DOUGLAS DALTON (BAR NO. CA 26960)

BART DALTON (BAR NO. CA 187930)

AND

MANATT, PHELPS & PHILLIPS, LLP
CHAD S. HUMMEL (Bar No. CA 139055)
DIANA M. KWOK (Bar No. CA 246366)
11355 West Olympic Boulevard
Los Angeles, CA 90064-1614
Telephone: (310) 312-4000
Facsimile: (310) 312-4224

Attorneys for Defendant
ROMAN RAYMOND POLANSKI

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff,

vs.

ROMAN RAYMOND POLANSKI,

Defendant.

Case No. A 334 139

REQUEST OF DEFENDANT ROMAN POLANSKI UNDER PENAL CODE SECTION 1385 FOR THE COURT, ON ITS OWN MOTION, TO DISMISS THIS PROSECUTION; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF; DECLARATIONS OF DOUGLAS DALTON, CHAD HUMMEL, JEFF BERG, AND DIANA KWOK

Judge: Hon. David S. Wesley
Hearing Date:
Department: 100

TO THE CLERK OF THE ABOVE-TITLED COURT AND TO THE HONORABLE STEVE COOLEY, DISTRICT ATTORNEY, AND DEPUTY DISTRICT ATTORNEY RICHARD DOYLE:

PLEASE TAKE NOTICE that on _____, or as soon thereafter as counsel may be heard, Defendant Roman Polanski's request that the Court dismiss this criminal prosecution pursuant to Penal Code Section 1385 will be heard in Department 100 of this Court at the Clara Shortridge Foltz Criminal Justice Center, 210 West Temple Street, Los Angeles, California 90012.

This Application is made on the grounds that new evidence revealed for the first time this year proves that:

(a) The plea agreement pursuant to which Mr. Polanski entered his guilty plea in 1977 was breached by the Court as the result of prosecutorial misconduct;

(b) Judge Lawrence J. Rittenband (i) engaged in judicial misconduct, including criminal misconduct and (ii) violated Roman Polanski's right to due process under the Fifth and Fourteenth Amendments of the United States Constitution and Article I, sections 7 and 24 of the California Constitution;

(c) The District Attorney's Office in this case, through then-Deputy District Attorney David Wells, (i) engaged in prosecutorial misconduct, including criminal contempt and other criminal conduct and (ii) violated Roman Polanski's right to due process under the Fifth and Fourteenth Amendments of the United States Constitution and Article I, sections 7 and 24 of the California Constitution;

(d) The Los Angeles Superior Court perpetuated Judge Rittenband's misconduct by also (i) engaging in judicial misconduct and (ii) violating Roman Polanski's right to counsel under the Sixth Amendment of the United States Constitution and Article I, sections 15 and 24 of the California Constitution;

(e) The District Attorney's Office in this case, through current Deputy District Attorney Richard Doyle, has also continued to (i) engage in prosecutorial misconduct and (ii) violate Roman Polanski's right to counsel under the Sixth

Amendment of the United States Constitution and Article I, sections 15 and 24 of the California Constitution; and

(f) the victim in this case, Samantha Geimer, has made numerous, repeated requests that this case be dismissed and that Mr. Polanski serve no further term of incarceration, a request that must be considered by this Court under Penal Code Section 1191.1.

This Request is based upon this Notice and Application, the attached Memorandum of Points and Authorities, the Indictment, the entire pleadings and files in this case, the declarations and evidence attached hereto, and upon such further argument and evidence as this Court accepts at the hearing on this Request.

Respectfully submitted,

Dated: December 2, 2008

By: Douglas Dalton
Douglas Dalton (former attorney)

Dated: December 2, 2008

MANATT, PHELPS & PHILLIPS, LLP

By: Chad S. Hummel
Chad S. Hummel
Attorneys for Defendant
ROMAN RAYMOND POLANSKI

Dated: December 2, 2008

CAULEY BOWMAN CARNEY & WILLIAMS, PLLC

By: Bart Dalton
Bart Dalton
Attorneys for Defendant
ROMAN RAYMOND POLANSKI

TABLE OF CONTENTS

		Page
I.	INTRODUCTION	3
II.	THE EVIDENCE OF PROSECUTORIAL AND JUDICIAL MISCONDUCT	4
	A. Mr. Polanski fled to France to avoid an unjustified second sentence of imprisonment	4
	B. New evidence revealed in the documentary film, Roman Polanski: Wanted and Desired, shows that Mr. Polanski's punishment was the result of improper prosecutorial and judicial misconduct	7
	C. Press from all around the world have commented on the injustice that Mr. Polanski has suffered as the result of the judicial and prosecutorial misconduct in this action	10
	D. The Los Angeles Superior Court and the Los Angeles District Attorney's Office have continued to engage in improper prosecutorial and judicial misconduct even after the release of the documentary film	12
III.	THIS COURT IS EMPOWERED BY LAW AND SHOULD DISMISS THE CASE AGAINST MR. POLANSKI	15
	A. Courts have held that dismissal is warranted when those in positions of authority and public trust engage in misconduct which interferes with a defendant's right of due process	15
	B. By engaging in ex parte communications regarding the disposition of Mr. Polanski's case, Deputy District Attorney Wells and Judge Rittenband violated Mr. Polanski's constitutional right of due process and committed misconduct in violation of the rules of attorney and judicial ethics	18
	C. The Los Angeles Superior Court, the Los Angeles District Attorney's Office, and DDA Richard Doyle have perpetuated the pattern of improper ex parte communications and ethical violations that has pervaded this case	22
	D. Dismissal of this action is not precluded by the doctrine of "fugitive" disentitlement	25
	E. Samantha Geimer's expressed wishes support the dismissal of this action	28
IV.	CONCLUSION	30

TABLE OF AUTHORITIES

Page

CASES

Boulas v. Superior Court,
188 Cal. App. 3d 422 (1986) 15, 16, 17

Dear Wing Jung v. United States,
312 F. 2d 73 (9th Cir. 1962) 6

Doe v. Polanski,
222 Cal. App. 3d 1406 (1990) 26

In re Barthold,
158 Cal. App. 4th 1301 (2008) 25

In re Newbern,
168 Cal. App. 2d 472 (1958) 6

In re Scarborough,
76 Cal. App. 2d 648 (1946) 6

Katz v. United States,
920 F. 2d 610 (9th Cir. 1990) 25

Maine v. Moulton,
474 U.S. 159 (1985) 23

Mathews v. Eldridge,
424 U.S. 319 (1976) 18

Molinaro v. New Jersey,
396 U.S. 365 (1970) 25

Morrow v. Superior Court,
30 Cal. App. 4th 1252 (1994) 16, 17, 20

People v. Covarrubias,
18 Cal. App. 4th 639 (1993) 17

People v. Crovedi,
65 Cal. 2d 199 (1966) 23

People v. Greenberger,
58 Cal. App. 4th 298 (1997) 18

People v. Hernandez,
160 Cal. App. 3d 725 (1984) 19

People v. Lopez,
81 Cal. App. 199 (1927) 6

People v. Ritchie,
17 Cal. App. 3d 1098 (1971) 25

People v. Spriggs,
60 Cal. 2d 868 (1964) 18

People v. Stringham,
206 Cal. App. 3d 184 (1988) 28

TABLE OF AUTHORITIES
(continued)

Page

People v. Superior Court (Flores),
214 Cal. App. 3d 127 (1989) 15

People v. Zikorus,
150 Cal. App. 3d 324 (1983) 28

Polanski v. Condé Nast Publications Ltd.,
[2005] UKHL 10 ..... 26, 27

United States v. Van Cauwenberghe,
934 F. 2d 1048 (1991) 25, 26, 27

STATUTES

Cal. Bus. & Prof. Code § 6068 ..... 18, 20
Cal. Pen. Code § 1191.1 ..... 28, 29
Cal. Pen. Code § 1203.03 ..... passim
Cal. Pen. Code § 1203.03(a) 5
Cal. Pen. Code § 1385 ..... 4, 25
Cal. Pen. Code § 1385(a) 15
Cal. Pen. Code § 161.5 4
Cal. Pen. Code § 166(a)(8) 18
Cal. Pen. Code § 182(a)(5) 18

OTHER AUTHORITIES

Cal. Code of Judicial Ethics Canon 2A 24
Cal. Code of Judicial Ethics Canon 3B(7) 20

RULES

Cal. Rules of Prof. Conduct Rule 5-120 24
Cal. Rules of Prof. Conduct Rule 5-300(B) 20

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Defendant Roman Polanski, a French citizen, hereby requests that this Court dismiss this thirty-year-old criminal case in which he has already served what was intended to be his entire sentence.

Extraordinary new evidence has surfaced which proves that Mr. Polanski was and continues to be the victim of repeated, unlawful, and unethical misconduct on the part of both the Los Angeles District Attorney's Office and the Los Angeles Superior Court. Just this year, with the release of the HBO documentary film, ROMAN POLANSKI: WANTED AND DESIRED, which was directed by Marina Zenovich (the "Documentary"), it was publicly revealed that a Los Angeles Deputy District Attorney named David Wells ("DDA Wells"), who was not the line prosecutor in the case, engaged in repeated unethical and unlawful *ex parte* communications with late Superior Court Judge Lawrence Rittenband, in which Wells advised Judge Rittenband regarding the disposition of this case.[1] As the direct result of these improper conversations, Judge Rittenband was illegally influenced by Wells and became unduly concerned about his public reputation regarding his conduct in this case. Driven by personal preoccupations and motivations, Judge Rittenband intentionally violated Mr. Polanski's plea agreement, imposed an illegal sentence upon him, and threatened him with a second term of imprisonment and compelled deportation -- all in clear violation of state and federal law and over the objections of both the defense and the prosecution.

The misconduct, however, did not stop when Judge Rittenband was removed from the case. Indeed, the Los Angeles Superior Court, the Los Angeles District Attorney's Office, and Deputy District Attorney Richard Doyle are now perpetuating the legacy of misconduct that has pervaded the prosecution for so many years. In June 2008, when the documentary was first released, both the Los Angeles Superior Court and the Los Angeles District Attorney's Office

[1] A DVD copy of the Documentary has been submitted for the Court's review as Exhibit A of the Declaration of Chad Hummel. As explained *infra*, there are two different versions of the Documentary which have been released to the public. The copy which has been provided to the Court contains the original "end card," before it was modified at the request of the Los Angeles Superior Court.

MANATT, PHELPS & PHILLIPS, LLP
ATTORNEYS AT LAW
LOS ANGELES

attempted to conceal the fact that Superior Court Judge Larry Paul Fidler wanted the concluding proceedings of this case to be televised to the public. In numerous statements made to HBO and the press, the Los Angeles Superior Court and DDA Doyle misrepresented what actually happened as a purported untrue and defamatory "fabrication" which could "enormously" injure Judge Fidler's reputation. As such, the Los Angeles Superior Court and DDA Doyle disparaged Mr. Polanski's attorney and effectively called him a liar. These statements not only betray the public trust insofar as they are demonstrably false, but also constitute a clear violation of the rules of ethics which govern prosecutors and the courts.

Under these egregious circumstances, this Court should finally end this matter pursuant to Penal Code Section 1385 -- in the interests of justice and the preservation of the integrity of California's judicial system.

II. THE EVIDENCE OF PROSECUTORIAL AND JUDICIAL MISCONDUCT

A. Mr. Polanski fled to France to avoid an unjustified second sentence of imprisonment.

In 1977, Mr. Polanski was convicted, pursuant to a plea bargain, of one count of unlawful intercourse with a minor in violation of Section 161.5 of the Penal Code, an alternative felony/misdemeanor. (Dalton Decl. at ¶ 3). The conviction was by his own plea to a multi-count indictment ("Indictment"). *Id.* The plea agreement provided that the sentence in the case was to be based upon the report submitted by the Probation Department and the argument of counsel. *Id.* Before Mr. Polanski entered his plea, he was read the following condition of the plea agreement:

> MR. GUNSON: Further, do you realize that this Court will not make any decision regarding probation and sentence until after it has read and considered the report and recommendation that will be prepared and submitted to it by the Probation Department? And after it has heard the argument of your attorney and the argument of the prosecutor; --
>
> [MR. POLANSKI]: Yes.

(Dalton Decl., Exh. A, 12:11-17.) It is thus clear that there were two conditions to the plea agreement. First, the Court was required to read and consider the report of the Probation

Department.[2] Second, the Court was required to hear and consider the arguments of counsel before making any decision regarding Mr. Polanski's sentence. But Judge Rittenband failed to heed either of these conditions.

Instead, Judge Rittenband impermissibly sentenced Mr. Polanski to confinement in state prison under the guise of a diagnostic study pursuant to Penal Code Section 1203.03.[3] (Dalton Decl. at ¶ 4). Both the prosecutor and the probation officer objected to the illegality of using the diagnostic study as a form of punishment, especially given the fact that the probation officer had recommended that Mr. Polanski not serve any time in prison, and the minor's family had urged the same. (*Id.* at ¶¶ 5-6). But the Judge persisted, informing all counsel ahead of time that he intended to sentence Mr. Polanski under Section 1203.03 and -- in a blatant abuse of the justice system -- instructing counsel to "stage" a hearing in which they would each present their designated arguments and the Judge would proceed to impose the sentence as if his ruling had not already been decided. (*Id.* at ¶ 6).

When Mr. Polanski was released from maximum-security prison after spending 42 days undergoing the unnecessary and unjustified "diagnostic study," Judge Rittenband did not conclude the case, as promised, but instead called counsel into his Chambers again to tell them that he had received "criticism" about his apparent failure to impose greater punishment on Mr. Polanski. (*Id.* at ¶¶ 12-13). The Judge at that time never specified the source or nature of the "criticism," and no such "criticism" appeared in the probation report or diagnostic study, both of

---

[2] On the last page of Mr. Polanski's Probation Report, it clearly sets forth that the Judge is required to acknowledge that he has "read and considered the foregoing report of the Probation Officer." (Dalton Decl., Exh. B).

[3] Penal Code section 1203.03, subdivision (a) provides:

> In any case in which a defendant is convicted of an offense punishable by imprisonment in the state prison, the court, if it concludes that a just disposition of the case requires such diagnosis and treatment services as can be provided at a diagnostic facility of the Department of Corrections, may order that defendant be placed temporarily in such facility for a period not to exceed 90 days, with the further provision in such order that the Director of the Department of Corrections report to the court his diagnosis and recommendations concerning the defendant within the 90-day period.

which recommended probation for Mr. Polanski.[4] (*Id.* at ¶ 13). However, as a result of this "criticism," Judge Rittenband decided that he was going to sentence Mr. Polanski ***again*** to state prison, and then release him if he would waive his rights and agree in writing to voluntarily deport himself.[5] (*Id.* at ¶ 16). The Judge instructed counsel to argue as though they were unaware of the entire scheme, and he told them not to expose any of this information to the press. (*Id.* at ¶ 17.) Both defense counsel and the prosecutor argued to Judge Rittenband that Mr. Polanski was entitled to a formal hearing to present argument prior to sentencing. *Id.* Judge Rittenband refused to permit any formal argument and stated that a hearing would not be held. (*Id.* at ¶ 16.) Further, the Judge indicated that if counsel went forward with a hearing request, it would only be permitted in the form of a motion for new trial ***after*** Mr. Polanski had already been sentenced to prison. *Id.* Notably, this instruction was also accompanied by a threat that any further argument might result in even harsher punishment for Mr. Polanski. *Id.*

---

[4] Notably, the file for this case has been "lost" by the Los Angeles Superior Court. (Kwok Decl. at ¶ 2).

[5] California has long prohibited sentences of banishment. In *In re Newbern*, 168 Cal. App. 2d 472 (1958), the trial judge imposed a sentence whereby defendant would serve 180 days in the city jail unless he left the state. Drawing on past cases that disallowed such practices, the court reinforced that a judgment of banishment from the state or country is void against public policy. *Id.* at 475; *see also In re Scarborough*, 76 Cal. App. 2d 648 (1946); *People v. Lopez*, 81 Cal. App. 199 (1927). The Ninth Circuit also prohibits these types of sentences, finding that they violate a defendant's constitutional rights. For example, in *Dear Wing Jung v. United States*, 312 F. 2d 73 (9th Cir. 1962), the trial court imposed a sentence of imprisonment on defendant, then suspended sentencing for six months on the condition that defendant depart from the United States. Thus, the defendant faced the choice of leaving the United States or being imprisoned. The Ninth Circuit equated this condition to banishment, and ruled that such a condition was "cruel and unusual" and a denial of due process. *Id.* at 76.

Here, Mr. Polanski was specifically advised at the time of his plea that only the federal government could decide whether he would be deported:

> MR. GUNSON: "Do you understand that the decision to deport and exclude you from the United States is made by the federal government? That is, the Immigration and Naturalization Service?
> [MR. POLANSKI]: Yes.

(Dalton Decl., Exh. A, 12:27-13:2.) Nevertheless, Judge Rittenband unlawfully attempted to abuse his position by proposing that Mr. Polanski be sentenced to prison again until he agreed in writing to voluntarily deport himself. Judge Rittenband had no authority even to threaten that Mr. Polanski be deported. That decision was solely the province of the federal government. As such, Judge Rittenband's condition that Mr. Polanski agree to voluntarily deport himself was an impermissible attempt to coerce Mr. Polanski into accepting an illegal sentence.

When Mr. Polanski was informed that the Judge intended to sentence him to imprisonment a ***second time*** and that he would be required to ***voluntarily deport himself*** thereafter, he left the United States. (*Id.* at ¶ 18). The prosecutor in the case, Mr. Gunson, later commented in his interview for the Documentary, "I'm not surprised that he left under those circumstances." (Hummel Decl., Exh. B, p. 58). Samantha Geimer (the minor) also said, "[Polanski] did the right thing under the circumstances. He wasn't getting a fair shake." (Hummel Decl., Exh. C). In the thirty years since Mr. Polanski left the United States, he has not returned. (Dalton Decl. at ¶ 18).

B. <u>New evidence revealed in the documentary film, ROMAN POLANSKI: WANTED AND DESIRED, shows that Mr. Polanski's punishment was the result of improper prosecutorial and judicial misconduct.</u>

This year, a documentary film was released entitled ROMAN POLANSKI: WANTED AND DESIRED. The Documentary contains indisputable evidence of an ongoing scheme of continuous and pervasive judicial and prosecutorial misconduct in this case.

The Documentary contains excerpts of a candid and remarkable interview of Deputy District Attorney David Wells, confessing for the first time in thirty years that he actually advised Judge Rittenband on how to handle this case. In the interview, DDA Wells openly admits that he had a very close personal relationship with Judge Rittenband:

> Yeah. I knew Rittenband because I had been with him for a long time and I used to kid with him and stuff. And as -- you know, he didn't have a lot of close friends in the legal profession . . . And I used to kid him a lot. He took me to Hillcrest [Country Club] for lunch every once in a while. And in that respect I knew him and I could talk to him.
>
> [. . .]
>
> Yeah, he's . . . [R]emember I was younger, too, at the time. And Rittenband said, "Well, I got two girlfriends." I said, "Judge Rittenband," I said, "What would you at your age do with a girlfriend?" And he said, "I'll do the same thing that you did, probably better!" [LAUGHS] And I said, "Well, tell me about it." He said, "Well, I got one that cooks and one that does the other thing." So -- and that was it. He said, "I don't want to . . . talk any more about it."

(Hummel Decl., Exh. D, Transcript of Wells Interview, 32:21-33:1, 33:14-25).

Additionally, because DDA Wells was the calendar deputy assigned to Judge Rittenband's courtroom at the time, he admits that he was "privy" to almost everything that went on in this

case -- apparently even the communications that took place behind closed doors between the prosecutor in the case, Mr. Roger Gunson, defense counsel, Mr. Doug Dalton, and Judge Rittenband:

> I can only talk about my involvement in the case [against Roman Polanski]. And, um, I was privy to almost everything that went on in that case being assigned to that court as the calendar deputy. I was in the court every day.

(Hummel Decl., Exh. D, 22:11-14). According to Wells, his relationship with Judge Rittenband was such that the Judge "counted on" him to provide him with advice on criminal law issues:

> So Rittenband [would] ask me questions about the thing because he counted on me, or whoever was his favorite D.A. at the time, to advise him on what the -- what the law was, criminal law. He was very good at civil law, but criminally, he left that to his D.A.s to -- to do. And so in that respect, I can -- I can comment on a -- some -- a few things, yeah.

(*Id.* at 22:15-21).

Specifically, with regard to Judge Rittenband's conduct of this case, DDA Wells made it very clear that he felt that Mr. Polanski should be punished with a term of imprisonment:

> I know I was very miffed the way it turned out because my feeling was [Polanski] belonged in state prison. And I was pretty vocal about that, and eventually I was told by the office, "it's not your case anymore."

(*Id.* at 23:11-16). Because DDA Wells was not assigned to the case, however, he made his feelings known to Judge Rittenband during the course of improper *ex parte* communications, in which he unduly influenced the Judge by persuading him to engage in unlawful and unethical conduct.

The Documentary reveals for the first time that Judge Rittenband's decision to sentence Mr. Polanski to an unnecessary and unlawful diagnostic study under Penal Code Section 1203.03 was the direct result of an improper *ex parte* communication between DDA Wells and Judge Rittenband -- a meeting of which neither Mr. Gunson nor Mr. Dalton were aware. DDA Wells openly admits that he advised Judge Rittenband to impose an unlawful sentence to deprive Mr. Polanski of the opportunity to pursue an appeal:

> Rittenband had asked me about it. And I said, "Judge," I said, "you know you're going to give this guy probation."
> He said, "No, no. I wanna send him to jail."

> I said, "you'll never do it because the first thing that's gonna happen when you sentence him, he's going to appeal it. And it's gonna go all the way up to the state Supreme Court -- he has the money -- and he'll take it to the U.S. Supreme Court, if he thinks he can."
>
> And he's all, "well, what am I gonna do" -- or "what should I do?"
>
> And I said, "you know what you should do is send him up for a 90-day observation because that's probably more time you're gonna give him anyway because you're a softy on sentencing."
>
> And he says, "Well, what will that do?"
>
> And I said, "It's not a final sentence. You can't appeal it. He has to go."
>
> **"And so that's what Rittenband did."**

(*Id.* at 23:17-24:9, emphasis added).

In addition, the Documentary shows that DDA Wells took advantage of his relationship with Judge Rittenband to evoke volatile and hostile reactions from him regarding Mr. Polanski. After Judge Rittenband had already ruled that Mr. Polanski's "diagnostic study" would be stayed in light of Mr. Polanski's existing commitment to a film project, DDA Wells purposefully went into Judge Rittenband's Chambers to show him a photograph of Mr. Polanski at the Oktoberfest event in Germany, in a transparent attempt to inflame the Judge. DDA Wells characterized Mr. Polanski's attendance at the Oktoberfest event as a personal affront to the Judge himself, thereby causing Judge Rittenband to retract his earlier agreement further to stay the case, and provoking him to develop a vindictive attitude toward Mr. Polanski that persisted throughout the remainder of the case:

> And in the meantime, [Polanski] goes to Oktoberfest. And I got a picture -- I don't know where I got it. Somebody sent it to me -- of him at Oktoberfest with his arms around a couple of -- of juveniles.
>
> And so I took the picture into Judge Rittenband. I said, "Judge," I said, "look here. He's flipping you off."
>
> He said, "what, what ?" This is the way he talked. He's very quick like that and sharp. And he had a real bark to him, Rittenband, but he's a softy. "He's not getting' away with that."
>
> INTERVIEWER: When -- did you really take that picture from Germany into his courtroom --
>
> WELLS: Oh, yeah.

INTERVIEWER – And say –

WELLS: And took it into chambers.

INTERVIEWER: It was the first time he saw it?

WELLS: Yeah.

INTERVIEWER: Why did you do that?

WELLS: Oh, you know, I was the calendar deputy and, you know, this was part of the case, I mean, you know, it's --

INTERVIEWER: Can you say that in a complete sentence?

WELLS: Yeah. Why did I take a picture of Roman Polanski --?

INTERVIEWER: Instead of saying "Why," can you say "I took the picture."

WELLS: Okay. The picture that -- of Roman Polanski that was taken at Oktoberfest with these young girls, I took it to Rittenband because I figured it was something he ought to see. And what I told him was, I said, "you know, judge, you've made so many mistakes, I think, in this case. Look. He's giving you the finger. He's flipping you off. And here's the way he's doing it." And I said, "haven't you had enough of this?" And then, of course, then he exploded, and what happened, happened.

(*Id.* at 24:25-25:7, 34:13-35:13). In the Documentary, the photograph is shown full-screen and clearly shows that the females are mature women and Mr. Polanski does not have his arms around them. Indeed, Mr. Polanski had only gone to Germany to obtain financing for the film project on which he was working. (Dalton Decl. at ¶ 10).

Thus, as the result of DDA Wells' illegal *ex parte* communications, Mr. Polanski has been subject to a punishment that has spanned the course of over thirty years. Not only has he served an unlawful sentence of 42 days in a maximum security prison, but he has been unable to return to the United States since 1978. This restriction on Mr. Polanski's travels has not only deprived him of his basic freedoms, but has also deprived him of numerous opportunities to work on film projects outside of France.[6]

[6] Notably, the District Attorney's Office has made no apparent effort to extradite Mr. Polanski, but has nevertheless kept the threat of such extradition looming over Mr. Polanski's life for the last thirty years.

C. Press from all around the world have commented on the injustice that Mr. Polanski has suffered as the result of the judicial and prosecutorial misconduct in this action.

The new and dramatic revelations in the Documentary of the manifest injustice perpetrated by Judge Rittenband and DDA Wells have caused tremendous reaction from the world press. The Documentary has been shown not only in the United States, but also in France, Greece, Israel, the Middle East, Portugal, Turkey, Indonesia, Spain, Italy, Croatia, and the United Kingdom and has been translated into ten different languages. Upon seeing the Documentary, reporters have almost uniformly condemned the unfairness and lack of justice which pervaded the proceedings against Mr. Polanski:

- "[ROMAN POLANSKI: WANTED AND DESIRED] shows how corrupt our judicial system can become when dealing with celebrity."

  – New York Observer, January 22, 2008

- "The lawyers fill in the appalling details of what was effectively a second crime, and one largely perpetrated by a celebrity-dazzled judge. The crime left two victims, Mr. Polanski, who was denied a fair trial, and Ms. Geimer, who was denied justice. As she wrote, 'sometimes I feel like we both got a life sentence."

  – Manohla Dargas , New York Times, "The Judge, the Bench and the Vagaries of Justice," March 31, 2008, also published in Fr. Lauderdale Sun-Sentinel, June 9, 2008

- "An embarrassing miscarriage of justice."

  – ScreenDaily.com, January 22, 2008

- " . . . one particular villain is responsible for [Mr. Polanski's] ongoing legal limbo: Judge Laurence J. Rittenband, dead for 15 years, whose vanity led him to turn Polanski's trial into a publicity plaything."

  – Ned Martel, Men's Vogue, June/July 2008

- " . . . the presiding judge . . . made unethical moves behind the scenes and pursued a personal mission to imprison Mr. Polanski, triggering the director's flight . . . '[Polanski] was supposed to be treated fairly in court and he clearly was not,' Lawrence Silver, the victim's lawyer, says in the Documentary."

  – John Jurgensen, The Wall Street Journal, June 1, 2008

- "Laurence Rittenband . . . had the stern countenance of American authority. But he lusted after the celebrity cases that came through the Santa Monica courthouse and ordered his bailiff to maintain a scrapbook of his press clippings. He held press conferences in his chambers and ran his courtroom like a movie set, sometimes calling the opposing lawyers into private session in order to stage-manage proceedings and tell them what to say."

– Peter Ames Carlin, The Oregonian, June 9, 2008

- "[The] film is startling in what it reveals about the US legal system, in which the execution of justice can apparently fall prey to the vagaries of a judge susceptible to media pressure. Rittenband was eventually removed from the Polanski case, but was heard declaring, when he stepped down from the bench in 1989, that he would get Polanski yet."

– Jonathan Romney, The Independent (United Kingdom), October 5, 2008

- "Rittenband was star-struck, an inveterate womanizer, and eager to make a name for himself with the Polanski case. . . . No one in California had served jail time for a comparable offense in the previous two years."

– The Daily Telegraph (United Kingdom), October 9, 2008

D. <u>The Los Angeles Superior Court and the Los Angeles District Attorney's Office have continued to engage in improper prosecutorial and judicial misconduct even after the release of the documentary film.</u>

Notwithstanding the public outrage in response to the Documentary, the Los Angeles Superior Court and the Los Angeles District Attorney's Office have continued the cycle of misconduct in this case by making material misrepresentations to the press regarding the 1997 meetings between Judge Fidler, the prosecutor, and the defense counsel in this case.

In 1997, Mr. Dalton requested that the original line prosecutor in this case, DDA Roger Gunson, appear in Department 100, the presiding criminal department, so the case could be assigned to a new judge for potential resolution. (Dalton Decl. at ¶ 22). The case was assigned to Superior Court Judge Fidler. *Id.* During the course of Mr. Gunson and Mr. Dalton's conversations with Judge Fidler in Chambers, there was no court reporter present. *Id.* In fact, ***no one else was present at those meetings.*** When Mr. Gunson and Mr. Dalton related the background of the case to Judge Fidler, the Judge spoke negatively of Judge Rittenband's actions, acknowledging that Judge Rittenband should have honored his promise to release Mr. Polanski after he had already served a 42-day prison sentence. (Dalton Decl. at ¶ 25). Consequently, Judge Fidler agreed that if Mr. Polanski returned to the United States, he would allow Mr. Polanski to be booked and immediately released on bail, require Mr. Polanski to meet with the Probation Department, order a probation report, conduct a hearing, and then terminate probation without Mr. Polanski having to serve any additional time in custody. (Dalton Decl. at ¶ 26).

However, because of the widespread interest in the case and the lack of public awareness regarding what had occurred in 1978, Judge Fidler expressed that the sentencing proceedings should be televised to the public for the benefit of public understanding. (*Id.* at ¶ 27).

Mr. Dalton discussed this proposal with Mr. Polanski and his agent, ICM's Jeff Berg. (*Id.* at ¶ 28, Berg Decl. at ¶ 2). Shortly thereafter, however, the possible resolution of the case was leaked to the press, and Mr. Dalton was quickly inundated with calls from the media, asking what Mr. Polanski would do. *Id.* Given these developments in the press, it became an increasingly likely possibility that a televised hearing would result in a media frenzy.[7] Given that Mr. Polanski had already been in a stable marriage for several years and had two young children that he wanted to protect from yet another media circus, he chose not to accept Judge Fidler's offer and instead remained in France. *Id.*

When the Documentary was first released in 2008, it concluded with an "end card" stating that all parties had agreed that Mr. Polanski could return to the United States but on the condition that the proceedings be televised. The card read:

> That same year, Doug Dalton and Roger Gunson presented the case to another Los Angeles Superior Court Judge.
>
> The Judge agreed that if Polanski returned to the U.S. he would serve no more time in custody.
>
> On one condition: The Judge wanted the proceedings to be televised.

The information on the end card had been provided to film-maker Zenovich, the Documentary's director, in an interview with Mr. Dalton. (*Id.* at ¶ 32). Upon seeing this reference in the Documentary -- which did not allege any wrongdoing by anyone -- the Los Angeles Superior Court and the Los Angeles District Attorney's Office immediately issued a barrage of vitriolic statements to HBO, the Los Angeles Times, and other press, disputing the truthfulness of this

[7] Notably, L.A.P.D. investigator Philip Vannatter, who was the former investigating officer on the case and to whom Mr. Gunson had informed of the pending resolution, had earlier requested that he be permitted to personally arrest Mr. Polanski upon his re-entry into the United States. (Dalton Decl. at ¶ 29). Mr. Dalton refused because of the publicity that would result. *Id.* He had already made arrangements with the Sherriff's Fugitive Detail to handle Mr. Polanski's arrival. *Id.*

representation.[8] None of the persons who issued the statements had attended the 1997 meetings between Mr. Dalton, Mr. Gunson, and Judge Fidler. Nevertheless, Allen Parachini, a Public Information Officer for the Los Angeles Superior Court, told the Los Angeles Times that the agreement alluded to in the Documentary "never occurred" and that the "fabricated reference" had "the potential to . . . enormously" injure Judge Fidler's reputation. (Hummel Decl., Exh. F). In a "Media Advisory" released by the Superior Court, the court labeled the Documentary reference "unsupported" and an "egregious error":

> This assertion concerning televising of the sentencing hearing is a complete fabrication, entirely without any basis in fact and completely unsupported by the court record. No such condition was ever suggested or proposed by the judge in question, either in 1997 or at any other time. The Los Angeles Superior Court has made HBO aware of this egregious error and believes the network intends to rectify this misstatement of fact later today.[9]

(Hummel Decl., Exh. G).

In response to these attacks on the factual accuracy of the Documentary, Mr. Gunson and Mr. Dalton spoke for the first time since 1997, to see what they could do to refute these inaccurate and false claims by the Superior Court. (Dalton Decl. at ¶ 32). Both were concerned that the Court was again making misrepresentations about the case, as Judge Rittenband had done thirty years ago. *Id.* Mr. Gunson ultimately drafted a joint statement on behalf of both himself and Mr. Dalton, which they both signed and submitted to the press. *Id.* From the joint statement, it is clear that Judge Fidler agreed to conclude the case against Mr. Polanski but wanted the proceedings to be televised. (Dalton Decl., Exh. C). Nevertheless, the Superior Court persisted in its false statements, indicating that "the court stands by its original position." (Hummel Decl., Exh. H). The District Attorney's Office also objected to the statements by Mr. Gunson and Mr. Dalton. In a joint statement written to the Los Angeles Times on behalf of the District Attorney's Office, DDA Richard Doyle, to whom the case had been assigned, and Sandi Gibbons, the Public

---

[8] Notably, Sandi Gibbons, a spokeswoman for the Los Angeles County District Attorney's Office, and formerly a reporter who covered trials in Judge Rittenband's courtroom, otherwise characterized the Documentary as a "very fair" portrayal of the case. (Hummel Decl., Exh. D).

[9] As mentioned above in footnote 4, the court file for this case has been "lost" since at least 2004. Thus, it is unclear how the Court would have had any basis for asserting that the Documentary reference was "completely unsupported by the court record."

Information Officer for the District Attorney's Office, denigrated Mr. Dalton by calling "untrue" the statement that Judge Fidler wanted the proceedings to be televised. *Id.* DDA Doyle and Ms. Gibbons said: "The judge involved is one of the most respected jurists in California. To sully his reputation . . . is unfair and unprofessional." *Id.*

Thus, the Superior Court and the District Attorney's Office were essentially claiming that Mr. Gunson and Mr. Dalton had lied about the proceedings with Judge Fidler and carelessly made representations that had compromised Judge Fidler's reputation.

Now, the end card for the Documentary reads:

> That same year, Doug Dalton and Roger Gunson presented the case to another Los Angeles Superior Court Judge.
>
> The Judge agreed that if Polanski returned to the U.S. he would serve no more time in custody.
>
> However there is a dispute over what happened next. Doug Dalton maintains that the Judge wanted the proceedings to be televised.
>
> Roger Gunson believes Doug Dalton's recollection is accurate.
>
> The Court maintains that no such condition was imposed.
>
> Given the possible television coverage, Polanski declined to participate.
>
> As a result, the case remains unresolved.

(Hummel Decl., Exh. B, p. 60).

III. THIS COURT IS EMPOWERED BY LAW AND SHOULD DISMISS THE CASE AGAINST MR. POLANSKI

A. Courts have held that dismissal is warranted when those in positions of authority and public trust engage in misconduct which interferes with a defendant's right of due process.

Under California Penal Code Section 1385, "[a] judge . . . may . . . of his or her own motion . . . and in furtherance of justice, order an action to be dismissed." Cal. Pen. Code § 1385(a). Dismissal in the furtherance of justice is a matter within the court's exclusive discretion and may be ordered over the prosecution's objection. *People v. Superior Court (Flores)*, 214 Cal. App. 3d 127, 136 (1989). A judgment of dismissal is not an adjudication that the charged crime was not committed. *Id.* Rather, the dismissal operates to free the criminal

defendant from further prosecution and punishment for that crime; the defendant stands as if he had never been prosecuted for the charged offense. *Id.* In determining whether an action should be dismissed "in furtherance of justice," a court must consider the constitutional rights of the defendant and the interests of society. *Id.* at 144. "Courts are empowered to fashion a remedy for deprivation of a constitutional right to suit the needs of the case." *Id.*

Where those in positions of authority and public trust engage in conduct "so outrageous as to interfere with an accused's right of due process of law, proceedings against the accused are thereby rendered improper." *Boulas v. Superior Court*, 188 Cal. App. 3d 422, 434 (1986). With regard to prosecutors in particular, "the court's conscience is shocked and dismissal is the appropriate remedy" where prosecutors orchestrate the violation of a defendant's constitutional rights. *Morrow v. Superior Court*, 30 Cal. App. 4th 1252, 1261 (1994). The sanction of dismissal in these cases is particularly appropriate because prosecutors are held to higher ethical standards insofar as they are responsible for exercising the sovereign power of the State:

> Courts expect even higher ethical standards from prosecutors. This is because of the unique function he or she performs in representing the interests, and in exercising the sovereign power, of the State. Our government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. **If the government becomes a law-breaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy.** Law enforcement agents are entrusted with awesome power. But with that power also comes a **responsibility to guard against its abuse**, a responsibility that the government in this case has abdicated. Were we to tolerate the government's conduct in this case, we would participate in that abuse.
>
> Among these high standards is the requirement that the prosecutor not act in a manner that circumvents and thereby dilutes the protection afforded by the right to counsel. **While district attorneys are expected to prosecute their cases with considerable vigor and dispatch, they may strike hard blows, but are not at liberty to strike foul ones.** By conspiring to violate petitioner's constitutional rights, the prosecutor struck a foul blow.

Id. at 1263 (emphasis added, internal citations omitted). Dismissal is proper where the facts "reveal a pattern of recurring violations by [those in positions of authority and public trust] that might warrant the imposition of a more extreme remedy in order to deter further lawlessness." *Boulas v. Superior Court*, 188 Cal. App. 3d at 431.

In *Boulas v. Superior Court*, the defendant was charged with two counts of illegally selling cocaine. 188 Cal. App. 3d at 425. When the defendant attempted to negotiate a plea

bargain with the prosecutor, he was told that he could not get a plea bargain unless he fired his attorney and hired another attorney who was recommended by the prosecutor. *Id.* at 426. The defendant did so, but when the second attorney declined to represent him, the defendant was left with no counsel. *Id.* at 428. Shortly thereafter, the district attorney informed the defendant that a agreement was no longer possible. *Id.* On appeal of the defendant's invitation to dismiss the charges against him, the court found the prosecutor's actions to be "outrageous in the extreme, and shocking to the conscience." *Id.* at 494. The prosecutor's actions intentionally undermined the defendant's constitutional right to counsel and could not "be countenanced under any rational standard of justice." *Id.* at 493. As such, "[n]o relief . . . would remedy the violation." *Id.* Moreover, because "the government went forth with the express intent of interference with an accused's constitutional right," the "sole appropriate remedy for intentional and calculated violation of [the defendant's] rights" was "the grave sanction of dismissal." *Id.* at 493-94.

In *Morrow v. Superior Court*, 30 Cal. App. 4th 1252, 1263 (1994), the court found dismissal to be the proper remedy where a prosecutor told her investigator to eavesdrop on a conversation between the defendant and his attorney. When the defendant discovered the prosecutor's misconduct, he moved to dismiss the action. *Id.* at 1256. The trial court denied the motion, finding that the defendant had not been prejudiced. *Id.* at 1258. On appeal, the court reversed, holding that the burden was on the People to show by a preponderance of the evidence that sanctions were not warranted because the defendant was not prejudiced by the misconduct. *Id.* In addition, the People had the burden to show that there was no substantial threat of demonstrable prejudice. *Id.* In the absence of any evidence that the prosecutor did not engage in the alleged conduct, the court found that the harm was apparent and the substantial threat of demonstrable prejudice was inherent. *Id.* at 1263. Moreover, the court reasoned that only dismissal of the prosecution would deter state agents from similar violations in the future:

> We, ourselves, have warned prosecutors in the past. Yet some prosecutors do not seem to be listening. This court has an obligation to support and defend the United States and California Constitution. Vindication of constitutional rights should not be dependent upon filing a civil rights lawsuit or upon the State bar instituting disciplinary proceedings.

Id. Notwithstanding any potential prejudice to the People of California, the court found that

dismissal was the only proper remedy because the prosecutor's conduct "offend[ed] a sense of justice" and "[t]he judiciary should not tolerate conduct that strikes at the heart of the Constitution, due process of law, and basic fairness." *Id.*; *see also People v. Covarrubias*, 18 Cal. App. 4th 639, 643 (1993) ("The prosecutor has [a] dual role. He or she is the defendant's adversary but at the same time, is the guardian of the defendant's constitutional rights.")

B. By engaging in *ex parte* communications regarding the disposition of Mr. Polanski's case, Deputy District Attorney Wells and Judge Rittenband violated Mr. Polanski's constitutional right of due process and committed misconduct in violation of the rules of attorney and judicial ethics.

DDA Wells' and Judge Rittenband's misconduct was "outrageous" and "shocking to the conscience" on multiple levels. By engaging in *ex parte* communications in which they discussed and decided upon Mr. Polanski's punishment behind closed doors and outside the presence of Mr. Polanski's counsel, DDA Wells and Judge Rittenband effectively deprived Mr. Polanski of his constitutional right of due process and right to counsel and violated multiple rules of ethical conduct. The only proper remedy for such egregious misconduct is the dismissal of this action.

As a preliminary matter, former Deputy District Attorney Wells' own statements in the Documentary should be considered by the Court as direct evidence of the misconduct that took place here. Courts have long recognized that statements against penal interest have a high degree of trustworthiness. Indeed, statements against penal interest are a recognized exception to the hearsay rule under California law precisely because they are "unlikely to be false." *People v. Spriggs*, 60 Cal. 2d 868, 874 (1964). As the California Supreme Court has noted, "a person's interest against being criminally implicated gives reasonable assurance of the veracity of his statement made against that interest." *Id.* Thus, "the very fact that a statement is genuinely self-inculpatory . . . is itself one of the 'particularized guarantees of trustworthiness' that makes a statement admissible." *People v. Greenberger*, 58 Cal. App. 4th 298, 329 (1997).

Here, Wells' statements in the Documentary constitute admissions that he engaged in numerous improper *ex parte* communications with Judge Rittenband and had a patent desire to provoke the Judge to impose improper and unwarranted punishment on Mr. Polanski. These statements clearly implicate Wells in criminal misconduct on multiple levels. First, by admitting

that he conspired with Judge Rittenband to impose an impermissible sentence on Mr. Polanski pursuant to Section 1203.03, Wells admitted to committing the felony of conspiring to pervert or obstruct justice. *See* Cal. Pen. Code § 182(a)(5). Second, by admitting that he made inflammatory, critical statements to Judge Rittenband regarding how and when Mr. Polanski should be sentenced, Wells admitted that he committed the misdemeanor of making an illegal representation to the court in aggravation of Mr. Polanski's punishment. *See* Cal. Pen. Code § 166(a)(8). Finally, by admitting that he had *ex parte* communications with Judge Rittenband regarding Mr. Polanski's sentence and in which he told the Judge that Mr. Polanski was "flipping [him] off" by going to Munich, Wells admitted to violating Section 6068 of the California Business & Professions Code. Cal. Bus. & Prof. Code § 6068. These statements were indisputably against Wells' penal interest; they were truly self-inculpatory and were not the result of some ulterior motive to shift blame or curry favor. Thus, Wells' statements in the Documentary constitute reliable evidence of the improper *ex parte* communications that ultimately deprived Mr. Polanski of the benefit of the plea bargain.

The Supreme Court has held that "[t]he fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner." *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976). Thus, a defendant's right of due process in a sentencing hearing indisputably encompasses the right to present argument and evidence to the court *before* the court has decided on the appropriate sentence:

> It is evident that in a sentencing hearing the defendant's liberty is at stake and due process considerations apply. In the instant case, the private interests of the litigant are the right to be heard to the extent necessary to place all facts and issues before the court and the right to an impartial judge. The defendant's right to be heard is designed to guard against the inadvertent use of misinformation and to insure the defendant an adequate opportunity to present his claims. The reasons for an impartial tribunal are so basic and so rooted in our societal expectations of justice that they do not need an explanation of purpose or justification.

People v. Hernandez, 160 Cal. App. 3d 725, 744 (1984).

Here, Judge Rittenband and DDA Wells deprived Mr. Polanski of his due process rights by deciding on Mr. Polanski's punishment behind closed doors and without giving Mr. Polanski the opportunity to be heard. Despite the conditions of Mr. Polanski's plea agreement, it is evident

that Judge Rittenband never considered either the recommendation of the Probation Officer's Report or the argument of counsel on this issue. Rather, his decision had nothing to do with the evidence before him, and it can be readily inferred that it was instead the result of DDA Wells' influence.

In the Probation Officer's Report, there is no mention of sending Mr. Polanski to prison for a diagnostic study under Section 1203.03. Indeed, it is evident from the Probation Officer's Report that the Probation Department did not recommend any prison sentence at all:

> Careful consideration has been given to the possible recommendation for a period in custody as a condition of probation. . . . However, jail is not being recommended at the present time. . . . It is believed that incalculable emotional damage could result from incarcerating the defendant whose own life has been a seemingly unending series of punishments.

(Dalton Decl., Exh. B, p. 27).

Judge Rittenband also failed to consider the arguments of either the prosecutor or the defense counsel in fashioning the sentence under Section 1203.03 and the additional prison sentence to be imposed later. Neither the prosecutor nor defense counsel offered Section 1203.03 as an option for punishment. Rather, both the prosecutor and the probation officer objected to the imposition of such a sentence because it was clearly an improper use of the statutory provision. Moreover, Judge Rittenband never considered any of counsel's arguments, choosing instead to "stage" the hearing so that the prosecutor argued for incarceration, and defense counsel argued for probation. Indeed, Judge Rittenband decided to sentence Mr. Polanski under Section 1203.03 before the September 19, 1977, sentencing hearing. Even after Mr. Polanski completed his psychiatric evaluation at the Chino state prison and received two evaluations which both recommended probation, Judge Rittenband still did not consider the Probation Officer's recommendation, instead announcing his intent to sent Mr. Polanski to prison a second time. The prosecutor never requested an additional sentence of incarceration. Nevertheless, Judge Rittenband instructed counsel to "stage" the hearing again, telling the prosecutor to argue for a prison sentence and defense counsel to argue for probation. By orchestrating the sentencing hearing to give the appearance that he was considering counsel's arguments when in fact he had no intention to do so, Judge Rittenband was much like the prosecutor in *Morrow*, whose

egregious conduct rightfully shocked the conscience of the court in her purposeful violation of the defendant's constitutional rights.

DDA Wells' and Judge Rittenband's misconduct also constituted multiple violations of the ethical rules that govern the conduct of attorneys and judges. Rule 5-300(B) of the California Rules of Professional Conduct expressly forbids *ex parte* communications with a judicial officer about a pending case. Similarly, Canon 3B(7) of the Code of Judicial Ethics provides that a judge may not "initiate, permit, or consider *ex parte* communications or consider other communications made to the judge outside the presence of the parties concerning a pending proceeding." The California Business & Professions Code also provides that attorneys have an express duty to (1) support the constitution and the laws of the United States and California; and (2) not mislead a judge by an artifice or false statement of fact or law. Cal. Bus. & Prof. Code § 6068.

Here, it is indisputable that DDA Wells and Judge Rittenband engaged in improper *ex parte* communications.[10] DDA Wells has openly admitted on camera that he frequently spoke to the Judge about the case, without the presence of either the line prosecutor or defense counsel. Moreover, as discussed *supra*, Wells' admitted misconduct in provoking Judge Rittenband with inflammatory comments and improper criticism resulted in the indisputable violation of Mr. Polanski's constitutional right of due process and unqualified right to counsel. As an officer of the court and prosecutor acting on behalf of Los Angeles County, DDA Wells had the obligation to support and defend the California Constitution. But instead of protecting Mr. Polanski's constitutional rights, DDA Wells committed an egregious violation of his ethical duties by engaging in improper *ex parte* communications that were specifically intended to affect Mr. Polanski's sentencing by subjecting him to an unlawful form of punishment in the guise of a "diagnostic study." Moreover, DDA Wells purposefully misled Judge Rittenband by presenting him with inflammatory materials solely designed to encourage him to impose a harsher punishment on Mr. Polanski. Contrary to DDA Wells' misrepresentative characterizations, the photo did not involve "young girls" and did nothing to refute the fact that Mr. Polanski was

[10] It is also apparent that DDA Wells and Judge Rittenband shared an inappropriately close relationship, given their conversations about Judge Rittenband's personal life and, in particular, his "girlfriends."

indeed on a business trip, as he had represented to the Court. Indeed, DDA Wells' comment to the Judge that Mr. Polanski was "flipping [him] off" was nothing short of a blatant fabrication intended to anger the Judge and provoke him to impose a harsher punishment on Mr. Polanski. As DDA Wells made clear in his interview for the Documentary, he was "very miffed at the way it turned out" and was "pretty vocal" about the fact that he thought Mr. Polanski "belonged in state prison." Even the District Attorney's Office had to tell DDA Wells that it was "not [his] case anymore." But DDA Wells made very sure that Judge Rittenband was aware of his opinion, even if it meant engaging in unethical *ex parte* communications with the Judge and presenting him with unsubstantiated theories based on completely irrelevant evidence.

As the result of Wells' and Judge Rittenband's misconduct, Mr. Polanski served a 42-day prison sentence, despite the recommendation of the Probation Officer and the protestations of the minor's family. There is no explanation for this conduct except for DDA Wells' own admission that he and Judge Rittenband wanted to "send [Mr. Polanski] to jail." (*See* Exh. A, 23:19). Moreover, it is evident that Judge Rittenband's interference with Mr. Polanski's constitutional rights was nothing short of purposeful and malicious. Judge Rittenband went much further than to merely ignore the Probation Officer's Report and the arguments of counsel; he flagrantly abused his discretion by instructing the attorneys to argue specific positions in open court, even though he had already decided on his ruling. As individuals in positions of authority and public trust, such shocking misconduct can only be remedied by the sanction of dismissal. Anything short of dismissal would effectively condone Wells' and Judge Rittenband's conduct in purposefully depriving Mr. Polanski of his constitutional rights.

C. The Los Angeles Superior Court, the Los Angeles District Attorney's Office, and DDA Richard Doyle have perpetuated the pattern of improper *ex parte* communications and ethical violations that has pervaded this case.

The perpetuation of this pattern of misconduct by DDA Richard Doyle, the Los Angeles Superior Court, and the Los Angeles District Attorney's Office further supports the need for dismissal. By issuing false, misrepresentative statements regarding Judge Fidler's request that Mr. Polanski's hearing be televised, the Court and the District Attorney's Office publicly challenged Mr. Dalton's integrity and thereby violated Mr. Polanski's right to the counsel of his

choice. In addition, the release of these false statements to the public constituted a clear violation of the California Rules of Professional Conduct and the California Code of Judicial Ethics.

The falsity of the statements made by the Superior Court and the District Attorney's Office is patently clear. First, Mr. Dalton had no reason to misrepresent the nature of the meetings that took place with Judge Fidler. Indeed, Mr. Dalton would have had every incentive to take the offer from Judge Fidler and conclude this case, but for Judge Fidler's desire that the proceedings be televised. Second, it is notable that Mr. Gunson and Mr. Dalton made a *joint* effort to affirmatively refute these allegations by the Superior Court and the District Attorney's Office. After ten years of no contact at all, Mr. Gunson felt compelled to help Mr. Dalton clear the public record because the allegations made by the Superior Court and the District Attorney's Office were simply wrong. The Superior Court's actions constituted the perpetration of continuing injustice against Mr. Polanski -- injustice that was only further magnified by the cooperation of the District Attorney's Office in delivering these falsities. Third, there was nothing about Judge Fidler's request for a televised hearing that would have "sullied" or "enormously injured" his reputation. Televised hearings are permitted in the Superior Court and can generally offer the advantage of allowing the public to gain firsthand knowledge of judicial proceedings, rather than relying on media reports that may not objectively reflect the facts. Indeed, Judge Fidler recently presided over the criminal trial of Phil Spector, which he decided to have televised. Although Mr. Polanski elected not to agree to a televised hearing because of his changed personal circumstances, that does not detract from the fact that televised hearings can offer a valuable benefit to the public in other situations.

By making such materially false misrepresentations to the press, the Superior Court and the District Attorney's Office effectively deprived Mr. Polanski of his constitutional right to the counsel of his choice. It is a well-established rule that prosecutors are obligated to give due respect to, and to preserve, a defendant's choice of counsel:

> Once the right to counsel has attached and been asserted, the State must of course honor it. This means more than simply that the State cannot prevent the accused from obtaining the assistance of counsel. The Sixth Amendment also imposes on the State an affirmative obligation to respect and preserve the accused's choice to seek this assistance. . . . [A]t the very least, the prosecutor and police have an

> affirmative obligation not to act in a manner that circumvents and thereby dilutes the protection afforded by the right to counsel.

Maine v. Moulton, 474 U.S. 159, 170-71 (1985). As the California Supreme Court has noted, "the right to employ one's own counsel is based on a value additional to that insuring reliability of the guilt-determining process . . . [namely] the state's duty to refrain from unreasonable interference with the individual's desire to defend himself in whatever manner he deems best, using every legitimate resource at his command." *People v. Crovedi*, 65 Cal. 2d 199, 206 (1966).

Here, the actions undertaken by the Los Angeles Superior Court and the Los Angeles District Attorney's Office to denounce publicly Mr. Dalton's truthful account of Judge Fidler's request for television coverage have effectively deprived Mr. Polanski of his right to the counsel of his choice. By directly contradicting Mr. Dalton's statements and misrepresenting the truth as a "complete fabrication" of an event that purportedly "never occurred," both Superior Court and the District Attorney's Office effectively challenged Mr. Dalton's veracity and professionalism, thereby forcing him to resign as Mr. Polanski's counsel. Mr. Dalton is a long-time member of the California bar and a well-respected, highly esteemed attorney. But the release of these patently false statements by the Superior Court and the District Attorney's Office has publicly challenged Mr. Dalton's honesty and professional integrity. Due to the nature of these mischaracterizations, Mr. Dalton can no longer provide Mr. Polanski with effective assistance of counsel. By questioning Mr. Dalton's truthfulness and asserting that Mr. Dalton has "sullied" Judge Fidler's reputation, the Superior Court and the District Attorney's Office have not only effectively discredited Mr. Dalton as an attorney, but have also made Mr. Dalton a potential witness in this matter.

These clearly erroneous statements also constituted a violation of the California Rules of Professional Conduct and Code of Judicial Ethics. Rule 5-120 of the California Rules of Professional Conduct expressly provides that "a member who is participating or has participated in the . . . litigation of a matter shall not make an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication if the member knows or reasonably should know that it will have a substantial likelihood of materially prejudicing an

adjudicative proceeding in the matter." In addition, Canon 2A of the California Code of Judicial Ethics provides that "[a] judge shall respect and comply with the law and shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary."

Here, DDA Doyle, the Superior Court, and the District Attorney's Office all engaged in misconduct violating Rule 5-120 of the California Rules of Professional Conduct because the press statements they issued were for no other purpose than to dispute publicly the references made at the conclusion of the Documentary. By discrediting Mr. Dalton and accusing him of lying, engaging in unprofessional conduct, and "sullying" Judge Fidler's reputation, these statements were not only likely to materially prejudice Mr. Polanski, but did in fact prejudice him by depriving him of his right to the effective assistance of his chosen counsel. The clearly misrepresentative nature of the Court's statements was also a violation of Canon 2A of the Code of Judicial Ethics because the Court has an obligation to be truthful to the public. By using the media to spread a patently false representation, the Superior Court recklessly undermined the public confidence in the integrity of the judiciary. DDA Doyle likewise betrayed the public trust by attempting to corroborate the Superior Court's statements and conceal Judge Fidler's actions. Such a blatant disregard for both the constitutional rights of Mr. Polanski and the expectations of the public cannot be condoned and warrant the dismissal of this case.

D. Dismissal of this action is not precluded by the doctrine of "fugitive" disentitlement.

Although Penal Code Section 1385 prohibits a defendant from formally moving to dismiss a case in the furtherance of justice, a court may consider an informal request for dismissal and, on its own motion, adopt the suggestion. *People v. Ritchie*, 17 Cal. App. 3d 1098, 1104 (1971). Where the court brings its own motion to dismiss, ***any*** perceived bar the defendant may have to filing a motion before the court is immaterial. *See e.g., In re Barthold*, 158 Cal. App. 4th 1301, 1309 (2008) (holding that a party's filing of a motion for reconsideration in violation of statute does not inhibit a trial court's inherent power to rule on its own motion). Accordingly, this Court should find that there is no bar to Mr. Polanski's current request that it dismiss this case in its entirety.

However, if this Court should find that the doctrine of disentitlement is relevant to its consideration of this Request, Mr. Polanski submits that the doctrine should not be applied here to save the prosecution from the appropriate sanction for its egregious misconduct in this case. In *Molinaro v. New Jersey*, 396 U.S. 365 (1970), the United States Supreme Court developed what has come to be known as the "doctrine of fugitive disentitlement" when it held that the Court did not need to adjudicate the pending appeal of a fugitive because the defendant's escape disentitled him to call upon the Court's resources for determination of his claims. Subsequent to *Molinaro*, however, courts have held that the disentitlement doctrine should not be so broadened that it "enters the realm of punishment and penalizes a fugitive for his escape." *Katz v. United States*, 920 F. 2d 610, 613 (9th Cir. 1990). Rather, courts have recognized that the disentitlement doctrine is one based on equitable considerations, such that its application is dependent upon the unique circumstances of each case. *See United States v. Van Cauwenberghe*, 934 F. 2d 1048, 1054 (1991).

Where a defendant does not appear to be "flouting the processes of the law" or "attempting to bargain with or to obtain a tactical advantage over the court," courts have held that the disentitlement doctrine should not apply. *See, e.g., Katz*, 920 F. 2d at 613 ("[T]he disentitlement doctrine may well bar otherwise meritorious claims. Society, as well as the individual defendant, has an interest in judicial review of convictions and sentences allegedly imposed in violation of the Constitution."). For example, in *Van Cauwenberghe*, the Ninth Circuit held that the disentitlement doctrine should not apply to dismiss a defendant's appeal because the totality of the circumstances militated against such a harsh sanction. 934 F. 2d at 1054-55. Although the defendant had violated a term of his probation by leaving the country before being permitted to do so, he had already served his sentence and paid the court-ordered restitution, thereby satisfying all the other terms of his probation. *Id.* at 1055. Moreover, the court found, there was "no further probationary purpose to be served" by requiring the defendant to remain in the United States. *Id.* As such, the court declined to dismiss the defendant's appeal. *Id.*

Notably, other courts which have specifically addressed whether the doctrine of

disentitlement should apply to Mr. Polanski have flatly rejected its application. Indeed, in *Doe v. Polanski*, 222 Cal. App. 3d 1406 (1990), the California Court of Appeal rejected the application of the doctrine in Samantha Geimer's civil suit against Mr. Polanski. In determining whether Mr. Polanski's answer should be stricken and a default judgment entered against him for his absence from the country, the court held that such punitive measures were unconstitutional: "[T]o strike Polanski's answer and enter a default judgment against him based solely on, and as a punishment for, his fugitive status would violate the due process clause of the Fourteenth Amendment to the United States Constitution." 222 Cal. App. 3d at 1411. Similarly, the English House of Lords refused to disallow Mr. Polanski from testifying via video link as part of a civil suit that he brought in London against Conde Nast publications in August, 2002. *Polanski v. Condé Nast Publications Ltd.*, [2005] UKHL 10. In finding that Mr. Polanski's status should not deprive him of the opportunity to defend his rights, the Court noted that a contrary result would be "wholly unacceptable":

> It may seem unattractive that a person can, at one and the same time, evade justice in respect of his criminal conduct and yet seek the assistance of the courts in protection of his own civil rights. But the contrary approach, adopted in the name of the public interest, would lead to wholly unacceptable results in practice. It would mean that for so long as a fugitive remained 'on the run' from the criminal law, his property and other rights could be breached with impunity. That could not be right. Such harshness has no place in our law.

Id. at ¶ 36.

Here, Mr. Polanski's circumstances are similar to those in *Van Cauwenberghe*, insofar as he is neither "flouting the processes of the law" nor "attempting to bargain with or to obtain a tactical advantage over the court." To the contrary, by this Request Mr. Polanski is merely requesting that the Court sanction the District Attorney's office for engaging in the prosecutorial misconduct that has forced him to stay outside of the United States for over thirty years. The new evidence in this case reflects that Judge Rittenband's sentencing decisions were not only in violation of the terms of Mr. Polanski's plea agreement, but were the result of the unlawful influence of Deputy District Attorney Wells, who provoked Judge Rittenband with inflammatory and unsubstantiated comments about Mr. Polanski. Mr. Polanski fled this country under circumstances so contrary to fairness and justice that even the prosecutor in this case has said,

"I'm not surprised he left under those circumstances." Moreover, Mr. Polanski has already served the sentence originally imposed upon him by Judge Rittenband – a sentence that even Samantha Geimer now characterizes as "excessive." (Dalton Decl., Exh. E). Thus, in light of the circumstances, equity demands that the prosecution be sanctioned for its misconduct and that this case be dismissed.

The prosecution should also be estopped from asserting that the disentitlement doctrine should apply here to prevent the just sanctioning of its own egregious misconduct. As discussed *supra*, the courts have been very clear in holding that prosecutorial misconduct should not be tolerated. Where the misconduct at issue is so egregious that it offends a sense of justice and strikes at the heart of fairness, the *only* sufficient remedy is dismissal. Thus, it follows that where the extent of prosecutorial misconduct in a case has been so abominable as to have forced a man to flee the country to avoid further unjust punishment, the prosecution should not be permitted to abuse a discretionary doctrine -- a doctrine which has no constitutional or statutory basis -- to save itself. Permitting the prosecution to benefit from the fugitive status of Mr. Polanski -- which was largely the result of its own deplorable misconduct -- would fly in the face of fairness and justice.

E. <u>Samantha Geimer's expressed wishes support the dismissal of this action.</u>

California Penal Code Section 1191.1, enacted in 1982 as part of an initiative measure entitled "The Victims' Bill of Rights," creates statutory rights for victims of crime, including: (1) the right to attend sentencing proceedings, (2) the right to notice from the probation officer of all sentencing proceedings, and (3) the right "to reasonably express his or her views concerning the crime, the person responsible, and the need for restitution." In addition, the statute requires a sentencing court to consider victims' statements in imposing sentence: "The court in imposing sentence shall consider the statements of victims . . . ." Cal. Pen. Code § 1191.1. As one court has noted, "[t]he clear purpose of . . . ['] The Victims' Bill of Rights['] was to mandate a previously optional procedure; to require the judge to listen and consider the views of the victim." *People v. Zikorus*, 150 Cal. App. 3d 324, 331 (1983) (emphasis in original). Section 1191.1 "acquaint[s] the court with the victim's unique perspective of the case, and require[s]

consideration of the victim's statement by the court." *People v. Stringham*, 206 Cal. App. 3d 184, 196 (1988).

Here, the minor involved in this case, Samantha Geimer, has made numerous requests over the years that the charges against Mr. Polanski be dismissed. In a letter to Judge Rittenband dated August 8, 1977, Ms. Geimer's attorney, Larry Silver, encouraged the Judge to accept Mr. Polanski's guilty plea and expressed that Ms. Geimer's family did not wish for Mr. Polanski to be incarcerated:

> Long before I had met any other attorney in this case, my clients informed me that their goal in pressing the charges did not include seeking the incarceration of [Mr. Polanski], but rather, the admission by him of wrongdoing and commencement by him, under the supervision of the court, of a program to ensure complete rehabilitation. The plea of guilty by [Mr. Polanski] is contrition sufficient for my clients to believe that goal may be achievable.

(Dalton Decl., Exh. D, p. 2). Twenty years later, when this case was before Judge Fidler, Ms. Geimer personally wrote a letter to the Judge, in which she voiced her desire that Mr. Polanski be permitted to return to the United States because the punishment he had already served was "excessive":

> It is my wish that you will include my opinions and feelings in your consideration of Mr. Polanski's request to resolve his status as a fugitive and return to the United States without fear of arrest or incarceration. It has long been my personal opinion that he be allowed to do so. . . . I have always been very disappointed in the way [Judge Rittenband] chose to handle this case.
>
> Judge Rittenband was not acting on my behalf or in my best interest when he refused to allow the agreed upon plea bargain and settlement of this case, which did not involve additional jail time for Mr. Polanski. It is also my opinion as the victim of this crime that the 42 days he has already served is excessive.
>
> I believe if you review the facts, it is apparent that he was not being treated fairly, and you may understand why Mr. Polanski as frightened enough to flee the U.S. at that time. I do not believe he was fleeing justice, but fleeing the lack of it in this particular case. I urge you to use leniency when considering this aspect of his case.

(Dalton Decl., Exh. E, p. 1). Then, again, in a letter that Ms. Geimer wrote to Gilbert Garcetti, the Los Angeles District Attorney at the time, Ms. Geimer unambiguously expressed her wish that Mr. Polanski be permitted to return to the United States, with no further period of incarceration:

> I have substantially recovered from the harm that Mr. Polanski has caused me, and I have always felt that Mr. Polansk[i] should be allowed to return to the U.S. and resolve his legal problems without the threat of more time spent in jail. . . . I request in the strongest possible terms that Mr. Polanski be allowed to come back to the United States, that the charges regarding his being a fugitive be dismissed, that the original plea bargain agreement be honored and that he be allowed to remain in the United States upon the time served of his sentence.

(Dalton Decl., Exh. F, p. 2).

Ms. Geimer's unambiguous desire to end this case should be given considerable weight by this Court in determining whether dismissal of this action is warranted. California Penal Code Section 1191.1 makes it clear that courts ***must*** consider victims' wishes in determining the appropriate punishment for those who have committed crimes against them. Here, Mr. Polanski has already served a 42-day prison term that Ms. Geimer has termed "excessive." Since 1977, Ms. Geimer and her family have expressed that they did not wish for Mr. Polanski to serve *any* term of incarceration. However, Judge Rittenband completely failed to consider Ms. Geimer's wishes and arbitrarily decided to violate the agreed-upon terms of Mr. Polanski's guilty plea. When Ms. Geimer renewed her request twenty years later before Judge Fidler, Judge Fidler was willing to respect Ms. Geimer's wishes and finally put an end to this case. However, the media frenzy that was likely to result from any televised hearing of this matter prevented a resolution at that time. Now, Ms. Geimer's wishes have remained unchanged, and this Court has the discretion to finally conclude this case, without any further harm to Ms. Geimer or her family. As such, the Court should find that the interests of justice demand that this case now be dismissed in its entirety.

///

///

///

///

///

///

///

///

IV. CONCLUSION

For the reasons set forth above, Mr. Polanski respectfully requests that the Court dismiss the charges against him in this case.

Dated: December 2, 2008

By: Douglas Dalton
Douglas Dalton (former attorney)

Dated: December 2, 2008

MANATT, PHELPS & PHILLIPS, LLP

By: Chad S. Hummel
Chad S. Hummel
Attorneys for Defendant
ROMAN RAYMOND POLANSKI

Dated: December 2, 2008

CAULEY BOWMAN CARNEY & WILLIAMS, PLLC

By: Bart Dalton /bm
Bart Dalton
Attorneys for Defendant
ROMAN RAYMOND POLANSKI

41340494.2