more fully in the Opening Brief, during closing argument the prosecutor pressed many of the erroneous themes noted above. Together, these instances of misconduct skewed the jury's decision, which was made on the basis of passion, and not on the basis of reliable facts and appropriate legal instructions. (AOB, pp. 272-274.)

Respondent contends that the prosecutor did not commit misconduct. (RB, pp. 199-218.) There is nothing in Respondent's brief that fairly addresses the serious constitutional issues raised in the AOB the collective or cumulative impact of these

unacceptable departures from acceptable prosecution and legal norms, nor the trial court's disinclination to control prosecution conduct to protect the appellant's right to a fair trial. Appellant addresses the Respondent's contentions below, using Respondent's subcategories for this argument.

A. Misconduct in Opening Statement. (RB, pp. 200-203.)

Respondent contends that the prosecutor did not engage in improper argument during opening statement, and refers to Argument VI of its brief on this topic. The gist of Respondent's argument was that "the prosecutor did not attempt to refer to evidence that was determined to be inadmissible." (RB, p. 202.) Respondent then endeavors to justify the state's proffer of speculative and inflammatory remarks that the victim was struck by a hammer or rock; that she had handcuff marks on her back; that she was gagged; and that her blood was drained. (RB, pp. 202-203.)

As set forth in the AOB and this brief, the only evidence was that the victim had been struck by a blunt object; there was none at all about what kind of object might have caused the injury, or how. (AOB, p. 258, citing 33 RT 3931.) The prosecutor invented scenarios about a hammer or rock, neither of which could possibly be proven.

The evidence that the victim might have been handcuffed did not come from the medical examiner – who did the autopsy -- nor from any physical evidence or other evidence tied to the event. Instead, that evidence came from a strikingly unusual and

staged "examination" by a dentist, using a random pair of handcuffs from the evidence locker, after the autopsy had been conducted. No handcuffs were found, nor was there other evidence any were used in connection with the victim's death. (AOB, p. 258, citing, e.g., 33 RT 3931, 3941, 3944; see also Argument 3.)

In its brief, Respondent says only that there was no blood on the body (RB, pp. 202-203), conspicuously omitting the prosecutor's assertion in opening statement that the blood was "drained," suggesting a ghastly scenario that could not be proven by the evidence. (AOB, p. 259.) The jurors heard what was said at trial, not the sanitized version set forth in the Respondent's brief.

Respondent does not respond at all to the allegation that the prosecutor argued that any quantity of what was termed "pornography" was somehow evidence of "planning." (AOB, p. 259, citing 33 RT 3947-3948.) That issue is more fully addressed in Argument 2 of this brief and the Opening Brief, and refutes the state's contentions in this regard.

The prosecutor's theory of the case included much that could never be proven, and yet was put forth anyway by an officer of the court — a public prosecutor — as truth. That is unacceptable and a violation of appellant's fair trial and due process rights.

B. Introduction of sexually graphic images to inflame and prejudice the jurors. (RB, pp. 203-204.)

Respondent argues that, as set forth in its Arg. II, "the sexually graphic images at issue were relevant because they were

probative of appellant's intent to kill and rape Gallego...." (RB, p. 203.) This explanation utterly fails to justify the large quantity of graphic material admitted (much having nothing to do with Ms. Gallego), nor the prosecution's constant drumbeat of references to "pornography" and "porn."

C. The evidence of the forensic dentist was not "junk" science. (RB, pp. 204-205.)

Referring to Argument III of its brief, Respondent asserts that "Dr. Sperber was qualified to testify as an expert in tool mark analysis." (RB, p. 204.) Additionally, Respondent claims (without citation or further discussion) that the National Academy of Sciences report in 2009[15] "did not invalidate the field of tool marks analysis." (*Ibid.*) Appellant notes the extremely unusual circumstances of this particular post-mortem experiment, and that the NAS report does not in any way endorse what happened here.

Typically, a forensic dentist is called upon to assess bite marks, of which there were none in this case. The record suggests that Dr. Sperber was called in by investigators only after the medical examiner failed to confirm the prosecutor's conjecture that – because Mr. Parker had handcuffs at some point in the past – perhaps handcuffs were used during the fatal incident.

Appellant's counsel is unable to locate or present any case where a dentist was asked to find and use some random

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[15] Respondent mistakenly noted that this report was issued in 2008. (RB, p. 204.)

handcuffs unconnected to the case for the purpose of lining them up on the victim's body, post-autopsy, to fit an entirely speculative theory for which no other evidence exists. Respondent cites no such case.

The prosecution invented a theory and staged a supposed "re-enactment" of handcuffing, producing and displaying to jurors absolutely horrifying photographs of the victim's body posed with these random handcuffs. It searched for a willing expert. It exploited the appalling nature of those staged photographs to incite the jurors' passions against Appellant. This Court should not countenance this perversion of court processes to manipulate the facts in order to achieve a "victory."

D. The prosecutor did not endeavor to sway the public or potential jurors by agreeing to participate in a television program about prosecutors. (RB, pp. 205-206.)

Referring to Argument IV of its brief, Respondent posits that the reality television show with which the prosecutors agreed to cooperate "was not focused solely on appellant's case (42 Supp. CT 9350)," and that "no episode depicting appellant's case ever aired and all of the videotaped footage at issue remained unpublished." (RB, p. 206.) Respondent further urges that appellant "failed to make the requisite showing of a reasonable possibility that those three videotapes would materially assist his defense." (RB, p. 206.) At no point does Respondent explain why — if no intent to influence the public or potential jurors existed — the prosecution agreed to that taping in the first place.

Respondent does not explain why third parties belonging to a production company were invited, for example, to the prosecution meeting at which a capital charging decision was made. Typically, that kind of decision would be considered work product and remain confidential; but in this highly unusual case, strangers were invited in to film it. The content of that tape is available to the prosecutors, to Respondent, and to this Court – but not to Appellant's own counsel. It is part of the record on appeal, but out of bounds for counsel in the automatic appeal, which is designed by state law to be **the** place where record-based legal issues are raised.

Respondent does not explain why the proprietary rights of a production company should have precedence over the fundamental Constitutional rights of a defendant facing capital charges. That flies in the face of fundamental fairness, and offends a panoply of federal and state Constitutional rights.

It cannot be denied that matters of significance to the case were discussed at the prosecution meeting about the charging decision: that was the entire point of the meeting. This was a prosecution unusually bent on winning at all costs. This Court and Respondent have access to that information; but it is not the job of either this Court or Respondent to **advocate for Appellant**. Only appellant's counsel remains in the dark about what is on that tape, and the others. If there are discrepancies; if statements are at odds with the transcript; if something was said that indicates another basis for relief on automatic appeal – all those have been hidden from counsel's view, and prevent full

prosecution of his claims on appeal and adequate review of the validity of Mr. Parker's conviction and sentence.

E. The prosecutor did not err in introducing gruesome photographs or arguing that they demonstrated the defense was untrue. (RB, pp. 206-207.)

Respondent contends that because the photographs were permitted by the trial court, they were not misconduct. (RB, pp. 206-207.) As set forth more fully in Argument 5 of this brief and the Opening Brief (AOB, pp. 177-182), the trial court erred in allowing these photographs to be shown to the jury. However, the prosecutor's insistence on presenting them is fair to consider, when assessing the overall cumulative impact of the prosecution's conduct in this case.

F. The prosecutor did not err in presenting evidence of a single sperm cell found on a banana peel. (RB, p. 207.)

Respondent refers to its Argument VII, and asserts that the evidence was relevant "and had strong probative value." (RB, p. 207.) It further asserts that it was not misconduct to use "the evidence of a single sperm cell found on a banana peel to suggest that appellant committed rape with the banana and then ate the banana." (RB, p. 207.)

The prosecution sought to and was permitted to admit evidence of a single unidentified sperm cell, found on the *inside* of a banana peel in a bag of garbage. The trial prosecutor 's primary factual argument was that there was reference to a cucumber on what she dubbed a "to do list," and no cucumber was found, so

this was close enough. (See, e.g., 23 RT 2478.) Incredibly, the trial court decided that the one sperm cell on the inside of a banana peel was relevant to planning. (25 RT 2560-2561.)

The average number of sperm cells in a normal ejaculation is three billion, so a single sperm cell is rare indeed. (40 RT 5150.) As defense counsel argued at trial, human cells in a mixed bag of garbage might easily transfer among items, and this record contains no evidence on how a determination of "relevance" was reached, or whether investigation was done to determine if that one lone unidentified sperm cell was connected to appellant or came from another source. (25 RT 25 RT 2552-2553, 2557.)

The prosecution over-reach in this case is shocking. It is startling, too, that the Attorney General would endorse misconduct of this nature. This Honorable Court should not countenance this far-fetched and unsubstantiated theory that appellant committed the crime of rape by object and then ate the banana, based on evidence of one sperm cell, found inside a banana peel inside a bag of mixed garbage. The state's misconduct undermines the integrity of the proceedings and renders the outcome unreliable.

G. The prosecutor's question to Det. Hergenroather about Ms. Gallego being gagged was brief and corrected by the trial court. (RB, pp. 208-209.)

Respondent contends that the prosecutor did not act in defiance of a court order or intentionally elicit inadmissible

evidence, and that any error was corrected by the trial court's admonition. (RB, pp. 208-209.)

The trial record clearly shows that the trial court had previously sustained an objection to exactly that line of questioning, and asked the prosecutor why she did not comply with that order. (39 RT 5024.) The prosecutor's response, that this question was following up on a defense question (39 RT 5025) is not supported by the record, and appears to have been contrived. Respondent blithely contends that all is fine, because the prosecutor's question *unintentionally* defied a court order. (RB, p. 208.)

This Court cannot explore the mental processes of the prosecutor; but it can and must look at the impact on the jury, in the context of this entire trial. As previously noted, the prosecutor's opening statement included an assertion that the victim had been "gagged," despite the total lack of any evidence supporting that specious theory. (See subpart A of this Argument.)

Again, Appellant contends that this Court must consider the totality of prosecution over-reaching and misconduct, and reject the Respondent's lead, urging this Court to consider each error *as if none of the others* was happening at this trial.

H. The prosecutor did not err in introducing a photograph of Ms. Gallego and her dog. (RB, pp. 209-210.)

Respondent refers to its Argument VIII, claiming that the photograph was "the only one that the prosecution would enlarge without substantial distortion." (RB, p. 209.) The argument

explains that the prosecutor wanted to pick a "prettier" one, but it could not be enlarged without distortion. (*Ibid.*) It asserts that a photograph of the victim while alive need not be excluded because it will garner sympathy, so long as it is relevant. (RB, p. 210.) Respondent argues that the photograph was relevant "as it allowed the witnesses to identify Gallego as the person about whom they were testifying." (*Ibid.*)

Respondent fails to respond to Appellant's argument (Argument 20.H.) and the cited cases therein that:

> This Court has held that a trial court errs when it admits a photograph of a murder victim while she was alive if the photograph "... has no bearing on any contested issue in the case." (*People v. Hendricks, supra,* 43 Cal.3d at p. 594; *People v. Ramos, supra,* 30 Cal.3d at p. 578.) Here, as in *Hendricks* and *Ramos*, the victim's identity was not in dispute; and this photograph was not used to establish her identity.

(AOB, pp. 266-267.)

The identity of Ms. Gallego was not in dispute during this trial. There was no reason offered at trial, nor does Respondent offer one, why it was imperative to have an <u>enlarged</u> photograph of Ms. Gallego to show to jurors, much less one of her in life and with her dog.

Yet, the trial court admitted the photograph. Appellant Parker refers to and incorporates herein the allegations of Argument 9 of the AOB and this brief, concerning the refusal of the trial court to exclude evidence of a photograph of the victim while alive, with the dog she had earlier in life. This error

prejudiced the appellant, and incited the passions of jurors against him.

I. The prosecutor did not err in presenting the testimony of Edward Lee. (RB, pp. 210-212.)

Respondent essentially contends that Lee's testimony was relevant, and that the defense was allowed to present impeachment evidence – except for two serious felonies for burglary and robbery. (RB, p. 211.) Respondent does not address the unreliability of Mr. Lee's testimony.

As set forth in Appellant's Opening Brief at pp. 267-268 (incorporating Arguments 10 and 12), which Respondent does not address:

> The testimony of the jailhouse informant was critical to the prosecution case presented at trial, as it purported to fill an evidentiary gap regarding Mr. Parker's alleged "financial gain" motive, as well as elaborating on aspects of the killing itself (such as efforts after the killing to disguise the identity of the body). But Mr. Lee himself had a motive to curry favor in sentencing on his own charges; he had the opportunity to learn details of the case from sources other than Mr. Parker; and the detective who conducted interviews with Mr. Lee had on several other occasions deviated from standard practices in order to tilt the scales in favor of conviction, rather than justice. The jury never heard the full story about either Mr. Lee or Det. Ott.
>
> The defense in this case contended that Mr. Parker denied making statements to the jailhouse informant Ed Lee, who already seemed to know certain facts in Mr. Parker's case. (42

> RT 5737.) Parker's counsel also asserted that there are gaps in the recorded interview of Mr. Parker by Det. Ott, who had already interviewed jailhouse snitch Lee alone, before conducting an interview with Parker accompanied by another detective. (42 RT 5738-5739.) There is reason to suspect that Ott "briefed" jailhouse informant Lee before the formal recorded interview of Lee as a witness in this case. (42 RT 5740-5741.)

Again, Appellant asks this Court to consider the entire pattern of aggressive, improper prosecution efforts to secure a conviction at the cost of fairness, adherence to constitutional principle, and the rule of law. The trial court's failures do not mitigate that pattern of prosecutorial over-reaching in service of the a goal of winning, rather than in service of having this jury determine the truth.

J. The prosecutor did not err by objecting to the defense request to examine Det. Ott about deviations from standard police practices. (RB, pp. 212-213.)

Respondent argues that Det. Ott's deviations from standard practices were irrelevant to this case and that there was no "tangible evidence" that Det. Ott had engaged in impropriety. (RB, p. 212) , Respondent asserts that exploring the issue "would have necessitated an undue consumption of time and would have created a substantial danger of undue prejudice, of confusing the issues, and of misleading the jury...." (RB, p. 213.) Respondent also refers to its Argument XI.

In fact, there was "tangible evidence" that Det. Ott had engaged in improper conduct. As noted in the Opening Brief and at Argument 11 of this brief, "The defense noted that jailhouse

snitch Ed Lee made a statement to prosecutor Bowman that Det. Ott came and told him about Mr. Parker's case. (42 RT 5755.)"

This jailhouse snitch told a prosecutor in this case that Detective Ott had come and told him about this case, ahead of the interviews. The trial court had the ability to conduct further pretrial evidentiary inquiries – given the information that this informant told a prosecutor that he was told in advance about Mr. Parker's case -- but it did not. Instead, it simply precluded this entire line of inquiry, including references to the other cases in which Det. Ott had crossed the bounds of propriety and protocol in investigating cases. This Court must demand better from public prosecutors and judges.

K. The prosecutor did not inflame jurors during the examination of Marilyn Powell by showing the witness photographs of random handcuffs placed on Gallegos' body. (RB, pp. 213-214.)

Respondent argues that the purpose of showing witness Powell a photograph of Dr. Sperber's staged experiment with random handcuffs on the back of the dead victim, post-autopsy, was "to establish that appellant had handcuffs [when Powell and appellant dated in 1988] that were similar, if not identical" to the handcuffs sued by Dr. Sperber. (RB, p. 213.)

Ms. Gallego died in 2001, three years after Ms. Powell's observation that appellant had handcuffs that he used to lock his bicycle. The handcuffs used in this gruesome experiment were randomly selected from the police department evidence room. One must suppose that many types of handcuffs look similar.

Respondent does not stop there, however, asserting they were possibly "identical" to handcuffs appellant purportedly had during some unknown period prior to the crime. Witness Powell was not a witness to any of the events surrounding Ms. Gallego's death and thus was incompetent to testify as she did.

The prosecutor's improper use of handcuffs in this way preyed on the fears and emotions of witnesses and jurors and was is far outside the bounds of ethical prosecution behavior. Reversal is required.

L. The prosecutor did not mislead the jury on lying in wait principles. (RB, pp. 214-217.)

In Argument VI of its brief, Respondent contends that it was fine for the prosecutor to tell jurors in opening statement that appellant was watching and waiting for an opportune time to act (RB, p. 214), and that it was also acceptable that the trial court did not stop the prosecutor from doing so (RB, p. 215, referencing Respondent's arguments VI and XX(A)). Respondent posits that the prosecutor "merely informed the jury of the evidence and the reasonable inferences relating to the prosecution's theory of the case." (RB, p. 215.)

Respondent then references its arguments XII and XIII, again relying on this Court's decisions in *People v. Combs, supra,* 34 Cal.4th 821 and *People v. Morales, supra,* 48 Cal.3d 527. (RB, pp. 216-217.) *Combs* featured the defendant and an accomplice luring the victim into driving them to the desert, where she was strangled and beaten. *Morales* also involved luring the victim

into a car, waiting until the car was in a place of isolation, and again, strangling and beating the victim.

In this case, by contrast, there is no evidence that appellant "lured" the victim to a place of isolation. The record is clear that Mr. Parker and Ms. Gallego were roommates, and that the fatal encounter occurred in their shared home. There was evidence that Mr. Parker and Ms. Gallego had agreed to marry, in order for her to become a United States citizen. (See, e.g., 36 RT 4638; 42 RT 5637-5639.) The defense case at trial was that the evidence proved only manslaughter, and that Mr. Parker acted in the heat of passion after a final falling out. This case is not similar to the cases cited by Respondent.

The lying in wait theory was unfounded, is unsupported by relevant law, and is another example of prosecution overreaching in order to win at the cost of a fair trial.

M. The prosecutor did not urge the jury to relieve the prosecution of its burden of proof. (RB, pp. 217-218.)

Respondent refers to its argument XIX, arguing that the jury instructions correctly stated the law, and that the prosecution therefore did not commit misconduct.

Appellant refers to and incorporates Arguments 12, 13, and 19 of this brief and the Opening Brief. The prosecution in this case fought hard to relieve itself of the burden of proof, and to press any theory that came to mind which would support a capital murder conviction.

N. The prosecution did not commit misconduct during her closing argument. (RB, pp. 218-219.)

Respondent asserts that prosecutors have broad latitude in closing argument, to characterize and draw inferences from the evidence. (RB, p. 218.) Even if the the prosecutor acted improperly, Respondent continues, Appellant forfeited claims of error due to lack of objection to the specific remarks in closing. (RB, p. 219.)

During closing argument, the prosecutor pressed many of the erroneous themes noted above. Together, these instances of misconduct unfairly skewed the jury's decision, which was made on the basis of passion, and not on the basis of reliable facts and appropriate legal instructions.

In pressing that the homicide was planned, the prosecutor stressed the alleged "porn" – cut and paste images apparently created by Mr. Parker. (45 RT 6303.) She discussed sexual fantasies attributed to Mr. Parker. (45 RT 6304.) From these, the prosecutor urged that this was a brutal, sadistic murder committed for sexual pleasure, and stressed her unproven theory that the victim had been handcuffed and gagged as well as raped. (45 RT 6307-6308.)

As noted above, objections to much of this material had previously been rejected by the trial court, and further objections would have been futile. This overwhelming pattern of prosecutorial aggressiveness, going to the extremes this prosecution did, however, cannot possibly be given this Court's blessing.

O. Conclusion.

For all these reasons, appellant Parker's conviction and sentence of death must be reversed. Considered individually, and certainly cumulatively, these acts violated appellant's First, Fifth, Sixth, Eighth and Fourteenth Amendment rights to liberty, a fair trial, notice, unbiased jury and tribunal, right to cross-examination and confrontation, due process, heightened capital case due process, reliable guilt determination and individualized and reliable penalty determination. (See *Hicks* v. *Oklahoma*, *supra*, 447 U.S. at p. 346; *Godfrey v. Georgia* (1980) 446 U.S. 420, 428-429; *Stringer v. Black* (1992) 503 U.S. 222; *Zant v. Stephens* (1983) 462 U.S. 862, 865.)

Reversal is required.

* * * * * *

21. THE PENALTY OF DEATH AND EXECUTION IN CALIFORNIA IS ARBITRARILY AND CAPRICIOUSLY IMPOSED DEPENDING ON THE COUNTY IN WHICH THE DEFENDANT IS CHARGED, IN VIOLATION OF THE RIGHT TO EQUAL PROTECTION OF THE LAW.

Appellant Parker refers to and incorporates herein the factual and legal allegations of Argument 21 of his Appellant's Opening Brief. (AOB, pp. 275-277.)

Respondent argues that this Court has rejected similar challenges before, citing *People v. Vines* (2011) 51 Cal.4th 830, 889-890). More importantly, however, Respondent fails to address the particular allegations made in Mr. Parker's case regarding the disparate treatment of capital defendants depending on the county where the alleged crimes occurred. As stated in the Appellant's Opening Brief:

> It is extraordinarily unlikely that Mr. Parker's case would have been capitally charged in the vast majority of other counties in this state. This case involved a single victim, who was neither a child nor a public safety officer; Mr. Parker had no prior criminal record; the victim and Mr. Parker had an ongoing relationship over several years, including an agreement to marry; and the most inflammatory facts pressed by the prosecutor were either irrelevant (e.g., graphic material) or occurred after the crime (e.g., efforts to hide the crime).

(AOB, p. 275.)

Respondent also fails to address the allegations of Argument 4, incorporated herein (AOB, p. 275), alleging that this Court has before it videotaped evidence discussing the actual

charging decision by the prosecution. That evidence was never been disclosed to counsel at trial, or in post-conviction, but it is nonetheless before this Court and should be considered in the context of this claim of arbitrary charging practices. Counsel for appellant is unaware of any other capital case in California in which that kind of evidence about the charging decision is actually in the trial record of a case before this Court on direct appeal.

This Court has a duty to consider that evidence and to permit appointed counsel access to it as well. As set forth in Appellant's Opening Brief at pp. 276-277:

> In some California counties a life is worth more than in others, because county prosecutors use different standards, or no standards, in choosing whether to charge a defendant with capital murder. (See, Pierce and Radelet, *The Impact of Legally Inappropriate Factors on Death Sentencing for California Homicides, 1990-1999* (2005) 46 Santa Clara L. Rev. 1; *People v. Adcox, supra,* 47 Cal.3d at pp. 275-276 (conc. op. of Broussard, J.).)

Respondent has offered only a generic response and considers the matter settled. But this Court has never dealt on direct appeal with a case like this, in which the factors upon which a county's decision to seek death are recorded and in the record (albeit sealed even from defense counsel), as is true in this particular case.

The recording of the charging decision and other matters connected with this case at trial was arranged by the trial prosecutors, and appellant believes those materials are in the

possession of prosecutors and, by extension, in possession of counsel for respondent, the state Attorney General. It is also accessible by this Court. Counsel for the appellant cannot fully consider, evaluate and raise issues in connection with the charging decision without access to that same material.

The issue as set forth in the Appellant's Opening Brief, incorporated herein, is meritorious. It cannot be fully explored or argued when one party – the defense – is deprived of all the evidence in the record. Appellant therefore respectfully requests disclosure of the sealed materials related to the charging decision and an opportunity to elaborate in supplemental briefing.

Appellant respectfully requests this Court to reconsider previous decisions about the arbitrary charging practices among the disparate counties of California.

* * * * * *

22. THE PROSECUTOR COMMITTED PREJUDICIAL MISCONDUCT AT THE PENALTY PHASE OF TRIAL.

The prosecution in Mr. Parker's case engaged in a pervasive, purposeful, intentionally improper, and consistent pattern of misconduct at the guilt and penalty phases of his trial that was designed to and did in fact prejudicially deprive Mr. Parker of the foregoing constitutional rights. The constitutional errors are both clear and fundamental, and strike at the heart of the trial process. Appellant refers to and incorporates the facts and legal arguments set forth in the Apellant's Opening Brief. (AOB, pp. 278-287.)

Respondent argues that none of these instances amounts to misconduct, and/or that the errors are forfeited. (RB, pp. 220-238.)

The following instances, among others to be referenced elsewhere in this appeal, illustrate the pattern of prosecution and police misconduct that pervaded Mr. Parker's case, and rendered his trial unconstitutional.

A. Carryover and Cumulative Error from the Guilt Phase.

Appellant refers to and incorporates herein all of the errors raised in this brief, and particularly the misconduct at the guilt phase raised in Argument 20, addressing multiple instances of misconduct and errors throughout the guilt phase of trial. This case is notable for the overreaching of the prosecution throughout the trial, and the errors at the guilt phase were compounded by additional misconduct at the penalty phase.

Predictably, Respondent asserts that the prosecutor committed no misconduct at the guilt phase. (RB, p. 221.)

B. Prosecutorial Misconduct Noted in the New Trial Motion.

Appellant Parker refers to and incorporates herein the errors noted in the New Trial Motion, Argument 26. While that argument is framed as errors of the trial court, the prosecutor's conduct was also error, resulting in presentation of testimony and evidence that was clearly improper at the penalty phase – but nonetheless approved in error by the trial court.

Respondent asserts that the actions complained of in the new trial motion were not misconduct. (RB, p. 222.)

C. The prosecutor improperly argued non-statutory factors in aggravation.

Under California law, only statutory factors in aggravation may be considered by the jury at a capital sentencing trial. The prosecutor argued several non-statutory factors in aggravation, detailed below.

Respondent asserts that these allegations are forfeited due to lack of objection. (RB, p. 222.) Further, Respondent argues that the claims are without merit because of the "wide latitude" afforded prosecutors in closing argument. (RB, p. 223.)

The following examples, individually and collectively, urged jurors to sentence Mr. Parker to death for improper reasons:

* The prosecutor argued that the facts of the case make everyone feel bad; that one consequence of Mr. Parker's acts is that the jurors themselves had to come to court, listen to evidence, look at autopsy photos, and hear the

pain of the victim's family. (54 RT 7609.) **This argument cast the jurors themselves as victims in this case.** Continuing, the prosecutor argued that jurors have a heart, they care about other humans, care about humanity; that Mr. Parker doesn't have those feelings and compassion; that jurors are only called upon because of what he did, that he deserves death; that he caused all this suffering. That jurors are called upon to deliver the death penalty because of him. (54 RT 7610.)

* Reinforcing the idea that jurors had a **duty to impose a death judgment**, the prosecutor named citizen witnesses and police officers, who did their duty. (54 RT 7611; *see* section below, argument about a death sentence allegedly being mandatory.)

Respondent contends that the prosecutor "was simply describing the sensitive nature of a capital case, ***not*** appellant's case per se." (RB, p. 223, emphasis in original.) Respondent's contention does not account for the prosecutor's argument that the defendant was inflicting this on jurors. (54 RT 7609.) Additionally, Respondent asserts that the prosecutor did not exceed the latitude afforded in closing argument, and does not discuss the prosecutor's emphasis on the jurors' "duty" to impose a death sentence, rather than focusing on factors the jury should consider in determining the appropriate sentence. (RB, pp. 225-226.)

This Court has consistently held that in the penalty phase of a capital case, a jury should properly consider "sympathy or pity for the defendant in determining whether to show mercy and spare the defendant from execution, and that it is error to advise the jury to the contrary." (*People v. Robertson (I)* (1982) 33 Cal.3d 21, 57, citing *People v. Vaughn* (1969) 71 Cal.2d 406, 422, and

People v. Polk (1965) 63 Cal.2d 443, 451.) Here, the prosecutor's argument was an egregious violation of these principles:

* The prosecutor urged that a sentence of life without possibility of parole would amount to failure. Drawing an analogy to climbing Mt. Everest, he urged jurors to think about reaching the "summit" as delivering complete justice, justice without compromise. (54 RT 7612-7613.) Continuing, he stressed that "we" are within striking distance; that **jurors had to reach a death verdict to serve society, the community, to express our denouncement of crime**. (54 RT 7613.) The prosecutor's argument, urging the jury to make a statement about crime by sentencing defendant to death, is contrary to the underlying principles that inform the jury's duty to decide the appropriate sentence for this individual.

Respondent contends that the prosecutor was merely describing the difficulties of deliberation. (RB, pp. 226-227.) As noted in the lengthy quote included in Footnote 34 of the Respondent's Brief (RB, pp. 227-229), the prosecutor in fact emphasized reaching the "summit" and "delivering full justice. Justice without compromise," arguing that if jurors did not return a death sentence, they will have not made it to the summit. Appellant contends this argument crossed the line , by emphasizing the jury's duty to return the requested death sentence, and ignoring the true task of a capital jury at penalty phase: weighing the evidence to decide the appropriate penalty.

* **The prosecutor improperly urged jurors to put themselves in the place of the victim,** to personally visualize what she went through in her final moments, so as to "experience" the state's allegations about what happened themselves. (54RT 7626-7631.) This line of argument, carried out at length and with considerable gory and heart-wrenching detail, can only be characterized as appealing to emotions over reason; and furthermore,

requiring jurors to **speculate** about the details of what happened and how. It is worth noting that there were no eyewitnesses nor other contemporaneous accounts before the jury; the state's case was largely circumstantial as to the details, but inflamed from the very beginning of trial by the prosecution.

Respondent contends that the prosecutor has wide latitude in closing argument, and that the prosecutor was only asking jurors to examine all the evidence. (RB, p. 229.) That contention ignores the prosecutor's plain instruction to jurors to "experience" for themselves all that the victim went through in her final moments of life. The very essence of this argument was to appeal to passion, not reason and not the evidence itself. That is not permitted.

In any capital case penalty phase proceeding, skewing the scales of justice in favor of death creates a constitutionally impermissible risk that the death penalty will be imposed in spite of factors calling for a less severe penalty. (*Lockett v. Ohio* (1978) 438 U.S. 586, 605.) A prosecutor's position is such that any improper acts "... are apt to carry much weight against the accused when they should properly carry none." (*Berger v. United States* (1935) 295 U.S. 78, 88.) Therefore, the effect of penalty phase prosecutorial misconduct is particularly egregious. (See *Caldwell v. Mississippi* (1985) 472 U.S. 320, 326-334.)

* The prosecutor improperly argued that defendant's **post-crime actions**, were legitimate sentencing factors because they offered a peek into the defendant's soul. (54 RT 7632.) This is not a statutory sentencing factor.

The prosecutor argued that "The way we treat the dead tells us a lot about us as individuals." (RB, p. 230, fn. 35, citing 54

RT 7632.) The prosecutor was asking jurors to consider a non-statutory aggravating factor, her conclusions about Mr. Parker's suitability for capital punishment based on post-crime actions. In an effort to sidestep this Court's holdings regarding non-statutory aggravation, Respondent argues that everything appellant did after Ms. Gallego's death was part of the crime. (RB, p. 229.) However, in *People v. Boyd* (1985) 38 Cal.3d 762, 775-776, this Court established that evidence of non-statutory aggravating factors is not admissible during the penalty phase of a capital trial, and the prosecutor may not argue that any non-statutory factors should be considered in aggravation.

* The prosecutor improperly argued that jurors should **count the aggravating factors** alleged to arrive at a death verdict. (54 RT 7638.) Although the trial court reminded jurors that no weight is to be assigned to any factor, that admonishment did not cure the error in urging counting of aggravators.

Respondent argues that the prosecutor did not ask jurors to count the number of aggravating circumstances. (RB, p. 238.) Yet in footnote 36, the quoted portion of the transcript allegedly supporting that argument shows the prosecutor arguing, "All you need is one.... If that's all we had, we'd still be here today, deciding what the appropriate punishment should be." The prosecutor drove the point home, saying, "If you have two, that's twice as many. If you have three, that's three times as many special circumstances that society has said...."

An objection was interposed and sustained (RB, pp. 230-231, fn. 36), but that bell had been rung. The jury was not

instructed to disregard that argument, even though it was told to decide the weight assigned to special circumstances.

* The prosecutor went so far with victim impact as to include the fact that the **victim had a beloved dog**. (54 RT 7642.) Canine fellowship is not a statutory factor in aggravation; this was mentioned solely for the purpose of inflaming passions.

Respondent asserts that the prosecutor mentioned the dog because the dog's name was her computer password. (RB, pp. 231-132.) Respondent fails to mention that at the guilt phase, the prosecution wrongly introduced a photograph of the victim in life, along with her dog. (See Argument 8, incorporated herein.) Jurors had access to all the evidence during deliberations.

* The prosecutor improperly argued that the mitigation evidence presented about appellant's appalling early childhood amounted to **"reverse victimization**," calling himself a victim and "robbing" the victim of this crime of the emotional response that the prosecutor asserted was rightfully hers. (54 RT 7649.) The prosecutor continued in this vein, accusing appellant of "usurping the passion" because he exercised his right to a trial. (54 RT 7650.) All capital defendants have a right to present mitigating evidence at the penalty phase, and moreover, the jury has a duty to give that evidence meaningful consideration. (See, e.g., *Lockett v. Ohio, supra,* 438 U.S. 586.)

Respondent posits that the prosecutor was "merely responding to the defense argument." (RB, p. 232.) Respondent argues that this situation was akin to that in *People v. Raley* (1992) 2 Cal.4th 870, 917, where the prosecutor, countering the argument that the confession showed the defendant had remorse, pointed out that the defendant only confessed after he realized that one of the victims had survived and he would not go free.

Appellant respectfully asserts that Respondent's reliance on *Raley* is misguided, and that situation was nothing like the argument in Mr. Parker's case. The prosecution was plainly trying to use appellant's exercise of his constitutional rights – to have a trial, to put on mitigating evidence – as reasons he should be held in disdain and sentenced to die.

* The prosecution **wrongly urged jurors to use Mr. Parker's lack of a prior criminal record as aggravation**, arguing that his brain couldn't have been affected since he graduated high school, flourished, had no history of misconduct before this crime. (54 RT 7657.) The lack of a prior record cannot be used as aggravation; it is mitigating only.

Respondent asserts that the prosecutor was merely arguing that the defense evidence lacked mitigating force. (RB, pp. 232-234.) To the contrary, the argument clearly urged jurors to count the appellant's lack of a prior record against him.

* The prosecutor continued, urging that the evidence of severe child abuse should be discarded, because there were 80,000 child abuse reports in one year in San Diego, and that jurors shouldn't give them all an "excuse" to get off the hook for murder. (54RT7659.) **Mitigating background evidence is not an "excuse" for murder**; instead, it must be weighed in the decision whether a sentence of LWOP or death is more appropriate.

Respondent asserts that the prosecutor "merely *asked*" the jurors whether all victims of child abuse should be let off the hook if they commit a homicide. (RB, p. 233, emphasis in original.) Respondent makes no effort to explain why, in determining appellant's sentence, his capital sentencing jury should consider what should happen in all other homicide cases where a

defendant suffered horrendous child abuse. Nor does respondent offer any legal support for the proposition that this was a proper matter for the jury's consideration. Appellant contends no such legal authority exists.

* The prosecutor wrongly urged that the fact that the victim did not get due process -- a jury and judge, an attorney, witnesses to testify before she was killed – weighed against a life sentence. (54 RT 7673.) A defendant's exercise of his constitutional rights cannot be used as aggravation.

Respondent contends that the prosecutor "was merely arguing that Gallego did not deserve to die...," and that the prosecutor did not suggest that appellant's exercise of his constitutional rights was a basis for imposing death. (RB, pp. 233-234.) Respondent fails to explain how else the jury could have interpreted the prosecutor's explicit references to court proceedings – a jury, a judge, a bailiff, an attorney to argue for her life – other than to mean that because appellant was afforded these rights, he should be sentenced to death for what he did. The suggestion that appellant should die because he did not accord his victim due process of law violates Eighth Amendment principles of reliability and individualized sentencing. The prosecutor's argument failed to channel the jurors' discretion, and precluded consideration of those factors relevant to determination of the appropriate sentence in a capital case. (See *Lockett v. Ohio, supra,* 438 U.S. 586 and *Eddings v. Oklahoma* (1982) 455 U.S. 104.)

D. Improper argument that jurors "shall" impose the death penalty.

Appellant refers to and incorporates herein Argument 23, regarding the improper jury instruction indicating that jurors were required to impose capital punishment. The prosecutor exploited that error during closing argument, arguing that the "shall" language was mandatory, and that any juror who did not feel bound by that language was not following the law. (See 54 RT 7660-7671.)

Respondent asserts that the prosecutor was merely explaining the jury instruction. (RB, at pp. 235-236.) Respondent does not address the prosecutor's repeated argument that the imposition of death was mandatory, and that if any juror failed to vote for death, other jurors should tell them they are not following the law. (54 RT 7671.)

E. Lack of remorse was improperly urged as an aggravating factor.

The prosecutor improperly urged lack of remorse as a factor in aggravation. The prosecutor argued that appellant would not feel bad in the least for the pain he caused to those who loved the victim. (54 RT 7666.) Indeed, the prosecutor continued, if he had felt remorse, he would not have mutilated her body or left it in other locations. (54 RT 7667.) Those statements failed to constitutionally channel the jury's discretion during their deliberations of sentence, and failed violated appellant's right to the individualized determination of sentence required by the Eighth Amendment. (See *Lockett v. Ohio, supra,* 438 U.S. 586;

Eddings v. Oklahoma, supra, 455 U.S. 104; *Woodson v. North Carolina*, *supra*, 428 U.S. at p. 304.)

Prosecutorial argument seeking imposition of death based on a defendant's lack of remorse violates a defendant's Fifth, Eighth and Fourteenth Amendment rights, as well as California law. (*People v. Coleman* (1969) 71 Cal.2d 1159, 1168; *People v. Fierro* (1991) 1 Cal.4th 173, 244; *Lesko v. Lehman* (3d Cir. 1991) 925 F.2d 1527, 1544-1545.)

Respondent contends that the prosecutor was merely responding to the defense argument that appellant felt remorseful, pointing to actions after the crime and arguing that "appellant did not deserve mitigation." (RB, pp. 237-238, citing 54 RT 7665-7667.)

As noted, every capital defendant deserves to have his or her jury consider mitigating evidence. This was not an argument about the weight of that evidence; it was an argument that the jury should disregard the mitigation completely.

For all of the reasons set forth above, and in Appellant's Opening Brief, this Court must reverse his death sentence because of the misconduct of the prosecutors.

* * * * * *

23. THE TRIAL COURT'S INSTRUCTION THAT THE JURY "SHALL" IMPOSE DEATH IF THE AGGRAVATING FACTORS OUTWEIGHED THE MITIGATING IS CONTRARY TO THIS COURT'S RULINGS, AND REVERSAL IS REQUIRED.

Appellant Parker refers to and incorporates herein the factual and legal allegations of Argument 23 of his Appellant's Opening Brief. (AOB, pp. 288-203.) Appellant also refers to and incorporates herein Argument 27 of this brief, elaborating upon the constitutional infirmity of this instruction given the jury, particularly in conjunction with the trial prosecutor's argument suggesting that a death sentence was mandatory.

The modified instruction given at appellant's trial violated his rights under the Sixth, Eighth and Fourteenth Amendments to the federal Constitution and the corresponding sections of the state Constitution. The instruction was vague and imprecise, failed to accurately describe the weighing process the jury must apply in capital cases, prohibited the jury from fully exercising its broad discretion in determining the appropriate penalty and deprived appellant of the individualized consideration the Eighth Amendment requires. The modified instruction could well have been understood by jurors to mean that a death verdict was mandatory. That was the very interpretation urged by the prosecutor.

The court's instruction to the jury retained the "shall" language, stating "If you conclude that the aggravating circumstances are so substantial in comparison to the mitigating circumstances that they warrant death instead of life without

parole, you **shall** return a judgment of death." (8 CT 1908; 54 RT 7606.)[16]

The prosecution argued to the jury that there is no debate about which penalty is worse; the law says that death is worse, and that if aggravation is so substantial in comparison to mitigation, the jury shall impose death even if jurors think that a sentence of life without possibility of parole is worse. (54 RT 7669-7670.) The prosecutor stressed that if any juror thought that aggravation outweighed mitigation but still wanted to impose a verdict of life without possibility of parole, other jurors needed to point to this instruction and tell that juror that he or she is not following the law. (54 RT 7671.) During this argument, the prosecutor used a copy of part of the instruction, in which only the word "shall" was circled. (54 RT 7678.) The defense objected on the ground that urging jurors they had no discretion as to penalty was a misstatement of the law; it took the jurors' task from unfettered discretion to no discretion. (54 RT 7679-7681.) The objection was overruled. (54 RT 7682.)

Respondent urges that the United States Supreme Court decision in *Boyde v. California* (1990) 494 U.S. 370, 376-377 (*Boyde*), is dispositive (RB, p. 242), and that this Court has approved similar language in other cases. (See, e.g., *People v. Noguera* (1992) 4 Cal.4th 599, 640-641, cited at RB, p. 244.)

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[16] CALJIC No. 8.88 was modified in the Spring of 2010 to delete this mandatory language.

In *People v. Brown* (1985) 40 Cal.3d 512, this Court observed:

> "Aggravating" and "mitigating" are not defined by statute. However, we see no statutory intent to require death if the jury merely finds more bad than good about the defendant and to permit life without parole only if it finds more good than bad. At a capital penalty trial, defendant has already been convicted of committing, without legal excuse, an intentional first degree murder with at least one "special circumstance" necessary to make him eligible for the death penalty. Often a person in this situation will have a substantial history of criminal and antisocial behavior. It would be rare indeed to find mitigating evidence which would redeem such an offender or excuse his conduct in the abstract. Recognizing this, the statute requires at a minimum that he suffer the penalty of life imprisonment without parole. It permits the jury to decide only whether he should instead incur the law's single more severe penalty – extinction of life itself. (§ 190.3) It follows that the weighing of aggravating and mitigating circumstances must occur within the context of those two punishments; **the balance is not between good and bad but between life and death**. Therefore, to return a judgment of death, the jury must be persuaded that the 'bad'evidence is so substantial in comparison with the 'good' that it warrants death instead of life without parole.

(*People v. Brown, supra*, 40 Cal.3d at pp. 541-542, fn.13. Italics in original. Emphasis added; see also *People v. Burgener* (1986) 41 Cal.3d 505, 542-543.)

In *People v. Duncan* (1991) 53 Cal.3d 955, this Court observed that section 190.3 and this instruction give the jury "broad discretion to decide the appropriate penalty by weighing

all the relevant evidence. The jury may decide, even in the absence of mitigating evidence, that the aggravating evidence is not comparatively substantial enough to warrant death." (Id. at p. 979.) However, the "shall" language given the jury in the present case deprived the jury of the broad discretion described in Duncan.

In *People v. Brasure* (2008) 42 Cal.4th 1037, this Court held that the trial court erred in deviating from CALJIC No. 8.88 and instructing the jury that it "shall impose a sentence of death if [it] ... concludes that the aggravating circumstances outweigh the mitigating circumstances." Contrary to the trial judge's belief, the interpretations of §190.3 set forth in *People v. Brown, supra,* 40 Cal.3d at pp. 541-544 are "authoritative ... [state law] interpretations of our death penalty statute," and remain controlling law despite the holding of *Boyde v. California, supra,* 494 U.S. at pp. 376-377 that a "shall impose" instruction does not violate the federal Constitution.

Appellant Parker respectfully urges this Court to reconsider previous decisions that the use of this defective, now-discarded, and misleading instruction does not implicate federal constitutional concerns. Even though there was other language in the instructions stating that the verdict was not mandatory, that conflicting language did not cure the defect, particularly when the prosecutor argued strongly that the instruction mandated the jury to sentence Parker to death. As the United States Supreme Court held in *Francis v. Franklin, supra,* 471 U.S. 307, language that merely contradicts, and does not explain, a constitutionally

infirm instruction does not suffice to absolve the infirmity. (*Id.* at pp. 318-325.)

It is plain that the jurors were unaware that they had the discretion to impose a sentence of life without possibility of parole even if they concluded that the circumstances in aggravation outweighed those in mitigation, – and even if they found no mitigation whatever. In short, CALJIC No. 8.88, modified and given to the jury, improperly directed a verdict of death should the jury find that aggravation outweighed mitigation to any degree. (See *People v. Peak* (1944) 66 Cal.App.2d 894, 909.)

The defect in the instruction deprived appellant of due process of law (see *Hicks v. Oklahoma, supra,* 447 U.S. at p. 346; see also *Hewitt v. Helms* (1983) 459 U.S. 460, 471-472), and rendered the resulting verdict constitutionally unreliable in violation of the Eighth and Fourteenth Amendments (see *Furman v. Georgia* (1972) 408 U.S. 238).

Reversal is required.

* * * * * *

24. THE TRIAL COURT ERRED IN APPOINTING SEPARATE COUNSEL TO INVESTIGATE THE DEFENDANT'S ALLEGATIONS OF INEFFECTIVE ASSISTANCE OF COUNSEL WHILE FAILING TO RELIEVE APPOINTED COUNSEL OF THEIR DUTIES; AND IN PERMITTING SIMULTANEOUS SELF-REPRESENTATION.

As set forth more fully in Appellant's Opening Brief (AOB, pp. 293-301), incorporated herein, the trial court unreasonably appointed alternate counsel for the purpose of investigating appellant's complaints that his trial counsel were ineffective, at the same time refusing to relieve appointed counsel, thus violating appellant's rights to due process of law, a fair trial, equal protection of law, effective assistance of counsel, and the heightened reliability required in capital cases under the Eighth Amendment.

On or about August 12, 2008, while the jury was deliberating penalty, appellant Parker sent a letter to the trial judge complaining that his counsel had not performed adequately. (8 CT 1938 et seq.) That day, the jury returned a verdict of death. (8 CT 1936; 11 CT 2615.) Mr. Parker's letter was construed as a motion for new trial based on ineffective assistance of counsel, and the trial court appointed the Alternate Public Defender's Office "for the limited purpose of representation on the New Trial Motion issues only." (11 CT 2616.)

A status conference on the motion for new trial was held on September 11, 2002. Mr. Parker was represented by Mr. Dealy of the Alternate Public Defender for the sole purpose of the new

trial motion; his appointed counsel were also present, and were not relieved. (11 CT 2618.) On October 7, 2002, Mr. Parker stated he wished to be heard in lieu of the alternate public defender. The trial court found no conflict with the alternate public defender, and denied the request for self-representation. (11 CT 2620; 57 RT 7855-7871.)

On December 13, 2002, the motion for new trial was set to be heard. (11 CT 2622; 58 RT 7872-7888.) The alternate public defender filed no motion for new trial. Over the objection of the alternate public defender, the trial court was advised that appellant wished to file his own motion for new trial.

The hearing was continued to December 16, 2002. (11 CT 2623; 59 RT 7889-7912.) The alternate public defender filed a declaration stating that they would not file a new trial motion. (8 CT 1973.) The alternate public defender was relieved. (11 CT 2623.) Appellant's personally written new trial motion remained sealed, but a copy was made for his appointed counsel. (*Ibid.*) That motion was unsealed and filed at the appellant's personal request on January 7, 2003. (11 CT 2624.)

This is an extraordinary and unprecedented set of events at this trial. As noted in the Opening Brief:

> In *People v. Sanchez* (2011) 53 Cal.4th 80, this Court held that
>
> > [I]f a defendant requests substitute counsel and makes a showing during a *Marsden* hearing that the right to counsel has been substantially impaired, substitute counsel must be appointed as attorney of record for all purposes. In so holding, we specifically disapprove of the procedure of appointing substitute or "conflict"

> counsel solely to evaluate a defendant's complaint that his attorney acted incompetently with respect to advice regarding the entry of a guilty or no contest plea.

(*Id*., at 84; emphasis added.) In so deciding, this Court noted its previous decision in *People v. Smith* (1993) 6 Cal.4th 684, stating

> In *Smith*, we criticized the appointment of a "series of attorneys ... at public expense whose sole job, or at least a major portion of whose job, is to claim the previous attorney was, or previous attorneys were, incompetent" and found no "authority supporting the appointment of simultaneous and independent, but potentially rival, attorneys to represent defendant."

(*People v. Sanchez, supra,* 53 Cal.4th 80, 88, quoting *People v. Smith*, *supra*, 6 Cal.4th 684, 695.)

This Court noted in *Sanchez* and *Smith* that under *People v. Marsden* (1970) 2 Cal.3d 118, the trial court should appoint new counsel when a showing has been made of the need for substitute counsel. This Court explained:

> "We stress, therefore, that the trial court should appoint substitute counsel when a proper showing has been made at any stage.... [W]hen a defendant satisfies the trial court that adequate grounds exist, substitute counsel should be appointed. Substitute counsel could then investigate a possible motion to withdraw the plea or a motion for new trial based upon alleged ineffective assistance of counsel. Whether, after such appointment, any particular motion should actually be made will, of course, be determined by the new attorney." (*Smith*, *supra*, 6 Cal.4th at pp. 695–696, 25 Cal.Rptr.2d 122, 863 P.2d 192.)

(*People v. Sanchez, supra,* 53 Cal.4th 80, 88-89.)

(AOB, pp. 295-296.)

The Appellant's Opening Brief continues with a recitation of the constitutional law underlying the right to counsel. (AOB, pp. 296-300.) It asserts that, "Here, appellant was left with no coherent representation by the actions of the trial court. His appointed counsel were left with their hands tied, while alternate counsel considered allegations of their conflict of interest and ineffective representation. Appointed counsel were in the untenable position of having their integrity attacked, while still bearing responsibility for the overall representation. The alternate public defender, having a limited mandate and limited resources for an undertaking that could potentially compromise Mr. Parker's post-conviction rights, also had their hands tied in respects that could not be fully explored on the record." (AOB, p. 300.)

In response, Respondent simply asserts that "Appellant's contentions are without merit." (RB, pp. 244-250; quote at p. 244.) Respondent's argument (sub heading B: Appellant Did Not Request Substitute Counsel and Had No Basis for an Ineffective Assistance of Counsel Claim, RB, p. 249) is essentially that "Appellant's reliance on [*People v.*] *Sanchez* [(2011) 53 Cal.4th 80] is misplaced because his case is factually and legally distinguishable." (RB, p. 250.)[17] Again, the majority of

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[17] Please note Respondent's opposite reasoning in its response to Argument 25, wherein it argued that, "The instant case is factually and legally indistinguishable from [*People v.*] *Sanchez* [(2011) 53 Cal.4th 80]." (RB, p. 257.)

Respondent's argument is a recitation of facts, rather than substantive analysis of the legal principles implicated here. (RB, pp. 245-249.)

Respondent seems determined to undermine a potential future habeas corpus claim about ineffective assistance of Mr. Parker's appointed counsel, which is not the issue raised in this direct appeal. While the trial court did advise appellant that he was represented and could get materials though his appointed counsel (as noted at RB, p. 251), the court absolutely failed in its responsibilities by ordering both conflict counsel and appointed counsel to proceed at the same time , and, furthermore, by allowing Mr. Parker himself to have standing at sentencing, as counsel of some kind, the status and scope of which is wholly unclear (as set forth more fully in Arg. 25 of this brief and the AOB, incorporated herein).

Respondent's brief fails to address the trial court's ineptitude in protecting appellant's right to counsel and presents no good case law to justify the court's actions here.

Reversal is required.

* * * * * *

25. THE TRIAL COURT ERRED BY PLACING IN THE PUBLIC COURT RECORD EXTENSIVE WRITINGS OF A REPRESENTED DEFENDANT, AND BY PERMITTING OR REQUIRING DISCLOSURE OF CONFIDENTIAL MATTERS IN OPEN COURT.

As set forth more fully in Appellant's Opening Brief (AOB, pp. 301-307), incorporated herein, the trial court improperly and unreasonably placed into the record extensive personal writings of the defendant, when counsel neither endorsed the content of those writings nor believed it was in the defendant's legal interest to disclose otherwise confidential material; permitted the defendant to make statements detrimental to his own legal interest in open court; and required counsel to publicly disclose confidential matters regarding the defense. These errors violated appellant's rights to counsel and confidentiality, due process of law, a fair trial before an impartial tribunal, meaningful post-conviction review, and reliable and non-arbitrary determinations of guilt, capital eligibility, and penalty.

This set of errors was compounded by the trial court's failure to declare a doubt as to appellant Parker's competence to stand trial, as set forth more fully in Argument 1, and incorporated herein.

Appellant refers to and incorporates herein the facts and legal foundation set forth more fully in Argument 24, regarding the trial court's error in refusing to relieve trial counsel, while simultaneously appointing the alternate public defender to investigate allegations of trial counsel's misconduct, and permitting appellant Parker to file his own pro se motion for new

trial (also alleging improprieties of counsel, among other issues). The court's errors created an undeniable and untenable conflict of interest that violated appellant's rights.

The trial court was obviously confounded and disconcerted by various events in this case including, but not limited to, trial counsel's valid complaints about the conduct of the prosecution, and appellant Parker's repeated complaints about virtually everyone involved in the case – the trial court, the prosecution, witnesses, and his own lawyers. As set forth throughout this brief, this was a contentious case that was made death-eligible only with the use of extreme and improper prosecution tactics, including over-charging and the use of untenable theories that at best can be described as overreaching.

The trial court's decision to place Mr. Parker's own uncounseled musings in the public record exacerbated the prosecutorial error and was unprecedented, inexplicable, and the final blow to any pretense of fairness. It is hard to conceive of any reason to make those writings public, when they were not endorsed at all by appointed counsel. The trial court required counsel, burdened with an undeniable conflict at that point, to proceed and, at sentencing, stated that the writings had not been read. This was a complete abdication of the court's duty to ensure a fair trial.

Respondent's basic contention (RB, pp. 251-257) is that this argument is without merit. The majority of its argument (RB, pp. 252-257) is no more than a recitation of facts in the trial record.

Respondent's counsel disingenuously argues that "All indications in the record are that the trial court and appellant's attorneys made every effort to keep his 85 page document sealed, confidential, and unread." (RB, p. 257.) That is objectively untrue, since the document did not remain "sealed, confidential, and unread." Instead, the trial court ordered that this extraordinary pro se material be made part of the trial record, over counsel's objections.

For reasons not well explained, Respondent contends (in topic heading B) that "Appellant insisted that the court unseal and file his document." (RB, p. 257.) Respondent contends that "The instant case is factually and legally indistinguishable from [*People v.*] *Sanchez* [(2011) 53 Cal.4th 80]" (RB, p. 257)[18], upon which appellant relies for the proposition that the right to counsel does not contemplate dueling representation. It is unclear why Respondent cites that case.

Sanchez holds that substitute counsel is appointed for all matters, period. A novel and unprecedented situation (like this) in which a court requires appointed counsel to continue representation, yet also allows a defendant to proceed differently *pro se*, in the exact same proceeding, is not addressed by Sanchez. Nor does Respondent offer any arguments why it should be. No

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[18] Note the opposite reasoning in Respondent's Brief regarding Argument 24, that Sanchez is factually and legally distinguishable, and therefore Appellant's argument is misplaced. (RB, p. 250.)

similar situation is offered in any cases cited by Respondent. No discussion or reasoning is offered.

Reversal is required.

* * * * * *

26. THE TRIAL COURT ERRED IN VARIOUS RULINGS AT THE PENALTY PHASE, AND ERRED IN DENYING THE MOTION FOR NEW TRIAL.

As set forth more fully in Appellant's Opening Brief (AOB, pp. 307-312), incorporated herein, trial counsel filed a Motion for New Penalty Phase Trial, arguing a number of trial court errors as bases for relief. (9 CT 2072-2080.) Under Penal Code section 1181, counsel raised the following grounds for a new trial:

1. Incorrect ruling permitting numerous photographs of the victim while she was alive. (9 CT 2074-2076.)

2. Incorrect ruling permitting additional autopsy photographs of face and mutilated hands. (9 CT 2076.)

3. Incorrect ruling permitting the testimony of Kristina Stapanof and the introduction of the 'thank you' note from Patricia. (9 CT 2077.)

4. Incorrect ruling permitting 'rebuttal' testimony of Brenda Chamberlain and the introduction of additional morphed photographs depicting pornographic images of her. (9 CT 2078-2079.)

5. Pursuant to Penal Code section 1181 (7), the evidence was insufficient to establish that death was the appropriate punishment according to the law and the facts and the court should reduce the punishment to life imprisonment without the possibility of parole. (9 CT 2079.)

The trial court erred in denying the motion. Between the submission of the new trial motion and the argument regarding sentencing, the trial court permitted Mr. Parker to file and argue

his own new trial motion; these errors are addressed in Arguments 24 and 25, incorporated herein by reference.

Respondent addresses this issue at pp. 258-266 of the Respondent's Brief, essentially arguing that the trial court properly exercised its discretion. (RB, p. 258.) Dodging the question of improper admission of photographs of the victim while alive, Respondent notes that the trial court had excluded a good number of other photographs, as if this resolves the issue. (RB, p. 265.) As to gruesome autopsy photographs, Respondent claims – without discussion – that the probative value outweighed the prejudicial effect and, again, that others had been excluded. (RB, p. 265.)

Similarly, Respondent defends improper victim impact evidence, echoing the trial court's ruling that victim impact evidence need not be limited to the impact on family members (RB, pp. 265-266.) and, with respect to prosecutor's use of "morphed" images of a sexual nature depicting a witness other than the victim, Respondent argues that these images were proper because they "reflected" his "personality" at a different point in time.

Despite Respondent's attempts to justify these errors, none of the evidence relied on by the prosecutor to obtain appellant's death sentence were proper statutory aggravating factors under California's capital punishment scheme. Respondent fails to elaborate or cite supporting case law. (RB, p. 266.) Appellant contends in this argument, as he did at trial, that in fact these matters are not appropriate to be "weighed" by the trial court at

sentencing. The error is, as noted by Respondent (RB, p. 266), subject to independent review by this Court.

Reversal is required.

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27. CALIFORNIA'S DEATH PENALTY STATUTE, AS INTERPRETED BY THIS COURT AND APPLIED AT APPELLANT'S TRIAL, VIOLATES THE UNITED STATES CONSTITUTION.

Appellant Parker refers to and incorporates herein the factual and legal allegations of Argument 27 of his Appellant's Opening Brief, and will not reiterate those arguments here, but elaborates on some recent developments. (AOB, pp. 313-346.)

In his opening brief, appellant challenged the California death penalty scheme on grounds that this Court has rejected and sought reconsideration of the court's previous decisions holding that the California's law does not violate the federal Constitution. (AOB, pp. 313-346.) Respondent counters that the court's prior decisions are correct and should not be reconsidered. (RB, pp. 267-271.)

After appellant filed his opening brief, but before the respondent's brief was filed, the United States Supreme Court held Florida's death penalty statute unconstitutional under *Apprendi v. New Jersey* (2000) 530 U.S. 466 (*Apprendi*) and *Ring v. Arizona* (2002) 536 U.S. 584 (*Ring*), because the sentencing judge, not the jury, made a factual finding regarding the existence of an aggravating circumstance that is required before the death penalty can be imposed. (*Hurst v. Florida* (2016) 577 U.S. __ [136 S.Ct. 616, 624; 193 L.Ed.2d 504] (*Hurst*).)

Hurst supports appellant's request in his opening brief that this Court reconsider its prior rulings that imposition of the death penalty does not constitute an increased sentence within the meaning of *Apprendi*, does not require factual findings within

the meaning of *Ring*, and therefore does not require the jury to find unanimously and beyond a reasonable doubt that the aggravating circumstances outweigh the mitigating circumstances before it jury can impose a sentence of death. Intervening and dispositive law demands reconsideration of this Court's prior rulings, and a result more favorable to appellant, to wit, reversal of the death sentence.[19]

A. Under *Hurst*, Each Fact Necessary to Impose a Death Sentence, Including the Determination That the Aggravating Circumstances Outweigh the Mitigating Circumstances, must Be Found by a Jury Beyond a Reasonable Doubt.

In Apprendi, a noncapital sentencing case, and Ring, a capital sentencing case, the United States Supreme Court established a bright-line rule: if a factual finding is required to subject the defendant to a greater punishment than that authorized by the jury's verdict, it must be found by the jury *beyond a reasonable doubt*. (*Ring v. Arizona, supra*, 536 U.S. at p. 589; *Apprendi, supra*, 530 U.S. at p. 483.) As the court explained in *Ring*:

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[19] Respondent was surely aware of the *Hurst* decision when its brief was filed on April 20, 2018, but chose not to address that case in its brief, even while disputing appellant's arguments directly implicated by that decision. Should this Court consider this a new issue, appellant Parker respectfully requests that this Court consider this argument to be a supplemental opening brief, and has no objection to supplemental briefing by respondent.

> The dispositive question, we said, "is one not of form, but of effect." [Citation]. If a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact – no matter how the State labels it – must be found, by a jury beyond a reasonable doubt. [Citation].

(*Ring*, *supra*, 536 U.S. at p. 602, quoting *Apprendi*, *supra*, 530 U.S. at pp. 482-483, 494.) Applying this mandate, the high court invalidated Florida's death penalty statute in *Hurst*. (*Hurst*, *supra*, 136 S.Ct. at pp. 621-624.) The court restated the core Sixth Amendment principle as it applies to capital sentencing statutes: "The Sixth Amendment requires a jury, not a judge, to find <u>each fact necessary to impose a sentence of death</u>." (*Hurst*, *supra*, 136 S.Ct. at p. 619, emphasis added.) Further, as explained below, in applying this Sixth Amendment principle, *Hurst* made clear that the weighing determination required under the Florida statute was an essential part of the sentencer's factfinding within the ambit of *Ring*. (See *id.* at p. 622.)

In Florida, a defendant convicted of capital murder is punished by either life imprisonment or death. (*Hurst*, *supra*, 136 S.Ct. at p. 620, citing Fla. Stat. §§ 782.04(l)(a), 775.082(1).) Under the statute at issue in *Hurst*, after returning its verdict of conviction, the jury rendered an advisory verdict at the sentencing proceeding, but the judge made the ultimate sentencing determinations. (*Id*. at p. 620.) The judge was responsible for finding that "sufficient aggravating circumstances exist" and "that there are insufficient mitigating circumstances to outweigh aggravating circumstances," which were prerequisites

for imposing-a death sentence. (*Id*. at p. 622, citing Fla. Stat. § 921.141(3).) The court found that these determinations were part of the "necessary factual finding that *Ring* requires." (*Ibid.*)[20]

The questions decided in *Ring* and *Hurst* were narrow. As the Supreme Court explained, "Ring's claim is tightly delineated: He contends only that the Sixth Amendment required jury findings on the aggravating circumstances asserted against him." (*Ring*, *supra*, 536 U.S. at p. 597, fn. 4.) *Hurst* raised the same claim. (See Petitioner's Brief on the Merits, *Hurst v. Florida*, 2015 WL 3523406 at *18 ["Florida's capital sentencing scheme violates this [Sixth Amendment] principle because it entrusts to the trial court instead of the jury the task of 'find[ing] an aggravating circumstance necessary for imposition of the death penalty'"].) In each case, the court decided only the constitutionality of a judge, rather than a jury, finding the existence of an aggravating circumstance. (See *Ring*, *supra*, 536 U.S. at p. 588; *Hurst*, *supra*, 136 S.Ct. at p. 624.)

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[20] The Court in *Hurst* explained:

> [T]he Florida sentencing statute does not make a defendant eligible for death until "findings by the court that such person shall be punished by death." Fla.Stat. § 775.082(1) (emphasis added). The trial court alone must find "the facts ... [t]hat sufficient aggravating circumstances exist" and "[t]hat there are insufficient mitigating circumstances to outweigh the aggravating circumstances." § 921.141(3); see [*State v. Steele*, 921 So.2d [538,] 546 [(Fla. 2005)].

(*Hurst*, *supra,* 136 S.Ct. at p. 622.)

Nevertheless, the seven-justice majority opinion in *Hurst* shows that its holding, like that in *Ring*, is a specific application of a broader Sixth Amendment principle: any fact that is required for a death sentence, but not for the lesser punishment of life imprisonment, must be found by the jury. (*Hurst*, *supra*, 136 S.Ct. at pp. 619, 622.) At the outset of the opinion, the court refers not simply to the finding of an aggravating circumstance, but, as noted above, to findings of "each fact *necessary to impose a sentence of death*." (*Id*. at p. 619, italics added.) The court reiterated this fundamental principle throughout the opinion.[21] The court's language is clear and unqualified. It also is consistent with the established understanding that *Apprendi* and *Ring* apply to each fact essential to imposition of the level of punishment the defendant receives. (See *Ring*, *supra*, 536 U.S. at p. 610 (conc. opn. of Scalia, J.); *Apprendi*, *supra*, 530 U.S. at p. 494.) The high court is assumed to understand the implications of the words it chooses and to mean what it says. (See *Sands v.*

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[21] See *Hurst, supra*, 136 S.Ct. at p. 621 ["In *Ring*, we concluded that Arizona's capital sentencing scheme violated *Apprendi*'s rule because the State allowed a judge to find the facts *necessary to sentence a defendant to death*," italics added]; *id.* at p. 622 ["Like Arizona at the time of *Ring*, Florida does not require the jury to make *the critical findings necessary to impose the death penalty*," italics added]; *id.* at p. 624 ["Time and subsequent cases have washed away the logic of *Spaziano* and *Hildwin*. The decisions are overruled to the extent they allow a sentencing judge to find an aggravating circumstance, independent of a jury's factfinding, that is *necessary for imposition of the death penalty*," italics added].

Morongo Unified School District (1991) 53 Cal.3d 863, 881-882, fn. 10.)

B. California's Death Penalty Statute Violates *Hurst* By Not Requiring That The Jury's Weighing Determination Be Found Beyond A Reasonable Doubt.

California's death penalty statute violates *Apprendi*, *Ring*, and *Hurst*, although the specific defect is different from those in Arizona's and Florida's laws: in California, although the jury's sentencing verdict must be unanimous (Pen. Code, § 190.4, subd. (b)), California applies no standard of proof, let alone the constitutional requirement that the finding be made beyond a reasonable doubt. (See *People v. Merriman* (2014) 60 Cal.4th 1, 106.) Unlike Arizona and Florida, California requires that the jury, not the judge, make the findings necessary to sentence the defendant to death. (See *People v. Rangel* (2016) 62 Cal.4th 1192, 1235, fn. 16 [distinguishing California's law from that invalidated in *Hurst* on the grounds that, unlike Florida, the jury's "verdict is not merely advisory"].)

California's law, however, is similar to the statutes invalidated in Arizona and Florida in ways that are crucial for applying the *Apprendi /Ring /Hurst* principle. In all three states, a death sentence may be imposed only if, after the defendant is convicted of first degree murder, the sentencer makes two additional findings. In each jurisdiction, the sentencer must find the existence of at least one statutorily-delineated circumstance – in California, a special circumstance (Pen. Code,

§ 190.2) and in Arizona and Florida, an aggravating circumstance (Ariz. Rev. Stat. § 13-703(0); Fla. Stat. § 921.141(3)).

This finding alone, however, does not permit the sentencer to impose a death sentence. The sentencer must make another factual finding: in California that "'the aggravating circumstances outweigh the mitigating circumstances'" (Pen. Code, § 190.3); in Arizona that "'there are no mitigating circumstances sufficiently substantial to call for leniency'" (*Ring, supra*, 536 U.S. at p. 593, quoting Ariz. Rev. Stat. § 13-703(F)); and in Florida, as stated above, "that there are insufficient mitigating circumstances to outweigh aggravating circumstances" (*Hurst, supra*, 136 S.Ct. at p. 622, quoting Fla. Stat. § 921.141(3)).[22]

Although *Hurst* did not decide the standard of proof issue, the court made clear that the weighing determination was an essential part of the sentencer's factfinding within the ambit of *Ring*. (See *Hurst*, *supra*, 136 S.Ct. at p. 622 [in Florida the judge,

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[22] As *Hurst* made clear, "the Florida sentencing statute does not make a defendant eligible for death until 'findings by the court that such person shall be punished by death.'" (*Hurst*, *supra*, 136 S.Ct. at p. 622, citation and italics omitted.) In *Hurst*, the court uses the concept of death penalty eligibility in the sense that there are findings that actually authorize the imposition of the death penalty in the sentencing hearing, and not in the sense that an accused is only potentially facing a death sentence, which is what the special circumstance finding establishes under the California statute. For *Hurst* purposes, under California law it is the jury determination that the aggravating factors outweigh the mitigating factors that finally authorizes imposition of the death penalty.

not the jury, makes the "critical findings necessary to impose the death penalty," including the weighing determination among the facts the sentencer must find "to make a defendant eligible for death"].) The pertinent question is not what the weighing determination is called, but its consequence. *Apprendi* made this clear: "the relevant inquiry is one not of form, but of effect — does the required finding expose the defendant to a greater punishment than that authorized by the jury's guilty verdict'?" (*Apprendi*, *supra*, 530 U.S. at p. 494.) So did Justice Scalia in *Ring*:

> [T]he fundamental meaning of the jury-trial guarantee of the Sixth Amendment is that all facts essential to imposition of the level of punishment that the defendant receives - whether the statute calls them elements of the offense; sentencing · factors, or Mary Jane - must be found by the jury beyond a reasonable doubt.

(*Ring*, *supra*, 536 U.S. at p. 610 (conc. opn. of Scalia, J.).)

The constitutional question cannot be answered, as this Court has done, by collapsing the weighing finding and the sentence-selection decision into one determination and labeling it "normative" rather than factfinding. (See, e.g., *People v. Karis* (1988) 46 Cal.3d 612, 639-640; *People v. McKinzie* (2012) 54 Cal.4th 1302, 1366.) At bottom, the Ring inquiry is one of function.

In California, when a jury convicts a defendant of first degree murder, the maximum punishment is imprisonment for a term of 25 years to life. (Pen. Code, § 190, subd. (a) [cross-referencing §§ 190.1, 190.2, 190.3, 190.4 and 190.5].) When the

jury returns a verdict of first degree murder with a true finding of a special circumstance listed in Penal Code section 190.2, the penalty range increases to either life imprisonment without the possibility of parole or death. (Pen. Code, § 190.2, subd. (a).)

Without any further jury findings, the maximum punishment the defendant can receive is life imprisonment without the possibility of parole. (See, e.g., *People v. Banks* (2015) 61 Cal.4th 788, 794 [where jury found defendant guilty of first degree murder and found special circumstance true and prosecutor did not seek the death penalty, defendant received "the mandatory lesser sentence for special circumstance murder, life imprisonment without parole"]; *Sand v. Superior Court* (1983) 34 Cal.3d 567, 572 [where defendant is charged with special-circumstance murder, and the prosecutor announced he would not seek death penalty, defendant, if convicted, will be sentenced to life imprisonment without parole, and therefore prosecution is not a "capital case" within the meaning of Penal Code section 987.9]; *People v. Ames* (1989) 213 Cal.App.3d 1214, 1217 [life in prison without possibility of parole is the sentence for pleading guilty and admitting the special circumstance where death penalty is eliminated by plea bargain].)

Under the statute, a death sentence can be imposed only if the jury, in a separate proceeding, "concludes that the aggravating circumstances outweigh the mitigating circumstances." (Pen. Code, § 190.3.) Thus, under Penal Code section 190.3, the weighing finding exposes a defendant to a greater punishment (death) than that authorized by the jury's

verdict of first degree murder with a true finding of a special circumstance (life in prison without parole).

The weighing determination is therefore a factfinding.[23]

C. This Court's Interpretation of the California Death Penalty Statute in People v. Brown Supports the Conclusion That the Jury's Weighing Determination Is a Factfinding Necessary to Impose a Sentence of Death.

This Court's interpretation of Penal Code section 190.3's weighing directive in *People v. Brown, supra,* 40 Cal.3d 512 (revd. on other grounds sub nom. *California v. Brown* (1987) 479 U.S. 538) does not require a different conclusion. In *Brown*, the court was confronted with a claim that the language "shall impose a sentence of death" violated the Eighth Amendment requirement of individualized sentencing. (*People v. Brown, supra,* at pp. 538-539.) As the court explained:

> Defendant argues, by its use of the term "outweigh" and the mandatory "shall," the statute impermissibly confines the jury to a mechanical balancing of aggravating and mitigating-··factors .... Defendant urges that

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[23] Justice Sotomayor, the author of the majority opinion in *Hurst*, previously found that *Apprendi* and *Ring* are applicable to a sentencing scheme that requires a finding that the aggravating factors outweigh the mitigating factors before a death sentence may be imposed. More importantly here, she has gone on to find that it "is clear, then, that this factual finding exposes the defendant to a greater punishment than he would otherwise receive: death, as opposed to life without parole." (*Woodward v. Alabama* (2013) 571 U.S. 1045 [134 S.Ct. 405, 410-411, 187 L.Ed.2d 449] (dis. opn. from denial of certiorari, Sotomayor, J.).)

> because the statute requires a death judgment if the former "outweigh" the latter under this mechanical formula, the statute strips the jury of its constitutional power to conclude that the totality of constitutionally relevant circumstances does not warrant the death penalty.

(*People v. Brown, supra,* 40 Cal.3d at p. 538.)

The high court recognized that the "the language of the statute, and in particular the words 'shall impose a sentence of death,' leave room for some confusion as to the jury's role" (*People v. Brown, supra,* 40 Cal.3d at p. 545, fn. 17) and construed this language to avoid violating the federal Constitution (*id.* at p. 540).[24] To that end, the court explained the weighing provision in Penal Code section 190.3 as follows:

> [T]he reference to "weighing" and the use of the word "shall' in the 1978 law need not be interpreted to limit impermissibly the scope of the jury's ultimate discretion. In this context, the word "weighing" is a metaphor for a process which by nature is incapable of precise description. The word connotes a mental balancing process, but certainly not one which calls for a mere mechanical counting of factors on each side of the imaginary "scale," or the arbitrary assignment of "weights" to any of them. Each juror is free to assign whatever moral or sympathetic value he deems appropriate to each and all of the various factors he is permitted to consider, including factor "k" as we have interpreted it. By directing that the

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[24] See Arg. 23 of Appellant's Opening Brief, and this brief, incorporated herein, regarding the "shall" language used in instructions to appellant's jurors.

> jury "shall" impose the death penalty if it finds that aggravating factors "outweigh" mitigating, the statute should not be understood to require any juror to vote for the death penalty unless, upon completion of the "weighing" process, he decides that death is the appropriate penalty under all the circumstances. Thus the jury, by weighing the various factors, simply determines under the relevant evidence which penalty is appropriate in the particular case.

(*People v. Brown*, *supra*, 40 Cal.3d at p. 541, footnotes omitted.)[25]

Under *Brown*, the weighing requirement provides for jury discretion in both the assignment of the weight to be given to the sentencing factors and the ultimate choice of punishment. Despite the "shall impose death" language, Penal Code section 190.3, as construed in *Brown*, provides for jury discretion in deciding whether to impose death or life without possibility of parole, i.e. in deciding which punishment is appropriate. The weighing decision may assist the jury in reaching its ultimate determination of whether death is appropriate, but it is a separate, statutorily mandated finding that precedes the final sentence selection. Thus, once the jury finds that the aggravation outweighs the mitigation, it still retains the discretion to reject a death sentence. (See *People v. Duncan, supra,* 53 Cal.3d at p. 979

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[25] In *Boyde v. California, supra,* 494 U.S. at p. 377, the Supreme Court held that the mandatory "shall impose" language of the pre-Brown jury instruction implementing Penal Code section 190.3 did not violate the Eighth Amendment requirement of individualized sentencing in capital cases. Post-*Boyde*, California has continued to use *Brown*'s gloss on the sentencing instruction.

["[t]he jury may decide, even in the absence of mitigating evidence, that the aggravating evidence is not comparatively substantial enough to warrant death"].)

In this way, Penal Code section 190.3 requires the jury to make two determinations. The jury must weigh the aggravating circumstances and the mitigating circumstances. To impose death, the jury must find that the aggravating circumstances outweigh the mitigating circumstances. This is a factfinding under *Ring* and *Hurst*. (See *State v. Whitfield* (Mo. 2003) 107 S.W.3d 253, 257-258 [finding weighing is *Ring* factfinding]; *Woldt v. People* (Colo. 2003) 64 P.3d 256, 265-266 [same].) The sentencing process, however, does not end there. There is the final step in the sentencing process: the jury selects the sentence it deems appropriate. (See *Brown*, *supra*, 40 Cal.3d at p. 544 ["Nothing in the amended language limits the jury's power to apply those factors as it chooses in deciding whether, under all the relevant circumstances, defendant deserves the punishment of death or life without parole"]') Thus, the jury may reject a death sentence even after it has found that the aggravating circumstances outweighs the mitigation. (*Brown*, *supra*, 40 Cal.3d at p. 540.) This is the "normative" part of the jury's decision. (*Brown*, *supra*, 40 Cal.3d at p. 540.)

This understanding of Penal Code section 190.3 is supported by *Brown* itself. In construing the "shall impose death" language in the weighing requirement of section 190.3, this Court cited to Florida's death penalty law as a similar "weighing" statute:

> [O]nce a defendant is convicted of capital murder, a sentencing hearing proceeds before judge and jury at which evidence bearing on statutory aggravating, and all mitigating, circumstances is adduced. The jury then renders an advisory verdict "[w]hether sufficient mitigating circumstances exist ... which outweigh the aggravating circumstances found to exist; and ... [b]ased on these considerations, whether the defendant should be sentenced to life [imprisonment] or death." (Fla. Stat. (1976-1977 Supp.) § 921.141, subd. (2)(b), (c).) The trial judge decides the actual sentence. He may impose death if satisfied in'writing "(a) [t]hat sufficient [statutory] aggravating circumstances exist ... and (b) [t]hat there are insufficient mitigating circumstances ... to outweigh the aggravating circumstances." (*Id.*, subd. (3).)

(*Brown*, *supra*, 40 Cal.3d at p. 542.) In *Brown*, this Court construed Penal Code section 190.3's sentencing directive as comparable to that of Florida -if the sentencer finds the aggravating circumstances outweigh the mitigating circumstances, it is authorized, but not mandated, to impose death. The standard jury instructions were modified, first in CALJIC No. 8.84.2 and later in CALJIC No. 8.88, to reflect *Brown*'s interpretation of section 190.3.[26]

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[26] CALJIC No. 8.84.2 (4th ed. 1986 revision) provided:

> In weighing the various circumstances you simply determine under the relevant evidence which penalty is justified and appropriate by considering the totality of the aggravating circumstances with the totality of the mltigatmg circumstances. To return a judgment of death, each of you must be persuaded that the aggravating evidence

The requirement that the jury must find that the aggravating circumstances outweigh the mitigating circumstances remained a precondition for imposing a death sentence. Nevertheless, once this prerequisite finding was made, the jury had discretion to impose either life or death as the punishment it deemed appropriate under all the relevant circumstances.

The revised standard jury instructions, CALCRIM, "written in plain English" to "be both legally accurate and understandable

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> (circumstances) is (are) so substantial in comparison with the mitigating circumstances that it warrants death instead of life without parole.

From 1988 to the present, CALJIC No. 8.88, closely tracking the language of *Brown*, has provided in relevant part:

> The weighing of aggravating and mitigating circumstances does not mean a mere mechanical counting of factors on each side of an imaginary scale, or the arbitrary assignment of weights to any of them. You are free to assign whatever moral or sympathetic value you deem appropriate to each and all of the various factors you are permitted to consider. In weighing the various circumstances you determine under the relevant evidence which penalty is justified and appropriate by considering the totality of the aggravating circumstances with the totality of the mitigating circumstances. To 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.

to the average juror" (CALCRIM (2006), vol. 1, Preface, p. v.), make clear this two-step process for imposing a death sentence:

> To return a judgment of death, each of you must be persuaded that the aggravating circumstances both outweigh the mitigating circumstances and are also so substantial in comparison to the mitigating circumstances that a sentence of death is appropriate and justified.

(CALCRIM No. 766, italics added.) As discussed above, *Hurst, supra*, 136 S.Ct. at p. 622, which addressed Florida's statute with its comparable weighing requirement, indicates that the finding that aggravating circumstances outweigh mitigating circumstances is a factfinding for purposes of *Apprendi* and *Ring*.

D. This Court Should Reconsider Its Prior Rulings That The Weighing Determination Is Not A Factfinding Under Ring And Therefore Does Not Require Proof Beyond A Reasonable Doubt.

This Court has held that the weighing determination - whether aggravating circumstances outweigh the mitigating circumstances -is not a finding of fact, but rather is a '"fundamentally normative assessment ... that is outside the scope of *Ring* and *Apprendi*. '" (*People v. Merriman*, *supra*, 60 Cal.4th at p. 106, quoting *People v. Griffin* (2004) 33 Cal.4th 536, 595, citations omitted; accord, *People v. Prieto* (2003) 30 Cal.4th 226, 262-263.) Appellant asks the court to reconsider this ruling because, as shown above, its premise is mistaken.

The weighing determination and the ultimate sentence-selection decision are not one unitary decision. They are two

distinct determinations. The weighing question asks the jury a "yes" or "no" factual question: do the aggravating circumstances outweigh the mitigating circumstances'? An affirmative answer is a necessary precondition — beyond the jury's guilt-phase verdict finding a special circumstance -for imposing a death sentence. The jury's finding that the aggravating circumstances outweigh the mitigating circumstances opens the gate to the jury's final normative decision: is death the appropriate punishment considering all the circumstances?

However the weighing determination may be described, it is an "element" or "fact" under *Apprendi*, *Ring*, and *Hurst,* and therefore must be found by a jury beyond a reasonable doubt. (*Hurst, supra*, 136 S.Ct. at pp. 619, 622.) As discussed above, *Ring* requires that any finding of fact required to increase a defendant's authorized punishment "must be found by a jury beyond a reasonable doubt." (*Ring*, *supra*, 536 U.S. at p. 602; see *Hurst*, *supra*, 136 S.Ct. at p. 621 [the facts required by *Ring* must be found beyond a reasonable doubt under the due process clause].)[27] Because California applies no standard of proof to the weighing determination, a factfinding by the jury, the California

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[27] The *Apprendi* / *Ring* rule addresses only facts necessary to increase the level of punishment. Once those threshold facts arc found by a jury, the sentencing statute may give the sentencer, whether judge or jury, the discretion to impose either the greater or lesser sentence. Thus, once the jury finds a fact required for a death sentence, it still may be authorized to return the lesser sentence of life imprisonment without the possibility of parole.

death penalty statute violates this beyond-a-reasonable-doubt mandate at the weighing step of the sentencing process.

The decision of the Florida Supreme Court in *Hurst v. State* (Fla. 2016) 202 So.3d 40, decided on remand from the U.S. Supreme Court ruling, supports appellant's claim. On remand following the decision of the United States Supreme Court, the Florida court reviewed whether a unanimous jury verdict was required in a capital sentencing. The court began by looking at the terms of the statute, requiring a jury to "find the existence of the aggravating factors proven beyond a reasonable doubt, that the aggravating factors are sufficient to impose death, and that the aggravating factors outweigh the mitigating circumstances." (*Hurst v. State, supra,* 202 So.3d at p. 53; Fla. Stat. (2012) § 921.141(1)-(3).) Each of these considerations, including the weighing process itself, were described as "elements" that the sentencer must determine, akin to elements of a crime during the guilt phase. (*Hurst v. State, supra*, 202 So.3d at pp. 53-54.) The court emphasized:

> *Hurst v. Florida* mandates that all the findings necessary for imposition of a death sentence are "elements" that must be found by a jury, and Florida law has long required that jury verdicts must be unanimous. Accordingly, we reiterate our holding that before the trial judge may consider imposing a sentence of death, the jury in a capital case must unanimously and expressly find all the aggravating factors that were proven beyond a reasonable doubt, unanimously find that the aggravating factors are sufficient to impose death, unanimously find that the aggravating factors outweigh the

> mitigating circumstances, and unanimously recommend a sentence of death.

(*Hurst v. State, supra*, 202 So.3d. at pp. 57-58.) There was nothing that separated the capital weighing process from any other finding of fact.

The recent decision of the Delaware Supreme Court in *Rauf v. State* (Del. 2016) 145 A.3d 430 [hereafter "*Rauf*"] also supports appellant's request that this Court revisit its holdings that the *Apprendi* and *Ring* rules do not apply to California's death penalty statute. *Rauf* held that Delaware's death penalty statute violates the Sixth Amendment under *Hurst*. (*Rauf*, *supra*, 145 A.3d at pp. 432-433 (per curiam opn. of Strine, C.J., Holland, J. and Steitz, J.).) Nonetheless, in a 3-to-2 decision, the Delaware Supreme Court answered five certified questions from the superior court and found the state's death penaity statute violates *Hurst*. One reason the court invalidated Delaware's law is relevant here: the jury in Delaware, like the jury in California, is not required to find that the aggravating circumstances outweigh the mitigating circumstances unanimously and beyond a reasonable doubt. (*Rauf, supra*, 145 A.3d at pp. 433; see *id*. at pp. 484-485 (conc. opn. of Holland, J.).) With regard to this defect, the Delaware Supreme Court explained:

> This Court has recognized that the weighing determination in Delaware's statutory sentencing scheme is a factual finding necessary to impose a death sentence. "[A] judge cannot sentence a defendant to death without finding that the aggravating factors outweigh the mitigating factors ...." The relevant "maximum" sentence, for Sixth Amendment purposes, that

> can be imposed under Delaware law, in the absence of any Judge-made findings on the relative weights of the aggravating and mitigating factors, is life imprisonment.

(*Rauf, supra*, 145 A.3d at p. 485.)

The Florida and Delaware courts are not alone in reaching this conclusion. Other state supreme courts have recognized that the determination that the aggravating circumstances outweigh the mitigating circumstances, like the finding that an aggravating circumstance exists, comes within the *Apprendi* / *Ring* rule. (See e.g., *State v. Whitfield*, *supra*, 107 S.W.3d at pp. 257-258; *Woldt v. People*, *supra*, 64 P.3d at pp. 265-266; see also *Woodward v. Alabama*, *supra*, 134 S.Ct. at pp. 410-411 (Sotomayor, J., dissenting from denial of cert.) ["The statutorily required finding that the aggravating factors of a defendant's crime outweigh the mitigating factors is ... [a] factual finding" under Alabama's capital sentencing scheme]; contra, *United States v. Gabrion* (6th Cir. 2013) 719 F.3d 511, 533 (en banc) [concluding that – under *Apprendi* – the determination that the aggravators outweigh the mitigators "is not a finding of fact in support of a particular sentence"]; *Ritchie v. State* (Ind. 2004) 809 N.E.2d 258, 265 [reasoning that the finding that the aggravators outweigh the mitigators is not a finding of fact under Apprendi and Ring]; *Nunnery v. State* (Nev. 2011) 263 P.3d 235,251-253 [finding that "the weighing of aggravating and mitigating circumstances is not a fact-finding endeavor" under *Apprendi* and *Ring*].)

Because in California the factfinding that aggravating circumstances outweigh mitigating circumstances is a necessary predicate for the imposition of the death penalty, *Apprendi*, *Ring*, and *Hurst* require that this finding be made by a jury, and beyond a reasonable doubt.

E. The Broad Application of Penal Code Section 190.3, Factor (a) Violated Appellant's Constitutional Rights.

Appellant argued in his opening brief that the scope of evidence that constitutes a "circumstances of the crime" under section 190.3, factor (a) is so lacking in limitations that prosecutors are able to argue almost any circumstance of a crime as aggravation, even those that from case to case reflect opposite circumstances. (AOB, Argument 27. A., pp. 315-317.) Appellant's point (dismissed in perfunctory fashion by respondent (RB, p. 267-268) is that the breadth of factor (a) allows a prosecutor to persuade the jury to impose death based on facts that occur in all homicides (AOB, pp. 315-317); or, as seen in this case, on the basis of random factors or arguments that actually have nothing to do with a reliable determination of whether death is the appropriate sentence.

Permitting a jury at the penalty phase to rely on "the circumstances of the crime" as interpreted under section 190.3 results in the arbitrary and capricious imposition of a death sentence-when that jury returns a death verdict.

F. Conclusion.

For all of the reasons set forth above, elsewhere in this brief, and in the Appellant's Opening Brief, the sentence and judgment of death must be reversed.

* * * * * *

CONCLUSION

For all of the reasons set forth in this brief, and Appellant's Opening Brief, appellant Calvin Lamont Parker respectfully requests this Court to reverse the judgment of guilt and sentence of death, and grant him a new trial.

Dated: August 13, 2019

Respectfully submitted,

/s/ *Kathryn Andrews*
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CALVIN LAMONT PARKER

CERTIFICATION OF WORD COUNT
PURSUANT TO RULE 8.630(b)(2)

I, Kathryn Andrews, appellate counsel for appellant Calvin Lamont Parker in the current case, hereby certify that the Appellant's Reply Brief was produced on a computer using a 13-point Century Schoolbook font. I further certify that, exclusive of the cover, table of contents, the proof of service, and this certificate, this brief contains **31,792** words, according to the word count of Microsoft Word, the computer program used to prepare the documents.

I declare under the penalty of perjury that the foregoing is true and correct, and that this certificate was executed on August 13, 2019, at El Cerrito, California.

/s/ *Kathryn Andrews*
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CALVIN LAMONT PARKER

People v. Parker
Automatic Appeal No. S113962
San Diego County Superior Court No. 154640

PROOF OF SERVICE BY MAIL AND ESERVICE

I, Kathryn Andrews, declare that I am over the age of 18 years and not a party to the within action. My business address is 3060 El Cerrito Plaza, PMB 356, El Cerrito, California 94530. My electronic service address is kathrynandrews2@comcast.net.

On August 13, 2019, I served the within **APPELLANT'S REPLY BRIEF** on the interested party in said action causing to be placed a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid in a United States Post Office box addressed to the parties as follows:

Supreme Court of California
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(1 unbound copy per L.R. 5(b)(1))

Calvin Lamont Parker
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Also on August 13, 2019, I transmitted a PDF version of this document by electronically serving the following parties via TrueFiling using the email addresses indicated:

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I declare under penalty of perjury under the laws of the states of California that the foregoing is true and correct, and that this declaration was executed at El Cerrito, California, on August 13, 2019.

/s/ *Kathryn Andrews*
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