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SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF MONTEREY

THE STATE OF CALIFORNIA, Plaintiff, vs. PAUL RUBEN FLORES, Defendant.	Case No. 22CR003712 **NOTICE OF MOTION AND MOTION FOR NEW TRIAL (PC § 1181); MEMORANDUM OF POINTS AND AUTHORITIES** Date: March 10, 2023 Time: 9:00 a.m. Dept.: 4 Hon. Jennifer J. O'Keefe

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TO THE CLERK OF THE ABOVE-ENTITLED COURT, THE DISTRICT ATTORNEY FOR THE COUNTY OF SAN LUIS OBISPO AND DEPUTY DISTRICT ATTORNEY CHRISTOPHER PEUVRELLE:

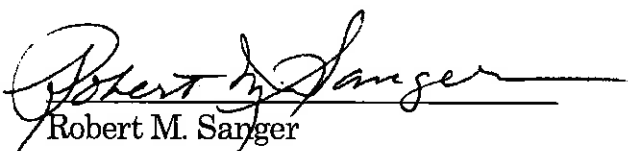
PLEASE TAKE NOTICE THAT Defendant Paul Ruben Flores hereby moves and will move on March 10, 2023 at 9:00 a.m., or as soon thereafter as the matter may be heard in the above-entitled Court, for an order granting a new trial, pursuant to Penal Code section 1181 and non-statutory grounds including the defendant's rights to due process and a fair trial under the Fifth, Sixth and Fourteenth Amendments to the United States Constitution and Article I, sections 7 and 15 of the California Constitution, relevant statutory and case law, and for such other and further relief as the Court may deem just and proper.

This Motion is based on this Notice of Motion, the Memorandum of Points and Authorities, the proceedings of this Court, prior to, during and after trial in this matter and on all pleadings, records, files, transcripts, exhibits, documents and other materials therein, as well as all supplemental materials submitted before, during or subsequent to the hearing hereon and such oral argument as may be presented at the hearing on the motion.

Dated: February 24, 2023

Respectfully submitted,

SANGER DUNKLE LAW, P.C.
Robert M. Sanger
Sarah S. Sanger

By: 
Robert M. Sanger
Attorneys for Defendant
Paul Ruben Flores

MEMORANDUM OF POINTS AND AUTHORITIES

INTRODUCTION

A motion for new trial should be granted in this case based on prosecutorial errors and the admission of junk science as evidence as well as the fact that the fact that there was insufficient evidence to find the defendant guilty. The prosecutorial error constituted prejudicial misconduct before the jury and the evidence admitted, as the urging of the prosecutor, resulted in a verdict that was contrary both to the law and to the evidence, all within the meaning of Penal Code section 1181, subdivisions (5) and (6).

The verdict must also be set aside because it was based on a violation of the defendant's constitutional rights to due process and a fair trial under the Fifth, Sixth and Fourteenth Amendments to the United States Constitution and Article I, sections 7 and 15 of the California Constitution, relevant statutory and case law.

I. PROSECUTORIAL ERROR DURING ARGUMENT

The record in this case is replete with efforts on the part of the prosecution to mislead the jury and manipulate flawed evidence to obtain a conviction. Individually and cumulatively this amounts to "prosecutorial error." As the California Supreme Court said in *People v. Centeno* (2014) 60 Cal.4th 659, 666-667 (*Centeno*), "prosecutorial misconduct" "suggests that a prosecutor must act with a culpable state of mind." However, "bad faith" is not required and, therefore, "prosecutorial error" is a more apt term.

Here, the prosecutor committed error both in individual instances and cumulatively. It is hard to ignore some instances which seem to involve bad faith or, at least, an overzealous attempt to win by manipulating the facts. But as stated in *Centeno*, which echoed prior cases, the court need not find bad faith, nor is a lack of bad faith a defense to prosecutorial error.

A. Improper Misstatement of the Reasonable Doubt Standard

One of the most egregious prosecutorial errors was the blatant mischaracterization of the burden of proof. Over objection, the prosecutor was allowed to argue that the jury had a binary choice, to believe the defense contention that it was a conspiracy or to find the defendant guilty of first degree murder.

The prosecutor led off his closing rebuttal argument with the statement:

> So I want to start by taking you back 24 hours ago, when Counsel first started giving his closing argument. Do you remember what he said? He said the People's entire case is a conspiracy theory. Everyone remember that? This is a conspiracy.
>
> So he would have you believe that it's not just possible but a reasonable interpretation that 50-something witnesses, spanning 26 years, are involved in a grand conspiracy to convict Paul Flores. He would have you believe that six dogs are involved in a grand conspiracy to convict Paul Flores. He would have you believe that even the media is on, with the dogs and with the witnesses, to convict Paul Flores. That's not possible, that's absurd.
>
> Just for that, Counsel has presented you a binary choice. Is this a conspiracy theory? Is that the truth? Or is it true that Paul Flores is guilty of first degree murder. (RT 91.)

First, whether the defense puts on evidence or makes an argument does not diminish the prosecution's burden of proof. The question at the end of the day is whether the people proved the case beyond a reasonable doubt. To make the statement that the prosecutor made is prosecutorial error on its face.

The Court in *Centeno* stated, "It is likewise error to state that 'a defendant has a duty or burden to produce evidence, or a duty or burden to prove his or her innocence.' (Citations omitted.)" (*Centeno*, *supra*, 60 Cal.4th

at p. 673.) Citing federal constitutional authority, the Court said, "The standard of proof is a measure of the jury's level of confidence. It is not sufficient that the jury simply believe that a conclusion is reasonable. It must be convinced that all necessary facts have been proven beyond a reasonable doubt. (*Victor v. Nebraska* (1994) 511 U.S. 1, 5 ["The government must prove beyond a reasonable doubt every element of a charged offense"].) The prosecutor, however, left the jury with the impression that so long as her interpretation of the evidence was reasonable, the People had met their burden." (*Centeno*, *supra*, 60 Cal.4th at p. 673.)

Precisely addressing the issue here, the Court in *Centeno* said, "It is, and remains, the prosecutor's burden to prove the case. If the defense chooses to produce evidence, the jury must, of course, consider it as part of the complete record before it. To that end, the prosecution can surely point out that interpretations proffered by the defense are neither reasonable nor credible. Nevertheless, even if the jury rejects the defense evidence as unreasonable or unbelievable, that conclusion does not relieve or mitigate the prosecutorial burden. The prosecution cannot suggest that deficiencies in the defense case can make up for shortcomings in its own." (*Id.* at p. 673.)

That is precisely what the prosecutor did here. He said that the choice is binary, either believe the (misstated) defense case or vote guilty. Here, as in *Centeno*, the "failure of the prosecutor's reasoning is manifest." (*Id.* at p. 673.) The prosecution cannot suggest that deficiencies in the defense case make up for failure to prove the case on its own.

B. Misstatement of Defense Argument

Second, the prosecutor deliberately misstated the defense argument. To be clear, whether or not the defense argument was misstated, the prosecution's argument was blatant error under *Centeno* as established above. However, while the prosecution's error, standing alone, requires that

the verdict be set aside, it was compounded by a deliberate manipulation and misstatement of the defense argument. Again, this was done in closing rebuttal when the defense could not respond.

The defense did not contend that the prosecution was a conspiracy. To the contrary, the defense argument was that, *by analogy*, the prosecution asked the jurors to "suspend disbelief" and asked them to believe in a theory contrary to facts. The point being, that the prosecution's *argument* was equivalent to a conspiracy theory and that theory was refuted by the actual evidence in the case. At no time did the defense argue that the 50 witnesses and six dogs conspired – the point was that the random evidence did not prove that there was a murder or that the defendant did it.

Therefore, it was patently false that the defense argued that there was actually a conspiracy, let alone that the jury had to believe that the 50 witnesses and six dogs had conspired. This aggravated the prosecutorial error in suggesting that there was a binary choice presented by the defense that the jury accept that there was a conspiracy of all these witnesses and dogs. The defense was to the effect that the prosecutor was asking the jury to ignore the actual evidence and to find the defendant guilty based on a flawed gloss on the actual evidence.

This does not mean that the defense was precluded from arguing, as it did, that the prosecution manipulated junk science, which it did in a breathtaking fashion. Nor does this mean that the defense could not argue, as it did, that the prosecution manipulated evidence, like concealing the fact that Ronda Doe was not a random person from Los Angeles but was someone who was at Cal Poly during the drama and accusations against the defendant.

It also does not mean that the defense could not argue, as it did, that the Podcaster admittedly had been used by law enforcement to disseminate

false information. Nor does it mean that the defense could not argue, as it did, that Podcaster and other third-party actors, such as Dennis Mahon, interfered in the investigation and influenced witnesses. Nor does this mean that the defense could not argue, as it did, that some witnesses, notably Jennifer Hudson, colluded with the Podcaster, Mahon, Justin Goodwin, and others to come up with a story that was impeached by prior statements and physical evidence.

Those arguments were all based on evidence before the jury. The people's evidence was severely flawed. But the fact that those fact-based arguments were made by the defense does not shift the burden of proof. The defense does not have to prove anything. The ultimate question is whether the prosecution's evidence proved the case beyond a reasonable doubt.

There is no "binary choice" between believing the "defense theory" and the prosecution's theory. Even if the prosecution had not misstated the defense theory, the prosecution cannot suggest that the jury's job is to decide between the two theories. As the Supreme Court held, "even if the jury rejects the defense evidence as unreasonable or unbelievable, that conclusion does not relieve or mitigate the prosecutorial burden." (*Centeno*, *supra*, 60 Cal.4th at p. 673.)

C. Prosecution's Violation of Court Order and Blatant Appeal to Passion and Prejudice

The prosecution committed a blatant violation of the Court's instruction regarding the limited purpose of admitting the photograph, Exhibit 458, showing an unnamed woman with a sex toy. It was admitted for the purpose of showing that Paul Flores had such an object in his possession at some point around the time of the search of his apartment and then ONLY for the purpose of potentially corroborating the Doe witness statement that a similar sex toy was used with them. It was expressly NOT admitted for the

purpose of showing other uncharged acts. The prosecutor argued in chambers that there was no need for a limiting instruction to the jury because he was a "professional" and could be trusted not to argue that the photograph should be considered for anything other than the limited purpose.

Nevertheless, in what should have been a rebuttal argument, when defense counsel could no longer be heard, the prosecutor specifically referred to the photograph and said something to the effect of, "Did it look that that woman was having fun?" That is precisely what defense counsel had warned the Court the prosecutor might do and, despite the prosecutor's protestations that he would never do such a thing, he did it. This was not only a violation of the Court's ruling but was extremely prejudicial. Instead of corroborating a minor point of an 1108 witness's testimony, this was inflammatory and designed to evoke passion and prejudice on the part of the jury.

There was no opportunity to address this unlawful use of the photograph during the evidentiary portion of the case. Because of the limited purpose for which the photograph was admitted, it could not be addressed during testimony nor by the defense in closing argument. Defense counsel was powerless to address this highly inflammatory and improper use of the photograph since the prosecutor used it to sandbag the defense in rebuttal.

D. Additional Prosecutorial Error During Closing Argument and Rebuttal Argument

1. The prosecutor in his rebuttal argument attempted to bolster Cindy Arrington's testimony saying that the staining here was different than staining in every other excavation she had seen. However, the prosecutor knew that she specifically testified that she saw similar staining (lamellae) in the excavation around the corner of the house.

2. The prosecutor improperly misstated the forensic conclusions which, as set forth below, were improper to start with. However, the

prosecutor impermissibly stated, "This is one hundred percent beyond any doubt human blood." First, not such opinion was given and second, had it been, it would have been entirely impermissible.

3. The prosecutor argued incorrectly in his rebuttal that there was no hate mail in Ruben Flores' room and that the collection of materials was because he had a perverse obsession with her because she was buried under the deck. Appealing to passion and prejudice, he said Ruben Flores had a trophy room. In fact, there was no evidence that this was a "trophy room" and, in fact, the prosecutor knew that the evidence showed there was a collection of hate mail that Ruben Flores had received.

4. In rebuttal, the prosecutor attempted to disguise his misstatements about David Stone not allowing people "under the deck because Kristin Smart was buried there." The prosecutor knew that David Stone had made it clear that both he and the story about the plumber pertained to the crawl space under the house at the southeast corner and not outside the house under the deck at the southwest corner.

5. In rebuttal, the prosecutor once again argued that the Blue Star reaction in the trailer was evidence of human blood.

II. PROSECUTORIAL ERROR IN OPENING

The prosecutor repeatedly appealed to emotion to obtain a conviction. The Court sustained some objections but not others. The prosecutor also stated that there was evidence when he knew that the evidence did not exist or was false. (*Napue v. Illinois* (1959) 360 U.S. 264 (*Napue*).)

The prosecutor persistently misstated facts in his opening statement, during the examination of witnesses and in closing in order to create a picture not supported by the facts. For instance:

1. The prosecutor repeatedly said that Kristin Smart was face down in the dirt despite the fact that the witnesses had consistently said that she

was lying on her side in the grass.

2. The prosecutor repeatedly said that Paul Flores came out of the darkness where he had a plain view of Kristin Smart lying in the dirt. He manipulated the witness, Tim Davis, into changing his earlier statement and actually marking on an exhibit a place by the side of the house under trees. The prosecutor knew that Davis had said when interviewed shortly after the occurrence that Paul Flores was walking down the street with people from the party across the street. Furthermore, the big trees in front of the house were not there in 1996 and, again, the prosecutor knew that the witnesses had stated Kristin Smart was lying on her side in the grass.

3. The prosecutor stated in his opening statement that Paul Flores was lying through his teeth to the police. This is inappropriate in opening and should have been stricken.

4. The prosecutor represented in opening statement that Karen Hall would say that she asked Paul Flores about the missing girl and that Paul Flores said "nothing" and hung his head in shame. This was argument but also blatantly misrepresented the facts. On direct examination, the prosecutor asked Hall if Paul Flores said anything and she said, "no." However, when the video was played, it was clear that Paul Flores did answer, and the witness admitted that fact. The prosecutor was aware of this tape which had been disclosed to the defense in discovery.

5. The prosecutor relied heavily on the latest version of Jennifer Hudson's testimony and repeated her new statement that Paul Flores used the words "that bitch dick tease" and buried her under "my place in Huasna." The prosecutor tried to invoke the jury's passion and prejudice by repeating this phrase throughout the trial. The prosecutor knew that Hudson was just one more of the people put forth by people like the podcaster, Dennis Mahon and others who provided wild and unreliable information. The prosecutor

knew that Hudson was impeached by her own prior statements and that she had rehearsed her testimony with the podcaster and Justin Goodwin before talking to the police. The prosecutor knew that Detective Cole of the Sheriff's Department could not corroborate any of the statements Hudson made, like so many of the other wild leads that had been rejected. The prosecutor also knew that at great cost and expense, two areas, one as large as the courtroom, were excavated in Huasna based on her "leads" and included false positive dog alerts which resulted in obtaining no evidence other than some animal bones.

6. The prosecutor in his opening statement made an argument to the jury that the deck behind the avocado trees is the perfect place to hide a body and began arguing that predators are creatures of opportunity. Although an objection was sustained, this misconduct has to be considered in the context of all the other appeals to passion and prejudice.

7. In the same portion of the opening statement, the prosecutor again tried to reconcile disparate and unreliable testimony by claiming that the deck was behind the avocado trees. The Angie Carrizel presented bizarre and unreliable testimony that she was directed away from the avocado trees which were not near the deck. Although this is a subtle manipulation, it was typical of the prosecutor's attempt to manipulate the facts to make an argument in his opening statement.

8. The prosecutor knew that David Stone had either recanted or clarified the original statement that he was not allowed under the deck. He had made it clear before trial that he meant he was not allowed in the crawlspace under the house but that he, in fact, was allowed under the deck. Nevertheless, in opening statement the prosecutor deliberately misrepresented Stone's testimony.

9. The prosecutor in opening statement offered the proposition

without any evidence that Ruben Flores, Susan Flores and Mike McConville had removed the remains of Smart in McConville's trailer. Once again, in opening statement the prosecutor improperly argued, "Some fathers would do anything for their sons."

10. In opening statement, the prosecutor stated that the trailer was sprayed with Blue Star which reacts with human blood and it "lit up like a Christmas tree." Having made this dramatic statement, the prosecutor admitted that the lab tests showed that the spot was negative for human blood but it could have come from cleaning agents like bleach.

III. JUNK SCIENCE

We respectfully submit that the prosecution overreached by arguing that the Court should not exercise its gatekeeper function to exclude the proffered testimony as to the bathtub ring, the HemDirect results, the trailer "blood" evidence, the dog behavior, and the box spring cover "uninformative" spot. This Court is not alone in being urged by prosecutors to allow evidence like this despite the requirements of *Daubert v. Merrell Dow Pharmaceuticals, Inc.* (1993) 509 U.S. 579 (*Daubert*), *Kumho Tire Co., Ltd. v. Carmichael* (1999) 526 U.S. 137 (*Kumho Tire*), and *Sargon Enterprises, Inc. v. University of Southern California* (2012) 55 Cal.4th 747 (*Sargon*). (See, e.g., Paul C. Giannelli, "Forensic Science: Daubert's Failure," 68 CASE WESTERN RESERVE LR 869 (2017).) As it played out in the trial, this prosecutorial overreach resulted in dramatic testimony, some of which caused emotional outbursts among the jurors, while ending up not establishing proof based on anything but unfounded, yet impressive sounding, opinion.

As it played out in trial, the prosecutions' claim that the "bathtub ring" and the HemDirect card readings of soil samples indicated the area under the deck was a burial site was junk science; the prosecutions' claim that the stain in the trailer showed a body was transported in the trailer was junk science;

the prosecutor's claim that dog behavior around the dorm room and under the deck was evidence of murder was junk science; the claim of the prosecutor that the spot on the mattress was uninformative but could have included either Paul Flores or Kristin Smart was junk science.

This testimony did not have a valid scientific basis either foundationally or as applied. There was no foundational validity for the use of HemDirect cards with regard to soils or to 25-year-old purported hemoglobin and no establishment of the validity of those results as applied. There was no scientific validity established for dog alert evidence beyond it establishing cause to look for actual evidence and certainly no validity as applied to a dorm room that had been cleaned, furniture removed and crime scene and other officers moving around in it before the search.

Some of it was just a misuse of impressive prosecution experts and data to give the appearance of something probative. For instance, the spot on the floor of the trailer was not blood despite the prosecutor's claim that it lit up like a Christmas tree and did not have any useful DNA results but the prosecution argued that it was evidence of a body being transported. The spot on the mattress cover was uninformative but was offered to bolster speculation that Kristin Smart could have been in Paul Flores' room. The science indicated there was no probative evidence but it was used, or rather mis-used, as "junk science" by the prosecution.

While the Court considered the admissibility of purported expert testimony prior to and during trial, the Court now has to honestly evaluate the effect of this junk science as it played out in front of the jury. There is no question that during this trial the jury was confronted with junk science of the worst kind and it was used by the prosecution in the worst way. Chris Fabricant, in his new book, JUNK SCIENCE AND THE AMERICAN CRIMINAL JUSTICE SYSTEM (2022), summarizes years of study of *Daubert*/gatekeeping

rulings in courts in the United States: "prosecutors virtually always won challenges and virtually never lost challenges to their experts . . ." (Fabricant, JUNK SCIENCE, *supra*, at p. 76.) For whatever reason, junk science was admitted in this case and the prosecution capitalized on it in an emotional appeal to sway jurors by passion and not fact.

Even if this case had not been prosecuted by appealing to emotion over fact, the problem of admitting junk science as expert testimony is exacerbated by the asymmetric knowledge of the subject matter between purported expert and juror. This leads to the jurors making determinations based on secondary indicia such as "demeanor, perhaps, or credentials, or superficial explanatory plausibility." (Jennifer L. Mnookin, *Expert Evidence, Partisanship, and Epistemic Competence*, 73 BROOK. L. REV. 1009, 1012–13 (2008).) The outsized significance attached to purported expert opinions is well documented. (National Academy of Sciences, STRENGTHENING FORENSIC SCIENCE IN THE UNITED STATES: A PATH FORWARD (2009).)

A. Junk Science "Blood Bath" Evidence

The present responsibility before the Court is not to necessarily second guess the Court's prior rulings, but to evaluate the way it played out in front of the jury. The junk science about a bathtub ring, suggesting there was a bloodbath, had no scientific basis. Yet, it caused a juror to have an immediate emotional breakdown. The juror erupted in a crying episode that disrupted the proceedings and caused other jurors to tend to her emotional needs. But there was not a bathtub ring and no bloodbath.

Phillip Hanes and Cindy Arrington had no experience with blood stains or taphonomy. They were commercial archeologists who made their living working with construction companies to certify that the construction sites were not disturbing ancient burial sites. They had found some ancient remains in the past and had done work on some cemetery plots. Their

testimony in a forensic capacity was minimal.

On cross-examination, it turned out that the Hanes/Arrington testimony was mere guesswork. Hanes admitted that his ground penetrating radar was not dispositive and only indicated where someone might want to look in otherwise undisturbed soil. Obviously, after the uncontroverted evidence introduced by the defense, this was not undisturbed soil. In fact, there was major construction to install footings going down to bedrock in the very area identified as having been disturbed which was preceded by the removal of avocado tree root-balls.

Hanes, however, brought the aura of an expert to bolster the contention – which to anyone in the light of day was preposterous – that the area under the undisturbed deck of Ruben Flores' house had been used as a gravesite. He had no scientific basis to conclude that his radar findings meant anything given the general disturbance of the site (and given the fact that under the best of circumstances, it was of limited value). Yet, he was presented as an expert to say that there was a burial size anomaly under the deck.

Unfortunately, the jury heard another self-confident witness, Cindy Arrington, who testified with an air of authority but really had no scientific basis for her opinions. She testified about stratification of the soil but, unlike the dramatic picture of stratification over eons, she had no experience in stratification around the foundation of a building. Even if she had, it was clear that there would have been no stratification in the location she testified to since it had been excavated to bedrock to establish the footings for the building and the deck wall.

Then she made the claim that she could identify a bathtub ring created by blood. This opinion was without a scientific foundation and was based on false information. Nevertheless, this had the dramatic effect of causing an emotional breakdown on the jury and causing the juror to say that this was

the first evidence she saw that indicated the defendant was guilty.

In fact, the line was not tested for blood and no purported blood spots tested positive at all in the upper area where these lamellae were found. It was mere speculation unsupported by evidence. The jury did not know that because the witness was presented as a foremost expert, which she was not. After the damage was done, Arrington had to admit that similar lines (lamellae) were found down around the corner of the house (in Grid 3, excavation 1) which could not have come from someone bleeding in the so-called bloodbath area. Of course, the lamellae in that area were not tested for blood at all. In other words, the horrible, emotionally devastating picture of a literal bloodbath had no factual basis whatsoever and yet it had a demonstrable effect on the jury.

In *Sargon* the California Supreme Court held that the trial judge is the gatekeeper regarding not just the foundations, or lack thereof, for an opinion but "whether the expert opinion is founded on sound logic is not a decision on its persuasiveness. (*Sargon*, *supra*, 55 Cal.4th at pp. 772.) Opinions based on speculation are not admissible. The United States Supreme Court has just forwarded the amendment to Federal Rule of Evidence 702 which makes the *Sargon* rule explicit. The court must determine if the proponent of the expert testimony demonstrated that "it is more likely than not that . . . (d) the expert's opinion reflects a reliable application of the principles and methods of the facts of the case." (Amended F.R.E. § 702 [eff. Dec. 1, 2023 if approved by the U.S. Supreme Court and Congress].)

Arrington, already passing off speculation as scientific knowledge, then went on to speculate about the effect of a "semi-permeable" tarp. First, she admitted she had no scientific or even practical experience with semi-permeable tarps. That should have resulted in exclusion of her testimony on that subject under *Sargon*. Just like the economist there who wanted to

testify as to the market share of dental implant technology – where he had no expertise in that area – Arrington wanted to and did testify about semi-permeable tarps for which she had no expertise. In addition to being barred by *Sargon*, this is acknowledged in the literature as "epistemic trespassing." (See, e.g., Mark Satta, "Epistemic Trespassing and Expert Witness Testimony," 22 JOURNAL OF ETHICS AND SOCIAL PHILOSOPHY 212 (2022).)

Furthermore, Arrington's testimony was not based on fact because there was no evidence whatsoever that a semi-permeable tarp was involved. There were no remnants of such a tarp, there was no description that anyone saw anyone with a semi-permeable tarp. In fact, there was no evidence that such a tarp existed since the idea of a tarp is generally to be waterproof and not allow permeation. *Sargon* simply prohibits this type of junk science, which the prosecutor promoted as expert opinion.

In light of all of this, the testimony of Arrington was merely pedantic. She presented the testimony to the jury as expert opinion, but it amounted to no more than unsupported claims to simply restate the prosecutor's (counterfactual) theory that the missing person's body was buried under the deck and then removed. The literature is replete with the danger of letting a purported expert simply restate a prosecution theory without an adequate scientific foundation. The prosecutor here persuaded the Court to allow him to play the "wise person card" knowing that a lay jury (and sometimes counsel and courts) will take the word of someone portrayed as a "wise man" [person] notwithstanding the fact that there is no scientific basis for that word. This has led to innumerable wrongful convictions. (See, e.g., David L. Faigman, "Anecdotal Forensics, Phrenology, and Other Abject Lessons from the History of Science", 59 HASTINGS L.J. 979, 992 (2007-08); Jules Epstein, "Preferring the 'Wise Man' to Science – The Failure of Courts and Non-Litigation Mechanisms to Demand Validity in Forensic Matching Testimony,"

20 WEIDNER LAW REVIEW, Research Paper 14-15 (2014).)

The fact is that, despite the prosecutor's arguments and Arrington's self-serving declarations, Arrington was a foremost authority in burials, she had no foundation for her opinions. She was simply put forth as a spokesperson for the prosecution theory. To the contrary, Dr. Carter, a real taphonomist, with 20 years of studying actual burials of human remains and working with the Medical Examiner's office on real cases, said that there was no evidence to indicate that a body had been buried at Ruben Flores' house.

B. Invalid HemDirect Test Results

We respectfully submit that the prosecution overreached by arguing that the Court should not exercise its gatekeeper function to exclude the proffered testimony as to HemDirect test results. Here, the science behind the HemDirect cards is not junk science if it were applied in a scientific manner. The fact is that there was no scientific basis to allow testimony regarding the use of the test cards in soils so it is invalid as applied.

The HemDirect evidence was offered to bolster the prosecutor's baseless claim that a body was buried under the deck in Paul Flores' house. The prosecution witness, Angela Butler, finally admitted in trial that NO OTHER LAB IN THE WORLD had used the HemDirect test in soil. She said that her lab had used it three times as a pre-packaged product. They did not do any validation studies or otherwise validate those three individual tests. She admitted that the scientist at the SERATEC laboratories in Germany had confirmed that there were no studies to validate the use of the test in soils. This should not have come before the jury because there was no scientific validity to the use of the test in soils. Period.

In addition, the existing studies showed that when blood was exposed to the elements, HemDirect testing could not detect hemoglobin after more than three to four weeks. The prosecutor argued without any evidence that

immersion in soil for 25 years would have protected the hemoglobin from the elements. That was simply asking the jury to speculate that his unsupported theory might be true. That is not a scientific foundation for this evidence. In fact, Dr. Elizabeth Johnson's uncontested testimony was that hemoglobin would not persist in soil for that long and would not react to a hemoglobin test like HemDirect.

Since there was no testimony that hemoglobin would remain in the soil after any significant length of time, let alone 25 years, the results must have been false positives. The studies on what invalidate the HemDirect tests as applied included literature, acknowledged by Butler, that a ph level below 5 could cause false positives. Butler did not take the ph level of the soil before testing and did not take the ph level of the actual samples tested. Instead, she tried to claim that a ph level of five was like battery acid, which she had to admit was not true.

Whatever it was that activated the thin red line on a few of the many tests, it was not hemoglobin that had been in the soil after 25 years. Therefore, the test, valid for controlled tests but invalid in soils, was invalid as applied. As applied, this was junk science, not even endorsed by the manufacturer, and should have never come before the jury.

As the trial played out, it was clear to a rational observer not being bombarded with unscientific experts, that the use of HemDirect in this setting was junk science. Yet, as has been repeatedly documented, jurors are not rational observers and, especially if persuaded by the prosecution, they replace rational judgment with emotion and use heuristics by appeal to secondary indicia including biases. (See, e.g., Ivan Rajkovic, "Decision Making Under Uncertainty: Psychological Pitfalls Bound to Usage of

Heuristics".)[1]

That is what happened here. The non-scientific use of a test not designed or validated for the purposes here, was used by the prosecution to claim that a few of the many brown specs indicated that human blood was present.

This was made all the worse by the prosecutor's bizarre appeal to emotion when, in closing argument, he claimed that all the Smart family had to bury were these little specs of dirt. That was a blatant appeal to passion, prejudice and emotion and is, in and of itself, reversible. It is all the worse because there was no credible scientific evidence that the specs of dirt were human blood.

C. The Complete Lack of Evidence That There Was Blood in the Trailer

Again, the prosecutor overreached and persuaded the Court that it should allow "evidence" that there was blood in the trailer. The prosecutor "argued" in his opening statement that the spot on the floor of the trailer "lit up like a Christmas tree" when he knew that it was not blood and that whatever was there contained DNA belonging to Mike McConville and NOT to the missing person or anyone else involved in the case. Yet he used this to claim that, somehow, after a search of the premises, Ruben Flores, Susan Flores and Mike McConville had dug up the remains of the missing person after the remains were buried for 25 years and then put them in the trailer where they were still bleeding sufficiently to make a presumptive blood test light up like a Christmas tree. This whole scenario is bizarre and contrary to

[1] As well as the sources cited therein: https://www.academia.edu/5061091/Decision_Making_Under_Uncertatinty_Psychological_Pitfalls_bound_to_Usage_of_Heuristics#:~:text=Decision%20making%20under%20uncertatinty%3A%20psychological%20pitfalls%20bound%20to,of%20thumb%20-%20general%20inference%20rules%20called%20heuristic.

science and logic, but it was his theory, and he promoted it without actual evidence.

Of course, presumptive tests for blood are just that, presumptive. They are not admissible, because they simply are not specific to human blood and may show a false positive based on the presence of other chemical compounds. Presumptive tests only give investigators a reason to do tests that are valid foundationally and as applied. And, here the HemDirect tests for human blood showed that there was no human blood involved in the stain. The prosecution cannot have it both ways and argue that 25-year-old soil samples would give accurate HemDirect results while samples preserved inside a trailer would not. Basically, this was just another application of junk science. The real science shows no human blood and, whatever it was, was related to McConville by DNA and all others were excluded.

This trailer theory, backed by no real scientific evidence, was advanced because the prosecution had to come up with a theory that somehow the body was moved after the first search and before the excavation. It was and is a theory based on speculation not evidence. Worse yet, junk science was used to confuse the jury and to make a claim not supported by actual science.

D. "Dog Alert" Evidence is Junk Science Where Nothing is Found

Among the junk science testimony pushed forward by the prosecution over defense objection was the fact that dogs alerted or otherwise changed their behavior. There is no scientific basis for the admissibility of dog alert evidence as substantive evidence. Rather, it is like a presumptive test that can lead to the location of real evidence or give probable cause to do a further search.

There is no precedent in California law to admit dog behavior in lieu of other substantive evidence located as a result of an alert. In front of the jury,

the probable cause to search is irrelevant, it is the evidence located that is relevant. Thus, in a jury trial, the search warrant affidavit or the CI's testimony establishing probable cause are not admitted before the jury. If the search survived a Penal Code section 1538.5 motion to suppress, the testimony at trial begins with the officers at the front door entering pursuant to a search warrant.

The logic supports the law. There are several types of dogs involved with official, although not necessarily forensic, activities:

1. Search and Rescue Dogs which locate live humans;
2. Scent tracking dogs which find a suspect;
3. Drug detection dogs which locate potential contraband;
4. Firearm and explosives detection dogs which find weapons and explosives;
5. Cadaver dogs which locate deceased humans.

The practical or forensic consequences of value in these cases of the dog behavior are:

1. In a live search the value is in finding a live person;
2. In scent tracking the value is in finding a suspect;
3. In drug detection the value is in locating drugs;
4. In firearms or explosives the value is in finding firearms of explosives;
5. In cadaver the value is in finding a dead body or part thereof.

The dog's behavior is not substantive evidence unless evidence is found.

The alert is not evidence. The alert is learned behavior. The dog is

trained to have that behavior by the trainer. The trainer then interprets the behavior. The dog is not testifying, the trainer is testifying that they recognize behavior that they trained their dog to perform. They are wrong a good percentage of the time. According to Dr. James Ha, even a well-trained dog exhibits behavior that is interpreted incorrectly and is therefore a false positive. None of the trainers had proficiency information but admitted their dogs alerted incorrectly in the past. In addition, there was remarkable evidence in this case itself that there had been false positives all around Cal Poly, in the hills nearby and out in Huasna where they excavated an area the size of the courtroom and only found pig bones.

In this case, the volunteer trainers, who certified each other through their volunteer group CARDA, did not have a scientific background. None of them were able to testify as to what, if any, volatile organic compounds caused the dogs' behavior or what compounds caused them to alert falsely. They were not able to point to any peer reviewed publications. They could not establish that dog alert evidence was generally accepted in the relevant scientific community and, instead, relied only on anecdotal stories within their community of volunteer dog handlers. This does not meet the criteria of *Daubert* and does not meet the criteria of *Kelly/Frye*.[2] Dog alert evidence is simply the most rank form of junk science.

The prosecution analogized the behavior in this case to that of dog scent tracking evidence. There is a jury instruction on that evidence if the trial judge in a given case found it reliable. Tellingly, there is no jury instruction for dog alert evidence because, of course, it is junk science and not generally accepted in the relevant scientific community.

However, even dog scent tracking evidence requires substantial

[2] *People v. Kelly* (1976) 17 Cal.3d 24 (*Kelly*); *Frye v. U.S.* (1923) 293 F. 1013 (*Frye*).

corroborating evidence. In *People v. Jackson* (2016) 1 Cal.5th 269 (*Jackson*), the California Supreme Court set forth the standard for the admissibility of dog-trailing evidence based on the Court of Appeal opinion in *People v. Malgren* (1983) 139 Cal.App.3d 234, 238 (*Malgren*). The Court established four factors that had to be satisfied by the proponent in order for the dog-trailing evidence to be admissible, namely: (1) whether 'the dog's handler was qualified by training and experience to use the dog'; (2) whether 'the dog was adequately trained in tracking humans'; (3) whether 'the dog has been found to be reliable in tracking humans'; (4) whether the dog was 'placed on the track where circumstances indicated the guilty party to have been.'" (*Jackson*, *supra*, 1 Cal.5th at p. 321, quoting *People v. Malgren*, *supra*, 139 Cal.App.3d at p. 238) Furthermore, the dog-trailing evidence must be corroborated by either direct or circumstantial evidence. (*Jackson*, *supra*, 1 Cal.5th at p. 321.)

The Court in *Jackson*, however, emphasized that "dog-trailing procedures and experiments must comply with the laws of physics, chemistry, and biology" and if they do not, courts must exclude the testimony as "unfounded." (*Jackson*, *supra*, 1 Cal.5th at p. 318.) Trailing cases where someone is located and there is corroborating evidence are different than this case where the behavior of the dog is offered as evidence despite the fact that nothing was located and there is no corroboration.

The courts in *People v. Mitchell* (2003) 110 Cal.App.4th 772 (*Mitchell*) and *People v. Willis* (2004) 115 Cal.App.4th 379, both recognized that there is an additional foundation required to establish the foundational validity of "scent discrimination" evidence, which involves a dog "sniffing the scent collected from an object a person is known to have touched and determining whether a second object has been touched by the same individual." (*Mitchell*, *supra*, 110 Cal.App.4th at p. 779.) In *Mitchell*, the court considered

testimony by the dog handlers that a scent "will remain on an object for two to four months after it has been touched." This testimony was based on anecdotes regarding the dog's prior performances, but "no effort was made to present information from any academic or scientific sources, let alone peer review journals, regarding these testimonial assertions." (*Mitchell*, *supra*, 110 Cal.App.4th at p. 791.) The court was also concerned about similarly unsubstantiated claims that "every person has a scent so unique that it provides an accurate basis for scent identification lineup." (*Id.* at p. 791.) The court emphasized that neither of the dog handlers who testified had a background in science and neither were aware of scientific data supporting this claim. (*Id.* at p. 791.) Thus, the *Mitchell* court stated that these "assumptions" must be supported by more than "the mere experiences of one trainer and one dog." (*Id.* at pp. 793-794.)

Similarly, in *Willis*, the Court of Appeal stated that the "prosecution cannot rely solely on anecdotes regarding the dog's capabilities." (*Willis*, *supra*, 115 Cal.App.4th at p. 386) The court in *Willis* summarized the factors considered in *Mitchell* as follows: "a foundation must be laid from academic or scientific sources regarding (a) how long scent remains on an object or at a location; (b) whether every person has a scent that is so unique that it provides an accurate basis for scent identification, such that it can be analogized to human DNA; (c) whether a particular breed of dog is characterized by acute powers of scent and discrimination; and (d) the adequacy of the certification procedures for scent identifications." (*Willis*, *supra*, 115 Cal.App.4th at p. 386.) The court in *Willis* also stated that a dog "showing interest" is "a far cry from tracking a suspect and giving an unambiguous alert that the person has been located." (*Id.* at p. 386.)

1. Dorm Room Search

In this case, the testimony regarding the dog alters at the dorm does

not satisfy these requirements. The foundation found to be insufficient for the admissibility of evidence in *Mitchell* and *Willis* is precisely what is involved here. The dog handlers could not articulate and did not understand the basic principles that they claimed were the basis for their conclusions.

There was no independent evidence presented that corroborated the dog scent evidence. (*Jackson, supra,* 1 Cal.5th at p. 321.) There was no biological evidence found in the dorm room that established a basis for the dogs' alerts. In fact, there was no evidence found in the dorm room at all nor was there any evidence that Smart was in the dorm room at any point. The prosecution merely relied on speculation and innuendo. Thus, the alerts by themselves cannot be accorded evidentiary value under the *Jackson/Malgren* criteria.

Furthermore, as set forth in detail above, the *Jackson/Malgren* criteria apply to trailing cases in which a suspect is located and is found to have some connection to the alleged offense. Even where there is some evidence that could be claimed to be corroboration, it has to be substantial or it is not sufficient. For instance, in *People v. Gonzalez,* the prosecution relied on several pieces of circumstantial evidence to support the dog trailing evidence, including "footprints found intermittently upon the track, along with a shiny dime," and that the officer "saw a heavy-set Mexican male suspect flee in the direction taken by the dog" and that the suspect was "found lying face down in tall grass when found and refused to speak when confronted by the officer." (*People v. Gonzales* (1990) 218 Cal.App.3d 403, 415 (*Gonzalez*).) The court found all of that to be insufficient evidence to corroborate the dog trailing evidence. (*Ibid.*)

2. Search of 710 White Court

The search of 710 White Court on March 15, 2021 began with dog handlers Kristine Black with dog Annie and Karen Atkinson with dog Amiga

searching areas of the property. Black and Atkinson and their dogs are subject to the same analysis as stated above. Neither knew the basic principles that make up the foundation of dog scent evidence nor did they have any academic or scientific support for their contentions.

However, the testimony has the further foundation issue that the dogs did not alert but only showed a "change in behavior." As the Court in *Willis* found in the context of dog trailing evidence, "[s]howing interest in locations is a far cry from tracking a suspect and giving an unambiguous alert that the person has been located." (*Willis*, *supra*, 115 Cal.App.4th at p. 386.) Therefore, the dog behavior has no evidentiary value in determining whether to hold either defendant to answer.

At trial, to the apparent surprise of the prosecutor, the second dog did not show a change in behavior in the area where the alleged bloodbath occurred. Instead, the handler testified that the change in behavior for her dog occurred on the southeast area far away from the area that the prosecutor was questioning her about.

We reserve the right to present additional evidence at the hearing on this motion.

E. Improper Use of "Uninformative" Test Results to Claim that the Defendant and the Missing Person Were Not Excluded

Also prejudicial to a rational evaluation of the actual evidence of guilt, or lack thereof, was the admittedly "uninformative" DNA evidence. Respectfully, as it finally played out in trial, this evidence should not have made it past the Court's gatekeeping function. Evidence has to be probative of something that is relevant to a material issue in the case. This was not but, again, since it was introduced by an expert, it can and will distract the jury from making a rational decision.

Butler testified that the results of the testing of the one spot on the box spring cover could not be deciphered by her. Instead, she relied on algorithms which were preprogrammed into a probabilistic genotyping computer. Even so, the results were "uninformative" which is recognized as an opinion by her company as well as the federal Department of Justice. (See, DEPARTMENT OF JUSTICE UNIFORM LANGUAGE FOR TESTIMONY AND REPORTS FOR FORENSIC AUTOSOMAL DNA EXAMINATIONS USING PROBABILISTIC GENOTYPING SYSTEMS, https://www.justice.gov/media/969526/dl?inline.)

As a matter of scientific principles, uninformative means just that. There is no basis to inform a jury of anything other than that the results were uninformative. Instead, Butler was allowed to testify that the sample was a mixture and that one of the contributors could have been the defendant or could have been the missing person. That is purported information (offered as informative) and the jury, again influenced by expert testimony, is bound to attach undue significance to it. That is why a judge is the gatekeeper. Only informative testimony that also meets rigorous scientific standards should go to the jury.

What is worse yet in this case, is that the results were uninformative but, under no circumstances, could both the defendant and the missing person be a contributor. While this spot was probably not contributed to by the defendant, if it was his bed, it is more likely that it would be him than her (even though not likely that it was either). So, again, this was junk science as applied.

IV. TESTIMONY KNOWN OR REASONABLY SHOULD HAVE BEEN KNOWN TO BE FALSE

A prosecutor has the duty to do justice and not simply try to win. Justice should not be a competitive enterprise. There is a reason that a case

against Paul Flores was not brought for 25 years. There was no evidence of a murder or that Paul Flores committed it. Countless hours and resources, including expensive and elaborate FBI wiretaps and FBI undercover operations, failed to turn up any substantial evidence against the defendant. In another election year, the Sheriff and the prosecutor decided to arrest Paul Flore and his father, Ruben Flores.

In doing so, they followed the playbook laid out in desperation by the FBI itself:

> The prosecution has several formidable obstacles to overcome to successfully prosecute this case including no eyewitnesses to the murder, no body, no physical evidence, and no forensic evidence.
>
> With the existing circumstantial evidence, the prosecution could present a credible case to the jury although the chances for a successful prosecution are at best 50/50. Nonetheless, the prosecution can use the threat of a trial to place the defense in a position where plea agreement is less costly than going to trial, even if the chance of a successful prosecution is 50/50. The prosecution can achieve this goal by careful orchestration of events.

The FBI cynically proposed a means to attempt to extort a confession and the prosecution followed this playbook exactly as set forth in the FBI report:

> [E]nter plea negotiations with the defense. If no agreement can be reached, the prosecution must be prepared to go to trial or, at least, proceed up to the point where the first witness is sworn. The trial can be continued for sufficient time to allow the defense to rethink their position. The defense will have to make a choice to take 3 to 5 years, a full confession, and recovery of Smart's body, or face a possible life sentence in the hands of a jury. If the case goes to trial, the outcome is unknown and very risky for the defense, which substantially increase the chances of a plea . . .

To avoid the appearance of taking this cynical approach, the prosecutor declared that he had "new" evidence that arose since the FBI's assessment that there was no case. That evidence was comprised of the statement of David Stone, the tenant at Ruben Flores' house, Jennifer Hudson and Jamilyn Holman. Yet, when the prosecution made these declarations, they knew that the evidence was false. The prosecutor also knew that he had to try to bolster some of the preexisting weak evidence.

A. David Stone

Although the prosecutor put forth the claim that David Stone said that he was not allowed under the deck at Ruben Flores' house. The prosecutor knew that was not true. Reports in the prosecutor's possession confirmed that the investigating officer had misunderstood and that he meant that he was not allowed under the house itself in the crawl space. He admitted to the officer that he had, in fact, placed fifty-gallon drums under the deck and that the door to that area was not locked.

B. Jennifer Hudson

When the prosecutor put Jennifer Hudson on the stand, he knew he was endorsing perjured and bizarre testimony. Detective Cole ran into many of these unreliable leads which he was fed by people like Dennis Mahon, Chris Lambert, Jim Murphy and Justin Goodwin. All of those people were involved in promoting the Jennifer Hudson story. But Detective Cole investigated and tried to corroborate her stories, which changed over time, but was not able to corroborate any of them. In addition, her stories were contradicted by Justin Goodwin, her friend who was seeking a reward, and by her own prior statements. The end result was a story that was bizarre and made no sense.

The police dug up several locations in Huasna to no avail. Her story

that the defendant was a skateboarder and stayed up with her all night doing meth was contrary to all known facts. She admitted giving her final story, replete with imperfect descriptions of the two trucks that law enforcement had leaked to the Podcaster, only after going to Huasna with the Podcaster and Goodwin and coming up with a new story. Yet, rather than rejecting perjured testimony, the prosecutor put it on as if it were truth. The prosecutor went so far as to change his theory to accommodate Hudson's perjury to say that when she said his house in rural Huasna (where he had no house), the defendant meant his father's house in a non-rural town, many miles away.

But this prosecutor latched on to her testimony and tried to protect the witness from cross-examination when she lied, for instance, about being afraid and not knowing anything about motorcycle gangs. Clearly, she lied given her smug statement in texts to Goodwin about posting "prospects" to surveil the defendant. Yet, the prosecutor tried his best to cover up her perjury rather than acknowledging it as he was required to do.

C. Jamilyn Holman

Then, to further encourage a non-evidentiary and irrational heuristic-based decision by the jury, the prosecution offered the "evidence" of the neighbor Jamilyn Holman who took pictures from her bathroom window across the street. This is the woman who talked to Chris Lambert and the plaintiff's lawyer Murphy and, only a year later, talked to Det. Cole who went to Murphy's office to do his due diligence in tracking down rumors created by the Lambert/Murphy people. Again, he pursued the rumor, got a search warrant and they searched the trailer. There was no evidence the trailer had been moved or had transported anything. He saw a "stain" on the floor of the trailer illuminated by BlueStar but, after further diligence through requested testing, found out that the stain was not blood and that the only DNA was

that of the trailer owner, Mike McConville, and was not from the Flores or Kristin Smart. Yet, the prosecutor chose to present this nonscientific, junk science evidence and argue emotionally that the Flores family had deprived the Smart family from locating their daughter by moving her body "again" over twenty years later.

D. Steve Fleming

Fleming was not interviewed until January of 1999 by the FBI. Fleming did not come forward but was contacted by the FBI. Up until then, Fleming had not told anyone that he had information about Paul Flores. By March 9, 1999, Fleming was aware of all of the publicity relating to the Kristin Smart's disappearance in the form of print, television and billboards. He was still at Cal Poly at that time. At that time, Paul Flores's name "was out there among the rumors."

Fleming was interviewed by the investigators in 2021 and gave a highly biased and obscene statement indicating he really wanted to see Paul Flores convicted. His statement was contrary to known facts, such as the fact that he was not really a close friend of Kristin Smart, that no one had seen him with her, that no one had seen Paul Flores in Muir dorm, and that Paul Flores was never reported to the dorm's residents assistant. Furthermore, the prosecutor knew that there had been a complaint and possible cross-complaint of stalking that related to two other people, not Paul Flores.

E. Tim Davis

The prosecutor repeatedly said that Paul Flores came out of the darkness where he had a plain view of Kristin Smart lying in the dirt. He manipulated the witness, Tim Davis, into changing his earlier statement and actually marking on an exhibit a place by the side of the house under trees. The prosecutor knew that Davis had said when interviewed shortly after the occurrence that Paul Flores was walking down the street with people from

the party across the street. Furthermore, the big trees in front of the house were not there in 1996 and, again, the prosecutor knew that the witnesses had stated Kristin Smart was lying on her side in the grass.

F. Ronda Doe

The prosecutor concealed the fact that Ronda Doe was not a random person from Los Angeles but was someone who was at Cal Poly during the drama and accusations against the defendant. When, on cross-examination, the witness was asked whether she had once lived in San Luis Obispo, she admitted to having lived there. She then disclosed that she was a student at Cal Poly during the time in 1996 that Kristin Smart went missing and remained there for another year and a half. She admitted that she was aware of a billboard and some other publicity.

When she was asked on cross-examination why she had not disclosed this to the prosecutor or the DA's investigator, she stated that she had. Defense counsel asked to inquire where that statement was since it had not been provided in discovery. The prosecutor and the DA's investigator both sat stone-faced and did not respond. Later, the DA's investigator claimed that the tape recorded did not work for the first part of the interview with Doe but that she had told him and he forgot to put it in his report.

The claim that law enforcement tape records happen not to work at a critical point in an interview is a well-worn trope that lacks credibility. The further claim that the investigator forgot to include such an important disclosure by the witness compounds the lack of credibility. The prosecutor simply put on a witness hoping the defense would not discover this important fact and that the witness would appear to be a random 1108 witness who came forward in 2021 only because she saw the publicity regarding the defendant's arrest on Los Angeles television. It was obviously a lot less random when it was discovered she had been on campus and in the

community back in 1996.

However the Court sees this evidence, the concealment from the defense was not only a violation of *Brady v. Maryland* (1963) 373 U.S. 83 but represented an intentional or, at least, grossly negligent failure to be candid with the Court and counsel. As stated in *Centeno*, *supra*, 60 Cal.4th at pp. 666-667, prosecutorial error does not have to be intentional. That is neither required to be shown by the defense nor is it an excuse.

V. ERRONEOUSLY ADMITTED EVIDENCE UNDER EVIDENCE CODE SECTION 1108

Although objected to by the defense, the Court allowed the Evidence Code Section 1108 evidence to be admitted. The Court's ruling was not based on a finding that there was evidence of a sex offense but strictly on the fact that the prosecution alleged it in the Information. Respecting the Court's ruling in that regard, the fact is that there was no evidence of a sex offense at trial. Although the Court ruled it was obligated to admit the 1108 other acts based on the bare pleading, these other acts should have been considered by the jury if there was evidence that there was a murder and that the murder occurred in the course of a sex offense.

The prerequisite showing was never made. There was no evidence of a sex offense at all and no evidence of a murder. However, instructing the jury to disregard the 1108 evidence if there was no such evidence required un-ringing that bell which was an impossible burden for a lay jury. The jury was prejudiced against Mr. Flores even though, when the actual evidence came in, as opposed to just alleging it, there was no basis for the admission of the 1108 evidence at all.

Second, the prosecution appealed to emotion, particularly in both closing arguments. This included a blatant violation of the Court's instruction regarding the limited purpose of admitting the photograph, Exhibit 458,

showing an unnamed woman with a sex toy. It was admitted for the purpose of showing that Mr. Flores had such an object in his possession at some point around the time of the search of his house and then ONLY for the purpose of potential corroboration of the Doe witnesses' statements that a similar sex toy was used with them. It was expressly NOT admitted for the purpose of showing other uncharged acts. Mr. Peuvrelle argued in chambers that there was no need for a limiting instruction to the jury because he was a "professional" and could be trusted not to argue that the photograph should be considered for anything other than the limited purpose.

Nevertheless, in what should have been a rebuttal argument, when defense counsel could no longer be heard, Mr. Peuvrelle, specifically referred to the photograph and said, "Did it look that that woman was having fun?" That is precisely what defense counsel had warned the Court the prosecutor might do and, despite Mr. Peuvrelle's protestations that he would never do such a thing, he did it. This was not only a violation of the Court's ruling but was extremely prejudicial. There was no opportunity to address this unlawful use of the photograph during the evidentiary portion of the case and defense counsel was powerless to address it since the prosecutor used it to sandbag the defense in rebuttal.

Misconduct was assigned and this one instance, standing alone, requires a new trial to be granted. And, for the purposes of this motion, the influence on the jury is significant in determining that a rational trier of fact could not have found the defendant guilty beyond a reasonable doubt. It was this and other appeals to emotion and non-evidentiary matters that made it possible for a lay jury to be overcome by the prejudicial materials and to ignore the absence of evidence regarding the elements of the crime charged.

VI. EVIDENCE PROFFERED BY THE DEFENSE WAS ERRONEOUSLY EXCLUDED

Mr. Flores sought to admit the evidence outlined below regarding Janusz Bajsorowics, Shahn Whitted, Sean Farrell, and the psychological report regarding Kirstin Smart. This evidence was erroneously excluded. Exhibits supporting the following were submitted to the Court as attachments to the Brief in Support of Admission of Defense Evidence filed on September 21, 2022.

A. Janusz Bajsorowics

Steve Fleming was permitted to testify for the prosecution that Kristin Smart made a report to a resident advisor ("RA") that Paul Flores was stalking her. Margarita Campos testified that Kristin Smart complained to her that Janusz Bajsorowics was stalking her. However, it was actually Janusz Bajsorowics who reported Kristin Smart for stalking him. Kristin Smart was given a copy of the report of her staking Bajsorowics. Most importantly, the whole stalking situation had nothing to do with Paul Flores.

The Incident Report submitted by Mr. Bajsorowics states:

> "Kristin Smart has been stalking me for approximately 1 week. She would call 4 to 5 times between the hours of 1 am to 3 am. She left several blank messages on my machine. On April 28, she walked into my room without permission while Eric and myself were sleeping. I opened my eyes to find her looking at me, the when she realized I was awake, she left." (Exhibit A to Motion.)

Chad Brock was interviewed by Private Investigator Ramona Messina and provided the following information:

> "Chad recalled being interviewed by an FBI agent about Kristin Smart and he had related that Kristin had "stalked" him. Chad said that he believes around the winter quarter he had "been stalked" by Kristin Smart. He said that he knew her name and he must have heard it from other students or even from Kristin.

> He never dated or hung out with Kristin. He described Kristin as a very tall, athletic appearing girl. She lived in another dorm on campus and besides him, Kristin also "stalked" his friend Janusz Bajsarowicz, a fellow swimmer. Chad believes there were other guys on campus that Kristin stalked but he did not recall details." (Exhibit B to Motion.)

John Kaufman, Mr. Brock's roommate, was interviewed by Special Agent Robert Sproulls. He indicated that Smart visited their dorm often before she moved to Muir due to her romantic interest in Brock. Additionally the interview report says:

> "He also stated that Smart once entered the room of a man, first name Jannish, who lived on the second floor of the Muir dormitory in the middle of the night, and she stood over him until he awoke; she then ran out of the room." (Exhibit C to Motion.)

Margarita Campos completed a law enforcement questionnaire regarding Smart and said, "she was stalking a male she liked." (Exhibit D to Motion.)

Eric Wyles, Mr. Bajsorwics' roommate, was interviewed by Special Agene Kathleen Ernst. The interview report states:

> "Wyles stated that Smart liked a swimmer, Chad Brock, and would leave him very detailed messages of what she wanted to do with him sexually. Smart then liked Wyles' roommate, Janusz Bajsarowicz, and would leave obscene, indecent messages, almost stalking him. One night she came in the room and hovered over Janusz in his sleep." (Exhibit E to Motion.)

Pamela Andres completed a law enforcement questionnaire and wrote: "Week or two prior – black male manager of the dorm – Chad Brock – Kristin Smart – allegations that masturbating outside her window. Smart retracted her statements" (Exhibit F to Motion.)

Kim Ciancio was interviewed by Special Agent Willeke and Detective Crawford. The report states:

> "She told me that Smart had a boyfriend by the name of Chad Brock. She went on to say that Smart did things to make Chad jealous."
>
> "She told me that there was a person who lived on the second floor of the Muir Dormitory named Yanish. Smart reported to an "R.A." that Yanish was stalking her and standing outside her window." (Exhibit G to Motion.)

Katie Lane was interviewed by Special Agent Steven Donahue. The report states, "although she did not have a steady boyfriend, she called one boy her "stalker" but Lane did not know why she called him this." (Exhibit H to Motion.)

Angelica Rodriguez was interviewed by Special Agent Ferrarer. The report states:

> "After Smart's disappearance on Memorial Day Weekend,1996, Rodriguez, Wyles And Jonish were having a conversation about Smart. Jonish told of how, on an earlier date, late one night, Smart had walked into Jonish's room while he was asleep and stood over him. When Jonish sensed someone was there, he woke up and saw Smart standing next to his bed and staring at him. After Jonish woke up, Smart then ran out of the room. Jonish believed that Smart may have had a "crush" on him. During this same conversation, Wyles and Jonish mentioned a previous conversation with Brooke. Brooke had told them about several occasions wherein Smart had followed Brooke around the Cal Poly campus and appeared to have a "crush" on Brooke." (Exhibit I to Motion.)

B. Shahn Whitted

Shahn Whitted was previously in a dating relationship with Kristin Smart. After they broke up, he took a pair of her shoes which had remained in his possession and lit them on fire in front of her door.

Trista Rinde was interviewed by Detective Stewart. The report states, "she said that Sean had a pair of Kristin's shoes, which he lit on fire in front

of Kristin's room." (Exhibit J to Motion.)

Laura Osborne was interviewed by Detective Stewart. The report states:

> "Ms. Osborne told me that Sean tried to climb an ivy trellis to their balcony one time last October or November of 1995. She said that, after Kristin and Sean broke up, Kristin had left a pair of shoes at his house. She said that Sean also brought the shoes over to their apartment and lit them on fire at their door. She said Sean also left a mean note with the shoes." (Exhibit K to Motion.)

Shahn Whitted was interviewed by Detective Stewart and admitted to lighting the shoes on fire. The report states:

> "I asked Whitted if he ever lit a pair of Kristin's shoes on fire and he said "yes." Whitted told me that Kristin was telling Trista lies about him. He said she had left some old "trashed" shoes at his house. Whitted said he burned them on her front porch and left a note. Whitted said he and Kristin made up after that.
>
> Whitted also told me that Kristin was working at the bookstore on campus. He said she started stalking some guy she met at the store and later got in trouble for waking him up in his room." (Exhibit L to Motion.)

C. Sean Farrell

During the relevant time period, Kristin Smart told several people that she was pregnant and that Sean Farrell was the father of her unborn child. She said that she was going to Planned Parenthood in Santa Barbara to undergo an abortion.

Sean Farrell was interviewed by Detective Stewart. The report states:

> "Farrell said Kristin told him that she was pregnant one time. He said she also told him that he did not have to worry about it anymore. Farrell said she suggested that she was pregnant with his child, because she had not been with anyone in a long time. Farrell said that, based on her conversation with him, she was

referring to the fact that she had an abortion." (Exhibit M to Motion.)

Mr. Farrell was also interviewed by Special Agent Willeke and Detective Crawford:

> "On another occasion, he was leaving the Lighthouse with friends, and he saw Smart hiding behind some bushes watching him.
>
> About a week after the sexual intercourse, Smart told him that she was pregnant. Sometime after that and prior to her disappearance, Smart told him that she had terminated the pregnancy." (Exhibit N to Motion.)

Margarita Campos was interviewed by Investigator Hobson. The report states:

> "Kristin Smart told Margarita she was pregnant about a month ago. She identified the father to Margarita as Sean Farrell, who lives in Sequoia. At the time of the conversation, Kirstin Smart told Margarita she was going to Santa Barbara with a friend in order to get an "abortion pill." (Exhibit O to Motion.)

Jennifer Matsler was interviewed by Investigator Hobson. The report states:

> "Two months ago, Jennifer also heard Kristin Smart talking around the dorm about being pregnant. She was asking how she could get rid of the baby if she was in fact pregnant. According to Jennifer, no one knows for sure whether or not Kristin Smart was actually pregnant. She identified Sean Farrell as the father." (Exhibit P to Motion.)

Peter Odorico was interviewed by Detective Stewart. The report states:

> "Odorico told me that Kristin had been at the concert with another guy. He said she got into an argument with this guy at the concert and came across the street, to use their telephone. Odorico said Kristin started telling them about this guy and, after about 30 minutes, she told them that she was pregnant.

> Odorico said Kristin called and talked with this guy and was visibly upset. He said she made several telephone calls that night." (Exhibit Q to Motion.)

D. Psychological Report

Law enforcement obtained a report of a psychological evaluation conducted by Dr. John Hannon. The report undermined statements by Kristin Smart's family that he was very close with them and that her failure to meet with them or communicate with them meant something was wrong. However, law enforcement failed to conduct follow-up investigation based on the information contained in the report.

The report contains the following excerpts:

> "She stated anger is a big problem for her, but she sees it as more frustration than straight anger. When she feels this way, she wants to explode but does not, and she talked at length about how her mother does not let own anger out and Kristin is fearful of behaving like her mother."
>
> "We talked about sadness, and she told me she gets depressed often and this usually has to do with interactions with her mother. She focused on her mother is chronically after her to do better generally, and in the process, Kristin feels put down and becomes sad. She laughed when I asked her if she ever wished she were not born and described that she often has."
>
> "She told me she is only happy if her mother is happy with her. She could tell me that her mother has a great deal of control over her, in her behavior, her thinking patters and her feeling state." (Exhibit R to Motion.)

The right of an accused to due process of law "is, in essence, the right to a fair opportunity to defend against the State's accusations." (*Chambers v. Mississippi* (1973) 410 U.S. 284, 294.) "[T]he Constitution guarantees criminal defendants a 'meaningful opportunity to present a complete defense.' [Citation.]" (*Crane v. Kentucky* (1986) 476 U.S. 683, 690 [emphasis

added].)

The right of an accused to present a defense is guaranteed not only by the compulsory process clauses of the federal and state constitutions (*Washington v. Texas* (1967) 388 U.S. 14, 19) and their confrontation clauses (*Davis v. Alaska* (1974) 415 U.S. 308, 319; *Smith v. Illinois* (1968) 390 U.S. 129), but also by their due process clauses (*Chambers v. Mississippi* (1973) 410 U.S. 284, 294, 290, fn. 3, 302; *Webb v. Texas* (1972) 409 U.S. 95, 98.)

The United States Supreme Court has held that the Sixth Amendment requires "at a minimum, that criminal defendants have . . . the right to put before a jury evidence that might influence the determination of guilt. [Citations.]" (*Pennsylvania v. Ritchie* (1987) 480 U.S. 39, 56.)

It is the right and responsibility of the defense to suggest, and imply, improper motive, bad faith, mistake, coaching, perjury, incompetence on the part of witnesses, and the plausibility of other hypothesis of how the crime might have occurred, or suspicion of other persons, even if he does not have the evidence to prove it is so, or has been deprived of the evidence. (See *Kyles v. Whitley* (1995) 514 U.S. 419, 441-46 (*Kyles*).) *Kyles*, refers to the right of the defense "to attack not only the probative value of crucial physical evidence and the circumstances in which it was found, but the thoroughness and even the good faith of the investigation, as well." (*Id.* at 445.) This includes examination based on the lack of evidence, or "inconclusiveness" of the evidence, and attenuated issues like the incompetence of the police investigation. (*Id.* at 450-453.) "To tell the jury that it may assess the product of an investigation, but that it may not analyze the quality of the investigation that produced the product, illogically removes from the jury potentially relevant information . . . . [d]etails of the investigatory process potentially affected [the investigator's] credibility and, perhaps more

importantly, the weight to be given to evidence produced by his investigation." (*United States v. Sager* (9th Cir. 2000) 227 F.3d 1138, 1145.)

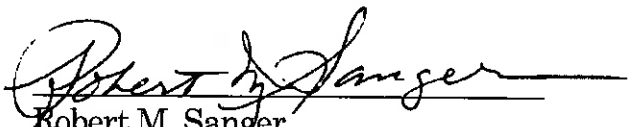
CONCLUSION

For the foregoing reasons, particularly the prosecutorial error and the admission of junk science, the Defendant respectfully requests that the Court grant this motion and order a new trial.

Dated: February 24, 2023

Respectfully submitted,

SANGER DUNKLE LAW, P.C.
Robert M. Sanger
Sarah S. Sanger

By: 
Robert M. Sanger
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PROOF OF SERVICE

I, the undersigned declare:

I am over the age of 18 years and not a party to the within action. I am employed in the County of Santa Barbara. My business address is 222 E. Carrillo St., Ste. 300, Santa Barbara, California, 93101.

On February 24, 2023, I served the foregoing document entitled: **MOTION FOR NEW TRIAL (PC § 1181)** on the interested parties in this action by depositing a true copy thereof as follows:

SEE ATTACHED SERVICE LIST

_X_ **BY ELECTRONIC TRANSMISSION** -I caused the above-referenced document(s) to be transmitted via electronic transmission to the interested parties at the email addresses referenced in the attached service list.

____ **BY U.S. MAIL** - I am readily familiar with the firm's practice for collection of mail and processing of correspondence for mailing with the United States Postal Service. Such correspondence is deposited daily with the United States Postal Service in a sealed envelope with postage thereon fully prepaid and deposited during the ordinary course of business. Service made pursuant to this paragraph, upon motion of a party, shall be presumed invalid if the postal cancellation date or postage meter date on the envelope is more than one day after the date of deposit.

____ **BY HAND** - I caused the document to be hand delivered to the interested parties at the address referenced on the attached service list.

_X_ **STATE** - I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

____ **FEDERAL** - I declare that I am employed in the office of a member of the Bar of this Court at whose direction the service was made.

Executed February 24, 2023, at Santa Barbara, California.

Jake Swanson

Jake Swanson

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