IN THE SUPREME COURT OF CALIFORNIA

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



**ON AUTOMATIC APPEAL**
**FROM A JUDGMENT AND SENTENCE OF DEATH**

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

# APPELLANT'S REPLY BRIEF

Diane Nichols
State Bar No. 174830
P.O. Box 2194
Grass Valley CA 95945
530-477-7462
DianeLNichols@aol.com
Attorney for Appellant
**DOUGLAS EDWARD DWORAK**

## TABLE OF CONTENTS

**Page**

## TABLE OF CONTENTS

Page

## TABLE OF CONTENTS

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

**Page(s)**

**CASES**

## TABLE OF AUTHORITIES

Page(s)

### CASES

## TABLE OF AUTHORITIES

Page(s)

### CASES

## TABLE OF AUTHORITIES

Page(s)

### CASES

## TABLE OF AUTHORITIES

**Page(s)**

**CASES**

## TABLE OF AUTHORITIES

Page(s)

### CASES

## TABLE OF AUTHORITIES

**Page(s)**

**CASES**

## TABLE OF AUTHORITIES

Page(s)

### CASES

## TABLE OF AUTHORITIES

**Page(s)**

**CASES**

## TABLE OF AUTHORITIES

## TABLE OF AUTHORITIES

## TABLE OF AUTHORITIES

**Page(s)**

### OTHER AUTHORITIES

IN THE SUPREME COURT OF CALIFORNIA

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

ON AUTOMATIC APPEAL
FROM A JUDGMENT AND SENTENCE OF DEATH

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

# APPELLANT'S OPENING BRIEF

## INTRODUCTION

Appellant Douglas Dworak incorporates and reaffirms the arguments made in Appellant's Opening Brief. In this reply brief, Mr. Dworak addresses respondent's specific contentions but does not reply to arguments effectively foreseen and addressed in the opening brief. The failure to address any particular argument, sub-argument, or allegation by respondent or to reassert any particular point already made in the opening brief does not constitute a concession, abandonment, or waiver of the point by Mr. Dworak but merely reflects his view that the issue has been adequately presented and the positions of the parties fully joined.

Rule 8.204(a)(1)(B), California Rules of Court requires a brief to "support each point by argument and, if possible, by citation of authority." Points merely asserted with argument or authority for the proposition may be deemed without foundation, requiring no discussion by the reviewing court. (*People v. Morse* (1993) 21 Cal.App.4th 259, 274.) Throughout Respondent's Brief, respondent cites case authority and, in brackets, recites an abstract legal principle from the opinion but fails to analyze the case's factual context, actual holding, or analogous relationship to the present case. Although some cases may primarily stand for a legal principle, most apply established principles to a particular set of facts. Respondent's failure to explain the concrete relevance of most of the authorities cited in

Respondent's Brief to the issues or the facts of the instant case makes a reply more difficult, since respondent has not explained the degree to which any particular cases is relied upon. Mr. Dworak must do triple duty, first speculating about respondent's point in citing the case and its legal principle; second, ferreting out respondent's intended analysis as to case content and analogous relationship to the issue at hand; and third, rebutting respondent's reliance on the case.

## ARGUMENTS IN THE GUILT PHASE

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

**A. Introduction.**

There was no forensic or other evidence linking Mr. Dworak directly with Ms. Hamilton's injuries while alive, none connecting him directly with her death, and none establishing his being in Ms. Hamilton's presence at the time of her death. Rather, there was only evidence that his sperm had been deposited sometime before her death. The prosecution attempted to fill this evidentiary gap in two ways. First, the prosecution attempted to narrow the timeline betwee Ms. Hamilton's departure from her friend Matt Zeober's[1] house and her death. Second, the prosecution attempted to portray Ms. Hamilton as a happy, sweet, naïve girl who would never have willingly failed to meet her father at the planned pick-up point. To counter this theory and create a reasonable doubt, Mr. Dworak sought to show that,

---

[1] Mr. Dworak notes for the record that Matt Zeober's name is spelled "Zeober." (11 RT 2094.) The name was frequently misspelled in the reporter's transcript as "Zoeber" but was corrected during record settlement proceedings. Respondent mis-spells the name as "Zoeber" throughout the Respondent's Brief. (See, e.g., Respondent's Brief 6 et seq.)

although he may have engaged in consensual sexual intercourse with Ms. Hamilton, she had died by misadventure or at the hands of another, without his involvement. In order to do this, he attempted (1) to introduce evidence of third-party culpability for the murder and (2) to present evidence that would provide a more accurate and realistic picture of Ms. Hamilton and her behavior. The court's exclusion of this evidence deprived Mr. Dworak of his state and federal constitutional rights to present a defense, to confront and cross-examine witnesses, to due process and a fair trial, to a reliable guilt and penalty determination, and to be free from cruel and unusual punishment. (Appellant's Opening Brief ("AOB") 75-111, citing U.S. Const., 5th, 6th, 8th, 14th Amends.; *Holmes v. South Carolina* (2006) 547 U.S. 319, 330-331; *Washington v. Texas* (1967) 388 U.S. 14, 18-19; *Chambers v. Mississippi* (1973) 410 U.S. 284, 302; *Pennsylvania v. Ritchie* (1987) 480 U.S. 39, 56; *United States v. Valenzuela-Bernal* (1982) 458 U.S. 858, 867; *Green v. Georgia* (1979) 442 U.S. 95, 97; *Crane v. Kentucky* (1986) 476 U.S. 683, 687-691; *Smith v. Illinois* (1968) 390 U.S. 129, 133; Cal. Const., art. I, §§ 7, 15, 16, 17, 24; *People v. Lucas* (1995) 12 Cal.4th 415, 436.)

Ms. Hamilton's body was discovered around 6:00 a.m. on Sunday at Mussel Shoals beach. (11 RT 2006, 2010, 2019-2020, 2011, 2032-2034.) Ms. Hamilton had hung out with Matt Zeober, smoking marijuana and

ingesting methamphetamine with him and friends at Zeober's house (where he lived with his mother, Robyn Jones) on Friday and Saturday, leaving the house late on Saturday, after talking to her father on the phone arranging for him to pick her up around midnight at a nearby Ralph's Market. (11 RT 2060-2064, 2100-2102, 2108.) First, the defense sought to introduce evidence of third-party culpability related to Jay Campbell, a friend of Jones and her roommate, and to Danny Carroll, "a long time drug user, low-level dealer, and occasional boyfriend of Robyn Jones." (1 CT 127, 129, 140.) As to Carroll, there was evidence that he was at Jones's home the day and the night of Ms. Hamilton's disappearance, that he had stolen Jones's care on the night of the murder and returned it with sand inside and a broken window, that he had avoided Jones after the murder (1 CT 140-141-142, 164-172), that he had shaved his moustache and pubic hair after the murder (which Jones found suspicious), that he had written letters from prison in which he discussed Ms. Hamilton's murders and made various claims (1 CT 143-144), that Jones had said Carroll was involved in the murders, that he had said he had a sexual relationship with Ms. Hamilton, and that he had said she was attractive. As to Campbell, he was at the Jones house that weekend, had been at the beach that weekend, and soaked his sandy jeans in a bucket in the garage. (1 CT 139.)

Second, the defense sought to introduce evidence of Ms. Hamilton's lifestyle, which included hanging out at hotels with friends, including men Mr. Dworak's age (1 CT 135-138), to show there were other possibilities about what Ms. Hamilton might have done, rather than show up at Ralph's to meet her father for a ride home.

Nonetheless, respondent contends that the lower court did not err in excluding the third-party culpability evidence because the evidence did not link the third parties in question – Danny Carroll and Jay Campbell -- to Ms. Hamilton's murder and therefore was irrelevant and incapable of raising a reasonable doubt about Mr. Dworak's guilt. (Respondent's Brief ("RB") 28.) Respondent also claims that evidence about Ms. Hamilton's associates and behavior was properly excluded because it was speculative and thus irrelevant. (RB 48.) Respondent further asserts that there was no prejudice. (RB 49-52.)

**B . The Trial Court Abused Its Discretion In Excluding Evidence As to Third Party Culpability, Violating Mr. Dworak's Fifth, Sixth, and Fourteenth Amendment Rights To Present A Defense, Among Other Rights.**

As a starting point, Mr. Dworak and respondent agree that appellate review of exclusion of third-party culpability is governed by an abuse-of-discretion standard. (AOB 93; RB 39-41.) While respondent has cited this Court's statement that discretion is abused when a trial court's ruling falls

"outside the bounds of reason" (*People v. Waidla* (2000) 22 Cal.4th 690, 714), such colorful actions are not required for a finding of an abuse of discretion (see *People v. Jacobs* (2007) 156 Cal.App.4th 728, 736-737; *City of Sacramento v. Drew* (1989) 207 Cal.App.3d 1287, 1297; *Department of Parks and Recreation v. State Personnel Board* (1991) 233 Cal.App.3d 813, 831, fn. 3). Use of "pejorative boilerplate is misleading since it implies in every case in which a trial court is reversed for an abuse of discretion its action was utterly irrational." (*People v. Jacobs*, *supra*, 156 Cal.App.4th at pp. 737-738.) Rather, the question is whether the trial court's ruling was unreasonable in light of the legal principles, the governing law, and the facts presented. (*Ibid.*) Both respondent and appellant also agree that, under *People v. Hall* (1986) 41 Cal.3d 826, 833-834, third-party culpability evidence is treated like any other evidence, admissible if relevant and relevant if capable of raising a reasonable doubt about the defendant's guilt. (AOB 93; RB 40.)

In its ruling, the lower court relied upon *People v. Adams* (2004) 115 Cal.App.4th 243. (4 RT 564G-564I.) Respondent cites *People v. Adams* and begins its recitation of that case's facts and procedural history with the fact that, in *People v. Adams*, the DNA of sperm in the victim matched that of the defendant. (RB 41.) Any evidence inculpating a defendant is, of course, completely irrelevant to any assessment of the admissibility of third

party culpability evidence and the evidence respondent cites was not considered in *People v. Adams* by the lower court or by the appellate court for purposes of third-party culpability. The amount, nature, or weight of the evidence against a defendant is irrelevant to a decision to admit third-party culpability evidence and, on appeal, to a determination of whether such evidence should have been admitted. (*Holmes v. South Carolina*, *supra*, 547 U.S. at pp. 330-331.)

In *People v. Adams*, the defendant sought to introduce evidence that the victim's erstwhile boyfriend may have killed her. (*Id.* at pp. 247, 250.) The evidence consisted of (1) hearsay evidence about a volatile relationship, (2) crushed beer cans at the crime scene and in the boyfriend's motel room, and (3) cigarette butts found in the victim's apartment and in the boyfriend's motel room. (*Id.* at p. 251-252.) The appellate court found the evidence did not sufficiently connect the boyfriend to the crime, because the cans were of different brands and not identically crushed, the butts were not found at the crime scene, and the victim's statement that the boyfriend had previously tried to kill her was made at an unknown time and referred to an incident at an unknown time; further, other evidence did not link the boyfriend to the victim in the hours before her death or on the date of her death. (*Id.* at pp. 253, 254-255.)

Here, on the other hand, there were links connecting Campbell and Carroll to the crime.

Asserting incorrectly that appellant made no offer of proof linking Campbell and Carroll to "the actual perpetration of Crystal's rape and murder," respondent again provides two citations with bracketed holdings but no legal or factual analysis. (RB 42, citing *People v. Sandoval* (1992) 4 Cal.4th 155 and *People v. Edelbacher* (1989) 47 Cal.3d 983, 1018.) An examination of each case shows lack of concrete relevance to the instant issue. In *People v. Sandoval*, *supra*, 4 Cal.4th 155, law enforcement had found the names of three men, one of whom was the defendant, written on two pieces of paper clipped into the victim's appointment book, and the defense sought to present the evidence to show that the victim was at the center of a violent criminal operation and that any number of criminal accomplices could have killed him. (*Id.* at pp. 176-177.) This Court found that the evidence was properly excluded, because the defense offered no evidence of a real, identified individual's actual motive to commit the crime, merely the possibility that unknown "others" might have potential motives, and no evidence of an actual link between the crime and a real, identified individual. (*Id.* at p. 176.) Similarly, in *People v. Edelbacher*, *supra*, 47 Cal.3d 983, the defense sought to introduce evidence that the victim had associated with "Hell's Angel-type people" and drug dealers as

third-party culpability evidence. (*Id.* at pp. 1017-1018.) This Court upheld exclusion of the evidence because the defense did not identify any actual suspect or link any actual third person to the commission of the crime. (*Ibid.*) Here, unlike in *People v. Sandoval* and in *People v. Edelbacher*, defense counsel named specific third-party perpetrators -- Carroll and Campbell -- rather than claiming vaguely that there were shadowy or stereotypically dangerous but unidentified people who might possibly have wanted to harm Ms. Hamilton.

Respondent erroneously contends that Mr. Dworak presented no third-party culpability evidence linking Carroll or Campbell to the lower court and has not presented any on appeal. (RB 42-45.) Contrary to respondent's claim, the requisite link between the crime and each of the two men was set forth below in the prosecution's trial brief and motion in limine (1 CT 135-148), in the defense opposition to the exclusion of third-party culpability evidence (2 CT 428-431), and at the hearing on third-party culpability. Contrary to respondent's claim, the evidence has been described on appeal in the opening brief. (AOB 77-89.)

As to Campbell, respondent claims there was "nothing unique about the sand in Campbell's jeans that somehow connected him to the crime scene or the crimes." (RB 44.) Respondent is minimizing the evidence in order to dismiss it. Ms. Hamilton's body was found in the ocean next to

Mussel Shoals beach. (11 RT 2033.) She may or may not have been killed at the same beach where she was found. According to the chief medical examiner, the cause of death was most likely drowning, but the evidence also strongly suggested she was manually strangled intermittently in sandy water inhaled into her lungs. (12 RT 2209-2212, 2252.). Campbell wore jeans to a beach, the jeans got wet and sandy, and sometime on Saturday or Sunday he was at the Zeober house where he placed the wet and sandy jeans in a bucket.

Respondent also hails Campbell's "innocent explanation" for the presence of the sandy jeans, as if such self-serving statements obviate the admissibility of the evidence. (RB 43.) However, respondent offers no authority to show that proffered "innocent explanations" for third-party culpability evidence (particularly when offered by the third party itself) is considered as part of the admissibility calculus or renders the evidence excluded. Indeed, as set forth in the opening brief (AOB 98), the standard for relevancy (including relevancy of third-party culpability evidence) is any tendency in reason to prove or disprove any material fact (Evid. Code, § 210), "no matter how weak it may be" (*In re Romeo C.* (1995) 33 Cal.App.4th 1838, 1843). Indeed, respondent has failed to challenge the authority in the opening brief establishing that *credibility* of evidence goes to the weight, not the relevance, of third-party culpability evidence. (AOB

99.) Respondent has also implicitly conceded that third-party culpability evaluations, contrary to the prosecutor's position below, do not include the prosecutor's personal beliefs, e.g., that there are adequate alternative explanations for the evidence (AOB 99, 101) by failing to counter Mr. Dworak's authorities.

Respondent cites *People v. Bradford* (1997) 15 Cal.4th 1229, 1324-1324, bracketing its holding, but failing to analyze its principles and facts in light of the issue at hand, merely stating that Mr. Dworak failed to make a showing that Carroll was responsible for the rape and murder. (RB 44.) In *People v. Bradford, supra*, this Court characterized the proffered third-party culpability evidence -- the victim's "statements that she *previously* had been in fear of a man" -- as clearly insufficient to link someone other than the defendant to the actual perpetration of the victim's murder. (*Id.* at p. 1325.) Here, in contrast, there is no vague nomination of an unknown and unnamed person at an unknown time but the naming of an identifiable, known person, Carroll. As to Carroll, the link to the actual perpetration included:

> •Carroll was at the Zeober/Jones home on the night Ms. Hamilton disappeared;
>
> •Carroll was at the Zeober/Jones home on the day she disappeared;

•Carroll said that he had a sexual relationship with Ms. Hamilton;

•Carroll said that he had offered Ms. Hamilton a ride home on the night of her murder;

•Carroll stole the Jones's car on the night of the murder;

•Carroll disappeared after the murder and avoided Jones after the murder;

•Carroll returned the stolen Jones's car with sand on the floor and a broken window;

•Carroll returned the car with his moustache shaved;

•Carroll had shaved his moustache and pubic hair after the murder; and

•Carroll made comments and wrote letters after the murder regarding the murder and knowledge of the murder.

Respondent minimizes these facts as Carroll's "mere presence", but as set forth herein, there was much, much more than mere presence. Respondent then downplays Carroll's presence because it was "presence at the Zeober/Jones home," rather than presence at the crime scene.[2] Contrary to respondent's position (and to the pronouncement of the trial court which respondent cites at RB 45), there was evidence linking Carroll to the

---

[2] Respondent posits that Ms. Hamilton was drowned at the beach north of Mussel Shoals. (RB 45.) While her body was found in the ocean at that beach and there was evidence that her drowning occurred in a mixture of sand and sea water, there was no direct evidence that she was killed or died at that particular beach.

probable crime scene at a beach -- the sand found in Jones's car. Furthermore, while a direct connection to the place where the body was found may, in some cases, provide a link for third-party culpability, in this case, there is not only a direct connection to the last place where Ms. Hamilton was seen alive and from whence she departed on foot, supposedly for a nearby shopping center, but also direct connections such as the statement that Carroll offered a ride to Ms. Hamilton that night and that he stole Jones's car that very night.

Respondent again turns to the forensic DNA evidence against Mr. Dworak, purportedly to contrast the lack of forensic evidence against Carroll. (RB 45.) However, as pointed out in the opening brief and in this argument, *ante*, the weight of the prosecution evidence against a particular defendant is irrelevant to whether there was sufficient evidence of third-party culpability. (AOB 96, citing *Holmes v. South Carolina*, *supra*, 547 U.S. at p. 324.) Indeed, the very holding of *Holmes v. South Carolina*, *supra*, 547 U.S. at p. 324 *rejects* any prohibition on third-party culpability evidence on the basis that there is strong evidence, even strong forensic evidence, of a defendant's guilt and that the proffered evidence about third party guilt does not raise a reasonable inference about the defendant's own innocence.

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

Respondent also claims that evidence about Ms. Hamilton's associates and behavior was properly excluded because it was speculative and thus irrelevant. (RB 48.) Respondent cites *People v. Morrison* (2004) 34 Cal.4th 698 as holding that evidence that only leads to speculative inferences is irrelevant (RB 48) and that defense counsel only wanted to present evidence about Ms. Daniels's behavior to encourage speculation that Ms. Hamilton did not go to Ralph's to wait for her father. (RB 48.) However, the evidence in *People v. Morrison* was not rejected because it was speculative but because it had insufficient particularity, consisting of a vague claim of evidence "floating around" that a brother of the victim living in another state had a "possible drug connection." (*Id.* at p. 712.) This Court found that "trial counsel offered no explanation as to how [the brother's] alleged drug involvement has any tendency to prove or disprove any disputed material fact in the case or what evidence was even available to establish [the brother's] drug connection and its relevance to the instant crimes." (*Ibid.*) Here, in contrast to the proffer in *People v. Morrison*, defense counsel presented an offer of proof as to Ms. Hamilton's associates and behavior. That evidence included: (1) a few months before her death,

Ms. Hamilton smoked marijuana in a room at Motel 6 with Ms. Daniels and three men, including the much-older Figueroa; (2) one month before her death, Ms. Hamilton, Ms. Daniels, and a man named "Tye" had consumed drugs together in a room at Motel 6; (3) shortly before her death, Ms. Hamilton and Figueroa went to a friends' barbecue together; and (4) on the day of her death, when Zeober's mom wanted her gone, Ms. Hamilton turned to Figueroa for a ride, but could not reach him because he was in jail. (1 CT 135-138.) The picture presented by the prosecution focused on one possibility only, that Ms. Hamilton had left the Zeober/Jones house and gone to Ralph's Market to wait for her father, that she would not have failed to show up, and that she would never have gone off with an older man. The truth, however, contained other possibilities, as evidenced by Ms. Hamilton's past behavior of socializing with older men and enjoying drugs with others in motel rooms. Her call for a ride from her father was a last resort. (11 RT 2106, 2108, 2126-2128, 2132-2133.) The quantity of methamphetamine in her system showed that she had taken methamphetamine sometime Saturday evening, although Zeober claimed they did not do so and he would have known if she had taken some then. (11 RT 2103-2105, 2112-2113, 2123-2125, 2137, 12 RT 2245, 15 RT 2725; People's Exhibit No. 32.) Without admission of evidence of the lifestyle

which Ms. Hamilton regularly enjoyed, the jury was left with the prosecution's portrait, which did not accurately reflect reality.

**D. The Errors, Individually And Together, Were Prejudicial.**

In the opening brief (AOB 102-104), Mr. Dworak explained that the error here was governed by *Chapman v. California* (1967) 386 U.S. 18, 24 ("*Chapman*"), *People v. Fudge* (1994) 7 Cal.4th 1075, 1103 and *People v. Cunningham* (2001) 25 Cal.4th 926, 999 because the trial court here completely precluded (1) third-party culpability evidence and (2) relevant evidence about Ms. Hamilton's associates, lifestyles, and the possible circumstances of that weekend essential to rebut the prosecution's false portrayal of Ms. Hamilton, her associates, and what she would and would not do. (AOB 102-104.) Each error is prejudicial on its own and when combined.

Respondent fails to counter Mr. Dworak's detailed, step-by-step case law analysis or even acknowledge it. Rather, respondent declares in conclusory fashion that the ruling did not constitute a refusal to allow presentation but merely the rejection of "certain evidence concerning the defense" and thus falls under *People v. Watson* (1956) 46 Cal.2d 818, 836. (RB 49.) Even under *Watson*, the error was prejudicial.

Respondent then contends that in light of the "extremely strong" evidence against Mr. Dworak, it is not reasonably probable that the verdict

would have been more favorable if the "extremely weak and speculative" third party culpability evidence had been admitted. (RB 49.) Respondent's garnering of the evidence contains mis-stated facts and overstated facts. (RB 50-51.) First, respondent contends Ms. Hamilton "had been waiting for her father at the Ralph's parking lot when she disappeared between 10:30 p.m. and midnight." (RB 50, citing 11 RT 2061-2062 [testimony of Ms. Hamilton's father].) The cited pages do not support respondent's statement, nor does the rest of the record. There was no evidence Ms. Hamilton ever arrived at the Ralph's parking lot and no evidence that she got there at 10:30 p.m.

Second, as to the evidence about Mr. Dworak's connection with Mussel Shoals Beach, where Ms. Hamilton's body was found, respondent exaggerates the record evidence by declaring that Mr. Dworak "was intimately familiar with the area." (RB 51, with no record citation.[3]) The friend who went to the Mussel Shoals beach with Mr. Dworak, did so only

---

[3]Citation to where a fact appears in the record is required by California Rules of Court, rule 8.204(a)(1)(C) ["Each brief must . . . [s]upport any reference to a matter in the record by a citation to the volume and page number of the record where the matter appears"]; *City of Lincoln v. Donald L. Barringer et al.* (2002) 102 Cal.App.4th 1211, 1239.) A reviewing court may disregard evidentiary contentions unsupported by proper page cites to the record, because the lack of such citations prevent the court from expeditiously locating the appropriate part of the record. (*Id.* at p. 1239 & fn. 16.)

twice, both visits occurred a year *after* Ms. Hamilton's body was found, and the friend never testified that Mr. Dworak talked about going there frequently. (13 RT 2349, 2351-2352.) As to respondent's assertion that Mr. Dworak "would go fishing in that area" (RB 51), the friend testified that he and Mr. Dworak had gone fishing one year *after* the offenses, that the fishing was ocean fishing, not beach fishing, and that they were not fishing off the beach coast, including Mussel Shoals beach coast, but fishing at other areas, i.e., the oil rigs, islands, or kelp beds. (13 RT 2347-2349, 2351, 2354-2355.) Finally, respondent's assertion that Mr. Dworak "knew that, in the early morning hours, nobody would be at [the beach]" (RB 51) is also embellished, because Mr. Dworak was quoted by his friend as saying Mussel Shoals Beach was a good place to take the dogs to run because if you went early, there weren't many people and the friend indicated that they had gone there early, early being between 9 a.m. and 11 a.m. (13 RT 2350-2358.)

Respondent emphasizes the speed of the jury verdict as to guilt, with the jury deliberating for 16 hours and 33 minutes, as if the length supports the strength of the evidence against Mr. Dworak. (3 CT 783, 786, 800.) Deliberations of this length are not brief, and the two full days of deliberation are more indicative of a close case favoring Mr. Dworak's showing of prejudice, where the rather straightforward charges were one

count of murder, with one special circumstance, and one count of rape. (See, e.g., *People v. Cooper* (1991) 53 Cal.3d 771, 837 [27 hours not overly lengthy in complex case]; *Lawson v. Borg* (9th Cir. 1995) 60 F.3d 608, 612 [nine hours of deliberations protracted].)

**E. Conclusion.**

For the reasons set forth herein and in the opening brief, Mr. Dworak was denied an opportunity to present a defense when the trial court excluded (1) evidence of third-party culpability and (2) other lifestyle evidence, errors which were separately and together unduly prejudicial. This Court should reverse the judgment and sentence.

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

In the opening brief, Mr. Dworak contends that the trial court abused its discretion when it denied his request to admit a booking photograph of Ms. Hamilton, which showed her shortly before she was sent to an inpatient rehabilitation facility for substance abuse, a sharp contrast with the prosecution's three photographs of her, which showed a well-scrubbed, cheery, healthy, teen-ager, when Ms. Hamilton was younger (People's Exhibit Nos. 16, 18, 19.) The photograph would have undermined the prosecution's theme that Ms. Hamilton was a sweet, naïve teen and would have offered an explanation why Mr. Dworak might not have recognized the two cheery photographs of her that he was shown during police interviews (People's Exhibit Nos. 18, 19). (AOB 112-128.) The error deprived Mr. Dworak of his right to present a defense, to confront and cross-examine witnesses, to due process of law and a fair trial, to a reliable guilt and penalty determination, and to be free from cruel and unusual punishment. (AOB 112-128, citing U.S. Const., 5th, 6th, 8th, 14th

Amends.; *Washington v. Texas*, *supra*, 388 U.S. at pp. 18-19; *Chambers v. Mississippi, supra,* 410 U.S. at p. 302; *Pennsylvania v. Ritchie*, *supra*, 480 U.S. at p. 56; *United States v. Valenzuela-Bernal*, *supra*, 458 U.S. at p. 867; *Green v. Georgia, supra,* 442 U.S. at p. 97; *Crane v. Kentucky, supra,* 476 U.S. at pp. 687-691; *Smith v. Illinois*, *supra*, 390 U.S. at p. 133; Cal. Const., art. I, §§ 7, 15, 16, 17, 24.)

Respondent asserts the booking photograph was irrelevant because there was no indication that Ms. Hamilton was under the influence of drugs when the photograph was taken. (RB 52-62.) In making this assertion, respondent states Mr. Dworak's position below was that he "sought to admit [Ms. Hamilton's] booking photograph to show what she may have looked like when she was under the influence of drugs." (RB 52.) Respondent is wrong. The photograph's admission was not sought to show only how Ms. Hamilton looked like under the influence of drugs but to show how, in fact, she looked at other times.

Defense counsel sought to introduce the probative booking photograph taken at the time of Ms. Hamilton's juvenile arrest on May 6, 2000, with the booking information removed. (2 CT 419-420, 423.) Counsel specifically argued in his motion to admit the photograph that the photograph was "highly probative in that it more accurately reflects how she appeared when she was using drugs and *how she may have appeared to*

*the defendant at any time he came into contact with her.*" (2 CT 419-420, emphasis added.) During the hearing on the photograph, when the court questioned its relevance, defense counsel argued, "Well, it appears at the time of the death of Crystal Hamilton, that she was again utilizing controlled substances as was evidenced by the blood analysis and the testimony of others, and this photo would reflect *perhaps another way that Miss Hamilton might have appeared* either in general or to Mr. Dworak at any time, and it -- it's relevant in that *it gives a better total view of the appearance that Miss Hamilton could make* and would be relevant in that regard." (4 RT 538-539, emphasis added.) Defense counsel argued "it is relevant just to show that there -- you know, there were *other appearances that were made by the [decedent]*, and we would request the Court to admit that." (4 RT 540, emphasis added.)

Where a photograph of a victim while alive has a bearing on a contested issue in a case, the photograph may be admitted. (*People v. Zapien* (1993) 4 Cal.4th 929, 983.) The booking photograph of Ms. Hamilton bore on a contested issue. The prosecution presented 18-year-old Hamilton as a sweet, naïve girl who would never have taken up with an older man like Mr. Dworak, who would never have exchanged sex for money or drugs, who was eager for her father to take her home, and who would never have changed plans, failed to show up, or let her father down.

The young girl shown in the three prosecution photographs supported the prosecution theory, as they all showed Ms. Hamilton, smiling and demurely dressed, with a shining, well-scrubbed face. Ms. Hamilton appears bright-eyed in all three photographs and not under the influence of drugs.

In the opening brief, Mr. Dworak argues that the booking photograph, in contrast to the happy family photographs, "would have shown how she had actually looked at other times and how she well might have looked that night." (AOB 119.) The booking photograph of Ms. Hamilton showed how she in fact sometimes looked, regardless of whether she was under the influence of drugs in the booking photograph. As set forth in the opening brief, the defense did not need to prove Ms. Hamilton's disheveled appearance in the booking photograph was solely the result of ingesting drugs in order for the photograph to be admissible. Respondent does not dispute the assertion in the opening brief that Ms. Hamilton had left home Friday morning, smoked marijuana and ingested methamphetamine all day Friday with Mr. Zeober and other friends, spent Friday night at Zeober's, wore the same clothes on Saturday as she had the day before, and told Zeober on Saturday that she wanted to go home, take a shower, and change clothes "and stuff." (AOB 121-122, citing 11 RT 2097, 2102-2105.) The court should have admitted the photograph as an accurate presentation of how she could look instead of the image shown in

the three happy family photographs. It would also have undermined any inference that Mr. Dworak was lying when he denied recognizing her in those photographs.

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

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

In the opening brief, Mr. Dworak contends that the trial court erred when it denied admission of local newspaper articles showing that Ms. Hamilton's death was widely publicized, such that Mr. Dworak would have had an opportunity to know about it when he was interviewed by police two years later and referred to "a deceased victim," and to rebut the prosecution's argument that the remark was an admission by the killer. (AOB 129-140.) The error deprived Mr. Dworak of his right to present a defense, to confront and cross-examine witnesses, to due process of law and a fair trial, to a reliable guilt and penalty determination, and to be free from cruel and unusual punishment. (AOB 129-140, citing U.S. Const., 5th, 6th, 8th, 14th Amends.; *Washington v. Texas*, *supra*, 388 U.S. at p. 19; *Michigan v. Lucas* (1991) 500 U.S. 145; *Rock v. Arkansas* (1987) 483 U.S. 44, 55; *Chambers v. Mississippi*, *supra*, 410 U.S. at pp. 29-30; *United States v. Valenzuela-Bernal, supra,* 458 U.S. at p. 867; *Green v. Georgia*, *supra*, 442 U.S. at p. 97; *Crane v. Kentucky, supra,* 476 U.S. at pp. 687-691; *Smith v. Illinois, supra,* 390 U.S. at p. 133; Cal. Const., art. I, §§ 7, 15, 16, 17, 24.) Respondent contends that the trial court properly denied the

defense request because the articles were not relevant unless defense counsel laid a foundation that Mr. Dworak had read the articles and that he was later aware the drowning had been ruled a homicide. (RB 63-67.) Further, respondent claims that any error was harmless. (RB 67-68.)

As a threshold matter, under "A. Relevant Proceedings," respondent states that a *video* of the May 12, 2003 interview was played for the jury. (RB 63.) This is incorrect. Detective Rubright testified that she tape recorded the interview (13 RT 2375), and the tape of the interview played for the jury was an *audio* tape, People's Exhibit No. 46a. (13 RT 2375-2378.)

Respondent contends the court properly excluded the newspaper articles as irrelevant because defense counsel never laid a foundation that Mr. Dworak had read the articles and was aware that the coroner determined the drowning was a homicide. (RB 65-66.) Other than Evidence Code section 403, respondent has cited no authority for this foundational requirement. Respondent has not explained why it was necessary to lay a foundation that Mr. Dworak had read the newspapers in order to make them relevant. The fact that there were multiple articles, that the newspapers were newspapers of general circulation, and that the articles reported that Ms. Hamilton was deceased was sufficient to establish probity. The weight of the evidence -- whether the widespread nature of

the news was sufficient to show common knowledge of the matter in Ventura County, such that Mr. Dworak could be aware of it -- was a question for the jury.

Respondent's first citation, to *People v. Brady* (2010) 50 Cal.4th 547, 558, may stand for the proposition that exclusion of evidence is reviewed under an abuse of discretion standard (RB 65), a proposition with which Mr. Dworak has no quarrel (AOB 174), but otherwise offers no guidance here, as the case deals with the propriety of exclusion of third-party culpability evidence in the form of hotline tips (50 Cal.4th at p. 557-558). No reply can be made to respondent's second authority, cited without legal or factual analysis, to *People v. Morrison* (2004) 34 Cal.4th 698, 724 (RB 67), as that case at the page cited upholds the exclusion of inadmissible third party hearsay at the penalty phase for a variety of reasons unrelated to the issue here. Respondent's reliance on a third case, *People v. Babbitt* (1988) 45 Cal.3d 660, is more germane but nonetheless unavailing. (RB 67.) In *People v. Babbitt*, *supra*, 45 Cal.3d 660, the defendant, a Vietnam veteran who asserted PTSD with triggers related to Vietnam, sought to introduce a television schedule for the night of the murder which featured movies with gunfire and evil Asian characters to show that the victim's television, tuned to that channel when her body was found, might have triggered his violent attack on her. (*Id.* at p. 681.) The evidence was

"clearly speculative" because there was not only no evidence the set was turned on before the attack but also there was a neighbor's testimony to the contrary, that the television had not been turned on until 2:00 a.m. when the neighbor also heard thumps. (*Id.* at p. 682 and fn. 4.) Here, there was no evidence directly contradicting defense counsel's assertion that multiple newspaper articles about Ms. Hamilton's death had appeared in a newspaper of general circulation in the relatively small county of Ventura for two years before the interview at issue, making her death a matter of common knowledge. (14 RT 2651-2653.)

As to prejudice, respondent argues that any error is harmless under *People v. Watson* (1956) 46 Cal.2d 818, 836. (RB 67-68.) Respondent sees no reasonable probability of a more favorable result to Mr. Dworak had the articles been admitted because defense counsel was able to argue that the detective's statement Ms. Hamilton "would have been" 19 years old made it clear that the victim was deceased, the evidence against Mr. Dworak was "strong," and the probative of the articles was slight. (RB 67.) The fact that defense counsel could point to one reason Mr. Dworak made the statement does not dissipate the prejudice from his not being able to refer to another, objective source of information, i.e., the published newspaper reports. Further, while defense counsel did his best to undercut the asserted admission, counsel's attempt has no real place in the prejudice

calculus. The prosecutor made substantial use of the admission, giving it "smoking gun" significance in lengthy remarks focused on the admission, concluding that Mr. Dworak's statement Ms. Hamilton was dead "is called an admission. And that is called a guilty defendant." (15 RT 2781.) The prosecutor's reliance on this evidence shows its importance to the prosecution's case and thus to the jury. (*People v. Powell* (1967) 65 Cal.2d 32, 55-57.) In determining prejudice to the defendant's case where suppressed evidence had not been disclosed to trial counsel, the United States Supreme Court has said that the "likely damage is best understood by taking the word of the prosecutor" as to what evidence or witnesses were important during closing arguments. (*Kyles v. Whitley* (1995) 514 U.S. 419, 443-444.) Respondent has not contravened any of the facts and arguments supporting prejudice in the opening brief. (See AOB 135-138.) Finally, while the probative value of the articles may have been minor when broadly compared to other evidence in the case, the probative value was major as to the admission itself, the use for which the articles' admission was sought.

The court prejudicially erred when it excluded from evidence the local newspaper's articles from two years before Mr. Dworak's police interview where the prosecution claimed he had made a devastating

admission, because the articles would have undercut the prosecution's claim. Reversal is required.

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

In the opening brief, Mr. Dworak argues that the trial court erred when it admitted evidence of the rape and sexual penetration of Cynthia W. in Napa County in 1986 as propensity evidence under Evidence Code section 1108, violating his rights to due process of law, a fair trial, and reliable guilt and penalty phase verdicts under the federal constitution and concomitant state provisions. (AOB 141-171, citing U.S. Const., 5th, 6th, 8th, and 14th Amends.; Cal. Const., art. I, §§ 7, 15, 16, 17, 24.) First, pursuant to *People v. Schmeck* (2005) 37 Cal.4th 240, 303-304 ("*Schmeck*"), overruled on other grounds in *People v. McKinnon* (2011) 52 Cal.4th 610, 637, Mr. Dworak contends that Evidence Code section 1108 violates his right to due process of law, a fair trial, and reliable guilt and penalty phase verdicts under the federal Constitution. (AOB 150-155.) Second, Mr. Dworak contends the court erred in not excluding the evidence under Evidence Code section 352's balancing test. (AOB 156-163.) Third, Mr. Dworak contends CALJIC No. 2.50.01 permitted the jury to rely upon criminal propensity to commit sexual offenses as proof Mr. Dworak committed murder. (AOB 163-167.) Respondent asserts that the evidence

was properly admitted, that the jury properly instructed, and that any error is harmless. (RB 68-83.)

First, respondent acknowledges that appellant is asking this Court to reconsider its holdings in *People v. Falsetta* (1999) 21 Cal.4th 903, 913 and *People v. Story* (2009) 45 Cal.4th 1282. (RB 72.) Respondent urges this Court not to reconsider those decisions. (AOB 72-74.) Because respondent simply relies on this Court's prior decisions and adds nothing new to the discussion, the issues are fully joined and no reply is necessary. For the reasons stated in the opening brief, this Court should reconsider its previous opinions.

Second, respondent maintains the court did not abuse its discretion when it found that Evidence Code section 352 did not bar the evidence. (RB 74-80.) Respondent argues that the court understood and fulfilled its responsibilities under Evidence Code section 352 and appropriately exercised its discretion. (RB 75-80.) Mr. Dworak has already addressed this issue in detail in the opening brief (AOB 156-163), so there is no need to reiterate those points here. Suffice it to say that respondent disagrees with Mr. Dworak on each and every point.

Third, respondent contends that the trial court did not err when it instructed the jury with CALJIC No. 2.50.01. In the opening brief, Mr. Dworak argues that, by its own terms, Evidence Code section 1108

propensity evidence may apply where, as here, a defendant is charged with rape or another sexual offense and, under *People v. Story* (2009) 45 Cal.4th 1282, 1291-1292 may apply where, as here, a defendant is charged with murder during the course of rape or another sexual assault. (AOB 165-166.) However, Mr. Dworak contends that Evidence Code section 1108 propensity evidence does not apply to malice-murder, because malice-murder is not a sexual offense within the meaning of Evidence Code section 1108, even where a sexual offense is charged or where, in addition to malice-murder, the prosecution pursues a felony-murder theory based on a sexual offense. (AOB 165-167.) CALCJIC No. 2.50.01, as given here, made no such distinction because it told jurors "[i]f you find that the defendant committed a prior sexual offense, you may, but are not required to, infer that the defendant has a disposition to commit sexual offenses. If you find that the defendant has this disposition, you may, but are not required to, infer he was *likely to commit and did commit the crimes of which he is accused*," (4 CT 926, 10 RT 1852-1853, 1878, 15 RT 2671-2672), i.e., he was likely to commit and did commit malice-murder.

In the opening brief, Mr. Dworak relied upon the language and reasoning of *People v. Story*, *supra*, 45 Cal.4th 1282, where this Court held that the use of Evidence Code section 1108 is limited to sex offenses and applies only when a defendant is charged with committing another sex

offense; that the only theory of first-degree murder presented at trial was felony murder with rape and burglary; that the type of first-degree murder was a sexual offense within the meaning of Evidence Code section 1108. (See AOB 165, citing 45 Cal.4th at pp. 1291-1294.) Four months after the instant opening brief was filed, this Court issued its opinion in *People v. Avila* (2014) 59 Cal.4th 496, upon which respondent now relies. (RB 80-81.) In *People v. Avila*, *supra*, 59 Cal.4th 496, this Court held that other sex crimes evidence was admissible because the "[d]efendant was charged with a sexual offense both because he was charged with committing lewd and lascivious acts on a child under the age of 14 and because he was charged with murder under the special circumstance of murder while committing the lewd and lascivious acts." (*Id.* at p. 515, citing *People v. Story*, *supra*, 45 Cal.4th at pp. 1290-1292.) Respondent is wrong, when, based on *People v. Avila*, it argues that "[b]ecause all of the crimes charged were sexual offenses [including murder under the special circumstance that the murder was committed while engaged in the commission of a rape], the jury was permitted to infer from his disposition to commit sexual assaults that he committed the rape and murder" and that the court did not err in so instructing the jury. (RB 81.) In *People v. Avila*, this Court did not reach the issue presented here -- whether malice-murder is a sexual offense within the meaning of Evidence Code section 1108. The defendant was not

prosecuted on a theory of malice-murder. (*People v. Avila*, *supra*, 59 Cal.4th at pp. 499, 512-513 [charges of kidnapping, lewd/lascivious acts on a child, and murder with two special circumstances (during kidnapping and during lewd/lascivious acts on a child)].) The defendant did not raise the question of whether malice-murder is a sexual offense for the purposes of sexual propensity evidence. This Court did not decide the issue of whether malice-murder is a sexual offense for purposes of sexual propensity evidence. Cases are not authority for propositions not considered. (*People v. Casper* (2004) 33 Cal.4th 38, 43.)

As to prejudice, respondent reasons that, because the jury found Mr. Dworak guilty of rape and found the rape-murder special circumstance to be true, the jury necessarily found him guilty of rape felony murder. (RB 82.) Prejudice was fully addressed in the opening brief. (AOB 167-171.)

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

criminal propensity to commit sexual offenses as proof Mr. Dworak committed malice murder. Contrary to respondent's assertions, this Court's holding in *People v. Avila*, *supra*, 59 Cal.4th 496 did not decide the issue of Evidence Code section 1108's applicability to malice-murder. Reversal is required.

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

In the opening brief, Mr. Dworak contends that admission of irrelevant evidence about Mrs. Dworak's demeanor during the weekend Ms. Hamilton died, from which the prosecutor inferred the couple had argued and Mr. Dworak was angry, was error because it was irrelevant and more inflammatory than probative under Evidence Code section 352, depriving him of his state and federal constitutional rights to present a defense, to due process of law and a fair trial, to a reliable guilt and penalty determination and to be free from cruel and unusual punishment. (AOB 172-179, citing U.S. Const., 5th, 6th, 8th, 14th Amends.; Cal. Const., art. I, §§ 7, 15, 16, 17, 24.)

Respondent contends that any claim other than the evidence being irrelevant and more prejudicial than probative under Evidence Code section 352 is forfeited due to a failure to object on other grounds. (RB 87-88.) Respondent further argues that the evidence was relevant, that it was not more prejudicial than probative, and, at any rate, was harmless. (RB 88-90.)

Respondent claims that, because appellant did not object to the testimony on federal constitutional grounds, any claim based on a violation of Mr. Dworak's federal constitutional rights is forfeited. (RB 87.) This argument ignores controlling authority from this Court. Contrary to respondent's position, this Court has held that federal constitutional objections to admission of evidence are not defaulted merely because defense counsel fails to cite the federal constitution. (*People v. Yeoman* (2003) 31 Cal.4th 93.) In *People v. Yeoman, supra*, 31 Cal.4th 93, this Court rejected the government's argument that the federal component of the claim was waived because the "new claim . . . merely invites us to draw an alternative legal conclusion (i.e., that the death sentence is arbitrary and unreliable) from the same information he presented to the trial court." (*Ibid.*) The decision followed naturally from a line of cases holding that, where a trial court admitted evidence over defense objection, the merits of a claim that the admission violated the federal constitution would be addressed even when there had been no federal constitutional objection at trial. (See, e.g., *People v. Holloway* (2004) 33 Cal.4th 96, 143 [objection based on relevancy sufficient to preserve merits of federal 8th Amend. claim]; *People v. Gurule* (2002) 28 Cal.4th 557, 654 [objection to evidence as prejudicial sufficient to preserve merits of federal due process claim];

*People v. Sakaris* (2000) 22 Cal.4th 596, 628 [hearsay objection sufficient to preserve merits of federal 6th Amend. claim].As this Court has explained, in most situations, a citation to the federal constitution "merely restates, under alternative legal principles, a claim otherwise identical to one that was properly preserved by a timely motion that called upon the trial court to consider the same facts and to apply a legal standard similar to that which would also determine the claim raised on appeal." (*People v. Yeoman*, *supra*, 31 Cal.4th at p. 117.) Simply put, the law does not require idle acts. (Civ. Code, § 3352.)

Such is the case here. As respondent concedes, this is not a case where defense counsel failed to object to admission of the evidence. Rather, defense counsel specifically sought exclusion of the evidence at issue. (11 RT 1940, 1945-1945.) Citation of the federal constitution would not have required the trial court to apply any different analysis to the objection and the prosecution's opportunity to oppose counsel's objection would not have been any different. Respondent's argument to the contrary exalts form over substance and ignores the rule set forth in *People v. Yeoman* and the cases preceding it.

In making its argument to the contrary, respondent cites *People v. Partida* (2005) 37 Cal.4th 428, 437, a case published *after* the penalty

phase verdict in this case,[4] but the case does not aid respondent. In *People v. Partida*, *supra*, 37 Cal.4th 428, defense counsel had objected to evidence based on Evidence Code section 352. (*Id.* at p. 431.) On appeal, in accord with the case law cited, *ante*, this Court held that counsel did not have to cite the federal constitution to preserve an objection based on due process, because a due process objection would not have required the trial court to perform any different analysis at trial. (*Id.* at pp. 431, 435, 437.) As respondent quotes in a bracketed holding, this Court did then state that a defendant objecting on Evidence Code section 352 grounds forfeits additional claims on appeal where defense counsel did not reasonably apprise the trial court of the analysis it was being asked to undertake. (*Id.* at p. 437.)

Respondent next contends that the evidence of Mrs. Dworak's demeanor was relevant because it was probative of Mr. Dworak's motive to rape Ms. Hamilton as he was sexually frustrated and wanted to have sex with someone. (RB 88.) Respondent's reasoning is that the couple were having marital problems around the time of the murder, that Mr. Dworak was sexually frustrated when the couple was not getting along, that Mr.

---

[4] The verdict was announced on April 26, 2005. (18 RT 3361.) *People v. Partida* issued on November 21, 2005. (37 Cal.4th at p. 428.)

Dworak would solicit prostitutes to have sex when he wanted to have sex with someone, that Mrs. Dworak's demeanor that weekend showed that the couple had fought and that Mrs. Dworak did not want to have sex with him, and that Mr. Dworak wanted to have sex with someone so he raped Ms. Hamilton. (RB 88.) There are multiple flaws in respondent's reasoning. First, according to respondent's recital of the facts, when Mr. Dworak was sexually frustrated because the couple was not getting along, he would solicit prostitutes to have sex. (RB 88.) Respondent cannot selectively parse the facts, accepting Mr. Dworak's statement that he was sexually frustrated when the couple fought but rejecting the statement that he solicited prostitutes when he was sexually frustrated and replacing it with a motive to rape. There was no showing below that prostitutes were unavailable that weekend. Second, whether the couple were fighting was irrelevant to whether the couple were having sex that weekend; they could not have had sex in any case that weekend, since Mrs. Dworak was out of town. Third, and perhaps most significantly, there was no evidence that Mrs. Dworak's demeanor was the result of the couple fighting. The fact that the couple was having marital problems, that the couple fought at other times, and that Mr. Dworak complained that his wife nagged him and rode his case (RB 88-89) does not create a rational inference that Mrs. Dworak's demeanor was the result of a fight with her husband, contrary to

respondent's assertion. Finally, while respondent wants this Court to assume that, on this weekend, it is reasonable to infer that everything that happened was what had happened before (except for the substitution for motive to rape for solicitation of a prostitute), but points to no evidence as to Mrs. Dworak's demeanor in the past based on fighting with her husband, such as missing work and sharing her mood with coworkers.

Respondent's citation of *People v. Morris* (1988) 46 Cal.3d 1, 21, overruled on other grounds in *In re Sassounian* (1995) 9 Cal.4th 535, 543-544, fn. 5 and *People v. Herrera* (2006) 136 Cal.App.4th 1191, 1205 and recitation of abstract legal principles drawn from the cases, without analysis, does not assist this Court. (RB 89.) The facts and reasoning of *People v. Morris*, *supra*, 46 Cal.3d 1, in fact, support Mr. Dworak's position, because this Court concluded therein there was insufficient evidence of robbery because there was no evidence from which to infer the victim was deprived of property in his position by force or fear. (*Id.* at p. 20.) This Court acknowledged that, while it *could* speculate "about any number of scenarios that may have occurred on the morning in question," it *should* not do so because a finding of fact must be an inference drawn from the evidence rather than "mere speculation as to the probabilities without evidence." (*Id.* at p. 21.) Here, respondent can speculate that the scenario that led to Mrs. Dworak's upset demeanor on the morning she called in sick

to work and in the days following was that she and her husband had had a fight but that is merely a probability without evidentiary support.

Similarly, *People v. Herrera*, *supra*, 136 Cal.App.4th 1191 does not advance respondent's position. There, the appellate court found insufficient evidence of a conspiracy to manufacture methamphetamine, where the prosecution relied on the absence of evidence of a lab in the defendant's house to prove he was a middleman in the conspiracy. (*Id.* at p. 1205.) Respondent brackets only part of the court's holding, which, in full, was that "[a] legal inference cannot flow from the non-existence of a fact; it can be drawn only from a fact actually established." (*Ibid.*) There were simply no *facts* here establishing the *source* of Mrs. Dworak's crying and upset demeanor on the particular days at issue.

As to *People v. Clark* (2011) 52 Cal.4th 856, respondent attempts to distinguish the case (RB 89-90) because the opinion supports Mr. Dworak, as this Court held that whether the defendant had not had sex in the weeks before the attempted rape and murder had no tendency to prove the rape or murder. (*Id.* at pp. 923-924.) This Court reasoned that, even if a lack of sex were probative of motive or intent, any inference that the defendant was sexually frustrated and motivated to rape was highly speculative, based only on the testimony of a girlfriend that she had last had sex with the defendant two weeks before. (*Id.* at p. 924.) Here, too, the supposition that

Mr. Dworak had lacked sex had no tendency in reason to prove rape or rape-murder. Even if it were probative, the inference is speculative on many grounds -- that, if the couple had fought this weekend, they had not had sex and Mr. Dworak had been sexually frustrated, because another time they had fought they had not had sex and Mr. Dworak had been sexually frustrated. More significantly, the string of conjectures necessary to create the inference as to a motive or intent to rape relies on one colossal conjectural leap -- that Mr. Dworak when sexually frustrated would rape, rather than, as he had in the past, seeking out a prostitute.

Respondent contends the evidence was not unduly prejudicial because it was relevant and any inferences were evidence-based. (RB 90.) As this Court found in *People v. Clark*, *supra*, 52 Cal.4th 856, lack of sex has no tendency to prove rape or murder. (*Id.* at pp. 923-924.) Where, as here, there is no probative value, the undue prejudice under Evidence Code section 352 predominated, such that the evidence should have been excluded.

As to prejudice, respondent contends that, even without the challenged evidence, there was ample evidence that the couple were having marital problems and that appellant was sexually frustrated. As explained earlier, such evidence is speculative and irrelevant and cannot dissipate prejudice here. Respondent counts transcript lines (five), ignores the fact

that jurors were actively listening, not reading a cold record, as two separate witnesses testified to the matter, and dismisses the significance of the evidence without consideration of its importance in the eyes of jurors. (RB 91.) Respondent overlooks how the prosecutor extensively exploited the seemingly small bits of evidence to fit her theme in closing argument, as set forth in full in the opening brief. (AOB 178.) The prosecutor's argument moved from Mrs. Dworak upset and crying to "you know what all that means," i.e., that the couple had a "huge fight that weekend" to Mr. Dworak angry at his wife, to Mr. Dworak as an angry rapist with a propensity to rape, to Mr. Dworak, angry, again and again. (15 RT 2694, 2699, 2710, 2711, 2733, 2790, 16 RT 2889, 2890, 2906.) Thus, even though there was no evidence the couple had fought that weekend or that appellant was angry that weekend, the prosecutor was able to paint a convincing, but inaccurate, portrait of Mr. Dworak as an angry, sexually frustrated rapist.

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

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

In the opening brief, Mr. Dworak contends that the court erred when it admitted the testimony of Ms. Hamilton's father about her future plans because the statements were hearsay and did not fall within California's hearsay exceptions (Evid. Code, §§ 1250, 1252), violating Mr. Dworak's right to confront and cross-examine witnesses, to due process and a fair trial, to a reliable guilt and penalty determination, and to be free from cruel and unusual punishment. (AOB 180-191, citing U.S. Const., 5th, 6th, 8th, 14th Amends.; *Idaho v. Wright* (1990) 497 U.S. 805, 814-815; Cal. Const., art. I, §§ 7, 15, 16, 17, 24.) In the court below, the prosecution argued that Ms. Hamilton's statements to her father "about going to college, getting a job, joining the military" showed that she was "not a girl who's planning on taking her own life" and were admissible under a hearsay exception for statement of intention. (11 RT 2050.) Below and on appeal, Mr. Dworak argues that the statements were hearsay and not admissible under the hearsay exception for statement of intention because the statements did not fall within Evidence Code sections 1250 [statements of intention] and 1252 [requisite circumstances of trustworthiness]. (11 RT 2050; AOB 180-188.)

Respondent fails to address the admission of the testimony as a hearsay exception, and such failure to engage in argument operates as a concession. (*People v. Bouzas* (1991) 53 Cal.3d 467, 480 [state's failure to dispute appellant's argument operates as apparent concession]; *People v. Werner* (2012) 207 Cal.App.4th 1195, 1212 [same]; *Westside Center Associates v. Safeway Stores 23, Inc.* (1996) 42 Cal.App.4th 507, 529.) Respondent effectively concedes that, if the statements constitute hearsay, they were not properly admissible under a hearsay exception.

On appeal, respondent first erroneously suggests, in a passing footnote, that the record is unclear as to whether the court admitted the statements as non-hearsay or under the hearsay exception offered by the prosecution, Evidence Code section 1250. (RB 94, fn. 36.) The trial court overruled defense counsel's objections that the statement were hearsay and that the statements did not fall within Evidence Code section 1250. (11 RT 2050.) The trial court stated that discussions with her father about future education- or career-related plans would be probative evidence that Ms. Hamilton might not be inclined to "hurt herself." (11 RT 2050-2051.) There was no discussion in the record that the statements were not hearsay, the prosecution or by the court, and there is nothing unclear about the court's overruling defense counsel's objections solely on hearsay grounds.

Respondent then contends the statements were not hearsay because they were not admitted for their truth, i.e., that Ms. Hamilton planned to go to college or planned to work in the medical field or planned to join the Air Force as a nurse, but admitted to show that she was not suicidal. (RB 91-96.) Respondent repeats the use of the statements (to show lack of suicidal intent) as if the use of the statements removes the hearsay nature of the statements, but the use is insignificant. Indeed, if a suicidal declaration is admitted in a homicide case to negate an unlawful killing, then any declarations showing a lack of suicidal intent are admissible under the state of mind exception to hearsay. (*People v. Selby* (1926) 198 Cal. 426, 430.) Further, for the statements to be relevant -- to have some tendency to prove that Ms. Hamilton was not suicidal -- the statements had to be admitted for their truth. Making real plans for her future would counter possible suicide ideations and would be relevant. Pretending to make plans, in order to placate her father or distract him from her renewed drug use, would not defeat suicidal possibilities and would be irrelevant. Only if the jury believed the statements made by Ms. Hamilton were true, i.e., that she was planning her future in variety of possible paths -- could the jury conclude that she was not suicidal.

Respondent cites three cases, *People v. Riccardi* (2012) 54 Cal.4th 758, 822-824; *People v. Ortiz* (1995) 38 Cal.App.4th 377, 389-390; *People*

*v. Harris* (2013) 57 Cal.4th 804, 842-844, and quotes their holdings in the abstract, but again fails to provide their factual context or analogous relationship to the facts of the present case. (RB 95.) At any rate, none of these cases advances respondent's arguments that the statements were admissible as non-hearsay. The three cases all turn on the admissibility of a hearsay, i.e., a victim's statements expressing fear of the defendant, an emotional state that, if relevant, may be proved by the victim's declarations. (*People v. Atchley* (1959) 53 Cal.2d 160, 172; *People v. Harris*, *supra*, 57 Cal.4th at pp. 843-844; *People v. Riccardi, supra,* 54 Cal.4th at pp. 822-823; *People v. Ortiz*, *supra*, 38 Cal.App.4th at pp. 385, 390-391.) Before removed by *People v. Ortiz*, *supra*, 38 Cal.App.4th at pp. 387-388, additional limitations on the admission of a victim's declarations were imposed by the prior case of *People v. Hamilton* (1961) 55 Cal.2d 881. The cases respondent cites does not stand for the proposition that Ms. Hamilton's statements here do not constitute hearsay.

Respondent further argues the statements were relevant because the prosecution was required to prove that she had been killed unlawfully but Mr. Dworak did not offer to stipulate to an unlawful killing. (RB 95.) Respondent cites no authority in support of this theory nor does respondent cite to the record to show where Mr. Dworak was ever asked to so stipulate. Respondent ignores defense counsel's emphatic statement that he was not

raising any issue as to suicide. (11 RT 2051.) Further, whether the statements were relevant is not dispositive of whether the statements were hearsay or whether they were admissible under a hearsay exception.

In the opening brief, Mr. Dworak has explained that the statements were not admissible as statements of intention under Evidence Code section 1250 because they were not material, they were not probative of Ms. Hamilton's state of mind at a time when her state of mind was at issue, and they were not statements of a present intention to do a future act but instead statements of generalized intention of hopes or desires in the future. (AOB 184-186.) Because respondent has switched theories of admissibility of the statements on appeal, respondent has not countered any of these arguments or rebutted the authorities cited to support them. The absence of a response should be construed by this Court as an effective concession of the validity of Mr. Dworak's argument. (*People v. Bouzas* (1991) 53 Cal.3d 467, 480; *Westside Center Associates v. Safeway Stores 23, Inc.* (1996) 42 Cal.App.4th 507, 529; C*alifornia School Employees Assn. v. Santee School Dist.* (1982) 129 Cal.App.3d 785, 787.)

Nor does respondent address the arguments and authorities in the opening brief showing that the statements were not admissible under Evidence Code sections 1250 and 1252 because they were made under circumstances indicating a lack of trustworthiness. (See AOB 186-188.)

Respondent does not dispute the facts -- that Ms. Hamilton had returned from court-ordered inpatient drug rehabilitation but had relapsed -- nor does respondent disagree that those facts suggest an ulterior motive to placate her father with acceptable future goals. (See AOB 186-188.) In a footnote, respondent discloses it will not address whether the statements were inadmissible on the basis of untrustworthiness. (RB 95, fn. 37.) Despite that choice, respondent contends that any lack of trustworthiness goes to the weight and not the admissibility of statements of intent. (RB 95, fn. 37.) That is not the law. This Court considers this limitation based on lack of trustworthiness as a condition of admissibility. (AOB 186, citing *People v. Hamilton* (1961) 55 Cal.2d 881, 893, 895, overruled on other grounds in *People v. Wilson* (1969) 1 Cal.3d 431, 440; *People v. Alcalde* (1944) 34 Cal.2d 177, 187.) Respondent's inclusion of the bracketed statement from *People v. Riccardi, supra*, 54 Cal.4th at pp. 821-822 -- that the trustworthiness applies to the statement, not to the testimony of the witness relating the statement -- is confusing. Nowhere in Mr. Dworak's argument has he suggested that Ms. Hamilton's father's testimony was not trustworthy as to the statements, only that Ms. Hamilton's statements were made under circumstances indicating a lack of trustworthiness. (See AOB 186-188.)

Respondent asserts any error was harmless under any standard and cites *Chapman, supra,* 386 U.S. at p. 24 (RB 96) in an apparent concession to Mr. Dworak's assertion that the error is of constitutional dimension. (AOB 190-191.) Respondent's burden of showing this Court beyond a reasonable doubt that the error did not impact the verdict is not met by respondent's two unsupported proclamations -- that the evidence against Mr. Dworak was "strong" and that the challenged testimony was "merely four lines of transcript." (RB 96.) The jury, of course, was not reading a cold transcript, but listening to live testimony and watching real witnesses. Respondent fails to consider the nature of the erroneously admitted evidence, which played into the prosecution's false portrayal of Ms. Hamilton as a "normal, happy kid," not a troubled, relapsed meth addict. The evidence was not compelling, as it demonstrated, at most, that Mr. Dworak had consensual sexual intercourse with Ms. Hamilton but no forensic or other evidence linked him to her death.

The trial court erred when it permitted the introduction of hearsay statements of Ms. Hamilton about her future plans, because her state of mind was not at issue, the plans were too general for the state of mind exception, and there was indicia of untrustworthiness. Respondent has failed to establish that the statements were not hearsay or were circumstantial non-hearsay state of mind. Reversal is required.

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

In the opening brief, pursuant to *People v. Schmeck* (2005) 37 Cal.4th 240, 303, Mr. Dworak contends that the trial court erred when it instructed jurors with CALJIC No. 2.03, telling them they might consider false statements about the charged crimes as proof of his consciousness of guilt, because the instruction is unnecessary, is improperly argumentative, permits the jury to draw irrational inferences against a defendant, and interferes with the jury's role as factfinder, depriving Mr. Dworak of his rights to due process, a fair trial, a trial by jury, equal protection, and a reliable jury determination on guilt and penalty. (AOB 192-202, citing U.S. Const., 6th, 8th, 14th Amends.; *Sandstrom v. Montana* (1979) 442 U.S. 510; *Mullaney v. Wilbur* (1975) 421 U.S. 684; *Francis v. Franklin* (1985) 471 U.S. 307, 314-315; *County Court of Ulster County v. Allen* (1979) 442 U.S. 140, 166; Cal. Const., art. I, §§ 7, 15, 16, 17, 24.)

Respondent does not dispute that the issue is cognizable on appeal. (See AOB 193.)

Respondent notes that this Court has upheld the language of the pattern instruction (RB 96-98), as Mr. Dworak acknowledged in the opening brief that this Court has rejected similar challenges to the pattern jury instruction (AOB 193, fn. 23). Respondent, however, makes no answer to the specific challenges to the instruction made by Mr. Dworak but merely labels the reasons given as not persuasive. (RB 98.)

Respondent does not dispute that the proper standard of review for prejudice is that of an error of constitutional dimension as found in *Chapman, supra,* 386 U.S. at p. 24, compelling reversal unless the government can show the error was harmless beyond a reasonable doubt. (See AOB 201.) Respondent has made no attempt to sustain its burden here and has not rebutted any of the specific facts supporting Mr. Dworak's prejudice argument. (AOB 201-202.)

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

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

In the opening brief, Mr. Dworak asserts that the prosecutor committed prosecutorial misconduct, over defense objection. when she repeatedly disparaged the defense expert (Dr. Bux) as a bought-and-paid-for hired mouthpiece who would say what the defense paid him to say and denigrated defense counsel and Mr. Dworak as buying Dr. Bux's opinion, depriving Mr. Dworak of his state and federal constitutional rights to present a defense, to confront and cross-examine witnesses, to due process and a fair trial, to a reliable guilt and penalty determination, and to be free from cruel and unusual punishment. (AOB 203-220, citing U.S. Const., 5th, 6th, 8th, 14th Amends.; *Gilmore v. Taylor* (1993) 508 U.S. 333, 345; *Beck v. Alabama* (1980) 447 U.S. 625, 637-638; Cal. Const., art. I, §§ 7, 15, 16, 17, 24; *People v. Harris* (1989) 47 Cal.3d 1047, 1083-1084.) Respondent first contends the misconduct[5] claim is forfeited because an insufficient

---

[5] Respondent suggests that the claim here should be characterized as "prosecutorial error" rather than "prosecutorial misconduct." (RB 98, fn.

objection was made below. (RB 98, 113-114.) Second, if the claim is not forfeited, respondent contends the prosecutor did not commit misconduct. (AOB 98, 114-117.) Third, respondent contends the misconduct did not prejudice Mr. Dworak. (RB 117-118.)

First, respondent contends that Mr. Dworak has forfeited his claim of misconduct because he failed to "timely object to the purported improper statements on the ground of prosecutorial error and request an admonition that the jury disregard the impropriety." (RB 113-114.) Contrary to respondent's claim, defense counsel made a sufficient objection to preserve the issue for appeal. The rationale behind the requirement that a defendant make a contemporaneous objection is to bring the given misconduct to the court's attention, to give the court an opportunity to rule on the essence of the matter, and to give the opponent an adequate chance to oppose the matter. (*People v. Partida* (2005) 37 Cal.4th 428, 431, 435; *People v. Scalzi* (1981) 126 Cal.App.3d 901, 907.) Here, the defense objection -- "improper argument" -- during the prosecutor's closing argument was

---

39.) Whatever the legitimacy of doing so in another case may be, Mr. Dworak maintains such re-labeling is not appropriate in this case. He certainly does not concede respondent's passing comment in the footnote that "there is no evidence the prosecutor intentionally or knowingly committed misconduct." (RB 98, fn. 39.)

clearly understood by the court and the prosecutor to refer to prosecutorial misconduct. In the defense new trial motion, defense counsel argued that the prosecutor misconduct during closing argument on the same grounds alleged here. (4 CT 1015-1026.) In its response to the new trial motion, the prosecutor defended her remarks (including the one found objectionable by the court), claimed she was not attacking the integrity of defense counsel, contended that her arguments about Dr. Bux were legitimate, and asserted she did not commit misconduct; she knew exactly what defense counsel was talking about and nowhere did she claim that defense counsel had not properly objected on those grounds or that she was in any way taken by surprise. (4 CT 1036-1040.) In its ruling on the new trial motion, the court stated that it did not find any improper conduct in terms of the prosecutor's alleged attacks on defense counsel. (18 RT 3396.) Like the prosecutor, the court expressed no surprise at or confusion on the issue of prosecutorial misconduct.

Further, because any admonition to the jury in addition to the timely objections would not have cured the harm caused by the prosecution, the matter is reviewable on appeal as an exception to the general rule. (*People v. Price* (1991) 1 Cal.4th 324, 447.) Respondent has noted the possibility of this exception in a footnote but has opted not to argue it because it was not raised in the opening brief. (RB 114, fn. 40.) Seeking an admonition

from the judge on an objection the judge just overruled is the epitome of futility. Here, although the first objection of improper argument was sustained by the court and the jury admonished (when the prosecutor argued "don't be misled by the defendant's lawyers into thinking that Crystal Hamilton is not the victim of a rape and murder"), as defense counsel noted in the new trial motion, "the damage was already done." (4 CT 1022, fn. 16.) No warning to the jury would have cured the harm begun when the prosecutor put into jurors' minds that defense counsel was deceiving them and continued with an intertwined attack on the defense expert and defense counsel.

Respondent and Mr. Dworak agree that California law does permit a prosecutor to argue that a compensated witness may be biased. (RB 115, citing *People v. Arias* (1996) 13 Cal.4th 92, 162; AOB 210, citing *People v. Parson* (2008) 44 Cal.4th 332, 362-363.) Bias, however, suggests partiality, not fabrication of evidence or subornation of false testimony; bias is defined as "[a]n inclination, a propensity, a predisposition, (towards); prejudice. (1 The New Shorter Oxford English Dict. (1993) p. 223, col. 1.) In law, bias has the same meaning -- "[i]nclination; prejudice; predilection." (Black's Law Dict. (9th ed. 2009) p. 183, col. 1.) This Court would no doubt agree both that there is a vast difference between a juror who is biased and one that is bought and paid for and that there is a world

of dissimilarity between a judge who is biased and one who is purchased. Here, the prosecutor sought to have the jury disregard Dr. Bux's testimony not because being a defense-paid expert might affect his impartiality and not because defense counsel might have sought out an expert favorable to the defense but because Dr. Bux was a puppet or pawn who would say whatever the defense paid him to say and that the defense had purchased his opinion.

Respondent and Mr. Dworak also agree that the prosecutor's denigration of defense counsel or personal attacks on his or her integrity are misconduct, as are unsupported implications that defense counsel fabricated a defense or that he or she suborned perjury. (RB 116, citing *People v. Hill* (1998) 17 Cl.4th 800, 832; AOB 210, also citing *People v. Hill;* see also *People v. Sandoval* (1992) 4 Cal.4th 155, 184; *People v. Bain* (1971) 5 Cal.3d 839, 847; *People v. Herring* (1993) 20 Cal.App.4th 1066, 1075.) Respondent argues that "the focus of the prosecutor's comments was on Dr. Bux's potential bias as a paid expert witness, not on counsel's integrity." (RB 116.) To the contrary, the prosecutor did not concentrate her remarks on Dr. Bux's partiality and certainly not on the mere possibility of partiality. Rather, she vehemently declared that he was a mouthpiece -- a person who conveys the opinions of others, not his own -- that the defense had paid him to say what it wanted him to say, that he and his opinion were

bought and paid for by the defense, and that the "defendant" himself had bought a "preposterous opinion about rape." 15 RT 2734-2736, 2748-2749.) These were direct aspersions on defense counsel, on his integrity, and on the Mr. Dworak himself. The intemperate remarks did not suggest Dr. Bux lacked impartiality because he was paid but outright declared that the defense had suborned perjury, dictated his testimony, owned him and his testimony and that Mr. Dworak bought an opinion that suited his needs.

Respondent also categorially announces that it was not reasonably likely the jury interpreted the remarks as an attack on defense counsel's integrity but fails to explain why jurors would not have done so. (RB 117.)

Respondent misses the point about Mr. Dworak's reliance on *People v. McLain* (1988) 46 Cal.3d 97 ("*McLain*") (AOB 212-214) when respondent simplistically finds the case inapplicable because it did not involve "the issue of whether a prosecutor commits misconduct or error by reminding the jury that a defense expert was paid and may be biased." (RB 117.) *McLain* involved a claim of misconduct during closing argument, where the prosecutor argued that the defense had "shopped around, found somebody who was willing to come in and lie, but they didn't get his story straight." (46 Cal.3d at p. 113.) The gist of the *McLain* and the case *sub judice* are the same -- both prosecutors impermissibly argued that the defense had fabricated a defense and suborned a witness's perjury. The

result of the two cases, however, is different -- unlike in *McLain*, the court here did not sustain the defense objection, endorsed the remark by sustaining it, and did not tell the jury that the prosecution was not inferring defense fabrication and that the defense had not countenanced false testimony; unlike in *McLain*, the prosecutor did not immediately and emphatically renounce his suggestion that the defense promoted the false testimony.

The jury here could only have understood the prosecutor's statements as an assertion that Mr. Dworak's defense attorneys -- or Mr. Dworak -- had fabricated a defense and paid Dr. Bux to perjure himself to present it.

As to prejudice, respondent does not dispute that the misconduct should be evaluated under the constitutional standard of *Chapman, supra,* 386 U.S. at p. 24. (See AOB 216-220.) There was no prejudice, respondent maintains, because the instructions told jurors that the attorneys' arguments were not evidence, the jury was told it should evaluate expert witness credibility, and a jury is presumed to follow instructions. (RB 117.) There are several flaws with respondent's arguments. First, respondent goes on to claim that any prejudice was dissipated because defense counsel had the opportunity to clarify he had done nothing wrong, i.e., he had not fabricated evidence or suborned perjury. (RB 117.)

However, if the jury instruction about attorneys insulated the prosecutor's misconduct from impacting the jury, then the instruction would also have prevented defense counsel's assertions from rectifying the misconduct. Second, the fact that the jury was told it was to evaluate Dr. Bux's credibility is insignificant because the problem was not that the prosecutor usurped the jury's role but that the prosecutor suggested improper criteria to use in that appraisal. Third, letting the jury know that evaluation of Dr. Bux's credibility was their job did nothing to dispel the impact of the prosecutor's improper attack on *defense counsel*'s credibility and integrity and, by implication, on Mr. Dworak and his defense. Fourth, respondent's argument overlooks the importance of Dr. Bux's testimony; respondent has failed to rebut the importance of Dr. Bux to Mr. Dworak's defense and the significance of his testimony refuting an exclusively homicidal manner of death and controverting the prosecution's attempt to narrow the timeframes of sperm deposits, injuries, and death. (See AOB 218-219.)

Lastly, respondent continues to maintain that the evidence against Mr. Dworak was "strong." (RB 117.) Although there was direct evidence that Mr. Dworak had sexual intercourse with Ms. Hamilton, there was no direct evidence of rape, no direct or forensic link between Mr. Dworak and Ms. Hamilton's death, and no direct or forensic link establishing Mr. Dworak's presence at the time of her death.

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

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

In the opening brief, Mr. Dworak asserts his constitutional right to a fair trial and details the errors which individually and cumulatively deprived him of a fair trial. (AOB 221-226, citing U.S. Const., 14th Amend.; *Donnelly v. DeChristoforo* (1974) 416 U.S. 637, 764; Cal. Const., art. I, §§ 7, 15; *Hill, supra*, 17 Cal.4th at p. 844; *Cooper v. Fitzharris* (9th Cir. 1978) 586 F.2d 1325, 1333.) Mr. Dworak further contends that the death judgment must also be evaluated in light of the cumulative error. (AOB 225-226, citing *In re Marquez* (1992) 1 Cal.4th 584, 605, 609; *People v. Hayes* (1990) 52 Cal.3d 577, 644; *People v. Brown, supra,* 46 Cal.3d at p. 466; *People v. Hamilton* (1963) 60 Cal.2d 105, 136-137.)

Respondent concedes that error should be examined for prejudice individually and cumulatively. (RB 118, citing *People v. Seaton* (2001) 26 Cal.4th 598, 691-692 [viewing errors "singly or cumulatively"]; *People v. Catlin* (2001) 26 Cal.4th 81, 180 [considering errors "singly or together"].) Respondent, however, alleges the errors, considered individually or cumulatively, "could not have affected the outcome of the trial." (RB 118.)

Respondent does not dispute that the standard of prejudice for cumulative error, where some errors are of constitutional magnitude, is that

the government must show that the combined effect of all the errors was harmless beyond a reasonable doubt. (AOB 221-222, citing *Chapman, supra,* 386 U.S. at p. 24; *United States v. Necoechea* (9th Cir. 1993) 986 F.2d 1273, 1282 and other cases.)

Respondent fails to address the nature of the errors and merely asserts any errors, even viewed cumulatively, would have had no impact because there was "strong uncontested evidence" at trial. (RB 118-119.) Much of the evidence respondent cites as strong uncontested evidence is not directly linked in any way to Mr. Dworak -- e.g., that Ms. Hamilton had premortem injuries, e.g., that she was found naked and without her possessions. (RB 118.) Some of the evidence respondent cites as strong uncontested evidence is generic and applicable to thousands of people in Ventura County and the rest of California -- e.g., that he had the opportunity or lacked an alibi because his wife was out of town, that he was familiar with Mussel Shoals Beach.[6] (RB 118.) Some of the evidence

---

[6] As set forth earlier, respondent tends to exaggerate the evidence as it relates to Mr. Dworak's "familiarity" with Mussel Shoals beach. The only witness who testified about a connection between Mussel Shoals beach and Mr. Dworak testified that he went there with Mr. Dworak twice, a year *after* the offenses at issue here and that any fishing the two did in the area were off the oil rigs or elsewhere, not off the beach, and he never testified to Mr. Dworak's saying he went there frequently. (13 RT 2347-2349, 2350-2358.)

respondent cites as uncontested evidence was not strong but equivocal -- e.g., that respondent denied recognizing the happy family photographs of a much younger Ms. Hamilton. (RB 118.) The only uncontested evidence connected to Mr. Dworak was that he had a prior rape conviction and the only other evidence connected to him was that his semen was found inside Ms. Hamilton, but the timing of the deposit was contested by defense expert, Dr. Bux. (RB 118.) Respondent fails to acknowledge that various errors impacted the very evidence respondent relies on, such as the exclusion of third-party culpability evidence, the exclusion of a more realistic photograph of Ms. Hamilton at another time, and the prosecutor's denigration of Dr. Bux and her belittlement of defense counsel and his integrity.

Respondent fails entirely to address Mr. Dworak's assertion that the death judgment must be reversed because the government cannot show that the errors had no effect on the penalty phase. (AOB 225-226, citing *Hitchcock v. Dugger* (1987) 481 U.S. 393, 399; *Skipper v. South Carolina* (1986) 476 U.S. 1, 8; *Caldwell v. Mississippi* (1985) 472 U.S. 320, 341.)

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

## X. RESPONDENT AND MR. DWORAK AGREE THAT THIS COURT SHOULD CONDUCT A REVIEW OF THE SEALED MATERIAL RELATED TO WITNESS MARGARET ESQUIVEL TO INDEPENDENTLY DETERMINE WHETHER THE TRIAL COURT ERRED IN NOT FINDING ANY DISCOVERABLE MATERIAL.

After reviewing in camera the subpoenaed psychological and psychiatric records of witness Margaret Esquivel's treatment at Vista Del Mar Hospital, the trial court denied the defense request for pretrial discovery of those records under *People v. Hammon* (1997) 15 Cal.4th 1117. (3 CT 645-647, 636-642, 666-667; 5 RT 656, 10 RT 1771.) Later, after Esquivel had testified, defense counsel again sought the records, based on Esquivel's inconsistency, equivocation, and credibility, and the court again denied the request. (11 RT 1947-1948.) In the opening brief, appellant asks this Court to review the records to ascertain whether the court erred in not providing access to the records to the defense, based on Mr. Dworak's rights to due process, compulsory process, and confrontation under the federal Constitution, including the right to present witnesses and evidence in his own defense (U.S. Const., 5th, 6th, 14th Amends.; *Washington v. Texas, supra,* 388 U.S. at pp. 18-19; *Pointer v. Texas* (1965) 380 U.S. 400, 406-407; *Chambers v. Mississippi, supra,* 410 U.S. at p. 302; *Pennsylvania v. Ritchie, supra,* 480 U.S. at p. 56) and to confront his accusers, even where the exercise of such a right may conflict with the

state's competing interest (*Davis v. Alaska* (1974) 415 U.S. 308, 319). (AOB 227-234.) Respondent agrees with Mr. Dworak that this Court should review the records and the lower court's comments to determine whether the lower court erred. (RB 119-126.)

Respondent "expects" that this Court's review would support the lower court's determination (RB 119) and further argues that "it is clear" that the lower court did not abuse its discretion (RB 123). Respondent does not know what the records contain, so such bald assertions are factually and legally unsupported. No rebuttal can be made to such conclusory statements, unsubstantiated by facts or the application of law to the facts, other than a bald denial. Any argument as to the merits of the lower court's decision is premature. Mr. Dworak has asked this Court to permit supplemental briefing if this Court finds any discoverable material (AOB 234), and respondent has similarly asked for further briefing (RB 126).

Nonetheless, Mr. Dworak must address respondent's argument that the lower court's decision should be upheld because Mr. Dworak sought the privileged material for a collateral matter and the evidence had "marginal impeaching value." (RB 124-125.) To make the need for the material seem collateral and appear to have only marginal value for impeachment, respondent mis-represents the record. Respondent erroneously states that "the record reflects that appellant merely wanted the records to impeach

Esquivel's testimony with a collateral matter, i.e., whether her Vicodin "comes in the strength of [5] milligrams and/or 7.5 milligrams," an issue which, in respondent's opinion, had no relevance in the instant case. (RB 124.) The record shows that defense counsel did not seek the material for the prescribed dosage. As set forth in the opening brief, defense counsel sought the records before trial "to determine Esquivel's treatments and medications, the severity of her addiction, her ability to perceive and reflect, and possible statements for impeachment." (AOB 231-232, citing 5 RT 656.) As set forth in respondent's own brief, defense counsel sought the records before trial "to determine whether the severity of Esquivel's addiction would affect her ability to perceive and recollect and whether Esquivel suffered from delusions." (RB 119-120, citing 3 CT 643-647, 666-667; 4 RT 630-631.) The pre-trial discovery of the records had nothing to do with the prescribed dosage, contrary to respondent's claim.

After Esquivel testified, as set forth in the opening brief, defense counsel again asked the court to make another independent determination of whether the court should release any of the records. (RB 233.) Defense counsel did not seek the records solely for the prescribed dosage. As set forth in respondent's own brief, defense counsel indicated that the records were necessary to confirm the prescribed dosage but also stated:

> Moreover, the Court having seen the witness, I believe the court is called upon now to make and independent determination as to whether there is anything discoverable in those materials.
>
> The witness was -- has been inconsistent in her statements. The witness equivocated on the stand. I have some concerns as to the issues of her credibility that I believe that the records could possibly shed light on.
>
> The Court having done an independent inquiry, I would ask the Court to please divulge the information requested.
> RB 121-122, quoting 11 RT 1947.)

Thus, when defense counsel renewed the request for Esquivel's records after she had testified, the request was not limited to the matter of the prescribed dosage, contrary to respondent's arguments.

Finally, in a footnote, respondent indicates that it assumes for purposes of this argument that the constitutional right to confrontation includes the right to discover information necessary to effective cross-examination but does not concede the matter, citing *People v. Abel* (2012) 53 Cal.4th 891, 931. (RB 125, fn. 42.) Mr. Dworak re-asserts his constitutional right to confront his accusers as paramount to the state's policy regarding Esquivel's privileged records. (AOB 227-231.)

Respondent also asserts that and Mr. Dworak had other "abundant evidence" with which to impeach Esquivel's credibility. (RB 125-126.) Respondent points to no such evidence, however, and without knowing what was in the records, no evaluation of this point can be made.

Mr. Dworak requests that this Court independently review the trial court's conclusion by examining the sealed hospitalization records and the court's sealed comments to determine whether the records contain discoverable matter, and respondent agrees this Court should do so. Were this Court to find that the trial court should have released all or some of the records, Mr. Dworak asks to be permitted to further brief this issue, and respondent also so requests.

## ARGUMENTS IN THE PENALTY PHASE

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

In the opening brief, Mr. Dworak set forth a number of attacks on the California capital sentencing scheme which have been raised and rejected in prior cases and follows *People v. Schmeck* (2005) 37 Cal.4th 240, by identifying the claim in the context of the facts, noting that this Court has previously rejected the claim or a similar one, and asking this Court to reconsider its decision. (AOB 235-245.)

First, Mr. Dworak asserts that California's capital punishment scheme (Pen. Code, § 190.2, et seq.), as construed by this Court in *People v. Bacigalupo* (1993) 6 Cal.4th 475-477, and as applied, violates the Eighth Amendment and fails to provide a meaningful and principled way to distinguish the few defendants who are sentenced to death from the vast majority who are not. (AOB 236-237, citing *Furman v. Georgia* (1972) 408 U.S. 238, 313, conc. opn. of White, J.; *People v. Edelbacher* (1989) 47 Cal.3d 983, 1023; *Schmeck, supra*, 37 Cal.4th at p. 304; see also *People v. Stanley* (1995) 10 Cal.4th 764, 842-843; *People v. McKinnon* (2011) 52 Cal.4th 610, 692.) Respondent does not dispute that the facts of the instant case -- murder in the course of rape by a defendant with a prior rape

conviction -- cannot be distinguished from the multitude of rape-murder cases where the defendant never faces the death penalty but instead faces or receives life without the possibility of parole. (See AOB 236-237.) Rather, respondent merely contends that there is no persuasive reason for this Court to reconsider its prior decisions. (RB 127.)

Second, Mr. Dworak asserts that the death penalty does not comport with the Eighth Amendment's prohibition against cruel and unusual punishment because capital punishment no longer comports with contemporary values nor serves a legitimate penological purpose. (AOB 237-238, citing *People v. Moon* (2005) 37 Cal.4th 1, 47-48.) Again, respondent's only answer is that there is no persuasive reason for this Court to reconsider its prior decisions. (AOB 127.)

Third, Mr. Dworak asserts that the death penalty statute is unconstitutional for failing to provide intercase proportionality review and because its imposition is grossly disproportionate to Mr. Dworak's individual culpability. (AOB 238, citing *People v. Stanley* (2006) 39 Cal.4th 913, 966-967.) Respondent's sole response is that there is no persuasive reason for this Court to depart from its prior decisions. (RB 127-128.)

Fourth, Mr. Dworak asserts that Penal Code section 190.3, subdivision (a) permitted the jury to sentence him to death arbitrarily and

capriciously, in violation of the Eighth Amendment because the definition of and instruction regarding "aggravating circumstances" encompass almost all features of every murder. (AOB 239, citing CALJIC No. 8.85; *Schmeck*, *supra*, 37 Cal.4th at pp. 304-305; *People v. Kennedy* (2005) 36 Cal.4th 595, 641.) Respondent's counters that this Court should reject the claim because there is no persuasive reason to reconsider. (RB 128.)

Fifth, Mr. Dworak asserts that, although he could not receive a death sentence under California law (Pen. Code, § 190.3) unless the jury found that the aggravating circumstances outweighed the mitigating circumstances, the jury was not told it had to find beyond a reasonable doubt that the aggravating circumstances outweighed the mitigating circumstances, violating his rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments. (AOB 240-242, citing *Apprendi v. New Jersey* (2000) 530 U.S. 466, 478; *Blakely v. Washington* (2004) 542 U.S. 296, 303-305; *Ring v. Arizona* (2002) 536 U.S. 584, 604; *Cunningham v. California* (2007) 549 U.S. 270, 280-282, 294; but see *Schmeck*, *supra*, 37 Cal.4th at p. 304; *People v. Anderson* (2001) 25 Cal.4th 543, 589, fn. 14; *People v. Griffin* (2004) 33 Cal.4th 536, 595 [no factual findings required]; *People v. Prieto* (2003) 30 Cal.4th 226, 263; *People v. Blair* (2005) 36 Cal.4th 686, 753.) Respondent counters with the assertion there is no

persuasive reason for departing from this Court's precedents. (RB 128-129.)

Sixth, Mr. Dworak asserts that the pattern jury instruction CALJIC No. 8.85, with which the jury was instructed, was constitutionally flawed because it fails to delete inapplicable sentencing factors, fails to delineate between aggravating and mitigating factors, contains vague and ill-defined factors, and limits some mitigating factors with qualifiers like "extreme" and "substantial," violating Mr. Dworak's constitutional rights. (AOB 242-245, citing U.S. Const., 5th, 6th, 8th, 14th Amends.; but see *Schmeck*, *supra*, 37 Cal.4th at pp. 304-305; *People v. Farnam* (2002) 28 Cal.4th 107, 191-192; *People v. Ray* (1996) 13 Cal.4th 313, 358-359; *People v. Perry* (2006) 38 Cal.4th 302, 319.) Respondent again asserts there is no persuasive reason to reconsider prior decisions. (RB 129.)

Lastly, Mr. Dworak asserts that California's death penalty law violates international law, including the International Covenant of Civil and Political Rights. (AOB 245, citing *Schmeck*, *supra*, 37 Cal.4th at p. 305; see also *People v. McKinnon* (2011) 52 Cal.4th 610, 698.) Respondent's final response is that there is no persuasive reason to depart from this Court's precedents. (RB 129.)

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

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

Pursuant to *Schmeck, supra,* 37 Cal.4th 240, in the opening brief, Mr. Dworak maintains that the introduction of victim-impact evidence in the penalty phase violated his statutory and constitutional rights to due process of law, a fair trial, cross-examination and confrontation of adverse witnesses, presentation of evidence in his own defense, and effective assistance of counsel under the Fifth, Sixth, Eighth, and Fourteenth Amendments, requiring reversal. (AOB 246-263, citing U.S. Const., 5th, 6th, 8th, 14th Amends.; *Payne v. Tennessee* (1991) 501 U.S. 808, 824-825; Cal. Const., art. I, §§ 7, 15, 16, 17, 24; Pen. Code, § 190.3; Evid. Code, §§ 210, 352.)

First, Mr. Dworak asserts that victim-impact testimony must be limited to witnesses who were present at the crime, an argument he acknowledges that this this Court has rejected (*People v. Thomas* (2011) 51 Cal.4th 449, 508). (AOB 247, citing *People v. Edwards*, *supra*, 54 Cal.3d at pp. 835-836; *People v. Fierro* (1991) 1 Cal.4th 173, 264 (conc. & dis. opn. of Kennard, J.); *Arave v. Creech* (1993) 507 U.S. 463, 474; *Maynard v. Cartwright* (1988) 486 U.S. 356, 364.)

Second, Mr. Dworak asserts that victim-impact testimony must be limited to characteristics of the victim known to the defendant at the time of the crime, or those that reasonably should be known, an argument this Court has rejected (*People v. Williams* (2013) 56 Cal.4th 165, 197; *People v. Weaver* (2012) 53 Cal.4th 1056, 1082). (AOB 247, 256-258, citing *Payne v. Tennessee*, *supra*, 501 U.S. at pp. 826-827.)

Third, Mr. Dworak asserts that victim-impact testimony must be restricted to testimony relating to the victim of the capital crime, an argument this Court has rejected (*People v. Nelson* (2011) 51 Cal.4th 198, fn. 2, 221; *People v. Demetrulias* (2006) 39 Cal.4th 1, 39). (AOB 247-248, 258-260, citing *Payne v. Tennessee*, *supra*, 501 U.S. at pp. 826-827. *People v. Holloway* (2004) 33 Cal.4th 96, 143; *People v. Melton* (1988) 44 Cal.3d 713, 757; *Murray v. Giarratano* (1989) 492 U.S. 1, 8-9; *Beck v. Alabama* (1990) 447 U.S. 625, 638.)

As to all three contentions, respondent declares there is no persuasive reason to depart from this Court's precedent. (RB 129-131.)

Respondent does not dispute that the proper standard of prejudice as to this matter is that of an error of constitutional dimension as found in *Chapman, supra,* 386 U.S. at p. 24, compelling reversal unless the government can show the error was harmless beyond a reasonable doubt. (See AOB 260.) Respondent, however. has made no attempt to sustain its

burden here and has not rebutted any of the specific facts supporting Mr. Dworak's prejudice argument. (AOB 260-263.)

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

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

Pursuant to *Schmeck, supra,* 37 Cal.4th at p. 303, in the opening brief, Mr. Dworak asserts that the trial court erred when it permitted the prosecutor to ask Mr. Dworak's wife and mother-in-law whether Mr. Dworak had laughed, joked, and been happy between April 2001 when the crimes occurred and July 2003 when he was arrested and permitted the prosecutor to argue, as an aggravating factor, that Mr. Dworak lacked remorse for the crimes, in violation of his right to remain silent and his rights to a fair trial, due process of law, a reliable penalty determination, and his state-created liberty interest regarding statutory aggravating factors. (AOB 264-271, citing U.S. Const., 5th, 6th, 8th, 14th Amends.; *Gardner v. Florida* (1977) 430 U.S. 349, 358; *Estelle v. Smith* (1981) 451 U.S. 454, 468, fn. 11; Cal. Const., art. I, §§ 7, 15, 16, 17, 24; but see *People v. Lewis* (2001) 25 Cal.4th 610, 674 [if prosecutor's argument about lack of remorse does not amount to a direct or indirect comment on the defendant's invocation of right to silence at penalty phase, argument does not violate constitutional principles]; *People v. Bemore* (2000) 22 Cal.4th 809, 855;

*People v. Stansbury* (1993) 4 Cal.4th 1017, 1067-1068, rev'd on another ground *sub nom. Stansbury v. California* (1994) 511 U.S. 318.) Mr. Dworak further asserts that the prosecutor improperly argued that his failure to show remorse during the two years after Ms. Hamilton's death and when police interviewed him, in contravention of this Court's holdings that lack of remorse cannot be used as an aggravating factor. (AOB 270-271, citing *People v. Gonzalez* (1990) 51 Cal.3d 1179, 1231-1232.)

Respondent does not dispute that the issue is cognizable on appeal and appropriately before this Court. Respondent only asks this Court not to reconsider its prior holdings, declaring that there is no persuasive reason to do so. (RB 136.)

As to whether the prosecutor argued lack of remorse as an aggravating factor, respondent and Mr. Dworak agree that lack of remorse is not a statutory aggravating factor and lack of remorse cannot be used as aggravating evidence. (AOB 270-271, citing Pen. Code, § 190.3 and *People v. Gonzalez*, *supra*, 51 Cal.3d at pp. 1231-1232; RB 137, citing *People v. Mendoza* (2000) 24 Cal.4th 130, 187.)

Respondent asserts the facts here align with those of *People v. Bonilla* (2007) 41 Cal.4th 313 (RB 136-137), but respondent is wrong. In *People v. Bonilla*, the prosecutor had specifically argued that the issue of remorse was significant in terms of mitigating evidence, telling the jury:

> •"there has been a total lack of remorse shown by the evidence by either of these two defendants, and before you consider any mitigating evidence, the fact that there has been no remorse shown whatsoever should weigh very heavily against even considering any of that in mitigation" (*id.* at p. 356);
>
> •"before you can get to that point where the mitigation is something you should even consider, they ought to be able to, they ought to express some remorse before they are entitled to any mitigation" (*ibid.*); and
>
> •as to the circumstances of the crime (the victim's body being eaten by animals), "those things you ought to consider and that remorse, that lack of remorse, that lack of remorse before you are, you ever, ever, consider any mitigation. Because what we're talking about is responsibility. Neither of these two men are taking any responsibility, and it doesn't appear they ever will. How could sympathy or mercy be applicable to them?" (*id.* at pp. 356-357.)

As a result, this Court found that "[t]he gist of the prosecutor's argument throughout . . . was that because [the defendant] had shown no remorse, the jury should take his mitigating evidence, which amounted to a plea for mercy from his family, with a grain of salt." (*Id.* at p. 357.) Respondent recites this same statement, verbatim, as the gist of the prosecutor's argument here, contending that, as in *People v. Bonilla*, lack of remorse was relied upon only as a non-mitigating factor, during argument about mitigating factors, and the prosecutor just "once mentioned" Mr.

Dworak's playing cards[7] with his mother-in-law while Ms. Hamilton's family was dealing with her death, during the prosecutor's argument about aggravating factors. (RB 136-137, citing 18 RT 3274-3275.) The prosecutor's argument here, however, was very different from that of the prosecutor in *People v. Bonilla*. First, the prosecutor set up her closing argument with a series of pointed questions to Mr. Dworak's wife and mother-in-law about any signs of remorse, about any behavior at home which evidenced the commission of a horrible crime, about whether he had ever not laughed, not joked, not been happy after the murder in April 2001. (17 RT 3174, 3204-3206.) Second, the prosecutor was then able to argue that Mr. Dworak's mother-in-law had testified about "the happy times she's had with the defendant . . . after he snatched Crystal Hamilton up off the street, beat her up, raped her, drowned her in the Pacific Ocean," always "happy and jovial and helpful," continuing "While Crystal Hamilton's nude battered body is being carried out of the ocean on a backboard and while her family is wracked in grief over what this defendant did to her, the defendant goes back to Oak View to play checkers with his mother-in-law. How charming. What a wonderful person. What a wonderful son-in-law."

---

[7] The testimony, and the argument based on it, was that the two played checkers, not cards. (18 RT 3275.)

(18 RT 3248-3249.) Third, during argument about aggravating factors, the prosecutor returned to the juxtaposition of Mr. Dworak's lack of remorse with what happened to Ms. Hamilton and to her family's reaction, reciting her own version of the rape and murder and concluding with an argument meant to highlight lack of remorse -- "and while Crystal Hamilton is drifting along in the Pacific Ocean here where he body was found the next morning, he goes back to his life. While she's being carried up on the backboard out of the ocean and being cut open at an autopsy to see what happened to her, the defendant goes and picks up his wife from that conference. And while Crystal Hamilton's father is making that awful phone call to her grandparents telling them what had happened to her, the defendant's in Oak View playing checkers with his mother-in-law telling jokes." (18 RT 3274-3275.) After describing Ms. Hamilton as a beautiful flower, the prosecutor returned to lack of remorse as an aggravating factor, arguing, "Two years later when the police talk to him about this crime, when they show him a picture of her, what does he do? *Does he break down sobbing and apologizing for what he's done? For what happened that night?* Does he admit everything that we know he did to her but explain it in some way, give some explanation that in any way mitigates what he did to her? No, no, no, no. He lies. He lies and lies. Turns on the manipulation, turns on the charm, 'cause that's his character. [¶] And

*those are the circumstances of this crime* and that's what you must consider in determining what penalty to now impose on the defendant," concluding with a statement about the tremendous amount of aggravating evidence in the case, explaining that "*the aggravating evidence in this case*" includes "*all the circumstances of this crime.*" (18 RT 3275-3276, emphasis added.)

The record belies respondent's contentions that the prosecutor relied upon lack of remorse only as a non-mitigating factor, speaking of it only during her argument about mitigating factors and that, while the prosecutor did argue lack of remorse during arguments about aggravating factors, it was just one brief mention. (RB 136-137.) The prosecutor did not speak of it only during her mitigating factor comments, the comments during her aggravating factor remarks were not a passing reference, and she used an allusion to her mitigating factor comments. The jury would not have missed the point. The broad storyline about lack of remorse, about a happy, laughing, checker-playing killer, about a contrast between Mr. Dworak's happy-go-lucky post-crime behavior and the terrible fate of Ms. Hamilton and the impact on her family, which began during cross-examination, extended through mitigating factor arguments, and was explicitly urged during aggravating factor arguments.

Respondent string cites a series of this Court's cases with bracketed holdings which, in the abstract, are correct statements of law. (RB 137,

citing *People v. Jurado* (2006) 38 Cal.4th 72, 141; *People v. Pollock* (2004) 32 Cal.4th 1153, 1184-1185; *People v. Lewis, supra,* 25 Cal.4th at p. 673; *People v. Mendoza* (2000) 24 Cal.4th 130, 187.) However, an examination of the holdings in the context of the cases themselves does not support respondent's position. In *People v. Jurado*, *supra*, 38 Cal.4th 72, the prosecutor never suggested that post-crime remorse was an aggravating factor (*id.* at p. 141), in contrast to the prosecutor here who did. In *People v. Pollock*, *supra*, 32 Cal.4th 1153, it was permissible to rely upon lack of remorse as an aggravating factor because the lack of remorse occurred while the defendant was fleeing the scene (*id.* at p. 1184), whereas, here, the prosecutor relied upon post-crime remorse. In *People v. Lewis*, *supra*, 25 Cal.4th 610, the jury would not have understood the prosecutor's remarks as an invitation to consider lack of remorse as an aggravating factor (*id.* at p. 673), unlike the instant case, where the prosecutor used the theme, the same suggestive facts, and referential comparisons. In *People v. Mendoza*, *supra*, 24 Cal.4th 130, the prosecutor never suggested consideration of lack of remorse as a circumstance in aggravation (*id.* at p. 187), while the prosecutor here certainly did. These cases provide no more support for respondent than *People v. Bonilla* does.

As to Mr. Dworak's prejudice argument, respondent does not dispute that the proper standard of review for prejudice is that of an error of

constitutional dimension as found in *Chapman, supra,* 386 U.S. at p. 24, compelling reversal unless the government can show the error was harmless beyond a reasonable doubt. (See AOB 271-272.) Respondent has made no attempt to sustain its burden here and has not rebutted any of the specific facts supporting Mr. Dworak's prejudice argument. (AOB 271-272.)

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

## CONCLUSION

For the reasons given herein and in Appellant's Opening Brief, this Court should reverse the judgment of conviction and penalty of death.

Dated: April 1, 2016

Respectfully submitted,

*/s/ Diane Nichols*

Diane Nichols
Attorney for Defendant and Appellant
DOUGLAS EDWARD DWORAK

## CERTIFICATION OF WORD COUNT

Pursuant to California Rules of Court, rules 8.630(b)(1)(C) and 8.630(b)(2), I hereby certify the number of words in Appellant's Reply Brief is 18,989, based on the calculation of the computer program used to prepare this brief. The applicable word count limit is 47,600.

Dated: April 1, 2016

*/s/ Diane Nichols*

Diane Nichols

## DECLARATION OF SERVICE

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

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

California Appellate Project
ATTN: VALERIE HRICIGA
101 Second Street, 6th Floor
San Francisco CA 94105

Douglas E. Dworak
V-85905 3EB83
CSP -- San Quentin
San Quentin CA 94974

Ventura County Superior Court
FOR DELIVERY TO:
HON. KEVIN J. MCGEE
P.O. Box 6489
Ventura CA 93006

Office of the Attorney General
Attn: Viet H. Nguyen, Deputy
300 South Spring Street
Fifth Floor
Los Angeles CA 90013

Each envelope was then sealed and with the postage thereon fully prepaid deposited in the United States mail by me at Grass Valley, California on **APRIL 1, 2016**.

I declare under penalty of perjury the foregoing is true and correct and this declaration was executed at Grass Valley, California on April 1, 2016.

*/s/ Diane Nichols*

Diane Nichols