IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. **DAVID ALLEN LUCAS,** Defendant and Appellant.	**Case No. S012279** (San Diego Superior Court No. 73093/75195)

AUTOMATIC APPEAL FROM THE SUPERIOR COURT
OF THE STATE OF CALIFORNIA, COUNTY OF SAN DIEGO

HONORABLE LAURA PALMER HAMMES, JUDGE, PRESIDING
HONORABLE FRANKLIN B. ORFIELD, MOTIONS JUDGE
HONORABLE WILLIAM H. KENNEDY, MOTIONS JUDGE

APPELLANT'S OPENING BRIEF - VOLUME 2(A)

Pages 49-366, § 2.1 - § 2.4

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VOLUME 2(A)

2.1 JACOBS CASE: STATEMENT OF THE CASE (CR 75195)[25/26]

The Jacobs murders were committed on May 4, 1979.

On March 19, 1984, the San Diego County District Attorney filed a complaint alleging that Johnny Massingale committed the Jacobs murders. (CT 9254.) On May 2 and 3, 1984, a preliminary hearing was held after which Massingale was bound over for trial. (CT 4726; 9255.) An information was filed on May 13, 1984 accusing Massingale of capital murder

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[25] Unless otherwise indicated, all events described in this statement of the case relate to proceedings in CR 75195.

[26] Abbreviations used for the reporter's transcripts are as follows: "RTO" refers to pretrial proceedings before Judge Orfield. (Pretrial volumes 9 through 49.) "RTK" refers to pretrial proceedings before Judge Kennedy. (Pretrial volumes 50 through 65.) "RTH" refers to in limine proceedings before Judge Hammes (Pretrial volumes 70 through 309.) Reporter's Transcript of the Trial (Volumes 1 through 73) are referred to as "RTT" The Clerk's Transcripts are referred to as "CT."

and trial was set for October 1, 1984. (CT 9255.) On January 4, 1985, the information was dismissed and the trial date vacated. (CT 9255-56.)

On March 13, 1985, the San Diego District Attorney filed a complaint alleging that David Lucas committed the Jacobs murders. (CT 5680-81.) Lucas was bound over after a preliminary hearing and on August 1, 1985, information number CR 75195 was filed charging Lucas with the Jacobs murders. (CT 5744-45.) That information also charged Lucas with the December 8, 1981 murder of Gayle Garcia. (CT 5744-45.)

At his arraignment, Lucas entered a plea of not guilty and William B. Saunders of the Public Defenders Office was appointed to represent Lucas.

On March 11, 1986, the defense filed a *Pitchess*[27] motion for an order to produce documents for inspection, specifically requesting documents in the San Diego Sheriff's Department personnel records of Detectives Fullmer, Henderson, Fisher and Hartman. (CT 6387-6405.) The defense also filed a motion to produce documents requesting personnel records of two officers in the National City Police Department. (CT 6406-6424.)

On July 7, 1986, the prosecution filed an amended "Notice Of Evidence In Aggravation" pursuant to Penal Code § 190.3. (CT 6842-6845.) Judge Orfield denied the defense's motion for severance. (CT 4720; 15150-52.)

On July 29, 1986, Judge Orfield granted Lucas' *Marsden*[28] motion to relieve William Saunders as counsel. Judge Orfield temporarily appointed Christopher Blake to represent Lucas. (CT 15158-59.)

The cases were assigned to Judge Hammes for all purposes, including

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[27] *Pitchess v. Superior Court* (1974) 11 Cal.3d 531.

[28] *People v. Marsden* (1970) 2 Cal.3d 118.

the prosecution's consolidation motion, on February 9, 1987. (CT 2722; 4808; 4811.)

In response to the defense timeliness objection to the consolidation motion, Judge Hammes acknowledged that the prosecution had delayed many months before bringing the motion and had changed its position many times on the issue. (RTH 2957; CT 4815; CT 15238.) However, the judge found no prejudice to Lucas and, therefore, denied the motion to dismiss for untimeliness. (RTH 2059-60.)

The defense filed a supplemental motion alleging prosecutorial vindictiveness as another ground for denying consolidation and as a ground for recusal of the San Diego County District Attorney's Office. (CT 3702-3824; RTH 25366; 23474-87; 12593-96.) Judge Hammes denied the defense request for an evidentiary hearing on vindictiveness and denied the defense motions without hearing any testimony. (RTH 25460; 25465.) Lucas also moved to recuse the District Attorney's office, District Attorney Miller, and Deputy District Attorneys Williams and Clarke. (CT 3702, 3707-3708, 3810-3814, 5708, 12474, 12577-12586.) The motion was denied. (CT 5211.)

The defense filed a *Hitch/Trombetta*[29] motion to exclude the "Love Insurance" note based on the loss/destruction of the fingerprint found on the note. (CT 8334-8360.) On March 26, 1987, Judge Hammes heard in limine motions including the *Hitch* motion with respect to the fingerprint found on the "Love Insurance" note. (CT 4852-54; 15276-78.)

On May 28, 1987, the judge ruled that *Kelly*[30] did not apply to

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[29] *People v. Hitch* (1974) 12 Cal.3d 641; *California v. Trombetta* (1984) 467 U.S. 479.

[30] *People v. Kelly* (1976) 17 Cal.3d 24.

handprinting comparison evidence because (1) the evidence was not scientific and (2) such evidence is not "new" since it is authorized by statute and has long been admitted, as a matter of course, in courts of law. (RTH 8160-61.)

Subsequently, during the testimony of the prosecution handwriting comparison expert John Harris, the judge explained that she might "rethink" her *Kelly* ruling on the handwriting if, "in the normal cross-examination for the other purposes[31] . . . it came to my attention . . . that a *Kelly/Frye* issue was beginning to develop. . . ." (RTH 13843:12-15.) However, the judge reaffirmed her ruling that she would not "permit . . . affirmative evidence to be brought in on this issue of handwriting comparison . . . handwriting is not *Kelly/Frye*." (RTH 13843:10-11.)

On September 9, 1987, Judge Hammes denied the defense motion to present affirmative evidence in opposition to the consolidation motion. (RTH 14036; CT 15427-28.) The judge ruled that the evidence would be limited to the prosecution's evidence. (RTH 14038; CT 15427-28.)[32] The defense moved to strike all of the testimony based upon the court's refusal to allow the defense to present its evidence. (RTH 14042; CT 15427-28.)

On May 24, 1988 the defense also filed a supplemental *Hitch* motion on the Love Insurance note. (CT 12597-650.) On May 25, 1988, Judge

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[31] The judge noted that witness Harris could be cross-examined with respect to the *Hitch* and consolidation issues for which his testimony was being offered. (RTH 13842.)

[32] For example, the judge precluded the third party guilt evidence as to third party guilt suspect Johnny Massingale. (RTH 14041; CT 15427-28.) As demonstrated in § 2.3.5, pp. 277-330 below, incorporated herein, the exclusion of affirmative defense evidence deprived Lucas of his federal constitutional rights to due process, trial by jury, compulsory process and representation of counsel.

Hammes denied the *Hitch/Trombetta* motion. (CT 5210; 15510; RTH 25438-43.)

On June 6, 1988, Judge Hammes ruled on the cross-admissibility, consolidation and severance issues. (RTH 25472-513; CT 5211-12.)[33] She first ruled, again, that the consolidation motion was not untimely. (RTH 25502-03.) Judge Hammes denied the defense motions for severance and granted the consolidation motion as to all charges. (RTH 25512-25513; CT 5211-12.)

Lucas' trial commenced on January 3, 1989. (CT 5378.) At the time of the trial Johnny Massingale, the third party suspect in the Jacobs murders, had a pending federal civil lawsuit against San Diego authorities for damages allegedly sustained following his own arrest for the Jacobs' murders. (RTT 370, 710-711, 3403.) However, the court prohibited defense counsel from cross-examining Massingale as to his possible financial bias which the defense wanted to present to demonstrate the relative weakness of the prosecution case on the Jacobs counts. (RTT 698-699, 710-714.) (See § 2.8.1(C), pp. 488-97 below, incorporated herein.)

The defense sought to admit the testimony of the detectives who obtained the confession of Johnny Massingale as to their belief in the truth of that confession. (RTT 298.) However, Judge Hammes excluded the evidence on the basis that the testimony was irrelevant. (RTT 299.)

During the trial, over defense objection Frank Clark, Lucas' former business partner, was permitted to testify that the Love Insurance note was "Dave's [Lucas'] writing." (RTT 3838.) Judge Hammes ruled that the

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[33] The judge concluded that cross-admissibility and consolidation involved exactly the same issues. (RTH 2961; 5699.)

opinion was admissible on the same basis that Clark's opinion was admitted to identify the carpet company's business records. (RTT 3829-30; 3835.) Additionally, the judge declined to give any cautionary instruction, ruling that the preliminary instruction was sufficient. (RTT 3838; 3863-67; 3871-73.)

The defense sought to introduce the taped statement of Rochelle Coleman that the printing on the Love Insurance note was the writing of David Woods, an acquaintance of Coleman's. (RTT 7339.) The defense offered Coleman's statement as a spontaneous lay opinion that Lucas did not author the note (Evidence Code § 1416) and for the nonhearsay purpose of establishing that the handprinting on the Love Insurance note was not unique. (CT 13948-49.) The judge denied the defense request, ruling that Coleman's statement was not spontaneous and that Wood's actual handwriting would be the "best evidence." (RTT 7950-51.)

Additionally, Judge Hammes disallowed the defense request to test, in open court, the ability of the prosecution handprinting expert, John Harris, to identify Lucas' handprinting. (RTH 13902.)

On June 9, 1989, closing arguments were presented. (CT 5553-54.)

On June 12, 1989, the jury was instructed and deliberations commenced. (CT 5555-56.) Shortly after the start of jury deliberations, the jury requested to rehear the testimony of the handwriting comparison experts David Oleksow and John Harris. (RTT 12232.) In accordance with a prior ruling, Judge Hammes ordered the court reporter to prepare a redacted version of the entire transcript of the two witnesses and give the transcript to the jury. (RTT 12233.) Subsequently, on June 15, 16, 19, and 20, 1989, the jury requested, and presumably received, additional transcripts of the testimony of 26 more witnesses. (See §2.11.1(B), pp. 700-07 below, incorporated herein.)

On June 21, 1989, the jurors informed the court that they had reached

verdicts on some counts but were deadlocked on others. (CT 5563.) The jury found Lucas guilty of the murders of Suzanne and Colin Jacobs,[34] guilty of the kidnapping and attempted murder of Jodie Santiago, guilty of the kidnapping and murder of Anne Swanke (CT 5565-66; 14232-3; 5569; 14236; CT 5570; 14237; CT 5571; 14238; CT 5572; 14239) and found true the multiple murder special circumstance allegation (§ 190.2(a)(3)). (CT 5573; 14240.) The jury was deadlocked as to the Strang/Fisher murders and Judge Hammes declared a mistrial as to those counts. (CT 5563.) The jury found Lucas not guilty of the murder of Gayle Garcia. (CT 5567; 14234.)

The proceedings were then recessed pending commencement of the penalty trial.

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[34] The jury also found true the enhancements for Penal Code § 12022(b)) [personal use of a deadly and dangerous weapon] in Jacobs, Santiago, and Swanke, and Penal Code § 12022.7 [infliction of great bodily injury] in Santiago and Swanke.

2.2 JACOBS CASE: STATEMENT OF FACTS[35]/[36]/[37]

A. Activities Of The Defendant, Victims And Others On Or About May 4, 1979

In May 1979, the Jacobs family, Michael Jacobs, his wife Suzanne and their three-year-old son, Colin, lived at 3419 Arthur Avenue, which was part of a residential neighborhood in San Diego. (RTT 112; 8058.)[38]

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[36] Because all the charges were ruled to be cross-admissible the jury was permitted to consider the facts in those cases on the issue of identity in Jacobs. The Statement of Facts for the other charges may be found as follows: Santiago Volume 3, § 3.2, pp. 757-810, incorporated herein, Swanke Volume 4, § 4.2, pp. 1068-1123, incorporated herein, Strang/Fisher Volume 5, § 5.2.2, pp. 1280-1308, incorporated herein, and Garcia Volume 5, § 5.1.2, pp. 1250-78, incorporated herein. (See, however, § 2.3, pp. 139-331 below, incorporated herein, where it is demonstrated that Judge Hammes (1) erred in concluding that the Santiago, Swanke and Strang/Fisher counts were cross-admissible as to the Jacobs counts, (2) denied Lucas a fair hearing on the issue of cross-admissibility, and (3) gave prejudicially erroneous instructions concerning cross-admissibility.)

[37] To promote continuity, facts based on the testimony of defense witnesses are included in the sections to which they relate. The text indicates when the testimony being summarized was presented as part of the defense case by including it in a separate defense subsection, by explicitly noting that the witness was called by the defense, or by inserting an identifying parenthetical label following the transcript page cite (e.g., "RTT 22 [defense]").

[38] Suzanne was a pretty good housekeeper and kept the house clean. (continued...)

The Jacobs' had purchased a new dinette set which was to be delivered on May 4. They were advertising the old dinette set in the newspaper. Michael remembered that they received phone calls about the dinette set on the evening of May 3 and someone was supposed to come look at it on May 4th. (RTT 134-135.) When Michael went to bed between 10 and 11 p.m., Suzanne was drinking a glass of wine and there was a bottle of Mateus on the table. (RTT 113-115; 121.)[39] The following morning, Michael had some coffee and smoked a cigarette and went to work at approximately 6:00 a.m. Suzanne was awake but Colin was still sleeping. (RTT 112; 9907; 10809.) At the time Michael left for work he didn't notice any scraps of paper on the bathroom floor. (RTT 117.)[40]

On May 4, between 8:00 and 9:30 a.m.,[41] Margaret Harris,[42] who lived across the street from the Jacobs, looked out of her kitchen window and saw

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[38](...continued)
(RTT 2600.)

[39] Michael Jacobs testified he had nothing to drink the night of May 3, 1979. (RTT 113.) He did not remember telling investigator Green he had a couple of beers that night. (RTT 128-130.) William Green had been a detective in the San Diego Police Department Team Four homicide unit. He later went to work for the San Diego District Attorney's office and, at the time of trial, was Supervising Criminal Investigator. (RTT 7968.)

[40] However, both the bathroom rug and the Love Insurance note, found after the murders, were pink. (RTT 11912-13.)

[41] Harris originally told Detective Green she saw the car between 8 and 9 a.m. (RTT 234-235.) On cross-examination she said it could have been anytime between 8 and 9:30 a.m. (RTT 235-236.)

[42] Margaret Harris's former last name was Tucker and she was also known as Peggy. (RTT 172; 7970 [defense].)

a sports car parked in the Jacobs' driveway.[43] The car was maroon or wine-colored on the bottom and black on top, but Harris didn't know what kind of car it was. (RTT 175; 191-192.) The car had sun damaged paint and it looked old and beat up. (RTT 216.) Harris assumed that the car belonged to one of Suzanne's friends who had come to pick her up (RTT 206; 226) as the car was parked near the porch. (RTT 226.) However, she didn't recognize the car. (RTT 244-245.) Harris also knew that the Jacobs' had been running an ad to sell something and people had been calling. (RTT 216.)

Jeanette Robertson, a neighbor of the Jacobs, testified for the defense. She drove by the Jacobs' home almost every morning while taking her daughter to preschool. (RTT 9906-09 [defense].) Robertson noted that the Jacobs were early risers and were always out in the front yard in the morning. By the time Robertson and her daughter would go by at around 9:00 a.m., Suzanne would be doing yard work while Colin rode around on his trike. (RTT 9909 [defense].)

On May 4, 1979, Robertson drove past the Jacobs' home around 9:00 a.m. and didn't notice any vehicles in the Jacobs' driveway. (RTT 9906-9907 [defense].) She also noticed that Suzanne and Colin weren't outside as usual, nor were they there when she returned. (RTT 9910 [defense].)

Between 10 and 11 a.m. on May 4, 1979, Rose Turner and her daughter Betty Beard were driving by the Jacobs' house. Betty, who was driving,

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[43] A couple of weeks prior to the killings, Michael Jacobs trimmed a bush in front of the house and placed the trimmings in his yellow and black Dodge pickup truck, but hadn't got around to disposing of the trimmings. (RTT 2595-2596.) The truck was parked out in front of the house (RTT 2598-2599) and a blue VW Baja bug was parked in the driveway. The VW had a roll bar and the top had been cut off. The vehicle was up on blocks. (RTT 132-133.)

slowed the car down a little bit to point out a house that had burned near the Jacobs' home a few days before. When Rose turned to look at the house she saw a young man standing at the end of the sidewalk or next to the driveway. (RTT 1601-1602; 1607; 1611; 1613.) He was standing next to the palm tree at the end of the sidewalk facing an alley next to the Jacobs' house. (RTT 1603-1604; 1626.) She didn't see the man's face but he was between 25 and 30 years old and had blond hair. He was wearing blue overalls with straps over the shoulders. His height and build were medium. (RTT 1606-1607.)[44] His hair was short and blond, or possibly light brown. (RTT 1610.) She just had a quick look at the man; then she noticed that there was a small truck there with tree limbs on it. (RTT 1608-1610.) The truck was on the opposite side of the alley, west of the Jacobs residence. (RTT 1627.) She didn't see any cars in the driveway. (RTT 1613.) She didn't actually see the man trimming the tree or notice whether or not the truck had a business name on it. (RTT 1614.)

Around 11:00 or 11:30 a.m., Michael Jacobs called home but got no answer. (RTT 112-113.) Between approximately 11:00 and 11:30 a.m., Harris phoned Suzanne Jacobs but got no answer. (RTT 198; 206-207.) She hadn't seen Suzanne that morning, but other than the sports car, nothing else seemed unusual that morning. (RTT 205, 217.)

Between approximately 12:00 and 12:30 p.m., Margaret Harris saw a Montgomery Wards truck at the Jacobs' residence delivering a dinette set. (RTT 198-199; 210; 213-214.)

Louis Hoeniger, the Wards driver who made the delivery to the Jacob's home, went to the rear of his truck and sent his helper to knock on the

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[44] Turner may have told the detectives the man was 5' 11". (RTT 1607.)

front door. When no one came to the door, the helper went to the left side of the house to see if anyone was in the backyard; Hoeniger went to the other side of the house. The helper told him that there were dogs in the backyard and they had come to the fence and barked at him.[45] Hoeniger and his helper were at the Jacobs home for approximately 5 or 6 minutes, 10 at the most. They left the dinette set on the front porch. During this time they did not hear anyone inside the house. Nor did they hear the dogs bark when they knocked on the front door. Hoeniger placed the time of the delivery at 12:30 p.m.; it was his first stop after lunch. (RTT 141-153.)

When Michael Jacobs returned home at approximately 5 p.m. that evening (RTT 990), Margaret and Ed Harris were in their driveway. Margaret waived to Michael. (RTT 157; 199.) Michael drove up to the front of the house and parked the car. He walked onto the porch, around the dinette, opened the front door and went inside. He called for Suzanne but got no reply. He walked to the hallway and seeing the bathroom door was nearly closed, thought that Suzanne and Colin might be in the bathroom. He opened the door to the bathroom and saw blood everywhere. Walking back out, he saw Colin in the hallway. He walked out of the house and sat on the porch. (RTT 118-119.) Michael had only been in the house 2 or 3 minutes when Margaret saw him come out looking very distraught. He looked at her and said, "Peggy, what's wrong," and threw his hat and cigarettes down and lay on the grass. Ed noticed that Michael appeared to be in shock and unable to talk. (RTT 158.) The Harrises went into the house; Ed went to the right and Margaret went to the left through the kitchen. Margaret noticed that the back

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[45] The Jacobs' owned two small dogs; there was a "doggie" door so the dogs could come in and go out as they pleased. (RTT 2596.)

door in the porch laundry room was closed and saw a bloody footprint in the middle of the dining floor. (RTT 159-162; 199.) Ed went down the hall because he saw that the door to Colin's bedroom was closed. He opened the door but there was no one there. He came back up the hall and saw Colin on the floor. Looking in the master bedroom, he took a step or two into the room and saw Suzanne Jacobs. He had to step over Colin to enter the room. The bed frame was broken. He called to Margaret and told her to call the police but not to enter because he didn't want her to see all the blood. Margaret got on the phone and Ed went back outside to be with Michael. (RTT 159-163; 171.)[46]

B. Description Of The Crime Scene And Location Of Physical Evidence

Fire Captain Edward Fairhurst was with the first emergency unit to arrive. (RTT 246-247.) The front door was open and Fairhurst went inside, walking through the middle of the living room. (RTT 247.)[47] He went into the hallway and saw Colin on the floor of the bedroom. (RTT 247.) He went to the doorway of the bedroom and leaned into the room; he did not touch the doorjamb or enter the room. (RTT 249; 251.) He did not see Suzanne's body. After he saw Colin, he retraced his steps and went out the same way he had come in. Fairhurst then called the police and sealed the premises. (RTT 249.) Fairhurst did not permit anyone else to enter the house until the first police officer arrived and took over the scene. (RTT 252.) While in the Jacobs'

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[46] Margaret called the operator and asked for the paramedics; she checked Colin to see if he was breathing but he was not. She then left the house and waited for the authorities to arrive. (RTT 199-200.) It was the most shocking experience Margaret had ever been through. (RTT 244.)

[47] The television set was on. (RTT 247.)

home Fairhurst walked on the rugs and hardwood floors. (RTT 257.)

San Diego Police Officer Frederick Edwards arrived at the Jacobs home and was met by Fairhurst. (RTT 252.) Edwards entered the front door. He walked into the bathroom and saw a large amount of blood; there was a trail of blood from the bathroom to the master bedroom, he turned to the right and went to the master bedroom. Edwards saw the two bodies. Neither had any vital signs present. Edwards noticed a trail of bloody footprints that went into the kitchen and toward the back door. The prints resembled those of the combat type boots he used to wear when he was in SWAT. Wanting to protect the scene of the crime, he tried not to walk in the blood. Edwards didn't go into the dining room or kitchen; he retraced his steps going back out the front door and contacted the homicide unit. No one else besides Fairhurst had been in the house since his arrival. (RTT 216-274.)

Detective Gary Gleason arrived and examined the outside of the house. He and Sgt. Kenneth Moller then entered the house and did a cursory walk through. Evidence Technician Pat Stewart was assigned to collect evidence and to photograph the scene. (RTT 277-279.)

In the living room, directly in front of the TV set at the edge of the hardwood floor and carpet there were bloody footprints; there were also bloody footprints in the dining room. The prints had a waffle sole pattern consistent with Vibram-soled boots. (RTT 311-312; 356.)[48] There was only one footprint in the dining room which was pointed toward the front door; it

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[48] There were a number of items on top of the TV including a wine glass that contained a substance consistent with wine, as well as a second wine glass. (RTT 488; 490; 562-63; 591-92; 1441.) An ashtray, containing a light brown cigarette butt was also on top of the TV. (RTT 562-63; 569.) Stewart seized the glass and removed some of the contents of the wine glass with a syringe. (RTT 1441.)

was an impression in the carpet and was not in blood. (RTT 448; 485-87.)[49]

There were at least two partial bloody footprints directly in front of and facing the kitchen sink, but it appeared as if there were several other bloody imprints over the two prints. (RTT 315; 344-345; 447-448.)[50] None of the bloody footprints in the kitchen led out the back door. (RTT 481-82.)

In the bathroom there was a pink throw rug on the floor and a large concentration of blood on the floor in the bathroom and hallway. (RTT 282-283.) There was blood on the front and inside of the bathtub. On the pink rug was a folded up piece of pink paper directly in front of the bathtub. (RTT 283-284.) Detective Gleason picked up the note with evidence gloves, unfolded it and examined it. The note had the words "Love Insurance" and a telephone number, 280-1700, hand printed in ink. (RTT 347-348; 1360-61.) The note also had a red stain on it. (RTT 456; 1356-57.) Stewart collected the note and took scrapings from the stain. (RTT 348; 1355-57.)

Colin Jacobs was lying inside the master bedroom. There appeared to

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[49] On the dining room table there was a white cloth towel and writing tablet which had the date "May 4, 1979" written on it as if it was a letter just being started. (RTT 314; RTT 511.) Also found in the Jacobs house was a receipt for $5.00 in groceries from St. Didacus church dated May 4, 1979. (RTT 610; Exhibit 503 [Item 74].) It was not indicated where this receipt was found.

[50] There was a washcloth in the sink (RTT 316) and what appeared to be blood on the left faucet handle. (RTT 316.) The kitchen sink drain screen contained hair and other debris. (RTT 529.) There was a partially eaten apple on the counter near the bread box (RTT 599) as well as an ashtray containing a cigarette butt. (RTT 1443.) To the left of the sink was a green paper towel. (RTT 531-532.) There was also a mop and bucket, but no evidence that there had been any mopping done in the kitchen. (RTT 600-601.) The exterior door to the back porch was closed, as was the one between the porch and kitchen. (RTT 357-358.)

have been a struggle on the bed in the master bedroom. (RTT 1452.) The padded railing of the waterbed was dislodged and was upside down off the bed on the floor just above Colin's head. (RTT 320; 450-451; 1452.)[51] A clump of hairs was located on the floor near the bedpost. (RTT 606.) The base of the door had blood smears going down it. (RTT 334.) The bed clothing was in a state of disarray and two chests of drawers and the items on top of them were also in a state of disarray. (RTT 323.) Suzanne Jacobs was lying between the chest of drawers and the foot of the water bed. (RTT 323.)

A bloody footprint lead away from Suzanne's body, with the toe of the foot print pointed toward the door. (RTT 334; 341.) The toe of the foot print near Colin's body also pointed toward the door leading out of the bedroom. (RTT 342.)

All of the adult-sized bloody foot prints appeared to be approximately the same size. (RTT 446.) Gleason also noted that the prints consistently went right foot, left foot; he did not find two right foot prints next to each other. (RTT 446.) However, there were prints over the top of each other in the kitchen. (RTT 315; 344-45; 447-48.) The master bedroom floor was covered with blood and no one could have walked around the bodies without leaving footprints. (RTT 447.) All of the Vibram prints appeared to lead out of the bedroom/hallway toward the kitchen. (RTT 447.) The adult footprints in the living room led toward the dining room and then into the kitchen. (RTT 344.)

Directly inside the door of the bedroom was a light switch and there appeared to be bloody hand smears near the switch on the door frame. The door frame was dusted for fingerprints. (RTT 327.) Several latent fingerprints

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[51] A white 4-hole button was located on the bed frame near the headboard; it was out of place because it didn't match those on Suzanne Jacobs' shirt. (RTT 595-596.)

were recovered from the Jacobs' home, which were taken from the bedroom door and door frame and a light switch, including a four-finger hand print and blood smear on the door jamb. (RTT 577-580.) Stewart collected the latent prints and other evidence found in the house. (RTT 1313.) Altogether there were 28 latent print lifts. (RTT 1315.)[52]

Suzanne Jacobs' hands were found clenched, and in her left hand were a number of hairs. (RTT 325; 1342; 1345.) There were also several strands of blond hair clutched in her right hand (RTT 330) and on her left elbow. (RTT 1346-47.) Some of the hair was removed at the scene. Her hands were covered with bags and the remainder of the hair was removed at the morgue. (RTT 1330-31; 1342.) There was also a clump of hair located on the floor near a bedpost. (RTT 1333.)

Hair samples were taken from Suzanne and Colin Jacobs at the morgue. (RTT 1349; 1351-52; 1353.)[53]

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[52] Stewart also seized the bedding from the master bedroom which included a brown blanket, a green blanket, the sheets and mattress pad. (RTT 1335.) He also collected items from a rug Suzanne Jacobs was lying upon. (RTT 1336.)

Colin Jacobs' bedroom was examined but there didn't appear to be anything of evidentiary value in the room; nothing was disturbed and there was no blood found on the floor, doors or walls in the room. (RTT 357-358; 619-620.)

[53] At the morgue, Stewart collected the victims' clothing. (RTT 1312, 1338.) The right front pocket of Suzanne Jacobs' tan pants contained a matchbook and a Winston cigarette which was torn in half. (RTT 570-571; 1338-39; 1446.) There were also 3 or 4 matchbooks, some green stamps and a business card in the lower right front pants pocket. (RTT 1339-40.) Suzanne Jacobs had a gold chain around her neck. The chain had red-brown stains on it. (RTT 1354-55.) Stewart also seized Colin Jacobs' clothing – a yellow T-shirt, green pants, and brown shoes. (RTT 1312.)

C. Victim Wounds

1. Suzanne Jacobs

Although Suzanne Jacobs had a rip in the back of her shirt and a broken bra strap, she was otherwise fully clothed and there was no evidence of sexual attack. (RTT 324; 355; 7199; 9394.) Oral, vaginal, and rectal swabs were taken and examined but there was no evidence of sperm present. (RTT 1092-1093.)

Forensic pathologist David Katsuyama conducted the Jacobs' autopsies at the San Diego coroner's office. (RTT 943-444.) In the upper-portion of her neck there was a gaping cutting/slashing injury in which the upper portion of the neck and the underlying structures were cut into and exposed, resulting in injuries to the large vessels on the right side of the neck. (RTT 944-945.) The jugular vein and carotid artery on the right side were cut. (RTT 945; 947.)

In Katsuyama's opinion the type of instrument used to cause the gaping neck wound was a very sharp-edged instrument, one with a medium blade length, 2" to 6" long. It would have been a relatively thick, stiff blade. (RTT 979.) It was not a very thin blade like a razor blade or a scalpel blade. (RTT 980.) As to the number of strokes, Katsuyama detected a number of tags, or interruptions. On one side of the neck he noted at least six of those cuts, or strokes. (RTT 980.)

Katsuyama noted other injuries to Suzanne Jacobs' body. There were three serious stab wounds. One was in the mid-chest area to the left of the midline, nearly into the upper inside portion of her left breast. (RTT 953; 954-955.) The penetration extended into the chest, into the pericardial sac around the heart, and had cut into the pulmonary artery, the large vessel that moves blood from the right side of the heart into the lungs. (RTT 955; 965-66; 978.) There was another wound above the left collarbone very close to the midline

that was likely caused by an object such as the tip of a knife. (RTT 952.) The wound penetrated into the subclavian vein under the clavicle. (RTT 952; 956; 978.) The third stab wound was in the lower portion of the chest or the upper portion of the abdomen just to the right of the xiphoid, a vertical wound of generally similar character to the other two wounds. (RTT 953; 960.) This particular wound penetrated into the abdomen itself (RTT 953) and cut into the liver rather deeply. (RTT 960-61; 978.) If not treated any of the three stab wounds may have been fatal. (RTT 954; 961.)

Katsuyama noted petechial hemorrhaging, tiny specks of blood on the surface in the inner aspect of the lower eyelids. (RTT 970-973.) There were no noticeable ligature marks. (RTT 1093-94.)[54]

2. Colin Jacobs

Katsuyama determined that Colin Jacobs' neck had been cut with at least two definite slashes, as there were two cuts separated by a v-shaped piece of skin or "tag." (RTT 976; 988.) It had not been made by a single cutting stroke. (RTT 976; 988.) The gaping wound extended into the neck and the right side of the head behind the ear. (RTT 976-77.) The right jugular vein and the right carotid artery were transected. (RTT 976-77; 984-985.) The depth of the wound, in relation to the front surface of the cervical vertebrae, did not extend to the backbone, and only approached the vertebra to within approximately a quarter of an inch. (RTT 985; 989.) Katsuyama did not see evidence of choking or petechial hemorrhaging in Colin Jacobs. (RTT 989.)

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[54] Because Suzanne Jacobs' tongue was clenched between the teeth, Katsuyama thought that there was a possibility that she had been restrained underneath the jaw. When there is pressure underneath the jaw, the tongue gets pushed up against the roof of the mouth and forward. If that occurs and the jaw is pushed up further, the tongue can get bitten or clenched between the teeth. (RTT 974-975.)

There were no noticeable ligature marks. (RTT 1093-94.)

Katsuyama noted cuts on Colin's fingers; on the right thumb, and on the palm at the base of the thumb on his left hand. (RTT 984.) The cuts on the hands appeared to be very fresh, consistent with the time frame of the slashing injuries to his neck. (RTT 986.) There was no other evidence of injury on the rest of Colin's body. (RTT 986.)

In Katsuyama's opinion the instrument used to inflict the wounds had a sharp edge and a relatively stiff blade. (RTT 987.)

Katsuyama did not conduct any tests to determine the time of death in that, in his opinion, too much time had elapsed from the time the bodies were found, around 5:00 p.m. the previous day, until the time he conducted the autopsies. (RTT 989-990; 1080.)[55] He was concerned with determining the cause of death, not the time of death, which was not his responsibility. (RTT 995; 1006.)

D. Suzanne Jacobs' Alcohol Consumption

Suzanne Jacobs' stomach contained approximately 250 ccs (or about 8 oz.) of fluid and cereal material. (RTT 978.) Her blood was drawn and placed into a vial which contained sodium fluoride as a preservative. (RTT 982-983.) The blood was tested for the presence of alcohol which revealed a blood/alcohol level of .04%. (RTT 1071-72.) Based on her weight of 126

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[55] No one measured the core temperatures or vitreous humor samples of the bodies at the scene. (RTT 1085.) Katsuyama testified that Deputy Coroner Max Murphy's report indicated that Colin Jacobs' body was "cooling to the touch and enveloped in full rigor mortis." The body was found at 5:05 p.m. but the report did not indicate when Murphy had arrived at the scene or when he made the observation. (RTT 1085-1086; 1087.) All that could be surmised from the report was that the observation had been made sometime after 5:23 p.m. (RTT 1087.)

lbs., this would have been consistent with consumption of at least two standard drinks an hour before death, or more than two drinks earlier in the morning. (RTT 1071-1073; 1088; 8319-21 [defense].)[56]

Michael Jacobs testified that Suzanne didn't ordinarily drink in the mornings and did not "over drink." (RTT 134-35.) Margaret Harris did not know Suzanne to drink in the mornings. (RTT 217.) Deborah Watts-Gaydos, a close friend of Suzanne, never knew Suzanne to drink by herself. (RTT 10822 [defense].)

E. Serological Evidence

Criminalist James Stam inventoried the evidence collected at the Jacobs scene and determined what type of analysis would be done on each item of evidence. (RTT 1102.) Stam tested bloodstain evidence samples from each of the following sources and location: the shoe print on the kitchen floor in front of the sink (RTT 1107-08), the green paper towel found at the sink counter (RTT 1129), various areas of the sink (RTT 1124-25; 1127-28),[57] the kitchen floor in front of the sink (RTT 1124-25), the living room floor near

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[56] One drink of either eight ounces of wine, 12 ounces of beer, or one ounce of 85 proof alcohol would cause the blood alcohol in an individual of approximately 126 pounds to be .015 to .02 or perhaps higher, and that the burn-off rate for that same individual would be approximately .015 to .02 per hour, meaning the blood-alcohol would dissipate at .015 or .02 per hour. (RTT 7749-7750 [defense].) Dissipation would stop after the liver ceased to function at the time of death. (RTT 1074; RTT 8318-19 [defense].)

[57] The police officers involved in the investigation had a theory that the killer had washed his hands in the kitchen sink. (RTT 1242-43.) The red, white and blue washcloth found next to the sink was tested for the presence of blood using ortho-tolidine. (RTT 1237-39.) Stam's report indicated results were negative but his rough notes indicated a possible positive. (RTT 1239-42.) It was possible that the washcloth had been stained then rinsed in water and the stain diluted. (RTT 1242-43.)

the television (RTT 1105; 1200), the bathtub (RTT 1130), the bath mat near the tub and the floor (RTT 1131-32), the hallway floor (RTT 1133), the bedroom door on the hallway side (RTT 1134), the door jamb above the light switch (RTT 1135), the floor of the master bedroom (RTT 1136), the corner of the four-drawer dresser (RTT 1137), the footboard of the bed (RTT 1137), fingernail clippings from Suzanne Jacobs (RTT 1138-39), and scrapings taken from the Love Insurance note. (RTT 1167.) After performing a serological analysis[58] of the bloodstains, Stam concluded that the blood on the items could have come from either Suzanne Jacobs or Colin Jacobs or another group "O" donor,[59] and did not come from Michael Jacobs.[60]

F. Fiber Evidence

Stam collected hair and fibers from sheets and blankets (RTT 1173); hairs from a brown blanket (RTT 1174); hairs from the multicolored oval rug (RTT 1176-77) and hairs collected from Suzanne Jacobs' pants. (RTT 1177-

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[58] Stam testified that his analysis did not go beyond ABO grouping because he had discussed the case with the investigators and the evidence technician at the scene and it was indicated that no one else had entered the scene but the victims. Therefore, he concluded the bloodstains were from the victims and didn't take the testing any further. (RTT 1170-71.)

[59] Colin and Suzanne Jacobs' blood samples were destroyed sometime prior to trial. (RTT 1144; 1204-05.) Some of the items only revealed that the blood was human; the quantity was insufficient to perform further testing. (RTT 1182-83.) Some of the samples were consumed in testing. (RTT 1113; 1125; 1126.)

[60] Stam tested Michael Jacobs' blood in December, 1988. It was type A. (RTT 1164; 1168.) He did not perform any enzyme or protein groupings. (RTT 1203.) John Simms examined and grouped Massingale's and Lucas' blood samples in the ABO system. They were both type "A." (RTT 2128-29.)

78.)[61]

[For analysis of fiber evidence, see § 2.2(J), pp. 89-95 below, incorporated herein.]

G. Shoe Print Pattern Found At The Jacobs Scene

1. The Partial Print In Exhibit 19 Could Have Been Made By Different Varieties And Sizes Of Boots Or Shoes

The prosecution produced a photograph of a partial footprint from inside the Jacobs' house. (Trial Exhibit 19.) (RTT 449.) The footprint was found on a hardwood floor in the living room, just left of the television. (RTT 449.) This print was of poor quality. (RTT 2064.) It was a size 12 sole that made the print in Exhibit 19 to the exclusion of all other sole sizes. (RTT 2018-19.) However, it was possible for a size 12 sole to be placed on a size 10, 11 or 11 ½ as well as a size 12 boot. (RTT 2066-67.)

The prosecution expert, Roy Nilson, believed that if it was a Lehigh boot that made the impression, it had a size 10 heel on a size 12 sole. (RTT 2020.) Nilson hadn't ever seen or purchased any Lehigh boots with that configuration. (RTT 2020.)[62] A repairman can cut a size 12 Vibram sole to

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[61] He also collected a green fiber from the white cloth towel found in the dining room. (RTT 1230-1231.) He compared the fiber with those found on the bedding and it did not match. (RTT 1232-33.) The fiber from the towel was possibly Dacron or wool fiber, a combination of synthetic and natural fibers. The fibers from the bed clothes were all natural, possibly wool. (RTT 1234-35.)

[62] Lehigh, which made the boots Lucas was issued at work, did not manufacture the Vibram soles; they bought the Vibram soles to go on the logger boots. (RTT 1906.) The Vibram soles were used on other kinds of footwear, such as hiking boots. (RTT 1906.) Detective Green contacted a local shoemaker, who had the kind of soles he was looking for, to ascertain

(continued...)

fit a size 10 shoe, and put a size 10 heel on. There might then be a 3/8" discrepancy in how the heel and sole line up as there was with the evidence print in Exhibit 19. (RTT 2021.) In terms of shoe sizes, the print was consistent with at least four different sizes including those of Johnny Massingale, David Lucas and Fire Captain Fairhurst. (RTT 890-91; 1914-16; 8176-77 [defense]; 2066-67.)[63]

However, Fairhurst denied wearing Vibram soled boots that day. (RTT 254-55; but see § 2.2(G)(3)(c), pp. 76-77 below, incorporated herein [Fairhurst's boots were consistent with the shoe print].) Also, Prosecutor George Clarke read in a portion of Investigator William Green's police report dated June 14, 1979, which detailed Green's examination of sole patterns of those who had entered the Jacobs' home: "The fire captain who entered the residence and determined it was a possible homicide scene. He was personally contacted, as well as the members of his crew, [and it was verified

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[62](...continued)
how many types of shoes the sole could be put on and the availability of that particular sole pattern. (RTT 7990.) Green learned that the sole could be put onto any type of shoe and was a commonly and widely used sole for many types of work and recreational boots. (RTT 7990-91.)

[63] The print was not consistent with the footwear of others who had walked in the house. Michael Jacobs testified that the boot sole patterns depicted in Exhibit 3, a black and white photograph depicting the sole pattern of a boot, didn't resemble the sole pattern of any shoes he wore in May of 1979, as his shoes were not Vibram soled, and the bottoms of his boots were faded and worn out. (RTT 120; 130.) Edward Harris wore size 8½ "E" work boots with horizontal bars in soft rubber sole. (RTT 166; 171.) Margaret Harris was wearing sandals. (RTT 200.) Officer Edwards testified that he wasn't wearing boots similar to Exhibit 3 that day (RTT 265) and that he wore size 13 "D." (RTT 268.) Pat Stewart was not wearing shoes with patterns similar to Exhibit 3; he wore dress-type shoes with flat bottomed soles. (RTT 1269.)

that he was the only one who had entered the residence] and [that] no one in his crew had a shoe pattern similar to that found inside the residence." (RTT 10873; 10881.)

The court gave a limiting instruction as to the bracketed portions of the statement from the report: "The portion of that statement that relates to verification that the fire captain was the only one of the crew who had entered the residence, that cannot be entered for the truth of the matter asserted to you, because from the report this is hearsay. You cannot consider it for the truth of the matter asserted. This only gives context to the remainder of the statement that has to do with checking sole patterns." (RTT 10881.)

Fairhurst testified that he didn't know who William Green was and had no recollection of anyone looking at his shoes. (RTT 11743-45.) He told Dan Williams that to the best of his knowledge, no one had checked his shoes. (RTT 11746.)

Fairhurst was 99% sure that no one checked his boots at the station after the killings were discovered. (RTT 11747.) The defense investigators were the first to express any interest in what sort of footwear Fairhurst wore on May 4, 1979; no one checked the soles of his boots in 1979. (RTT 11748-49.)

2. Shoe Print Comparison: Prosecution Evidence

Roy Nilson, a retired deputy sheriff, specialized in fingerprint and shoe print examination. (RTT 1968.)[64] Nilson took Lehigh size 10½ "D" boots

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[64] Nilson testified that in order to do footprint comparisons, it was important to get a suspect's shoe prints immediately, because the shoes wear and change, making it impossible to get a positive identification. (RTT 1970.) Wear may cause the print pattern to change, causing new, unique characteristics not found in the original print. (RTT 1971-72.)

(Trial Exhibit 84A & 84B) like the ones Lucas wore at work[65] and made a plastic overlay by inking the sole of boot 84B with black spray paint and then stepping onto the overlay, Trial Exhibit 89. (RTT 1981; 2052; 2063; 2073.) He then compared the overlay with Exhibit 19 and concluded that the sole portion of the overlay fit very closely to the sole portion of Exhibit 19. However, the heel was somewhat out of alignment and Nilson couldn't get the overlay and Exhibit 19 to match in every detail. (RTT 1982; 2012; 2073.) Nilson was not rendering an opinion about the size of shoe that made the impression memorialized in Exhibit 19. All he was trying to communicate was that the print may have been made with a Vibram style 100 sole. (RTT 2045-46.)

Nilson never compared any soles received from Lucas, Massingale, Michael Jacobs or Edward Fairhurst. (RTT 2022.) Nilson looked at the crime scene photos of the footprints in blood but noted that there was no ruler in any of the photos so he could not compare them to the boots he looked at. (RTT 2024.)[66] Without a ruler in the photo it was impossible to reconstruct the actual size of the print. (RTT 2024.) He compared size 10, 11 and 12 soles to Exhibit 19. (RTT 2048.) He also compared the heel sizes to Exhibit 19, but they didn't match in every detail because it was only a partial print. (RTT

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[65] Bruce Kastor identified a Lehigh industrial account order form for Precision Metal Products in El Cajon sent from Precision's accounting office. The order form was in reference to a "D. Lucas" and dated April 3, 1979. (Exhibit 83A) (RTT 1887.) The order was for a pair of stock number 1951 logger boot style, ten inch boot, size 10 ½ "D." (RTT 1887.) The boots cost $42.95. (RTT 1887.) Lucas received his pair of safety boots on April 27, 1979. (RTT 1917.)

[66] There was a ruler in the photo marked as Trial Exhibit 19. (RTT 1563; 2053-54.)

2049.) Nilson could not conclude that any of the heels constituted an exact match to the impression in Exhibit 19. (RTT 2049-50.) Lehigh, the company which sold the work shoes worn by Lucas, sold approximately 15,000 pairs in southern California and Nevada in 1978. (RTT 1904-05.) The Lehigh boots could be resoled at any shoe repair. (RTT 1906.)

3. Shoe Print: Defense Evidence

a. Precision Metal Boots Were Not Normally Worn Outside Of Work

It would not have been normal for a furnace operator of Precision Metals such as Lucas to have worn their safety boots outside of work. The furnace operators worked in an area where the grit and lubes were on the floor, as well as metal residue. (RTT 8456.) The metal residue would get picked up in the crevices of the sole pattern of the operators' boots. (RTT 8456-57; 8463.) When they were done with work they would take off their boots and coveralls in the dressing room, and leave the boots on their lockers because they were heavily soiled with the lubricants they used in the forge shop. (RTT 8435-38.)[67] Jackson testified that if someone were to wear the boots out of the factory it would ruin their carpet. (RTT 8438; 8457; 8461.) If someone walked into their house with the boots on, it would leave tracks through the house. (RTT 8457.) No evidence of metal residue, grit or lubricants was found on the floor in the Jacobs residence.

b. Boots Found In Lucas' Closet Were Inconsistent With The Shoe Print

John Simms testified that on March 13, 1985 he received a pair of

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[67] Those working in that department had to wear leather boots; it was an OSHA requirement. (RTT 8458.) Employees were not allowed to work in the department wearing any other kind of shoe. (RTT 8458.)

boots from Detective Ayers, Exhibit 733, which had been seized from the northwest bedroom closet of Lucas' house on December 16, 1984. (RTT 8677.) He compared the boots to a photographic enlargement. (RTT 8677.) He noted some generally similar tread design, but concluded that there was sufficient dissimilarity in the tread detail to conclude that the boots were dissimilar to the evidence shoe print at the Jacobs scene. (RTT 8677.) These facts were presented by stipulation. (RTT 10807-10808.)

c. Fairhurst's Boots Were Consistent With The Print

Edward Fairhurst denied that he had been wearing boots with Vibram soles on May 4, 1979 and denied ever owning a pair of shoes with Vibram soles. (RTT 254.)[68] However, when defense investigator William Pon Cavege showed Fairhurst a photograph of the sole pattern left at the scene in 1985 (RTT 8171), Fairhurst said his shoe's soles looked similar to the pattern. (RTT 8171.)[69]

Furthermore, Fairhurst had his shoes resold shortly before May 4, 1979 by David Daywood. (RTT 8171-72.)[70] Daywood testified that Ed Fairhurst

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[68] Fairhurst admitted that he had told Caldwell that on May 4 he was wearing Sears high top boots with Vibram soles (see RTT 10779), but Fairhurst claimed, at trial, that he didn't know what Caldwell meant by Vibram soles. (RTT 255.) In 1985, defense investigator William Pon Cavege contacted Fairhurst and asked to see the shoes he had been wearing when he entered the Jacobs scene. (RTT 8169.) However, Fairhurst had thrown them away. (RTT 8170.)

[69] Also, in November 1986, Fairhurst told Thomas Caldwell that he wore Vibram-soled work boots on May 4, 1979. (RTT 10779 [defense].)

[70] The re-soled shoes were the ones Fairhurst wore on May 4, 1979. (RTT 256.)

was one of his long time customers. (RTT 8173; 8174.)[71] Around April 1979, Fairhurst brought in some shoes to be resold. (RTT 8171-71; 8174.) Daywood resold them with Vibram soles and heels. (RTT 8175.) Shown defense Trial Exhibit 665, a size 12 sole, Daywood identified it as being the same type of heel and sole that he put on Fairhurst's boots. (RTT 8176.) Fairhurst's boots were size 10½; Daywood believed the soles he put on Fairhurst's boots were size 12 and had to be cut down to fit the shoe, as that was what they usually had to do with that size shoe. (RTT 8176-8177.)[72]

H. The Love Insurance Note

1. Loss of Fingerprint On Love Insurance Note

Shortly after the investigation began Detective Gleason completed a lab work request (RTT 460) to have the note found in the Jacobs' bathroom sprayed with ninhydrin, a chemical that when applied to paper turns purple. If fingerprints are present, the chemical makes them visible. (RTT 461; 1362.) Additionally, Gleason requested that the note be photographed to preserve any evidence of fingerprints and the handprinting on the paper. (RTT 460-461; 582.)[73] On May 11, 1979, the note was treated with ninhydrin

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[71] Daywood's testimony was presented during the defense case.

[72] Daywood testified the soles did not come in size 11. They came in a 12, 10 or 8, and the heels came in a size 9 up. (RTT 8177; 8178.)

[73] Gleason knew that, after the note was treated, any fingerprints would oxidize and evaporate. The only way to preserve the fingerprint would be to photograph it. (RTT 551-52.) However, he never followed up to determine whether a photo was taken, and he never saw any photos of the note. (RTT 552-53; 585.)

by lab technician, Pat Stewart,[74] and a partial fingerprint was discovered. (RTT 550-51; 1364; 1366; 1489; 1518.)[75]

At that time it was a matter of policy to have all fingerprints examined by latent print examiners. (RTT 1365; 1498.)[76] The prints would then be photographed after the latent print examiner had made an analysis and/or if the latent print examiner determined the print had some value and requested that

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[74] Before applying the ninhydrin, Stewart took a series of photographs of the note before he applied the ninhydrin. (RTT 1489; 1490; 1510-11.) Exhibits 20, 21, 22A and B (photographs of Love note prior to the application of ninhydrin.) (RTT 1511; 1582.) Stewart then applied ninhydrin to the note, photographed it and retained it. (RTT 1361-62; 1491-92; 1488-89.) However, no photograph of the print itself would have been taken unless and until there was a specific request from the Latent Print Section. (RTT 1499-1500.)

[75] Looking at the print on the note, Stewart noticed there appeared to be points of identification, but he didn't determine how many. (RTT 1520-21.) He was familiar with whorls and ridge characteristics of fingerprints. (RTT 1521.) He noticed characteristics of ridges on the print, but he didn't make a determination as to any specific characteristics. (RTT 1521.) Nor did he specifically record where on the note the print was located. He couldn't even recall whether the print was on the front, back, bottom or top. (RTT 1521-22.) Stewart did not attempt to photograph or record specifically what the fingerprint looked like. (RTT 1364; 1487; 1491; 1519-20.)

[76] The practice in 1979 was to not photograph items sprayed with ninhydrin but to send them to the Latent Print Section to be examined and then have a photograph request come back from the Latent Print Section. (RTT 1499-1500.) In 1979, Stewart did not know that ninhydrined fingerprints were subject to fading and could disappear in as little as two days. (RTT 1363; 1524-25.) Stewart had no prior experience with ninhydrined prints fading. (RTT 1526.) Stewart testified he learned about the fading problem several years after the Jacobs case when the lab was making their own ninhydrin and experienced problems. A print had disappeared virtually overnight. (RTT 1363-64.) Stewart didn't recall any specific conversation with anyone at the lab concerning ninhydrined prints fading. (RTT 1495-97.)

a print be photographed. (RTT 1365; 1366; 1498-99; 1499-1500.)[77]

At the request of Gleason (RTT 551), San Diego Police Department latent print examiner Leigh Emmerson examined the Love Insurance note and found a partial latent print. (RTT 1809.) The note had already been processed with ninhydrin when he examined it. (RTT 1809-10.) He found five points in the latent. (RTT 1809.) When he observed the five point latent he immediately went to homicide detectives Moller and Gleason and asked them if the piece of paper had much meaning in the case. (RTT 1810; 1850-51.) They told him it did. Emmerson told them that it had five or six points[78] and should be preserved. (RTT 1810; 1850-51.)[79] After Emmerson told the

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[77] Stewart thought he had seen a black and white Polaroid photo of the latent print on the Love note. (RTT 1365; 1500-01; 1533-36.) It would have had to have been taken after ninhydrin was applied. (RTT 1534.) There was a special camera that was used to take close up photos of latent prints and other types of small evidence, but he didn't believe it was used to take a photo of the latent print on the note. (RTT 1482-83.) He recalled a Polaroid was taken of the print and it would have gone with the latent to the Latent Print Section. (RTT 1484-85.) Stewart believed that Emmerson took a black and white photo in order to aid in their analysis, as it was their procedure to photograph that type of evidence so they could handle the photo rather than the note itself. (RTT 1500.) The photo he remembered was of that nature. (RTT 1500.)

[78] Emmerson remembered the Love note print as either being a loop or a whorl. (RTT 1853.) Approximately 60% of the population have loops and approximately 35% have whorls. (RTT 1688-89;1857.) All 10 of Lucas' prints contained whorls. (RTT 1816-17; 1855.) Michael Jacobs' prints contained nine whorls and one loop. (RTT 1817.) Massingale's prints contained 8 whorls and 2 loops. (RTT 1817.) Emmerson couldn't exclude Michael Jacobs, Massingale or Lucas as being the donor of the five point latent print. (RTT 1817.)

[79] Although he couldn't necessarily identify the person who left the
(continued...)

detectives about the print, it was retained in the Latent Print Section in a locked file. (RTT 1811; 1850.) Emmerson did not photograph it because it wasn't his responsibility to do so. (RTT 1811.)[80]

It wasn't until 1981, after the arrest of Johnny Massingale for the Jacobs murders, that Gleason and Stewart discovered the Love note print was no longer visible and that no photographs of it could be found. (RTT 581; 1366; 1518; 7995-96 [defense].)[81]

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[79](...continued)
print, Emmerson could have used it to eliminate possible suspects, including Lucas. (RTT 1810; 1857.) Emmerson thought it was a very important piece of paper. (RTT 1810.) Also, he could have compared it to Michael Jacobs and Massingale and either included or excluded them. (RTT 1857-58.)

[80] Emmerson testified that when he went to work for the San Diego Police Department in 1975 there was a department policy concerning saving fingerprints that had been developed using ninhydrin. (RTT 1849.) If they received a ninhydrined developed print it would be evaluated to see if it was good. If it was, they would tell the investigating officer it was good and that investigating officer should preserve it by photographing it. (RTT 1849.) Emmerson testified he didn't recall exactly what he said to Moller and Gleason and whether he told them to photograph the note or not, but the policy in 1979 was to photograph ninhydrined prints. (RTT 1852.) Emmerson was aware that there was no fixative to preserve the print at that time and that it would eventually fade. (RTT 1849.) The same policy was in effect in 1979, and that policy was followed the entire time he worked there. (RTT 1850.) It was not the responsibility of the Latent Print Section to take the photographs; the responsibility was with the investigating officer. (RTT 1852.) The investigating officer would notify the evidence tech who was assigned and the tech would take the photo. (RTT 1852.) According to James Stam, another evidence technician, it would have been Stewart's responsibility to photograph the note. (RTT 1216.)

[81] The defense evidence established that in 1981 William Green discovered that the Love note had been destroyed by ninhydrin when they came up with Massingale's last name and wanted to compare Massingale's
(continued...)

Stewart tried to get the print to reappear through the use of more ninhydrin, but it didn't work. (RTT 1367; 1518.) Stewart wrote a letter to the FBI asking for their help. (RTT 1367; 1535-36.) The letter stated that, "We believed photographs of the print were taken initially, but none can be found now." (RTT 1536.) The note was sent to the FBI but they couldn't raise the print. (RTT 583; 1367-68.) When returned from the FBI the note was a blackish, dark purple unreadable piece of paper. Before it was sent to the FBI the note was pink and the writing was readily visible. (RTT 1370; 1518; 1212; 1581.)

John Torres, a latent print examiner with the San Diego Police Department, testified that an examiner could render an inclusionary or exclusionary statement on the basis of a photo of a latent print. (RTT 1706.)

2. Handwriting Comparison: Prosecution

Manuel Gonzales, a forensic documents examiner with the San Diego Police Department, obtained specimen handwriting from Lucas in an interview room at the jail on January 2, 1985. (RTT 2377; 2379; 2384.) He described Exhibit 105 as 19 "Milk Bone shaped" exemplars on which he had Lucas write. (RTT 2380; 2381; 2383.) Exhibit 104 was a handwriting exemplar card completed by Lucas. (RTT 2380-81.) He also identified Exhibits 106 through 109 which were business envelopes containing Lucas' writing. (RTT 2382.)

Gonzales did not have any independent memory of whether or not Lucas was handcuffed at the time he took the exemplars. (RTT 2409-10;

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[81](...continued)
known prints with the five point partial that was on the note. (RTT 7983; 7995; 8010; 8011 [defense].) When they tried to compare the prints to the Love Insurance note they determined that the print had disappeared and that there was no photograph of the print. (RTT 8014 [defense].)

2412; 2414.)[82] Gonzales gave Lucas a series of the little slips of paper to do some writing on and then gave him one of the larger envelopes, Exhibits 106 or 107, and then moved back to the little slips of paper. (RTT 2403.) Lucas was sitting when he initially started writing the exemplars, and later as the handwriting specimen-taking session progressed, Gonzales asked him to stand. (RTT 2385.)[83] The entire process took about 40 or 45 minutes. (RTT 2403.)

Prior to going to the jail to obtain the Lucas exemplars Gonzales spoke with David Oleksow and discussed creating a series of slips for the purpose of comparing the handwriting on the series of slips to the photograph of the note. (RTT 2405-06; 2416.) Oleksow made the cutouts. (RTT 2406.) It was their intent to create pieces of paper that resembled the size and shape of the note. (RTT 2420; 2429.)

Lucas was very cooperative in giving the exemplars. (RTT 2421; 2422.) Gonzales did not notice any effort on Lucas' part to attempt to disguise his writing. (RTT 2429.) Gonzales did not prepare a formal report; he only made notes on the exemplars. (RTT 2414.) After he got the exemplars

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[82] John Simms also couldn't recall if Lucas was handcuffed when he obtained the hair samples prior to Gonzales obtaining the exemplar. (RTT 2148; 2423.) Simms was present when Gonzales got the handwriting exemplar from Lucas. (RTT 2149.) Gonzales didn't think Lucas was handcuffed when he produced the exemplars. (RTT 2387-2388.)

The only time one would prefer that a person be handcuffed while producing handwriting specimens would be if the questioned handwriting was produced while the person was handcuffed. (RTT 2387; 2409.)

[83] Gonzales identified exemplars #11 and 12 in Exhibit 105 as being one created when Lucas was standing. (RTT 2385.) He couldn't remember if Lucas was standing or sitting when he created Exhibits 106-109 (RTT 2385-86), but he believed he was seated when he wrote on the odd-shaped exemplars. (RTT 2386-87.)

he gave them to David Oleksow for evaluation. (RTT 2420.)

John Harris, a questioned documents examiner called by the prosecution, testified that the amount of writing on a questioned document is important. (RTT 2255; 2262; 2268.) If there were only one word, it would be difficult to make a comparison, and it would depend on the individuality of the writing; to have several words or more of the writing would be better. (RTT 2268-69.) Individuality of the style is also important. (RTT 2269.) Harris testified that it is important to get a lot of good quality information from the original, because if only one letter is different, a documents examiner could reasonably exclude an individual. (RTT 2326; 2338.)

With regard to the Love Insurance note, all Harris had to work with were five different numerals and only 11 letters. (RTT 2338-39.) [84] Out of an alphabet of 26 letters, that left 15 letters that could not be compared. (RTT 2346.) There were only five numerals to compare, leaving five that couldn't be compared. (RTT 2347.) That left 20 letters and numerals that couldn't be cross-compared between the Love note and Lucas' writing. (RTT 2347.)

Harris examined the original Love Insurance note in 1985 after it had blackened due to the chemical treatment for fingerprints. He used ultraviolet, infrared and a microscope with transmitted light but couldn't bring out any visible writing on it. (RTT 2276; 2324.) However, there was a photograph

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[84] Harris testified that the "R" on the note was obscured by either a shadow or a stain on the document; all that was visible were the bottom two strokes of it and it was narrow. However, Harris noted that Lucas made a narrow printed "R" that he made a little wider sometimes, but the narrow "R" was also in his handwriting. (RTT 2314.) Harris also noted that there wasn't an "A" on the Love note to compare against except for the top part of a narrow one. (RTT 2348.) Had the paper been unfolded and photographed with a 35 mm camera he might have been able to get a clearer image of the "R" and "A" for the purposes of comparison. (RTT 2368.)

which showed the printing on the note. (Trial Exhibit 22.) Harris prepared an enlargement of the photograph to use for comparison purposes. (RTT 2276-77.) Harris examined Lucas' writing from 1979, 1980, and 1981, and writing from later exemplars. (RTT 2274; 2278.)[85]

It was Harris' opinion that the person who wrote the Lucas exemplar documents, both the requested writing and the due course writing, also wrote the Love Insurance note. (Exhibit 22.) (RTT 2309.)[86] Harris compared the exemplars with the Love Insurance note and went over it number by number and letter by letter, looking for evidence of similarities and of differences. (RTT 2310.) As a result of his examination, he concluded that the writing on the Love note matched the handwriting of Lucas in all important aspects. It was his opinion that Lucas was the writer of the Love note although he wasn't 100% certain. (RTT 2310; 2315.)

Lucas' business partner, Frank Clark, testified that, in his lay opinion, the printing on the Love Insurance note was "Dave's [Lucas'] writing." (RTT 3838.)

3. Handwriting Comparison: Defense

In 1979, defense witness David Oleksow, a forensic document

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[85] Harris also prepared Exhibit 113 with writing on the "Memo" side from the photo of the Love Insurance note and writing on the "Lucas" side from the exemplars. (RTT 2279.)

[86] He based his opinion on the fact that Lucas is a fluent writer and not illiterate; that Lucas can write and he writes fast, and has quite an individuality to his writing. Harris determined that Lucas printed oftentimes and in upper case. (RTT 2309.) The skill was average; it had individuality to it and slanted to the right. (RTT 2310.)

examiner and handwriting expert, reviewed a photograph[87] of the "Love Insurance" note which was an irregularly shaped piece of paper bearing the printing "Love Insurance 280-1700." (Trial Exhibit 510.) (RTT 8979.) When he examined the Love note, Oleksow was concerned about the small amount of writing which limited the number of comparisons that could be made. (RTT 8987-88.)

William Green brought Oleksow writings of people other than Lucas to compare against the note, and the results were negative. (RTT 8988; 8980.) The next time Oleksow examined the Love note was in December, 1984, when he was presented with three pages of known handprinting in the form of letters written by David Lucas to Shannon Lucas. (RTT 8980-81.) Oleksow also received fictitious business name statements bearing certain file identification information, a financial statement, and various court documents bearing the known handprinting and signatures of David Lucas. (RTT 8981.) Oleksow noted numerous unexplained variations between the known

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[87] Oleksow testified that it was generally better to use an original than a copy or photo because more detail can be seen. Additionally, the examiner can look at the reverse side embossing, the amount of pressure that was applied by the pen which protrudes and actually is registered on the reverse side of the document. (RTT 8988-89.) Pressure is exhibited in a number of ways: in expansion or the width of the line, in actual fluctuations of the writing patterns of a particular letter formation, with the lack of intensity in those portions where the pressure on the pen is lighter, and the extending of pressure or the darkening of the pen line where pressure is applied. (RTT 8989.) Also, the fine detail of the original writing can be examined under a microscope or magnification. (RTT 8988-89.) There were other tests that could be conducted on an original document if needed. (RTT 8989.) But these tests cannot be done without the original. (RTT 8989.)

handwriting[88] of Lucas and the Love note writing. (RTT 8982.) He concluded that he could neither identify nor eliminate Lucas as being the writer of the Love note. (RTT 8982.)

The next contact he had with Lucas' writing and the Love note was in January 1985. (RTT 8982.) Between that time and the December 1984 evaluation, Oleksow obtained sample printing from Lucas on numerous irregular pieces of paper measuring approximately the same size and dimensions as the Love note. (RTT 8982-93.) Oleksow also obtained a partially completed exemplar card and four business-size envelopes, bearing known handwriting, signatures, numbers, and printing of Lucas. (RTT 8983.) After examination of all the writings, he again concluded that he could not make a positive identification due to numerous unexplained variations. (RTT 8983-8985.) Oleksow then requested that investigators obtain additional due course writing. (RTT 8984.)

In March 1985, Oleksow reviewed all of the writings again as well as a Polaroid[89] photo of the Love note. (RTT 8992-94.) He again reached the same conclusions stated in his earlier reports and could not make a positive

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[88] Defense counsel Steven Feldman asked Oleksow if there were "numerous unexplained variations in the writing between the known hand prints of David Allen Lucas and the Love Insurance note." (RTT 8982.) Obviously this was meant to refer to "handwriting" or "handprinting" instead of "hand prints." In Appellant's Request to Correct The Record, Etc., p. F-7, counsel asked the reporter to check the notes since the meaning was unclear. Judge Hammes "blanketly" denied all of the record correction requests, stating that she did not believe that they were "anything of significance." (Reporter's Transcript of Record Correction Hearing (October 15, 1997) 9:7-10.)

[89] Oleksow identified Trial Exhibit 22A as the photo he examined. (RTT 8992.)

identification. (RTT 8993.)[90] However, Oleksow concluded that the known writer, Lucas, showed similarities with the questioned numbers and handwriting found on the Love note (RTT 8993-94), leading him to state that Lucas was "probably responsible" for the writing on the Love note. (RTT 8994.) The documents that led to his last conclusion included some due course known handwriting by Lucas which were more contemporaneous in time with the questioned document than what he had earlier. (RTT 8995.)

4. Purchase Of Insurance From The Love Agency By Lucas

Harold Ille was the office manager for Love Insurance for approximately ten years. (RTT 1863.) His office was located on El Cajon Boulevard in San Diego. (RTT 1863.) It was a nonstandard brokerage firm meaning applicants were able to get insurance in the assigned risk business; Love had special companies that would keep the applicants out of assigned risk. (RTT 1863.) Ille identified several documents including an undated sheet

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[90] Oleksow testified that from his standpoint as a documents examiner, a positive identification was different than saying that a person is "probably responsible." (RTT 8996.) A positive identification is where there is total agreement between the questioned and known handwritings that are submitted; not only total agreement but an absence of significant differences. (RTT 8985.) For example, one significant difference would negate any form of identification and might even eliminate the suspect as being the writer. (RTT 8985.) One of the first things he did in an examination was to look for differences, because it would quickly short-circuit the entire examination, as a significant difference would indicate a different writer. (RTT 8986.) He also looked for sufficiency of characteristics. (RTT 8985.) Oleksow testified that when he was dealing with a very limited amount of writing, obviously he would have limited points for comparison and limited material to evaluate and arrive at a conclusion. (RTT 8985.) He also looked to make sure that there are no differences in class characteristics. In other words, those characteristics that are found between a large group of people. (RTT 8985-86.) In this instance, he did not find any significant differences, but did not make a positive identification. (RTT 8986.)

of paper from a note pad with a price quote for a 24-year-old single individual (Exhibit 81B) (RTT 2436); a memo dated July 24, 1979, sent to Lucas from Love Insurance (Exhibit 81C) in reference to his insurance application on a 1968 Chevrolet Belair which was set to go into effect on July 31, 1979 (RTT 2440); a billing statement dated August 24, 1979 sent to Lucas for the cost of the insurance, $50.00, which Lucas paid in full (RTT 2438); Exhibit 81G, an office receipt for Lucas' $52.00 payment dated July 7. (RTT 2438; 2444.)

Ille never did business nor sold insurance to Lucas personally (RTT 2457); nor did he personally fill out any of the forms about which he testified. (RTT 2457.) During 1979 and 1980, Love Insurance received approximately 40 to 100 phone calls per day, and approximately 7 to 12 people would come in daily to discuss purchasing insurance. (RTT 2458-59.) Of that number, 9 to 10 of the people would actually purchase insurance. (RTT 2458-2459.)

I. Analysis/Comparison Of Fingerprint Evidence Found At Jacobs Scene

Stewart collected the latent prints found in the Jacobs house. (RTT 1313.)

John Torres, latent print examiner for the San Diego Police Department, found four or five latent lifts that he felt were identifiable if he had the known prints of the donor. (RTT 1628-29; 1675; 1683; 1701; 1708.) The others were marked as being of no value for the purposes of identification, including the prints taken from the wine glass. (RTT 1323-24; 1696; 1751-52; 1756.)[91] Torres had known fingerprints from Suzanne, Michael and Colin Jacobs; he also had the major case prints of David Lucas

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[91] The wine glass prints did have some ridge characteristics which may have been useable for purposes of exclusion, but Torres did not use them for that purpose. (RTT 1753-57.)

and Johnny Massingale.[92] (RTT1679; 1680-81.) He examined and evaluated the 28 latent prints found in the Jacobs house (RTT 1667-68; 1735; 1743), but there were no prints identified other than one of Michael Jacobs found on the dining room doorjamb. (RTT 1684; 1686-87; 1743.) He compared the latents to the major case prints of Lucas and concluded that there were no matching impressions. (RTT 1743-44; 1747.) Lucas was not the maker of any of the prints recovered at the scene. (RTT 1783-84.)[93]

In May 1979, Leigh Emmerson was asked to examine some latent prints which were removed from the Jacobs house. (RTT 1798; 1804-05.) Emmerson felt that eight of the latent fingerprints were good for the purposes of comparison, but he was unable to make an identification of anyone using the eight latents. (RTT 1844; 1858; Trial Exhibit 52.)

J. Hair Evidence Found At Scene

1. Human Hair Characteristics

Three criminalists, Eugenia Bell, John Simms and James Bailey,[94] testified regarding the various characteristics of hair. The hair on an individual's head has a range of characteristics. (RTT 2234.) Different hairs will differ in one degree or another with other hairs on the same person's head. There might be different colors, thicknesses, curliness, different pigment

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[92] Margaret Harris and Edward Harris were also fingerprinted. (RTT 167-69; 205.)

[93] On cross-examination, Torres testified that he never compared Massingale's fingerprints for the purpose of determining whether or not he could be excluded as being the donor of the prints on Items 23, 24, or 25. (RTT 1792-93.)

[94] Bailey was employed by the Los Angeles county crime lab. (RTT 2200.)

or density, and the core or medulla may be different in size. (RTT 2234-35.)[95] Most of the microscopic characteristics examined concern how the pigment in the hair is distributed, as it is distributed in different patterns in different people. (RTT 2242.) Blond hairs have less pigment; it is more difficult to see a pattern and there are less patterns to see in the pigment distribution making it more difficult to compare. (RTT 2242; 2244.) It's easier with dark hair to distinguish certain characteristics than with blond hair. (RTT 2242-44.)

Hair has a root cycle that enables one to determine whether questioned hairs were growing rapidly or had stopped growing and were at the point of falling out. (RTT 2238.) The living cycle of hair varies; it may be 4-6 years with a resting cycle of 2 years or so. (RTT 2238.) In the growing stages of a hair, if a hair is forcibly pulled from the follicle, the root sheath or part of the skin will be attached to the hair. If it's in a nongrowing stage or in a resting stage, the root configuration would be different when it's pulled. (RTT 2080-81; 2239.) The follicle attached to the hair can be examined for the chromosomes in the cell and the sex of the donor of the hair can be determined.[96] (RTT 2239.) However, the normal shaft of hair cannot be sexed because it's too keratinized to see the chromosomes. (RTT 2239.) There was no way to determine the age of hairs found at a scene which were from

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[95] A person may have a range of color of hair within the head area; some individuals may exhibit a wide range of characteristics in hairs from different regions of the scalp. (RTT 2136.) Other individuals could have hairs from different regions which are very much alike. (RTT 2136.) Hair also goes through different growth cycles and there can be seasonal charges in hair due to different factors such as summer lightening. After a haircut hair has different tip and length conditions. (RTT 2137-38.)

[96] The ability to determine the sex of the donor of hair was known in 1979. (RTT 2239.)

unknown sources. (RTT 2238.)

2. Failure To Preserve Root Sheath

Eugenia Bell had experience examining and comparing hairs found at crime scenes. (RTT 2076-77; 2093.) She was aware of the fact that it was important to preserve a root sheath if found on a hair. (RTT 2082.) If there was a root sheath that was not mounted on a slide, she would recommend freezing it to preserve it for possible future blood grouping. (RTT 2082.) Bell was aware of the fact that even a small amount of blood found on a hair could be blood grouped. (RTT 2083-84; 2239.)

On May 7, 1979, Bell prepared a slide of some hair removed from Suzanne Jacobs' right hand and examined it under a microscope, Trial Exhibit 61D(E). (RTT 2077-79; 2088-89; 2090; 2092.)[97] Bell recalled there was an intact root sheath on one of the hairs. (RTT 2080; 2082.) She observed what appeared to be blood on the hairs. (RTT 2089.) Bell subjected the hair to a benzidine test which showed positive for blood. (RTT 2089.) The blood could have been preserved by freezing for advanced blood grouping. (RTT 2089.) Bell recommended to one of the criminalist staff[98] that the remaining hair be frozen to preserve it. (RTT 2089-90; 2099.) Instead, all the hairs were mounted on slide. (E.g., RTT 2101; RTH 20222-24.)

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[97] Bell identified one of the two slides, slide "E" contained within Exhibit 61D, as a slide prepared from Item 26. She put the number 26 on slide E as that was the item number the sample came from. (RTT 2077-79; 2090-91.) But Bell noted that the manila envelope containing the blue paper bindle did not have her initials on it. She noted that the slide and the bindle had the same laboratory and item numbers on them. (RTT 2077-79.) On cross-examination, Bell testified that if she had been given the blue bindle or removed anything from it, she would have put her initials on it. (RTT 2079-80.)

[98] She believed it was James Stam. (RTT 2090.)

3. Hair Comparison

In the present case the hair comparison was inconclusive. (See RTT 2158-62; 2222-24; 8680 [defense].)

Hair comparison expert James Bailey testified that hair comparison was not an exact science and the comparison opinion was certainly subjective. (RTT 2205-06.) Hair comparison was not comparable to fingerprint analysis. (RTT 2231.) Bailey also acknowledged that there was no state required certification of hair examiners. (RTT 2232-33.) While the examination and collection of data are not very subjective; results may be subjective and examiners can differ in their opinions, both believing their opinion is the correct one. (RTT 2233-34.)

John Simms was requested by the prosecution to prepare and mount some hairs onto some slides. (RTT 2101; Trial Exhibits 61A-E.) Exhibit 61A-E consisted of hairs and slides made from hairs found in Suzanne Jacobs' right hand. (RTT 2101-05.) Simms compared the hair from Suzanne Jacobs' right hand, slide "A" from Exhibit 61B, with known samples from Lucas.[99] His results were "no match, no exclusion." (RTT 2185.) He could neither exclude nor include Lucas as being the donor of the hair. (RTT 2185-86.) The same applied to the hair contained on the other slides in Exhibit 61, (61C, D and E), but that they were "close." (RTT 2191-92.) He could not exclude Lucas as being the donor of the hair, nor could he conclude that it came from

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[99] The Lucas hair standards were taken on January 2, 1985 while he was at the sheriff's jail facility. (RTT 2148; 2151; 8667-8668.) Simms testified that hair was taken from the top, front scalp region of Lucas, the right and left side scalp regions, and rear portion of the scalp, as well as combings of loose head hair. (RTT 2130-2132.) Simms testified that loose hairs may have different types of characteristics in them, so it was important to collect them and include them in the standard. (RTT 2132-33.)

Lucas. (RTT 2152-60; 2187-88; 2194; 8675 [defense]; 8679-80 [defense].)[100] Lucas' hair did not reflect all of the characteristics of the questioned hairs. Hence, the hairs could have been deposited by another individual. (RTT 2159-62; 2197.)[101]

In sum, Simms' comparison results were inconclusive. (RTT 8680 [defense].)

Prosecution expert James Bailey also examined and compared the questioned hair samples from Suzanne Jacobs' right hand contained in Exhibit 61 against the known hairs of the victims and Lucas. (RTT 2203.)[102] Bailey concluded that the hairs in Exhibit 61 were similar in physical and microscopic characteristics to the known head hair from Lucas. (RTT 2204-2205.) Bailey did not believe that these hairs came from either one of the victims, as he saw differences between the questioned hairs and those of Colin

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[100] Simms examined and compared these hairs to hair samples from Johnny Massingale, but the nature of Massingale's hair was very different and based on those differences, he excluded Massingale as being the donor of the hair. (RTT 2102-2105; 2125; 2126-27.)

[101] Simms observed that "blond hairs have a limited range of characteristics." All light blond hair can be expected to show at least some similarity. Hence, blond hair with similar characteristics can come from different individuals. (RTT 8676 [defense].) Also, Lucas' hair could have changed in the five plus year hiatus between 1979 and 1984 when the samples were obtained from Lucas. (RTT 8676.)

[102] In 1983, he was also provided with hair samples from another person suspected of killing the Jacobs. (RTT 2235.) Bailey couldn't remember the suspect's name and didn't know why that evaluation didn't show up in his report of 10/26/83. In this case, he was given known head hair samples from Suzanne and Colin Jacobs and Lucas. His examination was limited to what was given to him. He did not obtain the samples himself. As far as his reports were concerned, there was no other indication that any other knowns were used in the comparison. (RTT 2235-37.)

Jacobs and Suzanne Jacobs. (RTT 2205.) However, they *may* have come from Lucas. (RTT 2205-09.)

As to Exhibit 61E, Bailey did not believe that they came from Suzanne Jacobs, as there were sufficient differences. They were close to both the hair samples of Colin Jacobs and David Lucas. (RTT 2210.) The hair showed some characteristics closer to those of Colin Jacobs, but he couldn't exclude David Lucas from also possibly being a donor of the hairs.[103] (RTT 2211.)

Bailey also made comparisons of the hairs in Trial Exhibit 62, the hair taken from the bedding in the master bedroom. (RTT 2212.) He found a hair (62B) that was similar to Colin Jacobs and could have come from him. Bailey didn't believe that hair came from either Suzanne Jacobs or Lucas. (RTT 2213.) The hairs contained in 62C were human head hairs similar to Suzanne Jacobs which were not similar to Colin or Lucas. (RTT 2213.) The hair contained in 62D, 62E and 62F were similar to Colin and not Suzanne or Lucas. (RTT 2213-15.) One of the hairs taken from a multicolored oval rug in the bedroom could have come from Lucas but it was not similar to the hair of either victim.[104] (RTT 2215-2216.)

Bailey also examined the hairs in Trial Exhibit 65, which were taken from Suzanne Jacobs' right hand at the morgue. (RTT 2217; 2222.) 65A contained a pubic hair similar to the hair of Suzanne Jacobs, a possible head

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[103] Curvature measurement is another characteristic that can be determined in hair. It measures how curly the hair is. (RTT 2243.) He was unable to determine that characteristic with these hairs in 1985 because they were already mounted on slides. (RTT 2243-44.) The measurement of the length of hair is also affected if the hair is are mounted on slides. (RTT 2244.)

[104] There were also two head hairs similar to Suzanne Jacobs, two animal hairs probably from a dog, and a pubic hair that he didn't do any further examination on. (RTT 2216.)

hair fragment, some green carpet fibers, some orange carpet fibers and five animal hairs. (RTT 2219-20.) 65B contained what appeared to be a pubic hair. (RTT 2220-2221.) Bailey examined 65C and found three hairs similar to Colin's hair; four were similar to the head hair sample from Lucas, and one similar to Suzanne Jacobs. (RTT 2222.) Two of the hairs in 65C could have come from either Colin or Lucas. (RTT 2222.) Bailey also examined and compared the hairs in Exhibit 67, which were removed from Suzanne Jacobs' left elbow at the morgue. (RTT 2223-24.) Bailey concluded that this hair was similar to the known head hair sample from Lucas and not similar to that of either victim. (RTT 2224.)

4. Chain Of Custody

Bailey testified that in October 1983 he opened the bindle marked JB-1 (hairs from the left hand of Suzanne Jacobs Exhibit 66) and did not find any hair. The bindle was empty. The items were sent to him from the District Attorney's office and delivered to him by Green. He was also given a bindle that was labeled "hairs from right hand of female adult" which he labeled as JB-3. He examined the bindle and found no hairs in that bindle. (RTT 2248-49.) In 1985 he examined JB-3 and found glass slides with mounted hairs. (RTT 2251.) JB-3 was different in 1985 than when he viewed it in 1983; he wasn't responsible for changing the contents. (RTT 2252.)

K. MG Evidence

1. MG Evidence: Prosecution

On May 4, 1979, Margaret Harris told Detective Green that the car in the driveway was a maroon sports car. (RTT 208; 7971; 7978.) She didn't tell Green what kind of sports car it was. (RTT 208.) Harris testified that she didn't originally mention that the car was an MG because she didn't know the

make until she and her husband drove around two days later. (RTT 208.)[105]

According to DMV records a 1974 MG Midget roadster was sold to Lucas' mother, Patricia Jo Lucas, on December 20, 1974 and a registration certificate for the MG was issued to Ms. Lucas on April 19, 1979. (RTT 2500; 2503; 2526; 2529-30.)

David Lucas was stopped for speeding on November 11, 1976 and was involved in an accident on November 19, 1976,[106] in San Diego County while driving his mother's MG. (RTT 2540-44; 2560.)

Between 1962 and 1974 hundreds of thousands of MGBs were produced; the basic appearance was the same from 1968 through 1974. (RTT 2489-93.)

Lucas' former business partner, Frank Clark, testified he never saw Lucas driving an MG in 1979 and that, to his knowledge, Lucas had a white Audi in 1979 or 1980. (RTT 4179-80.)

2. MG Evidence: Defense

Margaret Harris did not inform the police of her belief that it was an MG until many years later. Detective Green did not recall receiving any information from Harris between 1979 and 1980 that changed her original

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[105] Two days after the Jacobs murders, Harris and her husband drove around the city looking for a vehicle that was similar to the one she had seen in the Jacobs' driveway the morning of the killings. (RTT 175; 190-91; 217-218.) She saw an MGB which she thought was the car she saw at the Jacobs' house on May 4. (RTT 191; 221-223.)

[106] As a result of this stop, Lucas was convicted of speeding and driving without a license. The court admonished the jury that the evidence concerning Lucas' driving record was being offered only for them to decide whether or not Lucas was, in fact, in the vehicle on the dates stated. The court further admonished the jury that Lucas' driving record should not be used against him in this case because it was "completely irrelevant." (RTT 2561.)

description. (RTT 7971.) Green recalled talking to Harris between 1981 and 1984, but didn't recall any changes in the information she gave concerning the vehicle description. (RTT 7971-72.) It wasn't until 1988 that Harris suggested that the car was an MG. (RTT 7972; 8103-04.)[107] In December 1988, Harris identified the car as an MG when Green went to her with a picture of an MG and asked her if it was similar to the one she had seen in the driveway. (RTT 7972-73; 7974; 7982.)[108]/[109]

In the mid-seventies, Lucas' mother, Mrs. Pat Lucas (Patricia Katzenmaier at trial), purchased an MG Midget. (RTT 8900; 8901; 8911.) The car was few months old when she bought it. (RTT 8906.) In 1979, there weren't any dents in the body of the car. (RTT 8906.) At trial, Mrs. Lucas identified a Polaroid photograph of the MG Midget taken in '76 or '77. (RTT

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[107] Harris admitted that she couldn't tell the difference between an MGA, an MGB, a Midget or any other type of MG. (RTT 222.) She also testified that "apparently" the car she saw in the Jacobs' driveway was an MGB because the car that William Green later borrowed to use to photograph was an MGB and that's what the car looked like. (RTT 222.)

[108] When asked how the subject of the MG came up, Green said that in the summer of 1988 Mrs. Tucker Harris volunteered that the car may have been an MG. (RTT 8104.) Before he showed her a photo of an MG, Green had information that Lucas may have had access to an MG. (RTT 8097.) About a week later, Green arranged to have a maroon 1974 MGB, parked in a driveway for purpose of taking photos. (RTT 7972; 7975; 7976; 7982.) Green took the photos that were Trial Exhibits 8-11 about three weeks prior to the start of testimony in the trial, in December 1988. (RTT 7973-74.) Green testified that he did not tell Mrs. Harris what kind of car he was going to utilize to create Trial Exhibits 8, 9 and 10. (RTT 8103-04.)

[109] Defense Investigator Thomas Caldwell testified that on June 21, 1985, he requested an interview with Mrs. Margaret Harris. (RTT 10695-96.) Caldwell identified himself as an investigator for the Public Defender's office. (RTT 10696.) She refused an interview. (RTT 10696.)

8901-04.) The color in the photo was a little faded; Mrs. Lucas described the car as kind of bright purple with white pinstriping.[110] (RTT 8902.) The car was purple when she purchased it and she never had it repainted. (RTT 8904-05.) At no time while she owned the car was it ever maroon. (RTT 8907.)[111]

In 1979 the car didn't run. (RTT 8905-8906.) From March 1979 until she sold the car in 1981 it was not driveable and she couldn't afford to fix it. (RTT 8633; 8635; 8906; 8911.)

In late 1979 or early 1980, Curt Andrewson saw the MG when he went to visit Mrs. Lucas. (RTT 10406; 10431.) The car was the same color as when he had seen it in the mid 1970's: purple. (RTT 10406.)[112] The car was at Mrs. Lucas' house in Lakeside and was parked half-way into the garage. (RTT 10406.) The car was being worked on and was torn apart. The engine was in pieces. (RTT 10406; 10431.) The car wasn't driveable at the time. (RTT 10406-10407.) He didn't notice any damage to the body of the car. (RTT 10407.)

Dennis Smith purchased the MG Midget from Mrs. Patricia Lucas in the summer of 1981. (RTT 8208; 8209; 8210-8211; 8212; 8213; 8220; 8637;

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[110] Exhibit 668 consisted of 9 different colored squares of paper. (RTT 8209.) Mrs. Lucas (Katzenmaier) selected # 6 from Exhibit 668 as being the color closest to that of the MG. (RTT 8902-03.) Steven Katzenmaier, Mrs. Lucas husband, also selected # 6 from Exhibit 668 as being the color closest to that of the MG. (RTT 8633-34.) There is no evidence that the squares were shown to Margaret Harris at trial. Additionally, there is no description of the colors of the squares in the record.

[111] However, when the vehicle was stopped by Patrol Deputy Hauser in December, 1986, it was described in the report as "black/maroon." (RTT 2468-79; 2484; 2722; 2526.)

[112] Andrewson selected # 6 from Exhibit 668 as being the color closest to that of the MG. (RTT 10405-10406.)

8907; 8911.) The car was purple.[113] (RTT 8209-10; 8214; 8221.) According to Smith, who had quite a few years experience as a mechanic, the car was in bad mechanical condition and didn't run. (RTT 8209; 8214.) It had flat tires and the engine had seized up. (RTT 8214.) Bugs and mice had infested the car. (RTT 8214.) The car was a convertible; the black rag top was down and had dry-rotted.[114] (RTT 8214; 8215.)

L. Lucas' Presence At The Salvation Army

Between March and June 1979, David Allen Lucas was a resident of the New Horizons program which was associated with the Salvation Army in downtown San Diego. (RTT 1955-56.) The New Horizons program was in the same building as the Salvation Army mission. (*Ibid.*) Because of his job, Lucas was permitted to stay out until 1 a.m. but wasn't allowed to leave until 9 a.m. (RTT 1957-1961; 1963.) The residents' presence or absence from the facility was monitored and any violations were reported to Michelle Tortorelli, the program coordinator. (RTT 1957-1961; 1963.) During the time Lucas lived at the residence there were no reports of him violating the time restrictions. (RTT 1958-1959.)[115]

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[113] Smith selected # 6 from Exhibit 668 as being the color closest to that of the MG. (RTT 8209-8210.)

[114] At trial, Smith no longer owned the car and didn't know where it was. (RTT 8216.) He sold the car about 2 ½ years earlier to someone named Robin Keith and he didn't know where Keith lived. (RTT 8216.)

[115] While it was conceivable that one of the night staff could give a resident permission to leave earlier if there was a legitimate reason, Tortorelli would have expected the staff member to inform her of it, as she had overall responsibility for the program, and to the best of her knowledge, that never occurred. (RTT 1964-1966.)

M. Lucas' Employment At Precision Metal

David Lucas began working for Precision Metal on March 19, 1979 as a furnace operator (RTT 1928; 8434.) Employee attendance records indicated that Lucas was not at work Thursday, May 3 and Friday, May 4, 1979. (RTT 1939; 1945-46.)

N. The Arrest And Prosecution Of Johnny Massingale

1. Massingale: Defense Evidence[116]

a. Pre-Confession Events

John "Shorty" Smith was from Harlan County, Kentucky. In August 1980, Smith owned a white Dodge van and was driving from Arizona to Benton Station, California. (RTT 7814.) He was looking for a job in a gold mine. (RTT 7814.) On the way he picked up a hitchhiker who introduced himself as Johnny Massingale. (RTT 717-18; 7815; 7817.)

Smith gave Massingale a ride to Benton Station to look for a job in the mine but the mine was closed. (RTT 717-18; 7814-15.) Smith then gave Massingale a ride to Los Angeles. (RTT 718; 7814-15.) Somewhere along the way Smith picked up another hitchhiker, Jimmy Joe Nelson. (RTT 7818-19.)

According to Smith, Massingale was wearing a Buck knife which had a blade approximately 4 ½" long. (RTT 7820-21.)[117] According to Nelson, Massingale had a Bowie knife which an 11" or 12" blade and 5" handle which Massingale wore in a holster. (RTT 7864; 7896-97.)

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[116] The defense evidence is presented first because it includes details necessary to provide a context for the prosecution evidence, which consisted only of Johnny Massingale's testimony.

[117] Smith described a Buck knife as one that closes with brass on each end and a wooden handle. (RTT 7820.)

Massingale denied ever carrying anything but a small pocket knife. (RTT 722; 8065-66; 8576-77; 8585.) However, on August 15, 1980 Massingale was wearing a knife in a sheath when he was stopped by a CHP officer while hitchhiking. The knife had a fixed blade of 6-8". (RTT 7958.)

Massingale told Smith and Nelson that he was wanted for murder in California. (RTT 7816.) Massingale said he had cut someone's head off or something of that nature. (RTT 7818.) At first Massingale didn't mention a name, but later he mentioned the name "Anne." (RTT 7818.) Massingale said something about a kid who was pestering him and the woman he was with, and said he shut the kid up because "she was bothering about going to the bathroom so much." (RTT 7821.) It seemed to Smith that Massingale was bragging about killing these people. (RTT 7831.)

Nelson's testimony confirmed that Massingale bragged about killing someone. Massingale told Nelson that in the spring of 1979, he had met a woman named "Sue Ann" or "Suzanne Jacobs" in San Diego and had gone to her house or apartment. (RTT 7864; 7866-67; 7896; 7904; 7921.)[118] Massingale told Nelson he and the woman had been out drinking and were sitting on the couch in the living room making out when her little boy came

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[118] On cross-examination, Nelson testified he thought Massingale had told him he had been out drinking at some bars one night and then met "Suzanne." They then went to her house or apartment. (RTT 7905.) Nelson also admitted he'd never used the name Suzanne in his previous testimony; it had always been "Sue Ann." (RTT 7920.) However, on re-direct Nelson was asked about the written statement he gave Styles on October 30, 1981 in which he stated: "He (Massingale) told me that he had met this Suzanne (S-u-z-a-n-n-e) Jacobs. I believe he said her last name was Jacobs, if I am not badly mistaken, in a bar." Nelson testified that he had written that in his statement. (RTT 7920.) On re-cross, Nelson testified that he spoke fast with a southern accent and that there wasn't much difference between "Sue Ann" and "Suzanne." (RTT 7921.)

in and wanted to be taken to the bathroom. (RTT 7864; 7865; 7879-80; 7905.) The woman got up to take the boy to the bathroom; Massingale got up. Massingale then told Nelson he took care of it and slit their throats with a knife. (RTT 7864-66.) He just reached up, caught the woman by the hair and slit her throat. (RTT 7864-65.) Massingale added that after he was done, "the little boy would never have to go to the bathroom again." (RTT 7864; 7866.) Massingale told him that when he was finished there was blood all over the place. (RTT 7899-7900.)

Eventually, Smith and Nelson left Massingale in Los Angeles and returned to Kentucky. (RTT 7828-29; 7898; 7902-03.) When they parted Massingale gave Nelson some boots, pants and shirts which he said he didn't need. (RTT 7869; 7890; 7902.) One night Nelson started to put on one of the shirts Massingale had given him. (RTT 7869-70.) It was a brown and white silk-like shirt with stripes that came down and met in a point. (RTT 7870-71.) Nelson noticed that the left sleeve looked as if a woman had taken her fingernails and raked them down the sleeve. (RTT 7869-70; 7888.) There were runs in the shirt and a substance on it that looked like blood. (RTT 7870.)

Massingale testified that he often stayed in Salvation Army Missions when he traveled. (RTT 664.) In 1979,[119] he stayed at the San Diego Salvation Army Rescue Mission in downtown San Diego a few times. (RTT 9471-73.)[120] Massingale admitted that he had been in San Diego for about three weeks in the early summer of 1979. (RTT 8044; 8057; 8476; 8505.)

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[119] No specific time frame in 1979 was given.

[120] Massingale was well dressed and looked like he "didn't belong" at the mission. (RTT 9472.)

Massingale said that he just kind of made his way around; that he didn't work and that he'd been to the mission. (RTT 8057.) He had spent a night or two at a local bar. (The Silver Dollar Bar.) (RTT 8058.) Massingale said he just walked around, sometimes in residential neighborhoods. (RTT 8058.)

In December 1980, Jimmie Joe Nelson was arrested on another matter in Alabama. Nelson told Alabama Detective Sergeant Harold Phillips that a person named Johnny had confessed to the killing of a woman and child in San Diego. (RTT 7869; 7910; 7918; 7922-23; 8896-97; 8898.) According to Nelson, "Johnny" said that he had cut their throats with a knife in the bedroom. (RTT 8897; 8899.) Nelson said that "Johnny" and the woman had been drinking. (RTT 8898-99.) Nelson told Phillips that the victims lived in a white wood frame house. (RTT 7923.)[121] Nelson also mentioned a blue vehicle. (RTT 7924.) Phillips contacted the San Diego Police Department and provided Detective David Ayers with the information Nelson had given him. (RTT 7765.)

Ayers did not provide Phillips with information about the crimes or the names of the victims. (RTT 8589.) Although Phillips spoke with the San Diego authorities three or four more times, they did not provide him with any specific details of the crimes. (RTT 7783.)

Phillips also recovered the silk shirt which Nelson had described. The shirt had runs in it, like the kind found in hosiery and had dark colored stains that appeared to be blood. (RTT 7779-80; 7785-86.)[122]

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[121] Exhibits 4B and 4D depicted the Jacobs house as a white wood frame house.

[122] Phillips couldn't remember what happened to the shirt. (RTT 7769.) To his knowledge it had been sent to San Diego, but it wasn't in the box (continued...)

On January 26, 1981, San Diego Detective Ayers spoke with Nelson. (RTT 8544; 7873; 7882.) Nelson told him that a woman and child had been killed in the east part of San Diego, that their throats had been cut, and that the woman's name was possibly Sue Ann.[123] (RTT 8547; 8548.) Nelson originally told Ayers that a David Woods committed the San Diego Murders. (RTT 7882; 8544-45.) However, the next day Nelson told Ayers that he had lied about Woods. (RTT 7883-84.) Nelson originally lied about Woods because he had accused Nelson of another murder which Woods had actually committed. (RTT 7882-83; 7906.)

Nelson told Ayers that it was a person named "Johnny" who had been bragging about committing the murders, but that he did not know Johnny's last name. (RTT 8543-44.)[124] Nelson also provided identifying information about Smith. (RTT 8548-49.)

On January 20, 1982, Detective Ayers talked to Smith. (RTT 8559-60.) As a result of the information Smith and Nelson had given him, and the information they had learned in Hollywood, Ayers was able to identify and locate Massingale, who was in custody in Harlan, Kentucky on an outstanding

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[122](...continued)
(Exhibit 505A-1) which contained the other items seized from Nelson's house. (RTT 7780-81; 7784-85.)

[123] Ayers provided no details to Nelson concerning the Jacobs case. (RTT 8548.) Nor did Detectives Montemayor or Messick provide any information to Nelson concerning the Jacobs case. (RTT 7792; 7795; 7796-97.)

[124] Nelson identified Trial Exhibit 515, a photo of Johnny Massingale, as a photo of the "Johnny" who bragged about committing the murders. (RTT 7874.) He also identified the transcript of a statement he had given Ayers on January 27, 1981. (Exhibit 659; RTT 7873.)

warrant. (RTT 8474-75; 8504; 8561.)

b. Interview Preliminaries

In March 1984, San Diego Police Department Detectives David Ayers and William Green[125] went to Harlan, Kentucky, to interview Johnny Massingale. (RTT 667; 688; 701 [prosecution].) Green and Ayers first interviewed Massingale in Kentucky on March 18, 1984. (RTT 8036; 8561; 8563.) The evidence is in conflict concerning whether Massingale was wearing leg chains or handcuffs. (Compare RTT 811 with RTT 813 and RTT 8037.)[126] Green and Ayers identified themselves and told Massingale they were there to discuss the 1979 case. (RTT 8037; 8475.) Green informed Massingale of his *Miranda* rights. (RTT 8039-40; 8475.) Massingale said he understood his rights and stated that he would waive those rights and speak with the detectives. (RTT 3040 [prosecution]; 8106; 8475-76.)[127]

c. The First Interview

i. Interview Events

According to Massingale he asked Kentucky State Police Detective Denny Pace, who was also present during the interview, whether Pace thought

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[125] William Green had been a detective in the San Diego Police Department Team Four homicide unit. He later went to work for the San Diego District Attorney's office and, at the time of trial, was Supervising Criminal Investigator. (RTT 7968.)

[126] Green testified that he didn't recall whether Massingale had shackles on his legs. (RTT 8069-70.)

[127] Green testified that he didn't threaten Massingale, promise him anything or offer him money. (RTT 3041.) They never threatened Massingale with the gas chamber. (RTT 3041.) Ayers did not scream at Massingale, threaten him with physical violence, or tell him that if he didn't confess he was a "dead man." (RTT 8587.)

Massingale needed a lawyer. Pace knew Massingale and his family. (RTT 8468.) Pace told Massingale he didn't need a lawyer if he hadn't done anything wrong. (RTT 745; 879; 901.) Pace told him he didn't have anything to worry about; they just wanted to ask him some questions. (RTT 901.)

After the interview started, Pace wanted to leave the room, but Massingale requested that Pace remain. (RTT 8113; 8474; 8479.)[128] There were times when Massingale wanted to use the bathroom and was allowed to. (RTT 8070.) They got Massingale coffee and cigarettes. (RTT 8070.)[129] They would take breaks. (RTT 8070.) Green didn't recall Massingale crying during the first interview, but he did get really upset. (RTT 8071.)

During the interview Massingale was shown four [130] crime scene photos. (RTT 667 [prosecution]; 691 [prosecution]; 872-75 [prosecution]; 8084; 8578.) The four photos depicted each victim and two overall views of the front and side yards outside of the house. (RTT 8086; 8580; 8582-83.) Each photo of the victim showed a full body shot taken in the bedroom where the victims were found.[131] (RTT 8086-87.)

ii. Massingale Denied That He Knew Nelson

The detectives showed Massingale a photo of Shorty Smith, whom

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[128] Pace testified that during the first interview he was in the room but also left for a considerable amount of time. (8474; 8505.)

[129] Pace also testified that Massingale was allowed to use the bathroom, smoke cigarettes and that he would bring coffee to Massingale. (RTT 8479.)

[130] There were over 100 photos taken at the Jacobs scene. However, Massingale was only shown photos 4, 6, 85 and 100. Those were the only photos shown to him. (RTT 8080-83; 8113; 8578-79; 8583-84; 8587.)

[131] Green never saw Ayers give Pace any photos other than the original four. (RTT 8113.)

Massingale identified. (RTT 8058; 8577; 8477; 8505.) Massingale told them that Smith had picked him up hitchhiking and they rode together to California in a van; that they ended up in Hollywood, and that was where they parted company. (RTT 8058-59.) Ayers showed Massingale a photo of Nelson and Massingale said he had never seen Nelson before. (RTT 8059; 8092; 8477-78; 8505; 8567; 8576-77.)

iii. Massingale Denied That He Carried A Knife

During the interview Massingale maintained that he never carried a knife. (RTT 8064; 8066.) Ayers asked him if he ever carried a sheath knife and Massingale stated that he never did. (RTT 8476; 8576.) Green told Massingale that he had witnesses who said they saw him carrying a knife. (RTT 8065; 8577.) Massingale again denied ever carrying a knife, but finally admitted carrying a small pocket knife on occasion. (RTT 8065-66.) Green told Massingale that both Smith and Nelson had said Massingale carried a large knife. (RTT 8066; 8576-77.) When Green asked him why he wouldn't admit to carrying a large knife, Massingale told him he never carried a knife and didn't know why anyone would say he did. (RTT 8066; 8585; but see RTT 7958 [Massingale observed wearing a 6"-8" fixed blade knife by a California Highway Patrolman].)

iv. Massingale Denied Guilt

During the first interview, Massingale denied any responsibility for the killings. (RTT 8106.) He did admit to knowing a lot about the downtown area of San Diego; he had gone to the Silver Dollar Bar, a tattoo parlor, the train station and some gambling places. (RTT 8585.) Massingale also admitted staying in a mission and other transient type residences in the downtown area. (RTT 8592.)

Ayers asked Massingale if he had heard about the case somewhere else

and just repeated what he heard to Nelson to make himself "look big." (RTT 8584-86.) Massingale told him it never happened; he never said anything to Nelson and didn't know anything about the case. (RTT 8584-85; 8591.) Specifically, Massingale denied ever telling Smith or Nelson anything about cutting someone's head off. (RTT 8587.) At one point Massingale looked at Pace and asked him if he thought he needed an attorney. (RTT 8483.) Pace told him, "Johnny if you didn't do anything wrong, I don't feel like you need an attorney." (RTT 8483.) Massingale then voluntarily continued with the interview. (RTT 8483.) At some point during the interview Ayers told Massingale it was a serious case; it could call for the death penalty. (RTT 8597.) At some point, Massingale indicated he wanted to talk to a lawyer and wouldn't talk to them anymore. (RTT 8071; 8114; 8478.)

The first interview with Massingale concluded around 4:00-4:30 p.m. (RTT 8071.)[132] The interview was not taped and had lasted about 5 hours.[133] (RTT 8072-73; 8104; 8591.)

d. Discussion Between Massingale And Pace After The First Interview

After the first interview, Massingale left the State Police post with Pace. (RTT 8072-73; 8088; 8106-07.) Massingale told Pace he wanted to talk to him alone, out of the presence of Ayers and Green. (RTT 8480; 8483; 8506.) They sat in Trooper Howard's patrol car outside the Harlan County

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[132] Ayers testified that there was never a time when he and Pace nearly came to physical blows. (RTT 8587.)

[133] Ayers testified that they took numerous breaks during the first interview. (RTT 8577.)

jail. (RTT 8484.)[134]

According to Pace, the following discussion ensued: Massingale asked Pace what he should do. (RTT 8484; 8506.) Pace told him he should tell the truth. (RTT 8484.)[135] Pace told him that Ayers and Green knew more than they were telling Massingale. Massingale asked Pace what it was, and Pace told him he couldn't tell him that, unless he asked Ayers and Green for permission. At that point in time, Ayers and Green hadn't briefed Pace about the crime. (RTT 8484.)[136] Pace had already received information that Massingale had made a statement to Nelson about the little boy being killed in the bathroom; that was what was so incriminating against Massingale, because none of the photos shown to Massingale depicted the bathroom. (RTT 8087-88; 8486.) Massingale was worried about why San Diego authorities were there and what they wanted out of him. (RTT 8506.) Massingale asked Pace what kind of sentence he could be facing. Pace told him it was his understanding that it was murder in the first degree and the maximum penalty was the death sentence. (RTT 8485; 8507; 8522.)[137] Pace

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[134] Pace testified that he did not have a tape recorder operating at the time of the conversation in the trooper's car. (RTT 8494-95.)

[135] Pace denied that he ever told Massingale to confess; in fact he told him not to confess to anything he didn't do. (RTT 8497-98; 8506.) Pace testified that he assured Massingale he would not be found guilty in court of something he did not do. (RTT 8498.) Pace also denied mentioning anything about the gas chamber. (RTT 8507.)

[136] Pace didn't see a crime report about the Jacobs homicides until sometime in 1985. (RTT 8484.)

[137] Pace didn't tell Massingale that he was going to receive the death penalty. (RTT 8522.) He just wanted to be truthful with Massingale because it was a serious charge and if he didn't tell him the truth he would have been

(continued...)

told him to tell the truth but not to admit to anything he didn't do. (RTT 8485; 8506; 8507; 8522.)[138] He assured Massingale that he wouldn't be convicted of a crime he did not commit. (RTT 8522.) He told Massingale if he did admit to the killings, that he should ask for mercy from the court. (RTT 8507; 8508.) Massingale indicated that he wanted Pace to speak to Green and Ayers, so they returned to the State Police post. (RTT 8486.)

e. Massingale's Confession: The Second Interview

According to Pace, he took Massingale back into his office and told him that Ayers and Green knew he was lying about not carrying a knife and about not knowing Nelson. (RTT 8487-88.)[139] Pace told Massingale that the only way he could have known the boy was killed in the bathroom was if he was present at the scene, at which point Massingale said, "I'm guilty." (RTT 8488.)[140]

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[137](...continued)
misleading Massingale. (RTT 8522-23.)

[138] Pace denied that he ever told Massingale anything to the effect of "You can lie and die, or tell the truth and live." (RTT 8485.) Pace also denied stopping the car and telling Massingale, "If you get to California with no money and no lawyer, you ain't going to have a chance." The only time the car was stopped was in front of the Harlan County jail and at the store when he bought Massingale the candy and cigarettes before returning to the State Police Post. (RTT 8497.) He also denied telling Massingale that he could die saying he didn't do it or he could throw himself on the mercy of the court and get off with a life sentence. (RTT 8497.)

[139] Green and Ayers decided to remain outside. (RTT 8073; RTT 8107-08; 8116.)

[140] Pace took Massingale back into his office and Pace showed Massingale a single photo of the bathroom which had been given to him by Ayers to show to Massingale. (RTT 8494.) Pace denied showing Massingale
(continued...)

Massingale had been nervous, but after he said he was guilty it appeared to be a relief and he became more talkative. (RTT 8500-01.) He admitted that he had been lying to Ayers and Green and that he did know Nelson and had given him a black flowered shirt. (RTT 8488; 8501.) Massingale told him about the van ride with Smith driving and about how he and Nelson were bragging about how mean they were. (RTT 8509.) He remembered Nelson because he had fits and that he asked Smith to let off Nelson because the fits were getting on his nerves. (RTT 8488; 8489.) Massingale also said he remembered telling Nelson that he almost cut a woman named Sue Ann's head off, along with her son. (RTT 8488.) Massingale also told Pace that when Green and Ayers showed him a photo of the exterior of the house, he remembered that it was the house where he killed the woman and child. (RTT 8496; 8512.)

After Massingale admitted that he had lied, he provided details about the killings in San Diego. (RTT 8489.) Massingale told Pace he was in San Diego during the summer of 1979 and he had met a lady named Sue Ann in a bar. (RTT 8489; 8509; 8510.) They went back to her house but he couldn't remember how they got there because she didn't have a car; unless they used a taxi. (RTT 8489; 8510.) He remembered sitting on the couch in the living room of Sue Ann's house, and he pinched her on the leg and she smacked him in the face. (RTT 8489; 8490-91.) And at that time he went crazy because he

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[140](...continued)
a photo of the kitchen and numerous photos of the crime scene. (RTT 8494; 8495.) He also denied going into Ayers' briefcase; removing the photos, spreading them out in front of Massingale, and telling him not to tell anyone he had shown them to him. (RTT 8495.) None of the photos the detectives had shown to Massingale graphically depicted the Jacobs' neck wounds. (RTT 8582.)

was spaced out on blotter acid. (RTT 8489; 8491.)[141] He got up off the couch and she told him, "Get the hell out." (RTT 8491.) He remembered the little boy saying, "don't hit my mommy," and he remembered cutting both of them. He remembered cutting the little boy in the bathroom, but doesn't remember where he went after he left the bathroom. (RTT 8489.) Massingale said he cut them with a dagger that he carried in the sheepskin holster on his belt and that he washed up in the bathroom or kitchen sink and left the residence through the back door. (RTT 8489.)[142] He said he remembered hearing a dog barking.[143] He also remembered seeing a blue dune buggy parked in the driveway beside the residence. The house was white. (RTT 8490.)[144]

During the prior interview conducted by Detectives Green and Ayers, Green never told Massingale anything about Colin Jacobs being slashed in the bathroom; about the possibility that the killer washed his hands in the kitchen sink or about the Jacobs' dogs. (RTT 8087; 8584.) Ayers didn't tell Massingale that the Jacobs' were nearly decapitated. (RTT 8582-83.)

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[141] When Massingale was arrested he had track marks on his arms from intravenous drug use. (RTT 1065-66.) Also, Massingale admitted he had been in drug detoxification. (RTT 688.)

[142] Massingale said he had clothes hidden; he changed clothes and went to a Salvation Army and told them he had hurt or cut his knee and got more clothes. (RTT 8490-91; 8513; 8515-16.) Massingale told Pace that he buried his knife in the desert in Mexico and threw his clothes away in Mexico. (RTT 8490; 8513.)

[143] Several defense witnesses testified that the Jacobs had dogs which barked. (RTT 7992; 8287-89.)

[144] Massingale said that "Sue Ann" was approximately 27 years old and the boy was approximately five. (RTT 8490.) Massingale also stated that the woman was wearing white pants and a pink blouse and that the boy was wearing a red and blue short sleeve shirt and blue pants. (RTT 8513.)

As Massingale related the details of the killing, he kept repeating that he was sorry. (RTT 8498.) Massingale admitted the police didn't threaten him. (RTT 788.) Pace denied yelling or screaming at Massingale, or telling him that Green had said he would get the death penalty. (RTT 8492-93; RTT 8496.) Nor did Pace observe anyone else strike or threaten Massingale. (RTT 8492-93.)

f. Third Interview: Taped Confession

After the second interview, Pace told Green that Massingale had confessed. (RTT 8089.) Arrangements were made for Pace to tape record an interview with Massingale the next day. (RTT 8089.) Green and Ayers wanted Pace to get Massingale on tape before they tried to interview him again as they didn't know if Massingale would speak to them again. (RTT 8109-8110.)

The next morning, Massingale was returned to the Post from the detention center by Trooper Howard. (RTT 8513-14.) Pace read Massingale his rights before speaking with him. (RTT 8492.) Trooper Howard and Pace interviewed Massingale and the entire conversation was taped.[145] (RTT 8089; 8090; 8110; 8492; 8501.) During this interview Massingale again confessed to the Jacobs' killings. (RTT 802-03.)

g. Fourth Interview: Second Taped Confession

After the taped interview with Pace and Howard, Massingale agreed to the request of Green and Ayers for an additional taped interview. (RTT 8090.) Trooper Howard and Pace were also present. (RTT 8089-90; 8105; 8110; 8113-14.)

Green began by re admonishing Massingale of his rights on tape. (RTT

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[145] Exhibit 517, Audio tape of Massingale-Pace interview of 3/19/84.

8114-15.)[146] Massingale told them that after he killed the Jacobs' he returned to the Salvation Army. (RTT 8091.) Massingale admitted knowing Nelson from the van and that he had lied the day before. (RTT 8092-8093.) Massingale told them he remembered a dog at the scene. (RTT 8087-88.)[147] Green believed at some time during this interview Massingale cried. (RTT 8112; 8117.)

Green testified that neither he nor Ayers threatened to harm Massingale. (RTT 8066-68; 8091.) Green did not coerce Massingale into giving him a statement; his confession appeared to be genuine and believable. (RTT 8094; 8096.)

h. Massingale Denied That He Would Hit A Woman

On direct examination Massingale denied that he would ever hit a woman. (RTT 806 [prosecution].) However, in December 1988, William Turner witnessed Massingale strike his wife, throw her around the room and against a wall. (RTT 8694; 8536-37.)

i. Massingale's Contact With The San Diego Salvation Army Rescue Mission

In 1979, Kenneth Clarence worked at the San Diego Rescue Mission. (RTT 9471; 9473.) The mission was located in downtown San Diego and provided free clothing, food and shelter to needy individuals. (RTT 2473; 9474.) According to Clarence, Johnny Massingale came to the Rescue

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[146] The only time the tape recorder was turned off during the interview was to change sides of the tape; they did not turn off the tape to talk to Massingale and then turn it back on. (RTT 8091.) The taped interview concluded at about 11:30 a.m. (RTT 8093-94.)

[147] The Jacobs' owned two dogs. (See RTT 2596.)

Mission and stayed a few times in 1979. (RTT 9472-73.)[148]

j. Massingale California Highway Patrol Contacts

On August 15, 1980, CHP Officer Robert McLean was stationed in San Diego county. (RTT 7956-57.) He observed a person on the freeway hitchhiking. He stopped and made contact with the person and issued him a citation. (RTT 7957.)[149] The man's name was Johnny Massingale. (RTT 7858-59.) The person was shabbily dressed and wearing restaurant cook pants. (RTT 7958.) He had what McLean referred to as "crazy eyes, " and was the type of individual "that kind of look(s) through you" and raises anxiety or concern with law enforcement officers. (RTT 7958.) Massingale was a very scary looking individual as far as McLean was concerned. (RTT 7960-61.) He wore a fixed blade knife, approximately 6" to 8" long with a sheath. (RTT 7958.)

On August 25, 1980, CHP Officer Curtis Honeycutt was patrolling eastbound on Highway 60 in Riverside County. (RTT 7962-63.) McLean came across an abandoned vehicle and made contact with a pedestrian who had been driving the car, Johnny Massingale. (7964-7966.) Massingale gave his occupation as "transient" and place of birth as Harlan, Kentucky. (RTT 7966.) Honeycutt subsequently received information from Los Angeles that the car Massingale was driving was stolen out of Hollywood. (RTT 7967.) He arrested Massingale for auto theft. (RTT 9766.)

2. Massingale: Prosecution Evidence

Johnny Massingale was born on January 12, 1955, and raised in

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[148] Clarence identified a photograph of Johnny Massingale (Exhibit 703), as the person who had stayed at the mission in 1979. (RTT 2473.)

[149] Exhibit 662. (RTT 7959-60.)

Harlan, Kentucky. (RTT 658; 742.)[150] He completed the 3rd, 4th, or 5th grade in special education classes. (RTT 659; 660; 661.) Massingale could read and spell small words and write his name. (RTT 662.) He could read numbers but couldn't do a lot of writing and wasn't capable of reading a book. (RTT 659; 662; 858.) He was expelled from school a month or two before his 16th birthday. (RTT 661.) Massingale had worked as a painter, and in the coal mines in Kentucky. He had most recently worked as a ditch digger in Charlotte, North Carolina. (RTT 662-63.) Massingale had traveled quite a lot. (RTT 664.) When he traveled, he hitchhiked and stayed in Salvation Army missions. (RTT 664; 9471-72 [defense].) He worked out of daily pay offices and other labor pools. (RTT 664.)

Over the course of time, Massingale had been shot in the head with a .45, had been in a car wreck and broken his jaw, had his throat cut, and been hit in the head with a baseball bat. (RTT 665-666.) He had also undergone drug detoxification. (RTT 688.)

Massingale trusted Pace and wanted him present during the interview with Ayers and Green. (RTT 808-809.) Massingale testified that during the interview one of the detectives slammed down a chair and said, "You know you done it." (RTT 810-811.) Massingale also testified that Ayers jumped at him in a "real hateful" manner while he was handcuffed. (RTT 811.)[151] Ayers yelled at him, telling him that he had done it. (RTT 811-812.) Ayers told him,

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[150] Massingale testified that he was right-handed, about 6' tall, and weighed about 155 lbs. in '79. (RTT 857.) He wore size 10 ½ boots. (RTT 890-91.)

[151] However, Massingale also testified that his legs were shackled at the time, not his hands. (RTT 813.) His hands were never cuffed while they talked. (RTT 813.)

"There's two things we don't like in California: that's a murderer and a liar." (RTT 812.) Ayers and Green were yelling and screaming at him. (RTT 786-87.) Ayers and Pace got into a big argument; they were having words with each other about the way they were talking to him. (RTT 811; 886; 897-88.) Ayers was yelling at Massingale and Pace told Ayers that he shouldn't talk to him that way. (RTT 786.) Massingale thought Pace and Ayers were going to fight. (RTT 897-898.) Massingale asked to speak to his mother, but couldn't get through. (RTT 864; 902.)

According to Massingale, the following discussion ensued: Pace told him he'd better tell the San Diego detectives something. (RTT 753; 869.) Pace told him they had proof he committed the crime. (RTT 754.) Pace told him that Nelson had picked him out of a line-up as the person who had bragged about the killings. (RTT 754-55.) He asked Pace if it was possible that he had done something that he didn't remember. (RTT 877.) Pace told him he could have been messed up on drugs or dope or something and done something he didn't remember. (RTT 690; 754.) Pace told him it happened all the time. (RTT 690; 877.) Massingale was frightened. (RTT 877.) Pace told him about the death penalty. (RTT 876-877.) He didn't have money to hire a lawyer. (RTT 877-878.) He told Pace he didn't know anything about the murders. Pace told him that from the evidence he had seen, he didn't have a chance. (RTT 746; 864; 878.) Pace told him they had eyewitnesses. (RTT 878.) He told Pace he didn't remember the crimes. (RTT 878.) Pace told him that if he went to California with no money and no lawyer, he wouldn't have a chance. (RTT 869-870.) He asked Pace what he should do. (RTT 870.) Pace told him if he had committed the crimes, he should say so. Pace said, "Johnny, you can die saying you didn't do it, get the death penalty, or you can throw yourself to the mercy of the court." (RTT 753-54; 690-691; 870-78.)

Massingale told Pace that if they had all the evidence Pace said they had, he'd just plead guilty to it. (RTT 878.) He told Pace he couldn't remember the crimes and Pace told him to tell them anything. (RTT 870.) Pace told Massingale that he was on his side, and was trying to help him. Massingale trusted Pace. (RTT 878.)

During the second interview, according to Massingale, Pace told him that there were eyewitnesses to the killings and that there was a lot more evidence than what they were telling him. (RTT 900.) Pace told him they had fingerprints, handwriting, and hair evidence. (RTT 900.) That was when Pace showed him more photos. (RTT 900.)[152] Massingale was scared, crying and nervous and asked Pace what he should do. (RTT 819.) Pace told him to throw himself on the mercy of the court. (RTT 900.) At that point Massingale confessed because he was afraid of dying in the gas chamber and because he wanted to get the detectives off his back. (RTT 691-93.) According to Massingale he still didn't remember Nelson in the van but told Pace that maybe he did know him. (RTT 699; 717; 856.)

Johnny Massingale was arrested and charged with the Jacobs murders in March 1984. (RTT 461-62; 935; 2726; Trial Exhibit 130.)[153] However,

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[152] According to Massingale, Pace went through the photos and showed them to Massingale, asking him if he remembered things in the photos. (RTT 819.) Pace showed him a lot of photos, including one of a kitchen. (RTT 886; 888.) Massingale thought there were at least 100 photos in the briefcase but he didn't see each and every one of them. (RTT 896.) Pace told him not to tell anybody that he showed him the photos. (RTT 886; 900.) Pace told him it was to help him. (RTT 886.)

[153] Massingale was arraigned on March 21, 1984 and entered pleas of not guilty to the charged Jacobs offenses and denied the penalty-enhancement allegations. (CT 9255.) An amended complaint was filed on April 4, 1984,
(continued...)

with the arrest of David Lucas, Massingale was released.[154]

In his trial testimony, Massingale denied telling Smith that he had murdered anyone. (RTT 702-03; 7222-23.) He also denied ever seeing or talking to Jimmie Joe Nelson. (RTT 702-03; 717-18; 722-23; 8576.) He also denied ever carrying anything but a small pocket knife. (RTT 722.) He also denied that he had ever hit a woman. (RTT 806.)

O. Tree Trimmer Evidence: Defense

In 1979, David Easley was working as a foreman for Peterson Tree Service. (RTT 8163-64.) His company had a contract job with the city of San Diego to trim the city's palm trees. (RTT 8164.) In May 1979, Easley was working in the Normal Heights area on several different streets, including Arthur Street. (RTT 8164-66.) Easley's hair was sun bleached blonde at the time. (RTT 8165.)[155]

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[153](...continued)
adding a special circumstance allegation of multiple-murder (Penal Code § 190.2(a)(3).) A preliminary examination was conducted on May 2-3, 1984 and Massingale was held to answer, the information being filed May 13, 1984. (CT 9255.) After arraignment on the information, trial was scheduled for October 1, 1984. (CT 9255.) Thereafter, due to "insufficiency of evidence and pursuant to Penal Code § 1385," the prosecution moved for dismissal of the charges against Massingale which was granted on January 4, 1985. (CT 9255-56.) Thereafter, on May 24, 1985, Massingale sought and obtained a judgment of factual innocence and order sealing and destroying his arrest record. (CT 9256.) In the present case, the defense moved to have the charges against Massingale reinstated. (CT 8546-8636.) The motion was denied. (CT 15201-03.)

[154] Massingale remained in custody from March 20, 1984 until January 4, 1985. (RTT 2723-24; Trial Exhibit 130.)

[155] William Green testified that he believed he interviewed Ebert the meter reader on May 15, 1979. (RTT 7971.) Green did not recall the name
(continued...)

Investigator Thomas Caldwell[156] took a photo depicting a portion of 3419 Arthur Avenue. (Exhibit 76.) (RTT 10691; 10694.) He used a fire hydrant as a reference point in the photo. (RTT 10713.)

On June 12, 1985, he conducted an interview with Rose Turner. (RTT 10691; 10712.) He asked Turner about whether or not she had observed a blond person in the area of the Jacobs home wearing overalls and cutting trees. (RTT 10694.) Turner told him that she had seen a blond person in the neighborhood trimming trees on the day of the homicides. (RTT 10694.) She specifically said she saw someone trimming trees. (RTT 10694.)[157]

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[155](...continued)
Easley. (RTT 7993-94.) He was aware that there were tree trimmers in the neighborhood at or near the time of homicide. (RTT 7994.) He didn't personally check out the information that one of the trimmers was Easley; somebody else did it. (RTT 7994.)

[156] Caldwell was a Deputy Probation Officer with San Diego county. Prior to that he had been a police officer. He then worked as an investigator for the San Diego county DA's office from Dec. '78 until April '85. In '85 he changed from a DA investigator to become a Public Defender investigator, and was assigned to work as an investigator for Bill Saunders who was Lucas' attorney at the time. (RTT 10690-91.)

[157] Caldwell testified that Exhibit 76 was a photo of Turner pointing at something. (RTT 10694.) He had asked Turner to point to where the person was that she saw when she was in her vehicle. (RTT 10694-95.) Turner pointed to an area west of the Jacobs house, approximately 60 feet from the driveway, and almost next door. (RTT 10695.) Turner was standing exactly where the blond man she had seen had been standing. (RTT 10712; 10713.) She was pointing to where he was standing when she saw him trimming trees. (RTT 10713.) The person had been right by the alley by the fire hydrant. (RTT 10712-13.) There had been a fire in the house right next door and a big tree was hanging over; that was what the man was trimming. (RTT 10715.) He believed Turner told him the man was wearing blue overalls. (RTT 10695.)

P. Potential Evidence Overlooked By The Prosecution

1. The Cigarette Butt

An ashtray containing the light brown cigarette on top of the TV, as well as one found in the kitchen in the Jacobs' home had not been impounded or preserved nor was any attempt made to try to identify the brand of cigarette. (RTT 562-563; 565; 569; 1253-54; 1444; 1446.) In 1979 it was possible to determine the ABO blood grouping of a person from saliva. (RTT 8958-59; 8418 [defense].)

2. Wine Glass

The investigators did not test or smell the contents of the wine glasses. (RTT 1222-23.) Nor did they check either glass for fingerprints. (RTT 1223.)

3. Blood Typing Of Hair

The prosecution failed to properly preserve hair root sheaths and blood samples from the hair that could have been typed. (See § 2.2(J)(2), p. 91 above, incorporated herein [prosecution].)[158]

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[158] Eugenia Bell also testified for the defense. She had training in the examination of hair, and had done an individual study on ABO blood grouping of hairs. (RTT 8960.) It was necessary to obtain a large sample of hair, then wash it thoroughly with soap and water. (RTT 8960.) The hair was then washed in alcohol or ether, then crushed between two polished stainless steel plates under pressure. Antisera was added to the portion of hair and it was placed in a refrigerator overnight, for 24 hours. The hair was then washed with cold water to remove all the antisera traces and then subjected to an absorption-elution test to determine if there was an ABO group substance present. (RTT 8960; 8961.) Bell testified that it was a test she had done and was familiar with in 1979. (RTT 8961.)

Bell testified this was a technique that was known for some period before 1979. In 1979 she had approximately 5 cases in which she performed the ABO analysis on hair. (RTT 8961.) On cross-examination, Bell testified that to obtain a result she would perform that test a number of times; it was due to the fact that the test was not reliable at all times. That testing method

(continued...)

4. Bite Marks On Apple Found In Jacobs' Residence

The partially eaten apple found on the counter near the bread box was not collected or preserved. (RTT 599; 1444; 1446.)

Norman Sperber, a forensic dentist, testified that forensic dentists are called upon to identify bite marks and human teeth marks on skin or other objects such as apples, pears, or cheese. (RTT 8417 [defense].) Depending on what the object was he would first observe it and might photograph it. He might swab the area for salivary residue to see if it was possible to determine the blood type of the biter. After that he would take impressions or photos of the object that caused the marks. (RTT 8418 [defense].) In 1979 it was possible to take an impression of a partially eaten apple and then use it for purposes of comparison. (RTT 8421-23 [defense].)

5. Blood Samples Of Suzanne And Colin Jacobs

The prosecution lost the blood samples obtained from the victims so the blood gathered at the crime scene could not be compared, to determine whether any of that blood had been left by the killer. (RTT 1144.)

6. Other Items Not Examined Or Tested: Prosecution

The following items were not tested and/or checked for prints: hair and debris found in the kitchen sink drain screen (RTT 1235-36); a file box (RTT 1244); a ballpoint pen (RTT 1245-46); a button found on the headboard bed frame (RTT 1246-1247) and a St. Didacus church receipt. (RTT 1248.)

Q. Other Offenses Evidence

For a chart of similarities and dissimilarities between the offenses, see § 2.2(R), pp. 128-38, below.

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[158](...continued)
actually destroyed the hair and once it's done the hair cannot be used for purposes of microscopic comparison. (RTT 8962.)

The trial judge ruled that all the charges were cross-admissible. Therefore, in reaching a verdict on the Jacobs charges, the jury was permitted to consider evidence relating to the charges in Santiago (see Volume 3, § 3.2, pp. 757-810, incorporated herein, for a summary of the evidence relating to the Santiago charges), Swanke (see Volume 4, § 4.2, pp. 1068-1123, incorporated herein, for a summary of the evidence relating to the Swanke charges), Strang/Fisher (see Volume 5, §5.2.2, pp. 1280-1309, incorporated herein, for a summary of the evidence relating to the Strang/Fisher charges) and/or Garcia (see Volume 5, § 5.1.2, pp. 1250-78, incorporated herein, herein for a summary of the evidence relating to the Garcia charges.) The extent to which the circumstances permitted the jury to cross-consider one or more of the other offenses depended on the extent to which the jury believed the offenses to be similar to or different from each other. On this issue both sides presented expert testimony.

Forensic pathologist Robert Bucklin examined the photographs and autopsy reports in the Swanke, Jacobs, Garcia cases and the photographs in the Santiago case. (RTT 6979; 7001.) Bucklin saw general similarities in the neck wounds in that they all extended through the same general plane of the neck, but that the wounds were not "carbon copies" of each other. (RTT 7002.) The wounds went through the larynx or in the area between the larynx and the hyoid bond; some had gone to the cervical vertebrae. (RTT 7002.) The carotid arteries and jugular veins had either been cut or parts of them had been cut. And it looked as if the cutting tool was a sharp instrument. (RTT 7002.) In those ways the injuries had similarities. (RTT 7002.) Bucklin testified that, based on his examination, the injuries stood apart from other throat injuries he had observed in the last 40 years. (RTT 7008.)

Bucklin noted that the Strang neck wound appeared to have gone from

right to left. (RTT 7010.)[159] He also noted a similar direction in the Fisher autopsy. (RTT 7010.) Bucklin also noted that there were shoulder injuries to Strang and Fisher that did not appear in the Garcia homicide, which constituted a dissimilarity between the two cases. (RTT 7011; 7013.)

Dr. Geiberger, who had treated Jodie Santiago for her injuries, examined the autopsy reports and photographs in the Jacobs, Garcia, Strang, Fisher and Swanke cases. (RTT 3683; 3684; 7057-58.) Geiberger thought there were several similarities amongst the wounds to the adults, but that the children's injuries were slightly different in some respects. (RTT 7058.) Geiberger noted four similarities in all of the wounds: all of the wounds showed skin tags that protruded from the smooth margin of the cuts; all of the wounds entered at the same place in the neck, the interval between the tip of the thyroid cartilage and the hyoid bone immediately above it; all of the wounds essentially went to the same depth, the spine is what appeared to stop the wound in every case. (RTT 7058.) In Santiago's case there was a ligature mark and in Strang's case there was an irregular mark as if something like a necklace had been pulled tightly around her neck. (RTT 7058-59.) Geiberger noted that a chain was found around the neck of Swanke. (RTT 7059.) Geiberger noted that all of the wounds were caused by a sharp instrument. (RTT 7059.)

Geiberger testified that when he saw the photographs of Swanke he thought the wounds looked like "twin cuts" to Santiago's wounds due to the similarities. (RTT 7061-62.) On cross-examination, Geiberger admitted that

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[159] Bucklin clarified the direction as from the right side of the victim's body to the left. (RTT 7010.) Bucklin testified that the direction was consistent with a left-handed movement, but was not exclusive of any other possibility. (RTT 7011.)

there were no ligature mark on Suzanne Jacobs' or Gayle Garcia's neck. (RTT 7073-74.)

Dr. Katsuyama had examined the photos of the victims. (RTT 7176-77.)[160] He noted that the injuries were all in the same general area. (RTT 7178.) All of the wounds came close to the backbone and at least a major portion of the larynx had been cut through. (RTT 7178.) He also noted that the large vessels had all been severed, at least on one side of the neck. (RTT 7178.) Due to the depth and appearance of the cuts, Katsuyama believed the wounds were all caused by a similar weapon. (RTT 7179.) Katsuyama thought the Swanke and Jacobs cases were quite similar. (RTT 7179.)

Cyril Wecht testified for the defense as a nationally recognized expert in anatomic, clinical and forensic pathology. (RTT 9369.) Wecht had examined the hospital and autopsy reports and photos as well as the testimony of the various pathologists involved. (RTT 9381; 9382.) While Wecht agreed that each of the deaths and the injuries to Santiago were due to extensive and severe injuries of the neck, including the vascular structures and other tissues in the neck, he did not feel that clear-cut definitive patterns existed among the seven cases to enable anyone to form the opinion that each was perpetrated by the same individual. (RTT 9393.)

Wecht noted several significant and relevant differences among the seven cases: Santiago and Swanke were found outdoors and were both unclothed from the waist down, all of the other victims were clothed. (RTT 9394.)[161] Suzanne Jacobs alone had three significant penetrating stab wounds

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[160] Katsuyama had performed the Jacobs' and Swanke autopsies. (RTT 7177.)

[161] Wecht thought that the fact that two of the victims were partially (continued...)

in addition to the neck wound, and the stab wounds were inflicted with some force. (RTT 9394; 9417.) Santiago alone had severe blunt force injuries to the head and a skull fracture. (RTT 9394-95; 9418.) Only Suzanne and Colin Jacobs had injuries which only went through the major vascular structures on the right side; the others had bilateral injuries except for Santiago. (RTT 9395; 9419.) Santiago's wounds were different in that only the right external jugular was lacerated; she did not have her carotid arteries of her internal jugular veins lacerated. (RTT 9395; 9418.)

Colin Jacobs, Santiago and Swanke all had injuries on the hands or fingers that could have been defensive wounds, the others did not. (RTT 9395; 9419-20.) That raised a question in Wecht's mind about the modus operandi; the method of approach and attack. (RTT 9395.) Wecht noted that in the Strang and Fisher cases, the pathologist expressed the opinion that there was a strong possibility that the directionality was from right to left. (RTT 9397; 9428.)[162] In the other cases the pathologists were unable to determine the direction of the wounds. (RTT 9397.)

As for the neck wounds, Wecht thought that by no means were the wounds anatomically carbon copies of each other. (RTT 9397; 9424.) Some of the wounds went through the thyroid cartilage; others went above the thyroid cartilage, severing the thyrohyoid membrane or muscle. (RTT 9397.) While all of the wounds were deep, the point of entrance was not the same.

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[161](...continued)
unclothed was suggestive of some sexual attack or rape. (RTT 9416.)

[162] Wecht thought this suggested that the assailant was left-handed. He couldn't rule out the possibility that a right-handed person was the assailant, and it was physically possible, although the assailant wouldn't have as much force, and the movement would be awkward. (RTT 9400-01; 9428.)

(RTT 9398.)

Wecht also noted that there were differences in the opinions of the pathologists who examined the wounds as to how many strokes were involved. (RTT 9398.) Dr. Robin thought the Garcia wound involved one stroke with some possible movement of the cutting instrument or victim. (RTT 9398; 9420.) Geiberger thought that Santiago's injury was caused by one stroke, again with some possible movement of the cutting instrument or victim. (RTT 9398; 9420.) In all of the other cases the doctors were very clear that they felt there were multiple strokes; 6 in one case and maybe as many as 11 in another. (RTT 9398; 9422.) Wecht thought this indicated a significant difference in the attacker's methodology. (RTT 9398.)

In Wecht's opinion, it was not possible to express with any reasonableness the opinion that one person perpetrated all of the murders and attempted murder based upon the pathological evidence. (RTT 9399; 9447; 9448.)

Wecht also took into consideration the fact that none of the adult victims knew each other, the fact that the crimes occurred between 1979 through 1984, the fact that San Diego had a population of approximately 2 million people, including a large military population moving in and out of the area constantly, in expressing the opinion that there was no pattern of one person responsible for all of the murders. (RTT 9405-07.)

R. Factors Of Similarity And Dissimilarity Between Offenses

CHART 2.2(R)(1) – COMPARISON OF SUZANNE JACOBS TO GARCIA

Factor	Suzanne Jacobs	Gayle Garcia
Victim Age	32 (RTT 20 [Op. Arg])	29 (RTT 21 [Op. Arg])
Single/Multiple Victims	Multiple	Single
Number of Strokes	"At least 6" strokes (RTT 980)	Only one cutting stroke (RTT 4503); but some possible movement of the cutting instrument or victim. (RTT 9398; 9420.)
Location of and Depth of Throat Wounds	One cut relatively high above the vocal cords which went all the way through the upper portion of thyroid cartilage; another considerably lower (RTT 952; 988; 7058). Cut extended to front surface of backbone (RTT 950); level of 4th vertebrae (RTT 980-81); did not cut into vertebrae (RTT 7193)	Cut went through membrane between hyoid bone and the top of the thyroid cartilage (RTT 4493; 4499-4500; 7058). Notch on right side of 2nd cerv. vertebrae (RTT 4493; 4500)
Jugular/Carotid severed?	Right carotid & right jugular vein (RTT 945; 7193)	Both jugulars & carotids on both sides (RTT 4493-94)
Direction Of Throat Wound	—	From left to right (RTT 4493)
Stabs to Torso	Three severe stab wounds to torso [collarbone; mid-chest; upper abdomen] (RTT 952-533; 961)	None noted
Hypoxia/Petechiae	Yes (RTT 970-73; 7191)	Yes (RTT 4496)
Evidence of Ligature Marks	No (RTT 1094 [K]; 7074 [G])	No (RTT 4533-34 [K]; 7074 [G])
Lip/Tongue Wounds	Tongue clenched between teeth but no bleeding (RTT 975; 7195)	Yes; hemorrhagic contusion of lower lip left of midline over front left incisor (RTT 4498-99)

Other Injuries To Face/Head	No (RTT 7198-99)	Three linear abrasions on left side of forehead; one midline of forehead (RTT 4492; 4501; 4502-03); abrasion on tip of nose (RTT 4492); abrasions & scratches under the chin (RTT 4493); abrasion near left ear (RTT 4495)
Other Nondefensive Injuries	Abrasions near collarbone (RTT 989); bruising on back (RTT 453 [Gleason]); yellow discolored area high on left side of buttock area (RTT 7199 [K])	None noted.
Defensive Wounds	None noted by Katsuyama; bent back broken fingernail "consistent with defense wound or struggle" (RTT 453 [Gleason])	No (RTT 9395 [Wecht])
Sexual Overtones of Attack	None noted; swabs negative for sperm (RTT 1092-93)	None noted
Had Advertised In Paper	Yes; to sell dinette set (RTT 116; 134)	Yes; Goff ran ad "rent to own" on house (RTT 2611)
Victim Abducted?	No (See place of attack)	No (See place of attack)
Victim Tied Up?	No	No
Place of Attack	Inside own home (RTT 111-12; 200)	Inside 3rd party home (RTT 2615; 2623)
Time of Attack	Morning [between 6:00 a.m. and11:30 a.m (RTT 112-113; 198; 206-207)	Early evening [between 5:35 p.m. and 6:05 p.m.] (RTT 2616-17; 2618-19; 2622)
Moved After Attack	No	Not noted
Victim's Clothing	Fully clothed (RTT 7199); Torn or rip in back of shirt; (RTT 324-25 [Gleason]; bra strap broken (RTT 325 [Gleason] 9394; 9399 [Wecht])	Fully clothed (RTT 2941 [Barry])
Acquainted w/ Lucas	No	No

CHART 2.2(R)(2) - COMPARISON OF SUZANNE JACOBS TO SANTIAGO

Factor	Suzanne Jacobs	Jodie Santiago
Victim Age	32 (RTT 20 [Op. Arg])	34 (RTT 21 [Op. Arg])
Single/Multiple Victims	Multiple	Single
Number of Strokes	"At least 6" strokes (RTT 980)	One stroke (RTT 3703); sawing or carving motion (RTT 3692; 7057; 7062)
Location of Throat Wounds	One cut relatively high above the vocal cords which went all the way through the upper portion of thyroid cartilage; another considerably lower (RTT 952; 988; 7058). Cut extended to front surface of backbone (RTT 950); level of 4th vertebrae (RTT 980-81); did not cut into vertebrae (RTT 7193)	Wound b/t the thyroid cartilage and hyoid bone (RTT 3687; 3690; 7058). Within 1/16" of cervical vertebrae (RTT 3686); would have impacted C-3 or C-4 (RTT 3691)
Jugular/Carotid severed?	Right carotid & right jugular vein (RTT 945; 7193)	One (left) external jugular vein severed; internal jugulars and carotids not cut (RTT 3686)
Direction Of Throat Wound	---	---
Stabs to Torso	Three severe stab wounds to torso [collarbone; mid-chest; upper abdomen] (RTT 952-533; 961)	No
Hypoxia/Petechiae	Yes (RTT 970-73; 7191)	---
Evidence of Ligature Marks	No (RTT 1094 [K]; 7074 [G])	Yes (RTT 3694; 7073; 7075)
Lip/Tongue Wounds	Tongue clenched between teeth but no bleeding (RTT 975; 7195)	---
Other Injuries To Face/Head	No (RTT 7198-99)	Severe closed head trauma; skull fractures (RTT 3695); concussion (RTT 3714); brain swelling (RTT 3717); amnesia (RTT 3711)

Other Nondefensive Injuries	Abrasions near collarbone (RTT 989); bruising on back (RTT 453 [Gleason]); yellow discolored area high on left side of buttock area (RTT 7199 [K])	No
Defensive Wounds	None noted by Katsuyama; bent back broken fingernail "consistent with defense wound or struggle" (RTT 453 [Gleason])	Middle and ring finger of right hand cuts; cut through tendons to bone (RTT 7054-55; 9395-96)
Sexual Overtones of Attack	None noted; swabs negative for sperm (RTT 1092-93)	Yes; nude from waist down (RTT 3048); Slides made from vaginal swabs detected sperm cells (RTT 8766-71; 10862-63 [Exhibits 689, 690, 691].)
Had Advertised In Paper	Yes; to sell dinette set (RTT 116; 134)	No
Victim Abducted?	No (See place of attack)	Yes; off street (RTT 7325-7334)
Victim Tied Up?	No	Yes (RTT 7340)
Place of Attack	Inside own home (RTT 111-12; 200)	Taken to house and choked (RTT 7338-44); found along side a public street (RTT 2997-99; 3033-34)
Time of Attack	Morning [between 6:00 a.m. and11:30 a.m (RTT 112-113; 198; 206-207)	Late evening [around 10:30-11:00 p.m.] (RTT 7324)
Moved After Attack	No	Yes (see above)
Victim's Clothing	Fully clothed (RTT 7199); Torn or rip in back of shirt; (RTT 324-25 [Gleason]; bra strap broken (RTT 325 [Gleason] 9394; 9399 [Wecht])	No apparent cutting of clothing
Acquainted w/ Lucas	No	No

CHART 2.2(R)(3) – COMPARISON OF SUZANNE JACOBS TO STRANG

Factor	Suzanne Jacobs	Rhonda Strang
Victim Age	32 (RTT 20 [Op. Arg])	24 (RTT 6983)
Single/Multiple Victims	Multiple	Multiple
Number of Strokes	"At least 6" strokes (RTT 980)	More than one stroke; 5 distinct cutting injuries to cervical vertebrae (RTT 6993)
Location of Throat Wounds	One cut relatively high above the vocal cords which went all the way through the upper portion of thyroid cartilage; another considerably lower (RTT 952; 988; 7058). Cut extended to front surface of backbone (RTT 950); level of 4th vertebrae (RTT 980-81); did not cut into vertebrae (RTT 7193)	Cut went through upper portion of the thyroid cart., below the hyoid, through top part of body of larynx (RTT 6988; 7058). 5 cutting injuries on anterior surfaces of the 3rd & 4th vert.; most pronounced on left side (RTT 6989; 6998); uppermost cut extended 1/4" into 3rd vertebrae (RTT 6989)
Jugular/Carotid severed?	Right carotid & right jugular vein (RTT 945; 7193)	Both carotid arteries; all jugular veins (RTT 6988)
Direction Of Throat Wound	---	Right to left (RTT 6986-88; 7010)
Stabs to Torso	Three severe stab wounds to torso [collarbone; mid-chest; upper abdomen] (RTT 952-533; 961)	No (RTT 6984-85)
Hypoxia/Petechiae	Yes (RTT 970-73; 7191)	Yes; in sclera, skin of forehead, cheeks and chin (RTT 6983-84); ["suffusion" of the face; possibility that she had been choked (RTT 6987)]
Evidence of Ligature Marks	No (RTT 1094 [K]; 7074 [G])	Yes (RTT 6992; 7059)
Lip/Tongue Wounds	Tongue clenched between teeth but no bleeding (RTT 975; 7195)	No (RTT 7018)
Other Injuries To Face/Head	No (RTT 7198-99)	1/4" superficial cut at right border of neck wound [point of origin] (RTT 6986)

Other Nondefensive Injuries	Abrasions near collarbone (RTT 989); bruising on back (RTT 453 [Gleason]); yellow discolored area high on left side of buttock area (RTT 7199 [K])	Right shoulder 4" right of midline, superficial hemorrhagic area, 1/4" diam. (RTT 6990; 7011-12)
Defensive Wounds	None noted by Katsuyama; bent back broken fingernail "consistent with defense wound or struggle" (RTT 453 [Gleason])	None noted (RTT 7009-10)
Sexual Overtones of Attack	None noted; swabs negative for sperm (RTT 1092-93)	No (RTT 6985)
Had Advertised In Paper	Yes; to sell dinette set (RTT 116; 134)	No
Victim Abducted?	No (See place of attack)	No (See place of attack)
Victim Tied Up?	No	No
Place of Attack	Inside own home (RTT 111-12; 200)	Inside own home (RTT 3201-02)
Time of Attack	Morning [between 6:00 a.m. and11:30 a.m (RTT 112-113; 198; 206-207)	Morning/Early Afternoon [between 9:00-9:30 a.m. and 1:30 p.m.] (RTT 3395; RTT 3402-03)
Moved After Attack	No	Not noted
Victim's Clothing	Fully clothed (RTT 7199); Torn or rip in back of shirt; (RTT 324-25 [Gleason]; bra strap broken (RTT 325 [Gleason] 9394; 9399 [Wecht])	Not indicated (but in limine testimony was fully clothed w/o shoes (RTH 4301))
Acquainted w/ Lucas	No	Yes (RTT 3425)

CHART 2.2(R)(4) – COMPARISON OF SUZANNE JACOBS TO SWANKE

Factor	Suzanne Jacobs	Anne Swanke
Victim Age	32 (RTT 20 [Op. Arg])	22 (RTT [Op. Arg] 21)
Single/Multiple Victims	Multiple	Single
Number of Strokes	"At least 6" strokes (RTT 980)	More than one stroke; 7 strokes on left side and 4 on right (RTT 4867-68)
Location of Throat Wounds	One cut relatively high above the vocal cords which went all the way through the upper portion of thyroid cartilage; another considerably lower (RTT 952; 988; 7058). Cut extended to front surface of backbone (RTT 950); level of 4th vertebrae (RTT 980-81); did not cut into vertebrae (RTT 7193)	Cut through upper portion of thyroid cartilage slightly above vocal cords (RTT 4871; 7058). Two marks; one very high up somewhere between C-2 and C-3, but see RTT 4974 [first near C-1 or C-2]; and one just behind the cut in the larynx between C-4 and C-5 (RTT 4872)
Jugular/Carotid severed?	Right carotid & right jugular vein (RTT 945; 7193)	Both carotids arteries and both jugular veins (RTT 4867; 4870)
Direction Of Throat Wound	---	Blade moved across neck in both directions (RTT 7196); likely that handle of blade was to Swanke's right (RTT 7196)
Stabs to Torso	Three severe stab wounds to torso [collarbone; mid-chest; upper abdomen] (RTT 952-533; 961)	No
Hypoxia/Petechiae	Yes (RTT 970-73; 7191)	Eyes were sunken "somewhat dehydrated" (RTT 4854; 4973); No (RTT 7191); maybe some petechiae on inner aspect of scalp (RTT 4910; 4974)
Evidence of Ligature Marks	No (RTT 1094 [K]; 7074 [G])	Yes. (RTT 4854; 4836-64) Could have been caused by choke chain found around neck (RTT 4864; 4703; 4997)

Lip/Tongue Wounds	Tongue clenched between teeth but no bleeding (RTT 975; 7195)	Yes, hemorrhage due to tongue being clenched b/t teeth (RTT 4905; 7194; 4910)
Other Injuries To Face/Head	No (RTT 7198-99)	Minor injury 1" behind lower portion of left ear (RTT 4976)
Other Nondefensive Injuries	Abrasions near collarbone (RTT 989); bruising on back (RTT 453 [Gleason]); yellow discolored area high on left side of buttock area (RTT 7199 [K])	Brush marks or line-like scrapes on buttocks and thighs (RTT 4854; 4858; 4888); number of scratches between buttocks & knees (RTT 4858; 4888); discoloration on palmar aspects of both hands at base of the thumb (RTT 4923); linear mark on right wrist (RTT 4923)
Defensive Wounds	None noted by Katsuyama; bent back broken fingernail "consistent with defense wound or struggle" (RTT 453 [Gleason])	Cut on ring finger of left hand (RT 4912-13; 4918-19) Occurred short time before death (RTT 4914; 4924-25)
Sexual Overtones of Attack	None noted; swabs negative for sperm (RTT 1092-93)	Nude from waist down except socks (RTT 4705); RTT 10723; 10730 [weak indication of acid phosphatase (seminal fluid) from swab]; unidentified pubic hair found (RTT 5145; 5152; 10726-27; 10730-32)
Had Advertised In Paper	Yes; to sell dinette set (RTT 116; 134)	No
Victim Abducted?	No (See place of attack)	Yes, off street (RTT 4722)
Victim Tied Up?	No	Possibly [linear mark on right wrist (RTT 4923)]
Place of Attack	Inside own home (RTT 111-12; 200)	Kidnapped off street; place of killing unknown–found outside in remote area (RTT 4549-53; 4701-02; 4722)
Time of Attack	Morning [between 6:00 a.m. and11:30 a.m (RTT 112-113; 198; 206-207)	Early morning [between 1:15 or 1:30 a.m.] (RTT 4549-53; 4552; 4561; 4599-4600)

Moved After Attack	No	Unknown; kidnapped off street; place of attack unknown–found outside in remote area (RTT 4701-02)
Victim's Clothing	Fully clothed (RTT 7199); Torn or rip in back of shirt; (RTT 324-25 [Gleason]; bra strap broken (RTT 325 [Gleason] 9394; 9399 [Wecht])	Clothing was cut (RTT 4706)
Acquainted w/ Lucas	No	No

CHART 2.2(R)(5) – COMPARISON OF COLIN JACOBS TO AMBER FISHER

Factor	Colin Jacobs	Amber Fisher
Victim Age	3 (RTT 20 [Op. Arg]; In Limine Exhibit 3)	3 (RTT 6994)
Single/Multiple Victims	Multiple	Multiple
Number of Strokes	"More than one stroke" (RTT 988); multiple strokes on one side (RTT 988); two definite slashes (RTT 976)	"more than one stroke" (RTT 6996)
Location of Throat Wounds	Between top of thyroid cartilage and hyoid bone (RTT 7058). Close to, within 1/4"; did not extend to backbone (RTT 985; 989)	Between top of thyroid cartilage and hyoid bone (RTT 7058). Hit cervical vertebrae on left side (RTT 6995); either at C-3 or C-4 (RTT 6999)
Jugular/Carotid severed?	Right carotid artery & right jugular vein (RTT 984; 7193)	Yes all (RTT 6995)
Direction Of Throat Wound	More on one side than the other (RTT 988)	Originated on right side (RTT 6995; 7010)
Stabs to Torso	No (RTT 986)	No (RTT 6994)
Hypoxia/Petechiae	No (RTT 989)	None noted
Evidence of Ligature Marks	No (RTT 1094)	None noted
Lip/Tongue Wounds	No (RTT 986)	No (RTT 7018)
Other Injuries To Face/Head	No (RTT 986)	Small superficial abrasions to forehead (RTT 6997)
Other Nondefensive Injuries	Cut to fingers; laceration in left palm (RTT 984)	1/4" superficial cutting-type wound on right shoulder, similar to wound on Strang (RTT 6990-91; 6994; 7011-12)
Defensive Wounds	Maybe (See above)	None noted; but see RTT 6997; 7009 (cut through the tip of the finger)
Sexual Overtones of Attack	None noted	None noted

Had Advertised In Paper	Yes. See S. Jacobs.	No
Victim Abducted?	No (See place of attack)	No (See place of attack)
Victim Tied Up?	No	No
Place of Attack	Inside own home (RTT 111-12; 200)	Inside 3rd party home (RTT 3201-02)
Time of Attack	Morning [between 6:00 a.m. and11:30 a.m (RTT 112-113; 198; 206-207)	Morning/Early Afternoon [between 9:00-9:30 a.m. and 1:30 p.m.] (RTT 3395; RTT 3402-03)
Moved After Attack	Not noted	Not noted
Victim's Clothing	Fully clothed (RTT 348-49 [Gleason];1312 [Stewart])	Not indicated (but prior testimony was fully clothed w/o shoes (RTH 4302)
Acquainted w/ Lucas	No	Yes. See Rhonda Strang.

2 JACOBS CASE

2.3 JACOBS CROSS-ADMISSIBILITY AND CONSOLIDATION ISSUES

ARGUMENT 2.3.1

THE JACOBS CRIMES WERE NOT ADMISSIBLE TO PROVE IDENTITY IN SANTIAGO, AND ACCORDINGLY THE TRIAL COURT ERRED IN (1) PERMITTING A JOINT TRIAL ON THESE INCIDENTS AND (2) AUTHORIZING THE JURY TO CONSIDER EVIDENCE CONNECTING LUCAS TO THE JACOBS CRIMES AS EVIDENCE CONNECTING HIM TO THE SANTIAGO INCIDENT

A. Introduction

The charges in CR 75195 were based on the following two separate incidents: the May 4, 1979, killing of victims Suzanne and Colin Jacobs – referred to herein as the "Jacobs case" and the December 8, 1981, killing of Gayle Garcia – referred to herein as the "Garcia case." (CT 5744-45.) The charges in CR 73093 were based on the following three separate incidents: the June 8, 1984, kidnap and attempted killing of Jodie Santiago – referred to herein as the "Santiago" case; the October 23, 1984, killing of Rhonda Strang and Amber Fisher – referred to herein as the "Strang/Fisher case" and; the November 19, 1984, kidnap and killing of Anne Swanke – referred to herein as the "Swanke case." (CT 70-72.) The judge ruled that all five separate incidents were cross-admissible with each other for purposes of establishing the identity of the perpetrator, and on that basis permitted a joint trial on all five incidents and authorized the jury to consider evidence connecting Lucas to any of the incidents as evidence connecting him to each of the other incidents. This ruling was erroneous as between Jacobs and Santiago because those incidents were not so unusual and distinctive, nor so similar, as to reflect

the "signature" of a single perpetrator.

B. Procedural Background

Lucas was arraigned in Municipal Court on the offenses in CR 73093 on December 19, 1984. (CT 18.) These offenses included the Santiago, Strang/Fisher and Swanke incidents. The preliminary examination commenced on January 4, 1985 and concluded on March 8, 1985 when Lucas was bound over to the Superior Court. (CT 24-46.) Lucas was formally arraigned in the Superior Court on March 22, 1985. (CT 4598.)

Lucas was arraigned in the Municipal Court on the offenses in CR 75195 on March 18, 1985 and subsequently arraigned again on an amended complaint on June 11, 1985. These offenses included the Jacobs and Garcia incidents. The preliminary examination commenced on June 24, 1985 and concluded on July 18, 1985 when Lucas was bound over for trial on all matters. (CT 5691-5706; 5722.) Lucas was formally arraigned in the Superior Court on August 1, 1985. (CT 15029.)

The cases proceeded along separate tracks until December 1986 when the prosecution filed a motion to consolidate in order to prevent CR 75195 from going to trial before CR 73093.[163]

The cases were ultimately assigned to Judge Hammes in early 1987, for all purposes, including the prosecution's consolidation motion. (CT 2722.)[164]

In response to the defense timeliness objection Judge Hammes

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[163] CR 75195 was sent out to trial in response to Lucas' Penal Code § 1382(2) speedy trial request. (See RTO 7776-77; 7813.)

[164] Judge Hammes reviewed the transcript of the proceedings held before Judge Kennedy on January 22, 1987, and found that Kennedy did not rule upon the merits of the consolidation motion and that Kennedy's remarks regarding consolidation were made in the context of a hearing on another motion. (CT 4814; 15237.)

acknowledged that the prosecution had delayed many months before bringing the motion and had changed its position many times on the issue. (RTH 2957; CT 4815; CT 15238.) However, the judge found no prejudice to Lucas and, therefore, denied the motion to dismiss for untimeliness. (RTH 2059-60.)

On September 9, 1987, Judge Hammes denied the defense motion to present affirmative evidence in opposition to the consolidation motion. (RTH 14036; CT 15427-28.) The judge ruled that the evidence would be limited to the prosecution's evidence. (RTH 14038; CT 15427-28.)[165] The defense moved to strike all of the prosecution's consolidation motion testimony based upon the court's refusal to allow the defense to present its evidence. (RTH 14042; CT 15427-28.)[166]

On June 6, 1988, Judge Hammes ruled on the cross-admissibility, consolidation and severance issues. (RTH 25472-513; CT 5211-12.)[167] She first ruled, again, that the consolidation motion was not untimely. (RTH 25502-03.) Judge Hammes then compared all of the offenses as follows:

> The following three factors I find to be minimally distinctive shared marks:
>
> (1) The victims were all vulnerable. The seven victims included five young women and two children under five.
>
> (2) All of the women were similar in appearance. They were all in their 20's or early 30's; there were all pretty, simply dressed, with slacks and shirts; all had brown hair.

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[165] For example, the judge precluded the third party guilt evidence as to Johnny Massingale. (RTH 14041; CT 15427-28.)

[166] See § 2.3.5, pp. 277-330 below, incorporated herein, where it is demonstrated that Lucas was denied a fair hearing on the issue of cross-admissibility and consolidation.

[167] The judge concluded that cross-admissibility and consolidation involved exactly the same issues. (RTH 2961; 5699.)

(3) At the time of the initiation of the attacks each of the women was alone or with a small child; each was in a secluded place – either in a home or on a dark street.

The following two factors I find to be substantially distinctive:

(1) The crime scenes – including Strang/Fisher, Jacobs and Goff homes; Swanke car and place where her body was found; the place where Jodie Robertson was found, and the condition of all the bodies – reveal no apparent evidence of motive for the murders. No apparent evidence of robbery, burglary, or vandalism; no unquestionable evidence of rape. Later investigation revealed no evidence that any of the victims was raped or, in the case of the children, sexually molested.

(2) Each victim suffered a massive throat slashing wound. Several pathologists and a surgeon testified regarding the uncommonness of throat cut homicides. (RTH 25504:23-25505:19.)

The judge then found that the throat wounds were sufficiently distinctive to be a signature:

I start from the finding therefore, as stated, that throat cutting cases are substantially significant in themselves.

The following shared marks I consider to be of signatory significance, significant enough almost by itself, and certainly strong enough in combination with the above factors, to lead to the conclusion that one perpetrator was responsible for all the Lucas case victims: that factor is the unique cut involved in the Lucas case throat wounds. (RTH 25506:22-25507:2.)

The judge then made the following additional findings:

I also make the following findings which support the cross-admissibility of all cases within each other for purposes of showing identity and intent:

Setting aside for the moment the evidence of shared marks in all the Lucas cases that indicate a sole perpetrator, there are independent factors about each of the crimes which link David Lucas to each crime. It is the fact that Mr. Lucas is

connected up through separate pieces of independent evidence to each of the crimes already linked together by signatory common mark that produces strong reliability in the identification.

In these cases, cross-admissibility of each of the crimes into the others is highly probative and necessary to the People's case. Each case adds an important element to the identification issue, and I believe that cross-admissibility of each of the cases in -093 into -195 is far more likely to enhance the truth-finding process than it is to detract from it. (RTH 25509:25-25510:14.)

Finally, Judge Hammes stated her 352 analysis as follows:

This court has, of course, also had to weigh the probative value from cross-admissibility against the prejudicial effects. I have taken into consideration all of the factors raised by the defense in their points and authorities, including:

The possible inflammatory nature of the other crimes; the possibility that David Lucas may want to testify in one case and not the other, or present a mental defense to one or more of the offenses but not the others; the greater publicity in the Swanke case; the effects of pre- and post-Prop Eight cases together; and the fact that some of these charges, if tried individually, and first in time before other cases, or after acquittals in other cases tried individually, would not be death penalty cases.

I found none of these factors, individually, or in combination, sufficient to outweigh the highly probative nature of the other crimes evidence. Each of these crimes individually is brutal and inflammatory in itself. The child victims, of course, add a dimension of magnitude in the horror of the crimes, but not such in this court's opinion as to necessitate severance of these crimes from the others.

I have examined the pre- and post-Prop Eight law factor, and I believe that a jury can understand and apply different instructions to each case where necessary. If I find that under some new issue that that cannot be accomplished during trial, then the defendant will receive the benefit of the law most favorable to himself. This has already been done by way of stipulation between counsel to remove the 1973 prior from use as possible impeachment.

> Regarding joinder of capital and noncapital crimes, defendant Lucas is charged with many murders and the probability of combinations creating capital offenses is great under any reasonable scenario of joinder or successive prosecution, and I cannot conclude that joining all the offenses together in one proceeding is substantially prejudicial.
>
> I have viewed all of the media accounts of the Lucas cases that have been submitted to me. It is clear that the Swanke case has received the most publicity, and I rather suspect that if any juror is familiar with any name among the victims, it will be Swanke. Nonetheless, the media accounts are three to four years old at this time. There have been numerous highly publicized murder cases in the meanwhile in San Diego. The process of voir dire will tell us if a fair and impartial jury cannot be obtained because of publicity effects on any one or more of the cases, and that will bear on a change of venue.
>
> The defendant has also argued that he may wish to present testimony on one case but not on others, and that his ability to remain silent on one or more of the cases will be imperiled by joinder with the cases where he would testify. He also may have a mental defense with respect to one or more of the crimes but not others and he will be forced into a compromised position of inconsistent defenses by joinder. Again, I do not see that these possibilities for prejudice would substantially outweigh the probative value of the other crimes evidence. (RTH 25510:15-25512:15.)

The judge then ordered consolidation as follows:

> Having determined the issue of cross-admissibility of all charges into each other, it would make no sense not to consolidate all of the charges for trial. Otherwise Mr. Lucas would be in the position of having the -093 charges subject to proof to a preponderance of the guilt phase of -195; possibly subject to proof beyond a reasonable doubt at a penalty phase of -195; and again subject to proof beyond a reasonable doubt at a second trial. I cannot see that he would be any more prejudiced by consolidation of the charges than by cross-admissibility. All counsel are well prepared to go to trial on all charges now, and I see no grounds for severance, having

already weighed the prejudicial effects of joinder. All the crimes are of the same class and all, arguably, are connected together in commission through the common marks discussed previously.

The defendant's motions for severance of charges within -195 and -093 are, therefore, denied and all charges are joined for trial. (RTH 25512:16-25513:5.)

C. Statement Of Facts

[Caveat: These facts do not include any defense evidence because the judge precluded the defense from presenting evidence at the consolidation/cross-admissibility hearing. (See § 2.3.5, pp. 277-330 below, incorporated herein.)

1. Overview: Statement Of Consolidation Facts[168]

The facts relevant to most of the pretrial/in limine motions are included in the subsequent case-specific volumes of this brief where issues arising from the trial court's rulings on those motions are addressed. However, the facts most directly relevant to Judge Hammes' rulings on cross-admissibility and consolidation – all of which were before her or proffered to her before her consolidation ruling – are set forth below in this section of the brief. The evidentiary showings as to many of the other pretrial/in limine motions are also relevant to the cross-admissibility/consolidation issues in that they bear upon the admissibility and/or reliability of evidence relied upon by Judge Hammes in concluding that evidence as to each of the five homicidal incidents

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[168] Abbreviations used for the reporter's transcripts are as follows: "RTO" refers to pretrial proceedings before Judge Orfield. (Pretrial volumes 9 through 49.) "RTK" refers to pretrial proceedings before Judge Kennedy. (Pretrial volumes 50 through 65.) "RTH" refers to in limine proceedings before Judge Hammes (Pretrial volumes 70 through 309.) Reporter's Transcript of the Trial (Volumes 1 through 73) are referred to as "RTT" The Clerk's Transcripts are referred to as "CT."

was cross-admissible as to the other and that consolidation for trial of all counts arising from the five incidents would not be prejudicial as to any of the charges. As to the Jacobs counts, facts underlying the following pretrial/in limine motions are relevant: challenges to the admissibility of purported evidence of a hand printed note found at the crime scene (the Love Insurance note), and of expert testimony concerning the author of that printing (see § 2.5.4, pp. 385-410 below, incorporated herein), and a *Hitch/Trombetta* motion based on the prosecution's loss of the fingerprint found on that same note (see § 2.4.2, pp. 333-48 below, incorporated herein). As to the Santiago counts, facts underlying the following pretrial/in limine motions are relevant: the defense challenge to the admissibility of Ms. Santiago's eyewitness identification testimony, and defense motions to present the testimony of an expert on eyewitness identification and for leave to conduct and present the results of neurological/psychiatric testing of Ms. Santiago (see Volume 3, § 3.6.1, pp. 938-50, incorporated herein). As to the Swanke counts, the facts underlying the defense challenge to the admissibility of electrophoretic blood analysis are relevant (see Volume 4, § 4.3, pp. 1124-45, incorporated herein). Additional cross-references and citations to summaries of this additional relevant evidence are provided in the text below.[169]

2. The Jacobs Case

In May 1979, Michael Jacobs lived at 3419 Arthur Street with his wife

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[169] Most in limine evidence was presented anew to Judge Hammes. (See RTH 16947; 17880.) However, in some situations Judge Hammes adopted the evidence and ruling from earlier litigation of the issue. (E.g., jury composition discovery. See Volume 1, § 1.4.1(B), pp. 25-28, incorporated herein.) In other situations the parties stipulated to consideration of previously taken evidence. (See RTH 18640-41; 23167; In Limine Court's Exhibit 13.)

Suzanne and son, Colin. (RTH 3006.) On May 4, 1979, he left for work at his usual time which was about 6:00 a.m. He saw Suzanne before he left and she was in good health. (RTH 3007.) Colin was still asleep. The bathroom and the house were neat when he left. He did not recall leaving or seeing any scraps of paper in the bathroom when he used it that morning. (RTH 3008.) Suzanne had purchased a new dining room set earlier that week. (RTH 3009.) When he got home, he noticed the dinette set and went inside. The door was unlocked. (RTH 3014.) He called out his wife's name and got no response. He first went into the bathroom and saw the blood. He went out and saw his son in the hallway. He went outside, sat on the lawn and called to the neighbors. (RTH 3015.)

Jacobs described Suzanne as 5'9" and 120-122 lbs. He denied she would drink large amounts of alcohol or that Suzanne would drink alcohol in the morning. She did drink some wine the night before but he was not sure how much. (RTH 3104.)

Gary Gleason, the Jacobs crime scene investigator, was a detective for the San Diego Police Department in 1979 and later became a DA investigator in 1987. (RTH 3348.) Gleason described the Jacobs house at 2419 Arthur as a single story single family dwelling on the south side of the street. The house was white, with a wooden exterior and a grey composition roof. It had a small porch with a wicker style dining room set. (RTH 3350-51.) A Volkswagen Baja type vehicle was in the driveway. (RTH 3352.)

Gleason went into the house and observed the living room and noticed that the TV was tuned to Channel 10. There was a wine glass on the TV. (RTH 3353.) There was a hallway with a bedroom on either end and a bathroom in the middle. (RTH 3356.) In the kitchen area there were what appeared to be partial footprints left in what appeared to be blood. (RTH

3357.) There also appeared to be blood in and around the kitchen sink area. (RTH 3358.) There were footprints in blood in the dining room area as well. (RTH 3360.) Gleason impounded the wine glass and some narcotics paraphernalia on the fireplace mantel. On the living room floor were five more footprints in blood. These were photographed. (RTH 3361.) The prints were approximately 12" long and 4½ inches wide. (RTH 3362.)[170] In the hallway, there were large drops of blood and some footprints on top of them. (RTH 3363.) The adult prints were a waffle type pattern made by heavy soled boot. Others were made by a child's shoe and appeared consistent with those of Colin Jacobs. (RTH 3364.) Colin's body was found in the master bedroom. The bed was in a state of disarray. (RTH 3365.) Suzanne Jacobs was at the foot of the bed. (RTH 3366.) The bureaus were in a state of disarray and material consistent with blood was on them. (RTH 3367.) There also appeared to be blood on the top of Colin's shoes. (RTH 3371.) There were blond hairs clutched in Suzanne's hands. Suzanne had brown hair. (RTH 3390.) Gleason instructed Stewart to seize the hair. (RTH 3391; 3464;.)[171]

According to Gleason, Colin was attacked with a knife in the bathroom and the wound was inflicted from the rear. (RTH 3408.) Colin then walked from the bathroom down the hallway and collapsed just inside the master

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[170] Fran Van Herrewaghe, the payroll clerk for Precision Metals testified that Lucas was hired on March 19, 1979 and was terminated on June 26, 1979. Employees such as Lucas were required to wear safety-toed boots. The company has a plan whereby employees can purchase boots on a payroll deduction plan. Lucas received his boots on April 27, 1979 and began having the cost deducted from his pay on May 1, 1979. In early May, Lucas worked the swing shift – 3:30 to 12:00. (RTH 3320-23.) But on May 22, 1979, Lucas went to the day shift. (RTH 3323.) Lucas worked April 30, May 1, and May 2 but was absent on May 3 and May 4. (RTH 3321.)

[171] The hair was consistent with Colin's. (RTH 3465.)

bedroom. Colin walked through his own blood as he was bleeding. Suzanne was attacked originally on the bed in the master bedroom. (RTH 3409.) Gleason opined that she was held against the chest of drawers and, while struggling, the items on it were scattered. According to Gleason, her throat was cut at this location and she fell forward of the foot of the bed, then ultimately she fell to the floor where the body was discovered. (RTH 3411.) There were bloody footprints leading away from the bedroom toward the kitchen. (RTH 5271.)

In the bathroom, the two things that caught his attention were the blood and the pink piece of paper on the rug in front of the bathtub. Evidence Technician Pat Stewart was directed to seize the paper and to photograph it. (RTH 3436.)[172] However, a Polaroid of the note was not taken at the scene. (RTH 3439.)[173]

William L. Green was originally assigned to the Jacobs investigation in1979. He contacted Gary Gleason at the scene and was given a briefing. (RTH 5248.) Gleason indicated where they found the Love Insurance note in the bathroom and said it was hard to spot because of the color. There was blood on the note. (RTH 5251.)

There were fingerprints found at the Jacobs scene which were not identified as belonging to Lucas or any of the people who had been in the house. (RTH 5284.)

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[172] Gleason ordered that the Love Insurance note be sprayed with ninhydrin, then photographed and retained. (RTH 3466; 3497.)

[173] Gleason would have anticipated that Stewart would keep a record of his photos but would not necessarily keep a record of every request for a photo that he made. Gleason did not recall making a written instruction to Stewart to take a Polaroid of the Love Insurance note. (RTH 3440.)

Dr. David Katsuyama performed the Suzanne Jacobs autopsy on May 4, 1979. (RTH 4155.)[174] Suzanne Jacobs had three penetrating stab wounds to her chest; one in the left lower neck, upper chest in the area of the clavicle; another at about mid chest level, and a third in the right upper portion of the abdomen, almost the lower portion of the chest. The one in the upper neck penetrated into the blood vessels. The one in the abdomen, penetrated into the liver. Also, there were other bruises here and there on her legs, arm and back. The wound in the upper clavicle would have been fatal if not treated promptly. (RTH 4156.)

Suzanne Jacobs had a massive wound to the throat. It was a large cutting wound that appeared to have been made by a number of strokes cutting through the skin, then through the underlying connective tissue, through the larynx, and across the large vessels on the right sick of the neck and partly through the great vessels on the left side. It extended to the backbone; there are definite marks on the backbone to indicate that the knife had cut across it. Because of the cutting across the right carotid and the right jugular and the left jugular, she bled to death from those wounds. (RTH 4157.) The cutting was on the upper portion of the larynx and below the hyoid bone. (RTH 4162-63.)[175] The pulmonary artery was also hit in the chest and that wound was life threatening. Suzanne Jacobs' cause of death was exsanguination. (RTH 4158.)

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[174] There was a stipulation that in Jacobs, Swanke and Garcia death was caused by exsanguination and by knife wounds. (RTH 4153.)

[175] Katsuyama later corrected himself with respect to the injuries on Suzanne's thyroid. It was a cut that did not pass all the way through. He repeated that the location of the wound was between the hyoid and the thyroid. (RTH 4179.) Katsuyama testified that the same was true of the location of the wound in Colin Jacobs. (RTH 4180.)

Katsuyama opined that the instrument involved would have been a very sharp-edged blade, moderately heavy and at least two to three inches long. (RTH 4163.) The wound was below the level of the hyoid bone. (RTH 4163.)

Petechial hemorrhages in the head area are frequently caused by lack of oxygen. Strangulation is one cause. Katsuyama noticed some in Suzanne Jacobs' eyes. (RTH 4164-65.) There was no evidence of ligature marks on Suzanne Jacobs. (RTH 4166.) The hemorrhaging was probably a result of blood loss caused by all of the wounds. (RTH 4167.)

Katsuyama also performed the autopsy on Colin Jacobs. There were large cutting wounds more on the right side of the neck extending to behind the right ear, but only a short distance behind the angle of the jaw on the left side. The right carotid and the right jugular vein were cut. His larynx was cut across above the level of the vocal cord, just below the hyoid bone. (RTH 4168.) The wound was in the same general location as was Suzanne's wound. There were no signs of petechial hemorrhages in Colin. His wound would have been inflicted by the same general type of instrument as with Suzanne. (RTH 4169.) More than one stroke was used on Colin; there were at least two on the right and two on the left. (RTH 4170.)

James Stam, the San Diego Police Department criminalist in the Jacobs case, first had contact with the Jacobs evidence shortly after the homicide occurred in 1979. (RTH 6990.) The hair found in Suzanne's hands as well as the standards taken from the bodies would have been in his custody and control until January 1980 when John Simms took over custody. (RTH 6993; 7016.)

Eugenia Bell, a criminalist with the San Diego Police Department, looked at some of the hairs in the Jacobs case and mounted some of them on

slides. (RTH 20205.) She prepared one of the slides in In Limine Exhibit 155D but not the other. (RTH 20206.) She was aware that blood samples should be frozen to avoid any deterioration in the sample. (RTH 20220.) These hairs should have been frozen. (RTH 20221.) Samples should be frozen whenever they contain blood. (RTH 20222.)[176]

James G. Bailey was the criminalist employed by the L.A. County Sheriff's Department as a hair examiner. His hair comparison technique was as follows: he measured the hair's length, curliness, and evaluated its color under low power magnification. Then he looked at various features under high power magnification. Then he looked at both the hair standard and the questioned hair. He then made a side by side comparison of the two. (RTH 7849.)

Most of the important characteristics are in what is called pigmentation. There is diffuse pigmentation or color to the hair cells and the melanin in the pigment granules. (RTH 7850.)

It is easier to compare dark hairs because there is more pigmentation as opposed to light colored hair. It is fairly easy to come to a conclusion that a given individual did not leave a questioned hair. It is much more difficult to come to a positive conclusion that the hair matches a particular individual. Even if some of the structures are similar, one cannot rule out that someone else might have left the sample. Positive identification by way of hair samples is impossible given the present state of technology. (RTH 7852; 7861.)[177]

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[176] One of the reasons for freezing is to enable the sample to be retested at some time in the future. (RTH 20222.)

[177] The reason why it is difficult to reach a conclusion that someone did leave a strand of hair is that the hair on a person's head varies from strand to (continued...)

Bailey was given some hair samples by William Green in October 1983. These were the hair samples found next to Suzanne Jacobs as well as the exemplars taken from her and from Colin. (RTH 7893.) One hair fragment from the left elbow could have come from Suzanne. Another hair fragment did not come from either Suzanne or Colin Jacobs.[178] In the right hand, was a pubic hair that was consistent with coming from Suzanne. There were some hair samples in the right hand that did not come from Suzanne or Colin. (RTH 7895.) These head hair fragments (that did not come from Suzanne or Colin) could have come from Lucas. (RTH 7897.)[179]

On June 3, 1987, Manuel Gonzales, the documents examiner and handwriting analyst for the Sheriff's Department, testified that he took handwriting exemplars from Lucas on January 2, 1985 at the County jail. This was the same time that Simms took the hair samples. (RTH 8557.) He wanted handprinting and numerals from Lucas, and asked him to write out "Love Insurance" and a telephone number. (RTH 8558.)[180]

Harold J. Ille, was the manager of Love Insurance in May of 1979. The

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[177](...continued)
strand. (RTH 7853.) Even from hairs on the same head, an experienced examiner might have difficulty reaching the conclusion that all came from the same person even though they would have many similarities. (RTH 7854.)

[178] Bailey never saw any hair samples from Michael Jacobs or Johnny Massingale, the third party suspect who confessed to the Jacobs murder but later recanted. (RTH 7910.)

[179] John Simms obtained hair samples from Lucas on January 2, 1985. (RTH 8557.)

[180] Bailey couldn't say what Lucas' hair was like in 1979 vis-à-vis 1984 although he notes that hair does not change that much over five years unless there is a significant greying trend. (RTH 7902.)

phone number was 280-1700. (RTH 3217.) Love Insurance wrote a policy for Lucas in 1979. (RTH 3220.) On July 7, 1979, Lucas made a down payment on the policy. It was through the Colonial Insurance Company. (RTH 3223.)

John J. Harris, a "questioned documents" examiner, examined the Love Insurance note found at the Jacobs scene. The note contained the following handprinting: "Love Insurance 280-1700." (RTH 13878.) Harris received various photographs of the note and certain exemplars taken from Lucas. (RTH 8122.) Harris tried to raise handwriting from the original of the note but due to its condition, he was unable to do so. He also looked at Lucas' prior probation and parole reports for samples of Lucas' handwriting. (RTH 8123-35.)

Harris testified that the person who wrote the Lucas exemplars wrote the Love Insurance note "with reasonable certainty." (RTH 8143.) He could not quantify what "reasonable certainty" means on a percentage basis. (RTH 8154.)

(For additional evidence relating to the handprinting comparison see § 2.5.3, pp. 375-85 below, incorporated herein. For evidence relating to the destruction of the original note and the loss of the useable fingerprint found on the note see § 2.4.2(B), pp. 333-38 below, incorporated herein.)

3. The Garcia Case

Frank Clark[181] first met Lucas in early 1980 although he was aware of

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[181] Clark testified that he currently [i.e., in March, 1987] used narcotics "two-three times a month." (RTH 3760.) Clark started using crystal meth in the latter part of 1980. (RTH 3765.) His use of crystal methamphetamine was perhaps once a month in 1981, increased to twice a month in 1982-1983 and two-three times a week in 1984. Clark had used crystal methamphetamine at (continued...)

[181](...continued)
least 190 times although, on another occasions, he admitted that total might be as high as 208. (RTH 3770.)

Clark started using cocaine in 1982 once a month or so. In 1983, it was once or twice a week, but he did not use any in 1984. (RTH 3771.) Clark's marijuana usage was up to twice a month in 1981 but increased to two-three times a week in 1984. (RTH 3772.) Clark denied that he ever told Lucas that he was spending $500 per week on cocaine. Clark said he drank hard liquor only once a month in 1981 and this increased to two or three times a month in 1984. (RTH 3773.) Occasionally, Clark would carry a flask of Jack Daniels, but only 10 times or so between 1981 and 1984. (RTH 3774.) Clark's current consumption of beer was two to three times a week, but was a little heavier in 1984, three to four times. (RTH 3775.)

Clark's would "snort" crystal methamphetamine. (RTH 3777.) An average amount or dose was one to two "lines." (RTH 3778.) Clark normally purchased it in 1/4 gram packages. (RTH 3779.) The crystal meth-amphetamine speeded Clark up and "motivated him to work." (RTH 3780.) By 1984, Clark experienced an occasional loss of sleep because of the crystal methamphetamine and he would combine it with other drugs, notably marijuana. (RTH 3781.)

Clark sought out the bud of marijuana as it was the most potent portion of the drug. (RTH 3782.) Although Clark purchased marijuana in 1981, it was not in cellophane bags. (RTH 3788.) Rather, it was in plastic baggies. However, Clark admitted that he and his friend would transfer the marijuana buds to cellophane wrappers. It would not be unusual for Clark or his friends to carry marijuana in a cellophane wrapper. Clark smoked marijuana in cigarette form. (RTH 3789.)

Clark quit cocaine in 1983 because he realized that it was harming him so he switched to crystal methamphetamine. (RTH 3791.) Although he was using cocaine more frequently, he denied being strung out on cocaine. (RTH 3792.) During this time period, Clark was getting 20 to 30 lines of cocaine from one gram and would use 4 to 5 lines at a time. (RTH 3793.) He also smoked marijuana at the same time. (RTH 3795.)

When Clark drank beer, he had from two to six at any one sitting. He denied that his use of drugs interfered with his ability to make life judgments. Nor did it affect his memory or his ability to drive a car. (RTH 3796.) However, Clark conceded that his memory faded with time. (RTH 3798.)

Although Lucas had been arrested, Clark was not angry with Lucas

(continued...)

him as early as 1979. Clark met Lucas through Miller's Carpet Care which was where they were both working at the time. (RTH 3563.) In 1980, they went to work for A&D carpet care, then in 1980, M&A carpet care. (RTH 3564.) In 1980, Clark was terminated by M&A. (RTH 3565.) In August or September of 1981, Clark was rehired at the request of Lucas who was then the office manager. (RTH 3566.)

In March of 1982, Clark and Lucas left M&A to form their own carpet cleaning company, Carpet Maintenance Company ("CMC"). During this period Clark became good friends with Lucas and they socialized. (RTH 3567.) Clark knew where Lucas lived but noted that Lucas moved around a lot. Lucas liked the Spring Valley/Dictionary Hill area. (RTH 3568.) In late 1981, when they started CMC, Lucas was living in North Park. (RTH 3569; 3578.) In late 1981, or early 1982, Clark and Lucas thought about living together and Lucas indicated he preferred the Spring Valley area. Clark saw Lucas look in the classified ads for places in that area. (RTH 3570.) Lucas later moved to Spring Valley. First to Bancroft street and then later to Casa de Oro. (RTH 3579.)

Clark testified that Lucas was a frequent user of marijuana. Clark used drugs himself. In the latter part of 1981, Lucas used marijuana buds. Lucas carried his marijuana buds in a plastic cellophane cigarette wrapper. (RTH 3572.)[182]

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[181](...continued)
regarding any loss of business. (RTH 3801.)

[182] Clark was interviewed by detectives in December of 1984 and January of 1985. The police told Clark about the marijuana bud found at the house on Banock Street where Garcia was killed and about the "rent to own" newspaper ad for that house. (RTH 3661-65.)

At M&A Lucas generally was the "Director of all Operations." In his absence, various people would fulfill that function, including Clark. (RTH 3574.) Between July and December 3, 1981, Lucas did all of the daily tally sheets except on November 24. (RTH 3575.) During the week of December 7, 1981, Lucas did not do the tally sheets for December 8 and December 9. Clark did those. (RTH 3576.) The tally sheets would normally be completed late in the day, around 5:00 or 6:00 p.m. (RTH 3577.)

In December 1981, Annette Goff owned the house at 866 Banock Street where Gayle Garcia, a realtor, was killed. Annette owned the house with William Greene. (RTH 3501.) The relationship between Annette and Greene had deteriorated to the point where Annette got a restraining order against Greene and an order to have him return the furnishings. The house was listed with Garcia, who was aware of the restraining order. (RTH 3501; 3517.)[183] It was advertised in the San Diego Union on December 8, 1981 as a "rent-to-own" situation. Garcia was at the house on December 8 between 4:00 p.m. and 6:00 p.m. to show the property to prospective clients. (RTH 3502.)

On December 8, 1981, Annette called Garcia at 5:35 p.m. to advise her that she would arrive in approximately 20 minutes and to advise Garcia that Greene might call her or show up. Garcia indicated that she was waiting for one more client to show up, a woman. (RTH 3503.) Annette had known Garcia since 1976 and was able to recognize her voice on the telephone.[184]

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[183] Goff and Greene were estranged at the time, which was why they were selling the house. (RTH 3508.)

[184] Annette first met Garcia on a professional basis and later socially. (RTH 3512.) Annette never saw Garcia use marijuana at any time. (RTH (continued...)

After work, Annette went to the house with her brother, Chris Goff, and her foreman. On the way they stopped at a 7-11 and bought some beer (Miller's) and cigarettes. As she walked into the house, she glanced at the wall clock and noticed it was 6:05 p.m. (RTH 3505.) The phone rang, and her brother, Chris, answered it. It was Greene and Annette took the call. Chris then went into the back bedroom and came out indicating that Garcia was sick as she was lying on the floor. (Chris did not turn on the light). Annette went back, turned on the lights and called an ambulance. Annette told Greene to get off the phone which he did and she told Chris to get the neighbors, Steve and Carol Peters. (RTH 3506.) Annette then called Clifford Garcia and told him to come over as soon as possible. She noticed a lot of blood around the head and neck area. (RTH 3508.)

Annette had vacuumed the house the previous night, but she only did a portion of the back bedroom where Garcia was found. She vacuumed some 3-4 feet inside the door where she had spilled some kitty litter. The vacuumed portion would have included the area covered by Garcia's torso and head only. (RTH 3510.)[185] The night she vacuumed she did not see any pennies or any plastic bags containing vegetable matter. (RTH 3510.) Annette did not use marijuana buds at that time. (RTH 3511.)[186]

Just prior to calling Garcia, Annette got a call from Greene who

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[184](...continued)
3513.)

[185] There were actually two vacuum jobs. One the night before which was a "complete one" and one the next morning which was just a quick one to clean up the kitty litter. (RTH 3535.)

[186] Greene smoked marijuana buds but did not smoke cigarettes. (RTH 3536.)

indicated he wanted to talk to Garcia personally. Goff tried to dissuade him. (RTH 3518.) There were actually three phone calls from Greene, one at 5:00 p.m., another at 5:15 p.m. and the third at 5:30 p.m. (RTH 3519.)

There was also $600.00 in a kitchen drawer. After homicide let them back into the house, Annette searched for the money but could not find it. (RTH 3527.)

Detective Thomas Streed was called to investigate a homicide scene in December 1981 in Dictionary Hill. (RTH 4913.) The location was 866 Banock Street. He arrived at 7:30 that night. The house was a small two bedroom structure set back from the road. There was a for sale sign in the front yard. (RTH 4914.) Garcia's Toyota was parked in the driveway. (RTH 4915.)

Streed contacted the deputies at the scene and went into the house. (RTH 4916.) He went into the large back bedroom where Garcia's body was located. Garcia was lying on the floor, facing toward the east and fibula tor pads were on her chest. There was a large gaping wound to her neck. (RTH 4917.) It was his opinion that the wound was caused by a knife. (RTH 4920.) It was also his opinion that the stains on Garcia's pants were left by a bloody knife blade. (RTH 4923-24.)

Streed found a cellophane wrapper located near Garcia's left elbow on the floor. Inside was some green vegetable matter that was later determined to be a bud of marijuana. (RTH 4931.) The wrapper was from a cigarette package but he could not determine the brand. No latent prints were developed on the package. (RTH 4932.) Garcia's right earring was found next to her body. (RTH 4934.) Also, some pennies were found around her body. (RTH 4936.) Garcia had a broken fingernail which was found in the hallway just outside the bedroom. (RTH 4937.)

Streed also discovered an ad in the San Diego Union advertising the house as a rent-to-own situation. The ad ran on December 7 and 8. (RTH 4940.)

Ronald Barry was the criminalist assigned to do the Garcia homicide. He identified the small cellophane wrapper with green vegetable matter that he found at the scene. (RTH 5252.) He tested the substance for marijuana and it was a bud of the plant. (RTH 5356; 5358.)

Howard S. Robin performed the Garcia autopsy on December 9, 1981 at the coroner's office. Other than the neck wound, there were three superficial abrasions on the left side of the forehead, a one inch abrasion in the mid-forehead region and one on the nose. (RTH 3243.) There also was a hemorrhagic contusion on the lower lip, a superficial laceration or cut of the ear lob on the left, a contusion on left upper eyelid, superficial scratches on the cheek and chin, and multiple small fine hemorrhages called petechial hemorrhages over the conjunctiva of the eye. Petechial hemorrhage may be caused by hypoxia or the absence of oxygen. It is primarily observed in people who have suffered asphyxiation, i.e., strangulation or hanging. (RTH 3244.)[187] The neck wound extended from the angle of the jaw on the left side all the way across the neck to the angle of the jaw on the right side. If you took the edges of this wound and brought them together, it measured six inches. The wound went through the skin, the subcutaneous tissue, and it went through a membrane that connects the hyoid bone in the neck and the thyroid cartilage. It went through the jugular veins and the carotid arteries on both sides, went through the sternoclatomastoid muscles and extended all the

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[187] The incision to the neck could have caused the petechiae in the eyes. (RTH 3246.)

way down to the anterior surface of the second cervical vertebrae with a little nick in that cervical vertebrae on the right side. (RTH 3245.)[188] Death was due to exsanguination caused by severing the carotid arteries. (RTH 3250.)

4. The Santiago Case

[For additional in limine evidence related to the Santiago case see Volume 3, § 3.3.1, pp. 811-47 and § 3.4.1, pp. 896-901, incorporated herein.]

Jodie Santiago[189] visited her brother during the first week in June 1984. She arrived in town that Monday and was scheduled to leave the following Sunday.(RTH 4482.) Her brother lived in an apartment complex on Petree Street in El Cajon. (RTH 4482.) The purpose of her visit was to see her brother and determine if she wanted to move to San Diego. She was considering looking for work as she had been unemployed for a "couple of months." (RTH 4505.)

On June 8, 1984, she left the apartment around 7:00 p.m. or 7:30 p.m. for Baxter's, a nearby restaurant and bar, two and ½ blocks away. She was there for a while, had a couple of Margaritas, danced, and then started home. (RTH 4483.) Baxter's was not jammed but a lot of people were there when she arrived. Before arriving, she had a beer. She had no dinner but did have lunch. (RTH 4562.) She did not recall how strong the Margaritas were. It took about 40 minutes to drink the first margarita. (RTH 4563.) She might have told law enforcement that she had three drinks that night. (RTH 4564.) She left around 10:00 p.m. When she was about 50 feet from the parking lot

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[188] Robin later met with Drs. Bucklin, Geiberger and Katsuyama to discuss similarities of throat wounds. (RTH 3250.)

[189] At the time of her in limine testimony Santiago had married and was using the last name of Robertson. However, for purposes of clarity the name Santiago will be used throughout this brief.

of the complex, a man passed her and then came up and put a knife to her throat and said she was to go with him. (RTH 4484.) The first time she saw her assailant, she was on the sidewalk. (RTH 4573.) He told her that if she tried to scream or get away, he would cut her throat. (RTH 4678.) He led her into the parking lot where there was a car with a door open and motor running and told her to get in. She entered from the driver's side; wasn't really shoved into the car. The man got in and took her to a house. The knife was placed on the dashboard after he got in. (RTH 4485.) The knife used in abduction had a blade of 3 to 3 and ½ inches, a light brown wood handle. She was pretty sure that it was not a folding knife. (RTH 4676.) She tried to memorize the license plate number and said she thought it had three numbers and three letters. (RTH 4603.) The car was dark in color, brownish, sports-like and with louvers. The interior had bucket seats and sheepskin covers. (RTH 4680.)

It took about 15-20 minutes to reach the house. She was trying to remember street signs but was unable to recall any. She saw the man's face through the rear view mirror. She was seated between the seats which were bucket seats. (RTH 4486.) The house was one story, brown she and recalled a porch. She had no recollection of roof or door. She recalled a circular drive like a horseshoe type thing and trees in the lawn. (RTH 4681.) They arrived at the house. She was taken out and they went into the house. The man took her down a corridor to a back room where he tied her hands behind her back and put her in a bedroom. He left for a few moments and returned with a beer and asked for cigarettes. (RTH 4487.)

The lighting was adequate enough for her to see his face and he did not attempt to hide his face. He took cigarettes from her purse and lit one up. He forced her face down on the bed. When she began to cough, he choked

her. (RTH 4488.) The next thing Santiago remembered is being in the hospital. (RTH 4488.)[190]

Anthony Salazar, the deputy sheriff who responded to the Santiago crime scene, was on duty on June 9, 1984. Early that morning he received a call about a badly beaten woman at 4500 Avocado; when he arrived, he found nothing and was updated to go to Lyons and Calavo. (RTH 5093.) He went there and arrived at 7:06 a.m. The site was in a residential area of San Diego; it was quasi-rural. Paramedics were already there. Salazar saw the woman in the weed section off the shoulder of the road. (RTH 5094.) She was some 10-15 feet off the side of the road. The woman was white, light brown/blond hair, and she had blood on her hair, face and shirt. She was naked below the waist and her hands were crossed on her chest. (RTH 5095.) She was in a seated position and crouched over herself. She was definitely in shock. The paramedics put her into an ambulance and took her to the hospital. (RTH 5096.)

After that, Salazar took steps to secure the crime scene area.[191] The detectives later came to the scene. Salazar saw the slash wound to her neck as she was loaded onto the gurney and the wound opened up. (RTH 5097.) It looked like it went from ear to ear. (RTH 5098.)

In 1984, Brian Wadlington was the relief fire captain for the district and would be assigned to various stations. On June 9, 1984, he was in charge

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[190] Santiago had severe lacerations on her hands which were described as defensive wounds. (RTH 4865.) However, Santiago's recollection of the events did not account for these wounds. (RTH 4488.)

[191] Other police to arrive included Helms, Fagundes, Bartholomew, Fullmer, Henderson Lab Tech McIntosh and criminalist Randy Robinson. (RTH 5100.)

of the Casa de Oro station on Ramona Street. Wadlington recalled responding with others to a call on Saturday, June 9 on a medical case. (RTH 16951.) Although they were given a couple of false starts, they eventually arrived at the location of Calavo and Lyons Streets in the Mt. Helix area. (RTH 16952.) The call was technically out of their jurisdiction but they went anyway because of a lack of time. They saw a woman sitting on the embankment of the street who appeared to be the person involved. (RTH 16953.) He noticed that her hands were up against her neck and her knees were up with the elbows resting on them. She had blood on her hands. He thought she may have been thrown from a car at first. He also saw that she was naked from the waist down. (RTH 16954.) He approached her and asked her if she was all right. He noticed that she had a vacant stare and did not seem to understand him. She turned her head toward him. She had a vacant stare, "fish-eyed" and without emotion. She held her neck. He again asked her if she was okay and started to remove her hands from her neck. (RTH 16955.) Santiago was conscious but only in the physiological sense. Based on his experience, he felt that she was in a state of shock. (RTH 16957.) He left her in the same position until the paramedics arrived. (RTH 16958.) He kept trying to reassure Santiago but she was unable to respond in any coherent fashion. Wadlington had a mustache at this time as did at least one other person responding to the call. He was 6'1" tall. (RTH 16959.)

Robert Fullmer responded to the Santiago crime scene on June 9, 1984. (RTH 5306.) He observed some blood on the asphalt and, in the weeded area,. He saw some green broken glass, chewing gum, and a bloody watch. Santiago had already been transported to the hospital when he had arrived. (RTH 5307.)

Dr. Charles Geiberger was the Chief of Surgery at Grossmont Hospital

in 1984. (RTH 4862.) He treated Santiago on June 9, 1984. She had scalp lacerations on each side of her head and an extremely large laceration in the neck, and small lacerations on two of her fingers; he thought it was the right hand. Both scalp lacerations were near the ears on each side. She also had a skull fracture on the right side of her head. (RTH 4865.) The two head wounds were caused by some blunt object. The neck wound was roughly horizontal. It extended from the interval between the thyroid cartilage and the hyoid bone, straight back nearly to the cervical spine. The last level in a posterior direction that was divided was the mucus membrane of the back of the throat which is two or three millimeters from the cervical vertebrae. (RTH 4866.) Another surgeon actually did the repair to the tissues of the throat. Geiberger's recollection was that one of the jugulars was cut. The injuries were caused by a sharp knife. (RTH 4867.) There were some small tags along the edges of the wound which would indicate there was some motion of the blade in the wound. (RTH 4868.) The black and blue marks on her neck were caused by a constricting band which had been around her neck. (RTH 4871.)[192] Santiago's carotids were not cut. The jugular that was cut was one of the external ones which are superficial veins. The large internal jugulars that run next to the carotids were intact. Severing the external jugular is not a life-threatening injury. There was no petechial hemorrhage. (RTH 4878.)

After Santiago recovered she identified Lucas as her attacker. (See Volume 3, § 3.2(A)(13), pp. 777-79, incorporated herein.)

The parties stipulated that David Lucas traded in his 1983 Datsun 280

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[192] Geiberger ordered a rape kit analysis but took the smears himself aided by a nurse skilled in the practice. (RTH 4872.)

Z for his truck on June 13, 1984. The 280 Z did not have louvers on it. The 280 Z was black. Sheepskin covers, which had been in the 280Z at the time of the deal, were not included in the transfer and trade in. (RTH 5115.)[193]

Rick Adler had ridden around in Lucas' 280 Z. He recalled a computer voice that would mention when the gas gauge was low. He recalled that the car talked when the doors were open and the motor on. (RTH 4068.) In June of 1984, Lucas expressed dissatisfaction with his 280 Z. Adler was with Lucas when he sold his car and bought the pick-up at John Rose Toyota. Adler lent David $800 to consummate the deal. They changed the license plate and put the sheepskin covers on to the truck seat. (RTH 3961.)[194]

5. The Strang/Fisher Case

Rick Adler, Rhonda Strang's brother, had met Lucas in November of 1982 and started to work for him.[195] Adler thought that he may have introduced Lucas and Rhonda but was not certain. (RTH 3953.)

Adler had been to his sister's house with Lucas on several occasions. Adler had a close relationship with his sister. (RTH 3954; 4027-29.) Rhonda was a very tidy housekeeper and kept her place immaculate. (RTH 3956.) Rhonda would never let any strangers into her house and was very particular about her appearance. (RTH 3957.) Rhonda always kept her doors and windows locked. She was extreme about this. (RTH 3963.)

Adler met Paula St. Germaine either through Peggy Shelton, Donna

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[193] This stipulation was for the limited purpose of the in limine motions. (RTH 5115.)

[194] There was a stipulation that the sale of the 280 Z took place on June 13, 1984. (RTH 4010.)

[195] He continued to work for him up until December of 1984 on a more or less steady basis (RTH 3953.)

Ellis or Dana Sullivan. (RTH 4014.) Adler was aware that Bob Strang used drugs. (RTH 4017.) Adler was also aware that Paula St. Germaine sold drugs. Adler bought drugs from her and introduced her to Bob Strang. (RTH 4018.)

In August, September, October of 1984, Rhonda told Alder that she was afraid but did not specify why. (RTH 4034.) Rhonda was considering divorce. (RTH 4042.) Rhonda complained that Strang was spending all of the family money on drugs. Rhonda was afraid of Paula St. Germaine. (RTH 4043.) Adler was present on October 22 when Lucas bought cocaine from Paula. Lucas gave Rick a "toot." (RTH 4044.)[196]/[197]

In October, 1984, R.O. Richardson worked as a Sheriff's deputy at the Descanso detention facility. Lucas showed up on October 22, 1984 for a two day commitment on a drunk driving charge. (RTH 4970.) Lucas was there on a program which allowed him to report, work for 10 hours or less and return home and report another day. (RTH 4971.) Lucas was originally scheduled to appear on October 23rd but Richardson excused him when Lucas asked to be rescheduled because he had a large carpet job on tap for the next day. (RTH 4974.) Lucas was allowed to make it up on October 25th. (RTH

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[196] Adler described a "toot" as a quarter gram of cocaine. (RTH 4044.)

[197] Adler recalled that each time he and Lucas went to Rhonda's house, it was to score drugs, particularly crystal methamphetamine. (RTH 4057.) Adler believed that Lucas and Rhonda were having an affair and that Rhonda may have been involved with someone else at CMC. Adler thought it might be Mike O'Brien but does not recall who told him about the affair. (RTH 4058.) Neither Lucas nor Rhonda admitted to the affair. (RTH 4060.) He had told the police on December 16th that Rhonda was not too faithful. (RTH 4061.) Rhonda told Adler that she frequently talked to Lucas. (RTH 4062.) Adler also told the police that Strang, Sr., may have been involved in the homicide as there was animosity between the senior Strangs and Rhonda. (RTH 4063.)

4975.) Lucas showed up on that day. Richardson had no contact at all with Lucas on October 23rd. (RTH 4976.)

Frank Clark received a telephone call from Lucas at 7:30 a.m. at the carpet business (CMC) on the morning of October 23, 1984. (RTH 3611.) Lucas told Clark that he went to Descanso that morning but they would not let him in as he was sick. (RTH 3612; 3614.)

Clark identified the daily log sheets for CMC that day. (RTH 3615.) The only thing in Lucas' handwriting was a reference to a job for some people named Kholer. (RTH 3616.) The method used in booking jobs would be to write the job and address on to a sticker, peel the back off and place the sticker on the spread sheet for that day. (RTH 3617.) The sticker would not necessarily be placed there the same day the job was performed, rather it was the day the job was booked. It appeared from the sticker that Lucas booked the job a week earlier. (RTH 3618.) Lucas did not come into work that day based on this spread sheet, Clark's memory and the phone call about Lucas' illness. (RTH 3620.)[198]

Clark knew Rhonda Strang. The only time he went to her house was when Lucas was with him. Rhonda showed up at the office once or twice. He recognized her voice on the telephone. (RTH 3623.) Rhonda would call CMC once or twice a week and would ask to speak with Lucas. Rick Adler, her brother, worked for CMC. (RTH 3624.) The purpose of the visit to Rhonda's house in late 1983 was to purchase cocaine. It was a joint purchase by both of them. (RTH 3625.)

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[198] The court indicated that the spread sheet was irrelevant as Clark said he couldn't tell for sure from that document whether or not Lucas was at work that day. There was no major job that day. (RTH 3622.)

Greg Fisher, Amber Fisher's father,[199] had known Rhonda Strang for at least 10-15 years, ever since he was a kid. (RTH 4121.) Fisher saw Rhonda at least six times in October. He had met Bob Strang only a few times. (RTH 4124.) Rhonda did express some concerns about Bob's use of cocaine. (RTH 4126.)

October 23rd was the first time that Rhonda baby-sat Amber. Fisher dropped Amber off at 9:15, chatted briefly with Rhonda and then left. (RTH 4122.) He returned to the house around 6:00 p.m. that day where he met with Detectives Fullmer and Henderson. (RTH 4129.)

With respect to the Strang homicide, Fullmer was assigned to work the homicide scene. The house was located at the end of a long driveway that goes off of Riverview Drive. (RTH 5486.) Fullmer arrived after the initial deputies and asked them what had happened. He was informed that the fire department had confirmed that there were two dead bodies – an adult female and a young child. Fullmer was not allowed into the house until 5:00 p.m., some two or more hours after he arrived with the criminalist. First, he checked for signs of forced entry but there was no such evidence. All windows were locked and the only door that was not locked was the front door. On entering the house, they noticed blood spots going over from the living room to the kitchen area. (RTH 5487-88.)

Fullmer saw Rhonda lying on her back in front of the television at an angle facing an end table in the living room. Also in the living room was a play pen. (RTH 5490.) Strang's bra was intact and she was fully dressed. (RTH 4301; 5530.) Fullmer was informed that an infant had been found inside

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[199] Fisher had filed a lawsuit against Lucas and against Bob Strang seeking damages for the death of his child. The suit was still pending. (RTH 4130-31.)

the playpen but unharmed. Fullmer described the spot where Amber Fisher was found in the living room. (RTH 5491.) He also pointed out the other rooms of the residence on his diagram. He was able to observe the neck injuries to both Fisher and Strang. (RTH 5492.) He also was able to observe petechial hemorrhaging in Strang. There were droplets of blood in the kitchen but he did not notice any blood in the living room except near the bodies. (RTH 5493.)

In June of 1984, Gary Fisher was assigned to the homicide detail of the San Diego Sheriff's Department. He was involved in the Strang/Fisher investigation. (RTH 6127.) Fisher was the first homicide investigator on the scene and discovered the bodies by the television. (RTH 6129.)

Edwin Masters was the criminalist who collected the blood samples from Rhonda Strang and Amber Fisher. (RTH 6383.) He also obtained the clothes of the victims. (RTH 6387.) He turned the vials over to Ron Barry for safe keeping and storage. (RTH 6390.)

Robert Bucklin performed the Strang and Fisher autopsies on October 24, 1984. (RTH 5136.) With respect to Strang, the most significant injury was a cutting type of incision to her neck. (RTH 5137.) It was a cutting-type injury which extended over the anterior surface of the neck, measuring six and a half inches on its upper border and eight inches on the lower border. It gaped to two inches in the central portion. At the right border was a one quarter inch superficial cut, suggesting that this was the origin of the cutting wound. (RTH 5138.)

The wound direction was from right (RTH 5138; 5142) toward left through the structures of the neck with complete transection of both carotid arteries, all jugular veins and the larynx. The lower part of the larynx was at the plane of the lower margin of the wound and the thyroid horns projected

above the margin of the wound. The transection was through the upper part of the thyroid cartilage. The upper part of the larynx had been retracted upward. (RTH 5138.) There was hemorrhage into the structures of the posterior part of the neck along the cervical spine. Bucklin described five distinct cutting injuries on the anterior surfaces of the third and fourth vertebrae. He also saw abrasions on the neck, consistent with the presence of a necklace. (RTH 5139.) On the right shoulder was a superficial hemorrhagic area consistent with a cutting wound. There were also bruises on the chest and clavicle. (RTH 5140; There were petechial hemorrhages in the face and eyes. (RTH 5142.) These were caused by constriction of the flow of blood through the neck, possibly by strangulation. (RTH 5143.)

The neck cut went through the upper portion of the thyroid, below the hyoid. (RTH 5144.) There were multiple cutting wounds. (RTH 5145.) Both carotids and jugulars were severed. (RTH 5146.) The cause of death was a cutting wound to the neck with transection of the airway and blood vessels. (RTH 5147.)[200]

Amber Fisher primarily had a deep cutting wound on the front surface of the neck. The upper border was two inches below the tip of the chin and the lower border at the level of the thyroid cartilage. The wound was six inches on both borders and gaped two inches in the middle. Slight irregularities on the right upper side indicated the point of first application of the wound. The carotid and jugular veins had been incised and retracted, and the cut extended through the upper part of the larynx. There were cuts on the anterior of the vertebrae. (RTH 5149.) The location of the wound was

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[200] Strang's clothes were still on and no sperm was found in her vagina. (RTH 5147.)

slightly higher than it was on Strang. (RTH 5150.) She also had several superficial abrasions to the forehead and chin. (RTH 5149.) There was no petechiae. The cause of death was a cutting wound to the neck with transection of the airway and blood vessels. (RTH 5150.)[201]

Fullmer had obtained information that Bob Strang bought drugs from Paula St. Germaine for purposes of resale. (RTH 5534.) Fullmer was also aware that Bob had committed an assault with a deadly weapon against Rhonda within a couple of weeks of the homicide. (RTH 5536.) The assault took place in late August of 1984. (RTH 5537.) Rhonda had indicated that she was afraid for her life. (RTH 5538.)

6. The Swanke Case

Frank Clark testified that Lucas rarely came to work in the last half of 1984, but was at work on November 19, 1984. (RTH 3627.) After work the two of them went to a bar and drank beer. (RTH 3628.) Later that evening, they went to a person's house to purchase some crystal methamphetamine. (RTH 3629.)

On November 19, Clark and Lucas went to Clark's house after purchasing the crystal methamphetamine and arrived there around 10:00 p.m. Mrs. Clark was watching "Fatal Vision," Part II. Clark and Lucas had more beer. (RTH 3627; 3649.) Lucas left around midnight or a little thereafter. Clark offered to let Lucas spend the night but David declined. (RTH 3650.)

Clark opined that the logical route for Lucas to take home was 805 south to 94 East. Another possible route was 8 east to 94 East. Lucas did not have any vertical linear scratches on his face when he left that night. (RTH 3651.)

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[201] There was no evidence of sexual molestation. (RTH 5151.)

Lucas was driving his Toyota pick-up truck that night. It had a license plate, CMC INC 2. (RTH 3652.) Lucas bought the pick-up in mid-1984. (RTH 3653.)

Gregory Oberle was Anne Swanke's boyfriend and the last to see her alive. Swanke came to his house on Lindo Paseo on November 19, 1984. (RTH 5040.) He was a student at San Diego State at the time and had known her for about three years. She left his house shortly after 12:30 a.m. (RTH 5041.)

Richard Leyva apparently witnessed the abduction of Swanke. In November of 1984, Leyva was living in the general vicinity of Fletcher Parkway and Jackson Drive. (RTH 5061.) On November 19th, he was visiting a friend of his, Vicki Edrozo and left to return home in the early morning hours of November 20th. (RTH 5062.) On the way home, he stopped at the light at Jackson and Fletcher Parkway. He noticed a car and saw someone bending over as if to put gas in the car. (RTH 5063.) A second car pulled up behind the first. Leyva was waiting to make a left turn onto Jackson. (RTH 5064.) As he made his left turn, he glanced at the second car and noticed its license plate as was his habit. This one caught his attention. (RTH 5066.) He saw two people between the cars. They were in a tight embrace, like a lover's embrace. (RTH 5067.) The license he recalls was TNC CNC or CNC TNC and a number. (RTH 5068.)[202] Leyva could not say what the vehicle was or the state of the plate other than it had a light color. (RTH 5069.) He contacted the police when he became aware that Swanke was missing. (RTH 5070.)

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[202] When he saw the letter combination, he thought of the phrase, "Tin Can." (RTH 5090.)

Charles Drake, a La Mesa Police Department officer, found Swanke's car. He was called to the intersection of Jackson Drive and Fletcher Parkway in La Mesa on the early morning hours of November 20th. He was to meet CHP officers who had found an abandoned vehicle. (RTH 4134.) When he arrived at the scene at 2:41 a.m., there was a flashlight on the trunk which was still on. (RTH 4138.) It was the first and only time that he has taken pictures of an abandoned vehicle. It was the suspicious circumstances surrounding it. The wallet, the books and the gas can left behind. (RTH 4150.) The only thing that the officers removed from the car was Swanke's wallet to determine ownership of the vehicle. (RTH 4137.) They made no attempt to dust the car for fingerprints nor any real attempt to secure the car. (RTH 4140.)[203]

Craig Henderson was assigned to investigate the Swanke homicide. (RTH 5765.) The site where the body was found was rural and no buildings or dwellings around for a mile. It was near a water tower and a radio transmitting station. (RTH 5766.) The site was off a dirt road and perhaps 150' down the hill from the road. It was not readily accessible to the public. (RTH 5767.) Henderson waited until Fisher and Fullmer arrived before doing a detailed investigation of the scene. (RTH 5766.)

Swanke had a chain draped around her throat over her left shoulder. She was naked below the waist except for socks. The shirt and sweater had been cut up the midline of the front and the area of her throat had been cut. There was a large gaping wound exposing the full front portion of her throat. Henderson found a pair of blue pants that had been cut down alongside the zipper. There were shoes scattered up the hill and a pair of women's panties that appeared to have been there a bit longer than the other clothing. (RTH

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[203] Drake's suggestion to impound the car was rejected. (RTH 4143.)

5768.)

Henderson prepared a diagram of the Swanke homicide scene. (RTH 5852.) He identified the various landmarks including the radio tower, the water tank, Elevator Road, the Otay District Office and Jamacha Boulevard. (RTH 5854.) He did not recall if there were any signs that prevented access to the area when the body was discovered in 1984. (RTH 5856.) The body was found some 100 to 150 feet from the parking area beyond the water tower. (RTH 5859.) He inspected the scene for evidence. (RTH 5862.) Detectives Fisher and Fullmer and criminalist Chuck Merritt were with him. (RTH 5863.)[204]

Craig Henderson was at the "green post" at the coroner's office, which is an inspection of the body before the autopsy, so that things like hair and fiber can be retrieved. Fingernail clippings were taken from the Swanke body as were stray hair standards. (RTH 5901; 5903.) Also swabs were taken from all orifices. (RTH 5907.)

Charles Merritt, the Swanke criminalist, had the responsibility for collecting evidence at the Swanke crime scene. (RTH 6250.) He seized the dog chain that had been around Swanke's neck at the coroner's office. He removed some hair from the chain and put it into a separate envelope. (RTH 6251.)[205]

The dog chain was given to Merritt who gave it to Fullmer who kept

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[204] Henderson took some notes but did not dictate into a tape recorder. The notes were incorporated into a report and the notes were subsequently destroyed. The report was written prior to the third of December which was when it was typed. (RTH 5864.)

[205] Merritt later testified that he had no reason to believe that the chain in evidence is not the one that was found around Swanke's neck. (RTH 6255.)

it in his desk and, according to Henderson, it stayed there until Lucas was arrested. (RTH 5908.) Henderson could not say for sure that no one else removed the chain from Fullmer's desk except that every time he saw it prior to Lucas' arrest, it was in his desk or immediately taken back to his desk. (RTH 5910.) There was no evidence tag on the dog chain. (RTH 5912.)

Frederick Freiberg was a crime scene investigator and photographer for the San Diego County Sheriff's Department. (RTH 6316.) His duties included retrieval of any blood samples from the crime victim. Usually the blood is obtained from the heart. (RTH 6317.) After he obtains the blood from the coroner, he takes the sample to the crime lab where it is stored in the refrigerator. (RTH 6319.) He observed the Swanke autopsy and he obtained the blood sample from the autopsy doctor, Dr. Katsuyama. (RTH 6320.) He gave the sample to Chuck Merritt for storage and testing. (RTH 6321.) He wasn't sure if he gave the sample directly to Merritt or placed it in his refrigerator and told Merritt about it. (RTH 6322.) Either he or Merritt put the blood into the refrigerator. He also took control of the dog chain at the coroner's office. (RTH 6328.)

He recognized the chain because it has an unusual pattern of links, rather serpentine. (RTH 6332.) Freiberg believed that the chain in the bag and in the courtroom is the same as the one found around Swanke's neck due to its distinctive pattern. (RTH 6345.) Freiberg did see Merritt remove the hair from the chain at the police lab. (RTH 6346.) Other than that, the chain had not been altered to his knowledge and appeared to be the same. (RTH 6347.)

Freiberg was involved in collecting the fingernail clippings from Anne Swanke's body. He clipped the fingernails while Chuck Merritt held a container. (RTH 6769.) Merritt took custody of the boxes containing the

nails. One box for the right and one for the left. (RTH 6787.)

Freiberg took several pictures of the chain around Swanke's neck at the coroner's office. (RTH 6771.) Based on his blow up of that photograph and a review of the chain, in his opinion, the chain in the photograph was around her neck. (RTH 6775.) There was nothing inconsistent in the appearance of the chain in the photograph and the chain presented in court. (Exhibit 56.) (RTH 6782.)

Merritt took the various swabs from Swanke's body including the vaginal and breast areas. He also did a combing of the pubic hairs. One of the hairs he obtained from the pubic combing was visually different from that of Swanke. (RTH 6880.) This pubic hair did not come from Lucas. (RTH 6881.)

Dr. Katsuyama performed the autopsy on Swanke. (RTH 4171.) He described various injuries to Swanke. There were peculiar discolorations on the back of neck, and areas of bleeding on the tongue. (RTH 4182.) When asked if the dog chain could have caused the injuries on the back of the neck. Katsuyama replied that the injuries were indistinct so that exact measurement could not be made. There were peculiar orientations on the back of her neck behind her left ear in sort of an up direction, and sort of oblong discolorations on the back side of her right neck. If some object had been used in a ligature fashion, they could have left the marks. (RTH 4185-86.)[206] The peculiar marks were caused by an object very similar to the dog chain. If used as a loop to encircle the neck, it could have left the line-like discolorations found behind the left ear. (RTH 4188.)

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[206] Katsuyama did not measure the distances that may have been consistent with ligature marks. (RTH 4187.)

There were some discolorations on the lower portion of the body, on the buttocks, superficial scratches that could have occurred as a result of being dragged or falling down. Katsuyama could not distinctly recall any petechial hemorrhages. (RTH 4189.) There were some marks found on her face, on the side of the nose, one near the lips, a discoloration on the chin. (RTH 4192.) There was an indication of a discoloration on the chest near the breast line. (RTH 4193.) There was also a cut on the left finger which was pre-mortem. (RTH 4194-95.) The wound was inflicted very soon before death. The neck wound was a large wound that went from almost close to one ear behind the angle of the jaw across the front upper portion of the neck to the other side close behind the ear. In addition, high above the left end was another sort of gaping wound that appeared to have been caused by the tip of the same instrument in two separate strokes. There was a hole directly below Swanke's left ear and the wound began below that. (RTH 4196.) The structures in the neck were cut across, including the blood vessels on both sides of the neck. It cut across her larynx, voice box, just above the vocal cords and struck the front portion of the backbone on two different areas. The wound involved the upper portion of the thyroid cartilage and in an area below the hyoid bone. (RTH 4197.) Both carotids and both jugulars were hit. The tongue bleeding occurred as the result of a bite which could have happened during strangulation. (RTH 4198.)

Katsuyama opined that the type of blade that was used was a heavy and very sharp blade, several inches long. Multiple strokes were involved. (RTH 4200.)

Fullmer testified that they received a number of citizen calls regarding attempts to solve Swanke case. Fullmer may have taken notes on those calls that he answered and that those notes were shredded. (RTH 5723.) Fullmer

did not prepare any reports regarding these contacts and destroyed the notes after Lucas was arrested as they were no longer of any value to him. (RTH 5724.)

Lucas did not work on November 20, 1984. (RTH 3654.)[207]

Rick Adler was living with Lucas on November 20th and saw some scratches on his face, on his higher cheekbones, a series of vertical scratches. They were fresh and Lucas did not have them the day before. Lucas also had some horseshoe type pecks on his forehead. (RTH 3958.) Adler spent the balance of the day preparing for a fishing trip he and Lucas were going on the next day. (RTH 3959.) Adler commented to Lucas that it looked like he had been in a fight with a sissy and Lucas replied that he had been in a bar and someone hit him in the face with a beer mug or beer pitcher. (RTH 3960.)

Frank Clark saw Lucas the day after Thanksgiving (November 23, 1984) and noticed four or five vertical scratches on the left side of his face that started around his eyelid, came down his cheek and off his chin. (RTH 3656.)

Charles Drake initiated C.L.E.T.S.[208] runs on the license plate information Leyva had given them. (RTH 4134; 18614.) He assigned it initially to Patricia Brassell. (RTH 18614.) Drake identified the printouts and

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[207] However, Clark admitted there is no way to tell whether or not Lucas was present on 11/20/84 based on this particular spread sheet. His recollection was that Lucas called him and told him he went to a bar and got into a brawl and that somebody hit the side of his face with a beer mug and Clark could not recall anything else. (RTH 3655.)

[208] Allen Joslyn, the La Mesa P.D. lieutenant who turned over the C.L.E.T.S. records defined C.L.E.T.S. as a system whereby you can obtain information on license plates, drivers and so on. (RTH 18633.) He identified the various La Mesa runs that were done by the department on November 20 and 21, 1984. (RTH 18634.)

the search that he designed for Brassell. (RTH 18615.) After all of the runs were concluded, they were turned over to Sergeant Murphy of La Mesa. (RTH 18617.)

Patricia Brassell, the La Mesa P.D. clerk who did the C.L.E.T.S. runs did a number of runs at the request of Officer Drake in November of 1984. (RTH 18644.) She added to the various combinations selected by Drake. (RTH 18646.)

Mark Parmely, a San Diego Sheriff's Detective, ran an independent C.L.E.T.S. search. He was aware that Henderson had the Leyva plate and asked if it was okay if he designed a search for the license plate. Henderson agreed. (RTH 18654.) He made the hit of CMC INC 2. (RTH 18657.) This run was done at 2:21 p.m. on December 3, 1984. (RTH 18659.) This run turned up David Lucas and his address and make of car. Carpet Maintenance Company also showed up. (RTH 18660.) The searches were extremely broad in application. (RTH 18674.) The search resulted in a number of matches; Lucas was not the only match that was found. (RTH 18671.)

7. Electrophoresis

Brian Wraxall performed various electrophoresis runs on blood obtained from Lucas, Lucas' wife Shannon, Jodie Santiago and Anne Swanke, as well as on a bloodstain on the sheepskin seat cover in Lucas' truck and matter from beneath Swanke's fingernails, and obtained various results. (RTH 7301; 7585.) By comparing the sheepskin bloodstain's genetic markers, he concluded that it could not have been left by Santiago, Shannon or Lucas, but he could not exclude Swanke, as each of the markers obtained were consistent with Swanke's markers. (RTH 7631-32; 7642; 7644.) The markers found in the blood of Anne Swanke would occur in only one in 3900 Caucasians. (RTH 7640.)

With respect to the matter beneath Swanke's fingernails, Wraxall noted that there was a small amount of tissue, so he selected PGM as the first test to run. He noted that Swanke was 2-1- which occurs is less than 2% of the population and provided a ready way to determine if the substance was foreign to Swanke. (RTH 7628.) Testing revealed the presence of 2-1-, consistent with Swanke, as well as a secondary band consistent with the presence of 2+1+, which was consistent only with David or Shannon Lucas. (RTH 7630; 12599.)

Additionally, Gm typing was done on two of the fingernails. (RTH 7629.) One of the nails, R-4, had a Gm 1, 2, 3, 11, 23. Swanke had a 1, 3, 11, 23. The 2 was foreign to her and was deposited by someone having a Gm of either 1, 2; 1, 2, 3, 11; or 1, 2, 3, 11, 23. (RTH 7642.) This Gm could have come from David Lucas. (RTH 7644-45.)

8. Wound Comparison Testimony

a. Dr. Katsuyama

Dr. David Katsuyama, who had seen the photographs and reports of the autopsies of all the victims, testified that "based on [the] similarity of the location, the extent of injury to the victims, one has to consider the possibility that a person, a single person, may have been involved in all of the injuries in these cases." (RTH 4203; 4260-61.) However, Katsuyama conceded that there was no literature that would enable him to render an opinion, based on the alleged similarities of the wounds that one individual inflicted them. (RTH 4315.)

Dr. Katsuyama compared the similarities of Swanke's injuries to those of the Jacobs: the type of instrument, location of the wound high up in the neck, cutting backward into the connective tissue and to the backbone. There was possible choking in Suzanne Jacobs. (RTH 4201.) The petechial

hemorrhaging in Suzanne may have been caused by lack of blood and oxygen to the capillaries caused by the chest wounds. (RTH 4202.)

Dr. Katsuyama testified that the injuries to Suzanne Jacobs were in the same general area of the upper neck. (RTH 4205.) All of the neck wounds were in the upper portion of the larynx. (RTH 4206.) He saw no visible signs of trauma to the vaginal area of Swanke. (RTH 4293.)[209]

Based on his examinations of the photographs in Strang and Fisher, Katsuyama could not say how many strokes were used in those cases. The same was true of Santiago, especially in light of the fact that her wound had been sutured. (RTH 4299.)

There were three penetrating chest wounds on Suzanne Jacobs, but no such wounds in any of the other cases. (RTH 4344.) There were no ligature marks on Suzanne Jacobs. That is a dissimilarity from Swanke. (RTH 4339.) The fact that the Jacobs incident took place in a house distinguishes it from Swanke. (RTH 4337.)

The ligature marks on Swanke were different from those on Strang and were the result of different instruments being used. (RTH 4305; 4343.) Based on his view of the photographs, Katsuyama also observed evidence of ligature in the Santiago case. (RTH 4346.) The absence of ligature marks is a dissimilarity as to Jacobs. (RTH 4347.)

Subsequent to his autopsies in the Lucas case, Katsuyama was no longer assigned to autopsies of potential homicide victims. (RTH 4310.) This may have been due to dissatisfaction with his work. (RTH 4311.) Dr. Bucklin testified that Dr. Katsuyama was taken off homicide autopsies at the request of Bucklin. (RTH 5192.) This was done for "quality control." (RTH

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[209] He did not examine the vaginal areas of the others.

5193.)

b. Dr. Robin

Dr. Robin had done some 500 autopsies a year and the Garcia wound was the first of this type that he had seen. (RTH 3272.) However, Dr. Robin did not believe that the similarities that he described suggested that one person caused all the injuries. (RTH 3273-74.)

At the meeting between Dr. Robin and the other doctors, each talked about their cases and the similarities and dissimilarities (RTH 3254.) Dr. Robin also reviewed the poster boards and the autopsy reports and noted similarities and dissimilarities between the various wounds. (RTH 3258.) Dr. Robin's evaluated the seven victims as follows:

Garcia's neck wound was between the hyoid bone and the thyroid cartilage. This is a thin membranous area and provides little resistance to a knife blade. The muscles that attach to the trachea and thyroid were cut. The great vessels in the neck were transected. There was a bruise on the tongue and petechial hemorrhages in both eyes. (RTH 3266-67.)

Suzanne Jacobs, had the "same gaping wound in the neck extending from the angle of the jaw on the left to the right side. One can observe the thyroid cartilage and cannot visualize the hyoid bone." (RTH 3267.) Suzanne Jacobs' incision was in the same location as Garcia's. It transected the great vessels of the neck and extended all the way through the neck to the cervical vertebrae. In both cases there was a defect on the anterior surface of the second cervical vertebrae. The defect was caused by a knife reaching to the bone. (RTH 3267-68.)

Colin Jacobs had the "same large neck wound" extending from behind the ear on the right side and across the neck to the left side. The cut went through the thyroid cartilage and was slightly lower than in the others by ½

inch. The great vessels were severed. (RTH 3268.)

The Santiago photos revealed a neck wound in the same general area from the angle of the mandible on the left and the right. From the photos, Dr. Robin could not determine if it was located above the thyroid and below the hyoid. (RTH 3269.)

Strang had the same large gaping incision that extends from behind the ear on both sides and transected above the trachea, and severed the great vessels. (RTH 3269.)

Fisher had the same gaping wound in the neck, through the trachea. Dr. Robin could not discern whether it was above the thyroid cartilage as in Garcia and Jacobs and Strang. It did cut through the strap muscles of the neck, as well as the great vessels. (RTH 3269.)

Swanke had "the same gaping wound to the neck from behind the ear on both sides . . . . We can see the top of the thyroid cartilage, indicating that the incised wound is between the hyoid bone and the top of the thyroid cartilage and it extends all the way down to the underlying cervical vertebrae. (RTH 3269.) The incised wounds were in the same level of the neck, mostly above the thyroid cartilage and below the hyoid bone. They transected the strap muscles, the great vessels of the neck and extended down to and cut the underlying cervical vertebrae." (RTH 3269.)[210]

A firm, sharp knife blade would have caused the wounds. (RTH 3270.) If a razor blade did it, it would have been held in an instrument like a scalpel. (RTH 3271.)

There were no stab wounds in the Garcia case or in Colin Jacobs. In

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[210] Petechial hemorrhages were present in Garcia, Swanke and Strang. (RTH 3267; 3271.)

Suzanne Jacobs, there were no abrasions to the head but there were some in Garcia. (RTH 3281-82.) There was no evidence of blunt force trauma such as a concussion to the brain in Garcia and no skull fractures. (RTH 3283.) In Garcia, there was some abrasion to the right wrist area. (RTH 3285.) Dr. Robin was unaware of any similar injury to Suzanne Jacobs, Strang and Swanke. These wrist abrasion injuries distinguished Garcia from the others. (RTH 3286.)

The toxicology screen on Garcia was absolutely clean as opposed to the .04 blood alcohol level of Suzanne Jacobs. (RTH 3287.)

Garcia and Swanke were the only cases with nose abrasions. (RTH 3296-97.) He could not find any true defensive type injuries in Garcia. (RTH 3298.)

c. Dr. Geiberger

Dr. Geiberger was present at a meeting with Deputy D.A. Williams in early 1985 to discuss the similarities of Santiago's wounds with those of the other victims. (RTH 4873.) Dr. Geiberger concluded that the wounds in the adults were similar in several respects: the level of the wound between the thyroid cartilage and the hyoid bone, the depth of the wound in that all went back essentially to the bone although some were a millimeter or two away, all wounds were inflicted with a sharp instrument and they all had small tags along the edge of the cuts indicating multiple strokes or movement of the knife within the wound. (RTH 4877.)[211] However, Dr. Geiberger agreed that there was no literature which says that it is possible to compare apparently similar injuries to enable an expert to form an opinion that the same person

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[211] However, on cross-examination, Geiberger testified that he regarded the Santiago wound as being caused by one stroke. (RTH 4884.) (But see RTH 4901 [there was more that one motion].)

inflicted all of the injuries. (RTH 4897.)

d. Dr. Bucklin

Dr. Bucklin concluded that Swanke, Santiago, Strang and Fisher were not "mirror images" of each other. The wounds were not so similar as to compel the conclusion that one person must have done them all. Nor were there any standards among pathologists to enable one to determine whether a single person was responsible for several different throat slashings. In fact, one could not even conclude that the same person did both Strang and Fisher much less Swanke: "I don't think anybody can say from the evidence that's here that the similarities make one assess one person as the assailant. There is no way that you can do this and be medically responsible." (RTH 5231-32.) Moreover, there were both similarities and differences. Based purely on anatomy, there was no way Dr. Bucklin could ever say that one person inflicted a series of wounds on different individuals. (RTH 5233.)

Dr. Bucklin had three or four meetings in 1985 and 1986 with the District Attorney to discuss the similarities of the wounds. (RTH 5190.) Bucklin was present at a meeting with the other autopsy surgeons to discuss the similarities of these wounds. (RTH 5151.) Bucklin saw similarities of the wounds to Swanke and Strang. Strang's wound were as deep as the one to Swanke which involved 7 cuts on the left and 4 on the right. The larynx and blood vessels were severed in each. (RTH 5153.) Strang had five cuts and Fisher had three. Both originated on the right side. (RTH 5156.) However, there was not much petechiae on Swanke as opposed to Strang. (RTH 5157.)[212] Bucklin also described the similarities of Suzanne Jacobs to Strang.

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[212] The Swanke photos indicated some bruises that might have been ligatures. (RTH 5158.)

In Jacobs six strokes were used and the larynx and blood vessels were transected. (RTH 5158.) However, only the right jugular and carotid were cut in Suzanne. The wounds were located in the same plane. The depth was similar and the same type of instrument was used. Bucklin could not say if the wound penetrated to the spine in Suzanne Jacobs. (RTH 5159.)

The plane of the wound of Colin Jacobs was in same general plane of Suzanne. There were two strokes on the left and three on the right. The right carotid and right jugular were hit and not the left ones. It was essentially the same plane as the Strang wound and a little lower than in Fisher. (RTH 5161.)

Dr. Bucklin also described the similarities between the Strang and Garcia wounds. The Garcia wound was six inches long, extended from the mandibular angle across the front of the neck. Both carotids and jugulars were cut and the cut went to the second cervical vertebrae. It went into the membrane between the cricoid and the thyroid but a little lower than in Strang. (RTH 5162.)

The Garcia wound was in the same plane as the Fisher cut. (RTH 5168.)

In sum, all the wounds in all of the cases were similar. (RTH 5171.) The photographs of Fisher and Swanke exaggerate the wounds. (RTH 5201.) Bucklin's opinion of the similarities was based on the photographs. (RTH 5202.)

One difference between Strang and Fisher and Jacobs is that the Jacobs had only the right carotid and jugular severed whereas both sides were severed in Strang and Fisher. (RTH 5204.)

The stab wound in Swanke's neck was unique to that case. (RTH 5205.)

If Dr. Robin said there was only one stroke in Garcia, then he was wrong. Bucklin based this on the fact that there was more than one incision line in the photographs. (RTH 5209.)

Although one cannot tell the direction of the strokes in Jacobs, one can tell it in Strang and Fisher and that is a distinguishing factor. (RTH 5211.)

With respect to the existence of tags, there has to be more than one knife movement in order to create a tag. (RTH 5214.)

The fact that Swanke was found nude from the waist down distinguished that case from all the others except Santiago. (RTH 5217.) The lack of pants in Swanke and Santiago may indicate some recent sexual activity. Bucklin checked for acid phosphatase level in Strang but he found none. (RTH 5218.)

In Swanke, Bucklin saw nothing that looked like a true ligature or compression mark on the neck. Strang had some ligature marks consistent with a necklace. (RTH 5221.) All he saw on Swanke were some superficial abrasions on the neck. (RTH 5222.)

Bucklin did not see any evidence of ligature marks in either of the two Jacobs cases. That was a distinguishing feature. There was evidence of a ligature mark in Santiago. There was none on Garcia. (RTH 5223.) Bucklin could not make any statements about the direction of the wound in Swanke. (RTH 5224.)

There were no nicks to the vertebrae observed in Jacobs which set it apart from Strang, Fisher and Swanke. (RTH 5228.) There were no nicks to vertebrae observed in Santiago either. (RTH 5229.)

The stab wounds to Suzanne Jacob's torso were unique to that case. (RTH 5229.)

The head wounds to Santiago were unique to her case assuming they

occurred as they did not show up in the photographs. (RTH 5230.)

On the similarity of neck wounds, Bucklin observed: "I have seen cases where the neck organs have been incised quite similar to these. I have seen cases, as I have noted in these other records, where they are different. There are not a tremendous number of ways to cut a throat, and whoever cuts throats doesn't have to follow a particular pattern, but there is (sic) a limited number of ways that one can cut a throat." (RTH 5234.)

One case that was very similar was in Texas City where a linoleum cutter was used. The cut was on the same plane and both carotids and jugulars were severed. Also, they were the same depth. (RTH 5235.)

Dr. Bucklin could not say if Strang and Fisher were cut from the front or the back. However, a right-handed person would have more difficulty in making a right to left cut from the front. (RTH 5238.)[213]

The blockage of blood in Rhonda Strang's head (suffusion) was unique to that case. (RTH 5244.)

e. Other Throat Slashing Cases

On April 27, 1987, Max Murphy, the supervising deputy coroner testified that he had been employed by the coroner's office since 1961. (RTH 6472.) His duty was to supervise the deputy coroners whose obligation it is to assist in determining the cause and mode of death of those cases falling within the jurisdiction of the coroner's office. (RTH 6473.) The coroner is required to prepare a toxicology report on various substances in the body. (RTH 6475.) The final document normally prepared is the autopsy report done by the pathologist who did the autopsy. (RTH 6477.) Another document that is

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[213] Bucklin could not make any determination whether the assailant of any of the victims was left or right handed. (RTH 5244.)

prepared by the coroner's office in a homicide case is the death certificate. (RTH 6479.)[214]

In 1985, Bucklin asked Murphy to research all cases in San Diego County within a period of time in which throat slashings were a contributing cause of death. (RTH 6480.) Mary Ann Tamburello did the actual search and presented him with various documents. This search went back to 1978. (RTH 6482.) The second search took place at the request of the defense and was in 1986 and went back to 1966 for throat slashings. (RTH 6483.) Tamburello just gave Murphy the case numbers and he pulled the actual files. (RTH 6489.) The defense request was broader and asked for slashings in general. (RTH 6493.)

Mary Ann Tamburello had worked at the Coroner's Office for sixteen years. She kept the statistics regarding the causes of death in the county of San Diego. (RTH 6533.) In 1985, she handled the search for all deaths caused by throat slashings in the county dating back to 1978. (RTH 6535.) Throat slashings are in the "other" category in deaths by homicide. (RTH 6536.) Prior to 1976, all the categorizing by death was done by Opal Hollister who trained her. (RTH 6539.) All throat slashings would be listed in the "other" category. (RTH 6452.) In general, she used the death certificate and the coroner's investigative report to categorize deaths. (RTH 6543.)[215] She and Murphy undertook the second search at the request of the defense in 1986.

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[214] All pathologists in San Diego County are licensed physicians. (RTH 6479.)

[215] The primary source of information for cause of death was the death certificate. (RTH 6552.) If there was more than one cause of death, it was listed in the "other category" and both causes were listed. (RTH 6553.)

(RTH 6544.)[216]

At the hearing Bucklin discussed some 20 other throat cutting cases. Many of there were clearly different from the killings charged against Lucas. However, some involved sharp cutting injuries of the larynx with extension to the cervical spine. (RTH 6590-91; 6620-21; 6627-28; 6639; 6643-45.) The cases with such cuts were not sufficiently distinct from the homicides charged against Lucas for Bucklin to exclude the killer in the other cases as the killer in the charged cases. (RTH 6658.)

9. Lucas' Arrest And Search Of Home

It was approximately one mile from Lucas' home to the site where Santiago was found. Swanke's body was found some two to two and one-half miles away in the opposite direction. (RTH 5494.)

During the search of Lucas' home, San Diego Sheriff's Deputy Gary Fisher seized a sheath and a box for a folding 112 Buck knife. (RTH 6144.) It was from the northwest bedroom. (RTH 6145.)

Fisher was the one who formally arrested Lucas. (RTH 6146.)

Detective Henderson had a conversation with Shannon Lucas on the day that David was arrested (December 16, 1984). (RTH 5780.) This conversation took place at the homicide detective's office on Kurtz Street. The conversation with Shannon Lucas was about the dog chain. (RTH 5781.)

According to Henderson, Detective Hartman brought Shannon down to the station. Shannon was not under arrest. (RTH 5803.) The interrogation

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[216] Some of the packets had photographs included with them, were of poor quality. (RTH 6587, 6599.) Where the photos or diagrams were poor, Bucklin was handicapped in accurately assessing the injuries. (RTH 6649.) He did not discuss any of the other twenty autopsies with the pathologists who did them. (RTH 6654.)

was not coerced or anything of that nature. Shannon could see the tape recorder. (RTH 5804.) Shannon was interested in the circumstances leading to David's arrest and was talkative. At one point, she was shocked and, at the end, she was concerned about her husband. (RTH 5806.) She was never arrested and, after the interview, Hartman drove her home. (RTH 5807.)

During the course of the interrogation, Shannon's demeanor changed and the point at which it changed was when Henderson showed her the dog chain. (RTH 5830.) Prior to seeing the dog chain, her demeanor was glib. She seemed normal and comfortable. (RTH 5831.) When he took the chain out of the bag, she seemed taken aback by it. She focused on it and her eyes widened. (RTH 5832.) Shannon had a definite reaction upon viewing the chain. Henderson removed the chain from the bag while she was still answering another question. Prior to this questioning, she was talking about dog chains in general. (RTH 5834.) Shannon appeared to be stunned upon seeing the chain. (RTH 5836.) She paused for about 10 seconds before making a response. (RTH 5842.)

10. Testimony Of Dr. Penrod

Steven Penrod, an Associate professor at the University of Wisconsin in Psychology, testified he obtained an undergraduate degree from Yale and a Ph.D. and law degree from Harvard. (RTH 23950.)[217] He received various and sundry awards for his work in both law and psychology; mostly the latter.

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[217] Penrod's testimony was being offered in support of the severance motions and as an affirmative defense to consolidation. Also, he was an expert on the jury decision making process. (RTH 23974.) Eventually the court excluded Penrod's testimony. (RTH 24037-38: CT 5176-77.) In § 2.3.5.2, pp. 301-06 below, incorporated herein, Lucas demonstrates that the trial court's exclusion of Penrod's testimony was prejudicial error which deprived him of a fair hearing on the consolidation issue.

A major focus of his research was the manner in which juries make their decisions. He also conducted research on eyewitness identification issues. (RTH 23951.) A third focus of his research has been the effect of media on the jury's decision making process. (RTH 23952.) In Wisconsin, he undertook a series of studies with respect to the joinder effect and did so at the request of a defense attorney in a multiple rape case. (RTH 23955.) After doing some initial research into this area, he concluded that it might be appropriate to get a grant from the United States Department of Justice and obtained funding to study the joinder effect. These studies involved the use of offenses that were similar and dissimilar. (RTH 23958.) These were then mixed and matched in various combinations and singly as well to determine what effect, if any, joinder had on the likelihood of conviction on the various counts. (RTH 23959-60.)[218] All of his articles were published in peer review journals. (RTH 23964.)

One of the things that he was looking for in his joinder of offenses research was the root cause of the joinder effect[219] and remedies therefore. Another issue was whether or not jurors actually paid attention to limiting instructions about the use of other crimes evidence. (RTH 23966.) Another focus of his study was the effect of one stubborn juror as well as the effects of majorities on the minorities of a jury. (RTH 23969.) Another experiment involved the use of notes by jurors and this involved actual trials. (RTH 23972.) He also did research concerning the effect of enabling jurors to ask

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[218] Several of his articles were admitted into evidence on these issues including the joinder effect. (RTH 23961.)

[219] The "joinder effect" is the tendency of multiple charges to increase the likelihood of conviction. (RTH 24024.) This is true even in cases where the charges are "cross-relevant." (RTH 24024-25.)

questions of the witnesses through the judge and the attorneys. (RTH 23973.) He also tested some assumptions about the jurors' ability to handle rebuttable presumption instructions. (RTH 23974.) He recognized Elizabeth Loftus as an expert in the area of joinder and consolidation, and her article on the area was marked into evidence. (RTH 23975.) He is involved in continuing education of judges in Wisconsin and the National Institute of Justice. (RTH 23979.) He is also a consultant for the California Judicial Council on the effect of reducing the number of jurors from 12 to eight. (RTH 23980.) Much of his work involved the complex use of statistics so he has extensive training and background in that area. (RTH 23981.) This was the first time he tried to qualify as an expert on joinder issues. (RTH 23988.)

Penrod's later studies involved videotaped summaries and simulated deliberations. (RTH 23995.) These summaries were manipulated to have various combinations of charges and some were "tried" alone. The cases were also manipulated in that some cases were wholly circumstantial; others involved eyewitness identification and so on. The basic charge was a burglary of a service station. This might be combined with other service station burglaries, robberies, assaults and some with eyewitness identification or forensic evidence, etc. (RTH 23996.) The subjects of this study were actual potential jurors and not students. The only difference in the presentation was that the dead time was edited out. (RTH 24000.) The jurors were then videotaped in their deliberations but they had only one hour. (RTH 24001.) The representative nature of the sample was reduced because of a self-selection process. (RTH 24002.) The jurors were given a brief voir dire but no one was ever eliminated nor were any expected to be eliminated. (RTH 24004.) The next study, conducted with college undergraduates, was closely related to the previous one but some additional parameters were included.

(RTH 24008.)[220] They saw the same videos as the experienced jurors saw. (RTH 24011.) The students were generally shown all of the usual dynamics of a trial less the detritus and dead time. (RTH 24012.) The students had an interest in obtaining extra credit based upon the quality of their decision making. (RTH 24013.) The comments of the jurors, both adult and student, were then coded by proctors according to a set guideline on such topics as guilt, innocence, etc. (RTH 24017.) To properly test the joinder effect, one must start out with a case in which the evidence is not overwhelming in nature. (RTH 24021.) Factors he cannot control such as juror confusion about the evidence affect the reliability of the data. (RTH 24022.) One of the things he tried for in the studies on joinder was to have offenses that were cross-admissible. (RTH 24024.)

Penrod found that curative instructions did not work. (RTH 24025.)

Penrod addressed why he felt his research did reflect reality. The problem with using sitting juries was the belief by lawyers and judges that deliberations should be confidential. (RTH 24078.) He knows of only one situation in which a jury's actual deliberations were filmed and that was done by PBS some years ago. His simulations are every bit as intense as the actual ones filmed by PBS. (RTH 24079) His studies were about as good as any can be. They cost in excess of $120,000 and were subject to many layers of peer review and criticism. (RTH 24081.) To use actual juries would involve an enormous amount of money and time. (RTH 24083.) Penrod had a significant role in designing the ideal five-year study on joinder in San Diego County.

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[220] It was done with undergraduates to save on costs and to increase the number of potential panels under each scenario. (RTH 24008.)

(RTH 24086.)[221]

Penrod concluded that the jury cannot effectively deal with cross-joined offenses. First, jurors are simply unable to follow instructions which prohibit them from applying the evidence across charges. Second, they are unable to follow instructions which require the exercise of discretion as to cross-consideration of the evidence. Even when they were admonished to exercise discretion they "would go ahead and use the evidence . . . indiscriminately." (RTH 24111-13.)[222]

D. Comparison Of Similarities And Differences: Jacobs vs. Santiago

1. Date Of The Offenses

The Jacobs' murders occurred on May 4, 1979. (RTT 16-17.) The Santiago attempted murder was committed on June 8, 1984. (RTT 17.)

2. The Victims

a. Number Of Victims

The Jacobs case involved two victims; Santiago, one.

b. Age And Sex Of Victims

In Jacobs, the female victim was 32 years old (RTH 6619); the male victim was 3 years old. (RTH 6620.) In Santiago the female victim was 34 years old. (RTH 5319.)

3. Time And Place Of The Attack

a. Time Of Day

Jacobs took place in the morning sometime between 6:00 a.m. and 11:30 a.m. (RTH 112-13; 198; 206-07; 3007.) The Santiago attack began

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[221] The voir dire process or lack thereof does not affect the validity of his studies because there is a wash out effect for both sides. (RTH 24103.)

[222] There is a scientific community using similar methods to Penrod's and that these methods are widely accepted as being reliable. (RTH 24114.)

late at night at approximately 10:00 p.m. and ended the next morning. (RTH 4484.)

b. Place Of The Attack

The Jacobs were attacked in their home. (RTH 4410.) Santiago was taken from a public street, and driven to a residence where she was attacked. (RTH 4484-88; 5093-94.)

4. Circumstances Of The Attack

a. Victim Abduction Before Assault

The Jacobs were not abducted. (RTH 4410.) Santiago was abducted. (RTH 4484-88; 5093-94.)

b. Tying Or Restraint Of Victim Prior To Assault

There was no evidence that the Jacobs were tied or restrained prior to their attack. Santiago's hands were tied behind her back. (RTH 4487.)

c. Use Of Ligature/Ligature Marks

In Jacobs there were no ligature marks on either victim. (RTH 4413; 4166; 4201-02; 4339; 4413; 5223.) In Santiago there was an apparent ligature mark on Santiago's neck. (RTH 4345; 4869-71; 4892-93; 5223.)

d. Removal Of Victim's Clothing

In Jacobs, neither victim had clothing removed. (RTH 4412.) Santiago was found nude from the waist down (RTH 5095.)

e. Sexual Overtones

In Jacobs there were no sexual overtones to the attack. In Santiago vaginal swabs revealed semen (RTH 2512; 2548), acid phosphatase and two sperm cells. (RTH 5095; 24936-37; 24945; 25091-92.) This, coupled with the fact that Santiago was found nude from the waist down, suggested possible sexual overtones.

f. Movement Of Victim After The Attack

In Jacobs the victims were not moved after the attack. In Santiago, the victim was apparently moved and left on the street after the attack. (RTH 4488.)

5. Throat Cutting Wounds

a. Throat Cutting Multiple Strokes

Suzanne Jacobs' throat was cut with at least six strokes. (RTH 4157; 4171; 4433.) As to Colin Jacobs there was "definite evidence of . . . more than one stroke." (RTH 4170.) There were two slashes on the left and two on the right. (RTH 4170; 4435; 5161.) As to Santiago, there were skin tags consistent with movement of the knife within the wound. (RTH 4877; 4884; 4901.)

b. Location Of Throat Cuts

In both Jacobs and Santiago the throat cuts were in approximately the same location: between the hyoid and thyroid. (RTH 4179-80; 4866.)

c. Depth Of Throat Cut; Jugular/Carotid Severed

In Jacobs the cuts went all the way to the backbone, or close to it, and the carotids and jugulars were cut. (RTH 4157; 4168; 5161.) In Santiago the wound did not extend to the backbone and did not sever the carotid or internal jugulars. (RTH 4878-79.)

6. Nature Of Other Wounds

a. Stabbing

Suzanne Jacobs sustained three major stab wounds to her torso.[223] She

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[223] These wounds were: (1) lower left back (RTH 4156); (2) upper chest in area of clavicle cutting into left subclavian vein and pulmonary artery (RTH 4156; 4167; 4335) mid-chest level (RTH 4156; 4335); (3) right upper portion of abdomen, cutting into the liver. (RTH 4156; 4167; 4335.)

also had bruises on her legs, arms and back. (RTH 4156.) Santiago had no stab wounds. Nor did she have bruising of the legs, arms or back.

b. Facial Or Head Wounds

Neither victim in Jacobs had any facial or head wounds. (RTH 3281-82; 4430.) Santiago sustained severe head trauma.[224]

c. Hypoxia/Petechiae

Suzanne Jacobs showed evidence of petechial hemorrhaging in her eyes. (RTH 4165.) Santiago did not have petechial hemorrhaging. (RTH 4877-78.)

d. Defensive Wounds

Suzanne Jacobs had no defensive wounds to her hands. Colin Jacobs had some cuts on his fingers and hands. (RTT 453; 9395.) Santiago had severe lacerations to two of her fingers, which appeared to be defensive wounds. (RTH 4865; RTT 9395-96; 7054-55.)

E. Expert Testimony Comparing The Offenses

1. Dr. Katsuyama

Summary Of Conclusions: Dr. Katsuyama, who had seen the photographs and reports of the autopsies of all the victims, testified that "based on [the] similarity of the location, the extent of injury to the victims, one has to consider the possibility that a person, a single person, may have been involved in all of the injuries in these cases." (RTH 4203; 4260-61.) However, Katsuyama conceded that there was no literature that would enable him to render an opinion, based on the alleged similarities of the wounds that

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[224] These wounds included a scalp laceration on each side of head above ear caused by a blunt object, 10 cms long (RTH 4865-66; 4888); skull fracture on right side (RTH 4865); and eyes swollen and black and blue. (RTH 4886.)

one individual inflicted them. (RTH 4315.)

2. Dr. Robin

Summary Of Conclusions: Dr. Robin did not believe that the similarities among the wounds necessarily suggested that one person caused all the injuries. (RTH 3273-74.)

3. Dr. Geiberger

Summary Of Conclusions: Dr. Geiberger was present at a meeting with Deputy D.A. Williams in early 1985 to discuss the similarities of Santiago's wounds with those of the other victims. (RTH 4873.) Dr. Geiberger concluded that the wounds in the adults were similar in several respects: the level of the wound between the thyroid cartilage and the hyoid bone, the depth of the wounds in that all went back essentially to the bone although some were a millimeter or two away, all wounds were inflicted with a sharp instrument and they all had small tags along the edge of the cuts indicating multiple strokes or movement of the knife within the wound. (RTH 4877.)[225] However, Dr. Geiberger agreed that there was no literature which concluded that it is possible to compare apparently similar injuries to enable an expert to form an opinion that the same person inflicted all of the injuries. (RTH 4897.)

4. Dr. Bucklin

Summary Of Conclusions: Dr. Bucklin concluded that the cases were not "mirror images" of each other. The wounds were not so similar as to compel the conclusion that one person must have done them all. Nor were there any standards among pathologists to enable one to determine whether a

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[225] However, on cross-examination, Geiberger testified that he regarded the Santiago wound as being caused by one stroke. (RTH 4884.) (But see RTH 4901 [there was more that one motion].)

single person was responsible for several different throat slashings. "I don't think anybody can say from the evidence that's here that the similarities make one assess one person as the assailant. There is no way that you can do this and be medically responsible." (RTH 5232.) Moreover, there were both similarities and differences. For example, Bucklin noted that there was an absence of ligature and other head injuries in Jacobs which distinguished it from Santiago. (RTH 5223; 5230.) Additionally, the existence of stab wounds distinguished the Suzanne Jacobs case from Santiago. (RTH 5229.) Based purely on anatomy, there was no way Dr. Bucklin could ever say that one person inflicted a series of wounds on different individuals. (RTH 5233.)

For additional testimony concerning wound similarity/dissimilarity among the cases, see § 2.3.5.1(C), pp. 279 below [Consolidation Statement of Facts], incorporated herein.

F. Legal Principles

1. Separate Incidents Are Not Cross-Admissible To Prove Identity Unless They Share Characteristics So Unusual And Distinctive As To Be Like A Signature

Other crimes evidence "has a 'highly inflammatory and prejudicial effect' on the trier of fact." (*People v. Thompson* (1980) 27 Cal.3d 303, 314.) Such evidence "is to be received with 'extreme caution,' and all doubts about its connection to the crime charged must be resolved in the accused's favor." (*People v. Alcala* (1984) 36 Cal.3d 604, 631, citations omitted; see also, *People v. Holt* (1984) 37 Cal.3d 436, 451; *People v. Brown* (1993) 17 Cal.App.4th 1389, 1395.)

The least degree of similarity is needed to establish relevance on the issue of intent. (*People v. Ewoldt* (1994) 7 Cal.4th 380, 402.) For this purpose, the uncharged crimes need only be "sufficiently similar [to the

charged offenses] to support the inference that the defendant '"probably harbor[ed] the same intent in each instance." [Citations.]'" (*Ibid.*)

A higher degree of similarity is required to establish relevance on the issue of common design or plan. (*People v. Ewoldt*, *supra*, 7 Cal.4th 380, 402.) For this purpose, "the common features must indicate the existence of a plan rather than a series of similar spontaneous acts, but the plan thus revealed need not be distinctive or unusual. (*Id.* at 403.)[226]

The highest degree of similarity is required to establish relevance as to identity. To be relevant on the issue of identity, the other charge must be "highly similar to the charged offenses." (*People v. Kipp* (1998) 18 Cal.4th 349, 369; see also *People v. Ewoldt*, *supra*, 7 Cal.4th at 403.) "Evidence of an uncharged crime is relevant to prove identity only if the charged and uncharged offenses display a pattern and characteristics . . . so unusual and distinctive as to be like a signature." [Internal citations and quotation marks omitted.] (*People v. Kipp*, *supra*, 18 Cal.4th at 370.)

For example, in *People v. Bean* (1988) 46 Cal.3d 919 the "crimes were similar in that they occurred in the same neighborhood, within 10 to 12 blocks of each other, and involved entry into each victim's home. Both attacks involved blunt trauma to the head and an obvious motive of theft. The crimes occurred within three days of one another and both concluded with theft of the victim's car and abandonment of the car in the same general area." (*Bean*, 46 Cal.3d at 937.) Without qualification, this Court concluded that these factors were <u>not</u> sufficiently unique to justify cross-admissibility on the issue of identity. (*Id.* at 937-38.)

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[226] Hence, even if the other crimes are admissible to show a common plan or scheme, this does not allow them to be used to prove identity.

In sum, even if there are some similarities between two crimes, they are not cross-admissible to prove identity unless they are so similar and so distinctive as to reflect the "signature" of a single perpetrator.

2. Each Incident Must Be Evaluated Independently

The test for cross-admissibility is whether "evidence of each incident would . . . be admissible in the separate trial of the other." (*Williams v. Superior Court* (1984) 36 Cal.3d 441, 451; see also *People v. Balderas* (1985) 41 Cal.3d 144, 171; *People v. Bean* (1988) 46 Cal.3d 919, 936.)

3. Similarities And Differences Between The Incidents Must Be Evaluated

The court must evaluate both the similarities and the differences between the incidents under comparison. (See *People v. Haston* (1968) 69 Cal.2d 233, 249 n. 18; *People v. Harvey* (1984) 163 Cal.App.3d 90, 102.)

G. The Santiago Attack And The Jacobs Murders Did Not Share Signature-Like Similarities

Judge Hammes found the following similarities among all the offenses:[227]

1. The victims were vulnerable.

2. All of the women were similar in appearance.

3. At the time of the attack each woman was alone or with a small child.

4. The crime scene suggested no motive.

5. The victims suffered throat wounds which, in Judge Hammes' view, were of "signatory significance." (RTH 25504-07.)

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[227] (But see § 2.3.5.3, pp. 307-11 below, incorporated herein [judge failed to consider each incident independently].)

These factors fell far short of the unique distinctiveness and signature-like quality required for admission to show identity.

Factors 1 and 3, vulnerability and being alone, did not make these victims unique. It is an unfortunate fact of life that violent crimes are often committed against those who are alone and vulnerable.

Factor 2, the appearance of the victims, is of minimal significance especially considering that Jacobs also included a 3 year-old male victim while Santiago did not.

Factor 5, lack of motive, is not a point of similarity between Jacobs and Santiago. In Jacobs there was no apparent motive, but in Santiago there was evidence of a sexual motive. (See Volume 3, § 3.2(A)(19), pp. 786-87, incorporated herein.) Moreover, even if there were no motive, that would not make the assaults so unique as to be "signature" crimes.

Finally, Judge Hammes' conclusion that the throat cutting was of "signatory significance" is not supported by the record. While there were some basic similarities between the throat wounds in Jacobs and Santiago, the experts did not agree with Judge Hammes' assessment of the distinctiveness of the throat wounds.

None of the experts concluded that the wounds were of signatory significance. (See § 2.3.1(C)(8), pp. 181-91 above, incorporated herein.) For example, Dr. Bucklin testified:

> I don't think anybody can say from the evidence that's here that the similarities make one assess one person as the assailant. There is no way that you can do this and be medically responsible. (RTH 5232.)

Judge Hammes also failed to consider the many substantial differences between Jacobs and Santiago, including marked differences concerning the

range of injuries suffered by Suzanne Jacobs and Santiago:

1. Suzanne Jacobs had serious stab wounds to the torso; Santiago did not.

2. Santiago had severe blunt force trauma to the head; the Jacobs' did not.

3. Santiago had defensive wounds on her hands; Suzanne Jacobs did not.

4. Suzanne Jacobs showed evidence of petechial hemorrhaging in the eyes; Santiago did not.

5. Jacobs was committed in 1979; Santiago in 1984.

6. Jacobs involved a child victim; Santiago did not.

7. Jacobs was committed in the victims' home; Santiago was not.

8. Santiago involved abduction in a vehicle; Jacobs did not.

9. Jacobs occurred in the early to midmorning; Santiago was attacked late at night.

10. Santiago's hands were bound; the Jacobs' were not.

11. Santiago had ligature marks; the Jacobs' did not.

12. Santiago's clothing was removed (from the waist down); the Jacobs' was not.

13. Santiago was transported after the attack and left on the roadside; the Jacobs' were not.

In sum, when compared to cases such as *People v. Bean*, *supra*, the evidence in the present case falls far short of the "signature" required for cross-admissibility between Santiago and Jacobs.

Moreover, the judge's exclusive focus on the alleged similarities, without any discussion of the many differences, was an abuse of discretion. A sound exercise of judicial discretion requires that "all the material facts . .

. must be both known and considered. . . ." (*In re Cortez* (1971) 6 Cal.3d 78, 85-86; see also *People v. Jordan* (1986) 42 Cal.3d 308, 316; *Carroll v. Abbott Laboratories, Inc.* (1982) 32 Cal.3d 892, 897-98; *Harris v. Superior Court* (1977) 19 Cal.3d 786, 796; *People v. Giminez* (1975) 14 Cal.3d 68, 72; *People v. Rist* (1976) 16 Cal.3d 211, 219; *People v. Stewart* (1985) 171 Cal.App.3d 59, 65; *Gossman v. Gossman* (1942) 52 Cal.App.2d 184, 195; 9 Witkin, *Cal. Procedure*, Appeal, § 358, 406-408.) In short, the trial judge did not exercise "informed discretion." (*People v. Belmontes* (1983) 34 Cal.3d 335, 348 fn. 8.)

Furthermore, by failing to abide by the established requirement that differences be considered, the judge indefensibly changed the law and made an arbitrary decision in violation of the Fourteenth Amendment. (See *Bouie v. Columbia* (1964) 378 U.S. 347; see also *Wolff v. McDonnell* (1974) 418 U.S. 539, 558.)

H. The Error Violated Lucas' State And Federal Constitutional Rights

The state and federal Due Process Clauses protect a party from inflammatory and prejudicial matters that affect the fundamental fairness of the proceedings. (*Payne v. Tennessee* (1991) 501 U.S. 808, 825; *Dawson v. Delaware* (1992) 503 U.S. 159, 166-68; *Chambers v. Florida* (1940) 309 U.S. 227, 236-237; *Cooper v. Sowders* (6th Cir. 1988) 837 F.2d 284, 286; *Walker v. Engle* (6th Cir. 1983) 703 F.2d 959, 968; *People v. Jones* (1996) 13 Cal.4th 535, 585; *People v. Olivas* (1976) 17 Cal.3d 236, 250; *People v. Sam* (1969) 71 Cal.2d 194, 206.)

Because admission of other crimes evidence undermines fundamental fairness it "is to be received with 'extreme caution,' and all doubts about its connection to the crime charged must be resolved in the accused's favor."

(*People v. Alcala* (1984) 36 Cal.3d 604, 631, citations omitted; see also, *People v. Holt* (1984) 37 Cal.3d 436, 451; *People v. Brown* (1993) 17 Cal.App.4th 1389, 1395.) Hence, the jurors' improper consideration of such evidence violated Lucas' federal constitutional due process rights under the Fourteenth Amendment. (See *McKinney v. Rees* (9th Cir. 1993) 993 F.2d 1378, 1380-85; *Walker v. Engle* (6th Cir. 1983) 703 F.2d 959, 968; see also *State v. Hawk* (Tenn. Crim. App. 1985) 688 S.W.2d 467, 474.)

Furthermore, misjoinder of counts violates the Due Process Clause of the federal constitution. (*Bean v. Calderon* (9th Cir. 1998) 163 F.3d 1073 [joinder of strong and weak murder charges made trial fundamentally unfair]; *Panzavecchia v. Wainwright* (5th Cir. Unit B 1981) 658 F.2d 337; *Breeland v. Blackburn* (5th Cir. 1986) 786 F.2d 1239; *Proctor v. Butler* (11th Cir. 1987) 831 F.2d 1251, 1256-1257.)

Moreover, the error also violated the Due Process and Cruel and Unusual Punishment Clause of the federal constitution (8th and 14th Amendments) which require heightened reliability in the determination of guilt and death eligibility before a sentence of death may be imposed. (See *Beck v. Alabama* (1980) 447 U.S. 625, 627-46; see also *Kyles v. Whitley* (1995) 514 U.S. 419, 422; *Burger v. Kemp* (1987) 483 U.S. 776, 785; *Gilmore v. Taylor* (1993) 508 U.S. 333, 342.)

Furthermore, verdict reliability is also required by the Due Process Clause (14th Amendment) of the federal constitution. (*White v. Illinois* (1992) 502 U.S. 346, 363-64; *Donnelly v. DeChristoforo* (1974) 416 U.S. 637, 646.)

Finally, because Lucas was arbitrarily denied his state created right to exclusion of irrelevant and prejudicial other crimes evidence under Evidence Code § 352 and §1101(b), the error violated his right to due process under the

Fourteenth Amendment to the United States Constitution. (*Hicks v. Oklahoma* (1980) 447 U.S. 343, 346; see also *People v. Sutton* (1993) 19 Cal.App.4th 795, 804; *Hernandez v. Ylst* (9th Cir. 1991) 930 F.2d 714, 716.)

I. The Error Was Prejudicial

1. Allowing The Jury To Improperly Cross-Consider Other Crimes Is Highly Prejudicial

Other crimes evidence "has a 'highly inflammatory and prejudicial effect' on the trier of fact." (*People v. Thompson* (1980) 27 Cal.3d 303, 314.) This is especially true in a capital trial where "evidence of other crimes . . . may have a particularly damaging impact on the jury's determination whether the defendant should be executed. . . ." (*People v. McClellan* (1969) 71 Cal. 2d 793, 805; *People v. Jones* (1996) 13 Cal.4th 535, 585.) This is so because of the jurors' tendency to condemn the accused on the basis of perceived disposition to commit criminal acts. (*People v. Thompson*, *supra*, 27 Cal.3d at 317.)

2. The Jacobs' Evidence Was Closely Balanced

The Jacobs counts were closely balanced for several reasons.

First, a third party – Johnny Massingale – confessed to committing the murders. (See § 2.2(N)(1)(e), pp. 110-13 above, incorporated herein.) His confession was sufficiently detailed and credible to convince the investigators and the district attorney's office that Massingale was the perpetrator. Charges were brought against Massingale and, after a preliminary hearing, the magistrate bound him over on the charges. Even though Massingale recanted his confession at Lucas' trial, the veracity of his testimony was subject to dispute. For example, he continued to deny ever carrying a knife even though

numerous witnesses testified to the contrary.[228]

Second, all of the prosecution evidence offered against Lucas was ambiguous and/or subject to conflicting inferences. The prosecution argued that the Love Insurance note was probative since Lucas purchased insurance from that company approximately three months after the Jacobs murders. (See § 2.2(H)(4), pp. 87-88 above, incorporated herein.) However, this evidence failed to reasonably focus guilt on Lucas since as many as ten people per day purchased insurance from Love Insurance. (RTT 2458-59.)

Moreover, the evidence did not conclusively establish that the note was left by the killer. Although Michael Jacobs testified that he had not seen the note before he left for work that morning (RTT 117), the note was very small and easily could have been overlooked by Jacobs. Moreover, the presence of numerous unidentified fingerprints in the Jacobs house suggests that numerous other people had been in the house. Any of these people, even if not the killer, could have left the note.

Additionally, even if it is assumed that the note was left by the killer, and that Lucas had authored the note, this would not prove Massingale's innocence beyond a reasonable doubt. By his own admission Johnny Massingale had stayed in the San Diego Salvation Army Mission where Lucas had resided as well. (RTT 664; 9471-72.) Thus, Massingale could have obtained clothing containing the Love Insurance note left by Lucas.

Nor did any of the other circumstances, either individually or cumulatively, establish Lucas' guilt. The MG evidence was inconclusive. Margaret Harris testified that she saw an MG parked in the Jacobs' driveway,

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[228] See § 2.2(N), pp. 100-19 above, incorporated herein, for a summary of evidence as to Massingale's guilt of the Jacobs' homicides.

but her original description was only that it was a maroon sports car. Even though she claimed to have known it was an MG, within two days after the murders in May 1979 she didn't tell this to the police in her discussions with them between 1979 and 1988. It wasn't until the summer of 1988 that she informed the police about the change in her description. (RTT 7971-72; 8103-04.)

Additionally, Harris described the car she saw as maroon, but the color of Mrs. Lucas' car was bright purple. (See § 2.2(K)(2), pp. 96-99 above, incorporated herein.) Also, in May 1979, the car was not running. (*Ibid.*)

Finally, Harris originally told the police that she saw the car in the Jacobs' driveway between 8:00 and 9:00 a.m. (RTT 234-35.) If this was correct then it was evidence which favored the defense since Lucas was not permitted to leave his residence at the New Horizons program until 9:00 a.m. (See § 2.2(L), p. 99 above, incorporated herein.) Moreover, the inference that the Jacobs were killed before 9:00 a.m. was corroborated by another neighbor of Jacobs, Jeanette Robertson. Robertson testified that the Jacobs' were "always" out in their front yard by 9:00 a.m. (RTT 9906-09.) However, on the morning of May 4, 1979, the Jacobs' were not out front when Robertson drove by at 9:00 a.m. (RTT 9910.)[229]

3. Because The Error Was Substantial The Judgement Should Be Reversed

Allowing the Santiago case to be used to prove identity in Jacobs was devastating to the defense. The cross-admissibility ruling allowed the prosecution to heavily rely on the other crimes to fill in the evidentiary gaps

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[229] Robertson also testified that she didn't see any cars in the driveway at that time. (RTT 9906-07.)

in individual cases such as Jacobs. (See § 2.3.5.1(H), pp. 293-99 below, incorporated herein, for a summary of the prosecutor's extensive closing argument reliance on the other crimes evidence.) Moreover, Santiago, in particular, involved an eyewitness identification of Lucas which the jury was allowed to carry-over from Santiago to fill in the evidentiary gaps in Jacobs. In fact, the prosecution opened argument with a discussion of Santiago's identification of Lucas.[230]

Accordingly, the error was prejudicial under the state (*People v. Watson* (1956) 46 Cal.2d 818) standard of prejudice. "'In a close case . . . any error of a substantial nature may require a reversal and any doubt as to its prejudicial character should be resolved in favor of the appellant.' [Citation]." (*People v. Von Villas* (1992) 11 Cal.App.4th 175, 249.)[231]

Moreover, because the error violated Lucas' federal constitutional

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[230] Mr. Williams: May it please the Court, ladies and gentlemen of the jury, and counsel for Mr. Lucas; Mrs. Jodie Santiago-Robertson told you in this courtroom that this man right here, Mr. David Allen Lucas, was the man that attacked her, that cut her throat. She told you that he had – he had a look like he had a job to do and he had to do it.

And as you will see, as I discuss the facts of this case with you, what that job really was, ladies and gentlemen, was nothing less than a statement, a deadly statement. And Mr. Lucas had a deadly statement to make, and he made it. He made it six times and tried to make it a seventh, but Jodie Santiago-Robertson lived.

Tomorrow marks the fifth anniversary of the attack on Jodie Robertson. (RTT 11750.)

[231] The prejudicial impact of joining the Jacobs and Santiago counts for trial and permitting the jury to consider the Santiago evidence in appraising Lucas' guilt or innocence on the Jacobs counts was heightened by a series of instructional errors concerning the jurors' cross-consideration of evidence. (See § 2.3.4, pp. 231 below, incorporated herein.)

rights the judgment should be reversed unless the prosecution demonstrates beyond a reasonable doubt that it was harmless. (*Chapman v. California* (1967) 386 U.S. 18.) Given the closeness of the evidence in Jacobs and the devastating impact of the cross-admissibility ruling, the prosecution cannot meet its burden under *Chapman*. Therefore, the judgment should be reversed.

4. Even If Guilt Is Not Reversed, The Penalty Judgment Should Be

Even if the error was not prejudicial as to the guilt judgment, it was prejudicial, individually and cumulatively, as to penalty. The penalty trial was closely balanced[232] and the error was substantial. Certainly, erroneously authorizing the jury to consider the Santiago evidence in support of finding Lucas guilty of the Jacobs murders, thereby improperly undermining lingering doubt as to Lucas' guilt, was a "substantial error." Therefore, the prosecution cannot meet its *Chapman* burden of proving beyond a reasonable doubt that the error was harmless as to the defense mitigating theory of lingering doubt. (See Volume 6, § 6.5.1(D), pp. 1551-52, incorporated herein [substantial error at penalty is prejudicial under *Chapman*].) Further, even if that error were viewed solely as an error of state law, reversal would be required, for there is at least "a reasonable (i.e., realistic) possibility" that but for that substantial error, the jury, giving due weight to the lingering doubt they likely would have otherwise harbored, would not have rendered a death verdict. (*People v. Brown* (1988) 46 Cal.3d 432, 448.)

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[232] See Volume 7, § 7.5.1(J)(3)(a), pp. 1619-22, incorporated herein [close balance at penalty demonstrated by near-deadlock, length of deliberations, request for readback of testimony, request for re-instruction, etc.].

2 JACOBS CASE

2.3 JACOBS CROSS-ADMISSIBILITY AND CONSOLIDATION ISSUES

ARGUMENT 2.3.2

THE SWANKE CRIMES WERE NOT ADMISSIBLE TO PROVE IDENTITY IN JACOBS, AND ACCORDINGLY THE TRIAL COURT ERRED IN (1) PERMITTING A JOINT TRIAL ON THESE INCIDENTS AND (2) AUTHORIZING THE JURY TO CONSIDER EVIDENCE CONNECTING LUCAS TO THE SWANKE CRIMES AS EVIDENCE CONNECTING HIM TO THE JACOBS INCIDENT

A. Introduction

The judge ruled that all seven charges were cross-admissible with each other for purposes of establishing the identity of the perpetrator. This ruling was erroneous as between the Jacobs and Swanke incidents because they do not share characteristics so unusual and distinctive as to be like a signature and, in fact, are marked by significant differences.

B. Procedural And Factual Background

See § 2.3.1(B) and (C), pp. 140-96 above, incorporated herein.

C. Comparison Of Similarities And Differences: Jacobs vs. Swanke[233]

1. Date Of The Offenses

The Jacobs' murders occurred on May 4, 1979. (RTT 16-17.) The Swanke murder was committed on or about November 20, 1984. (RTT 19.)

2. The Victims

a. Number Of Victims

The Jacobs case involved two victims; Swanke, one.

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[233] For a narrative statement of facts regarding consolidation see § 2.3.1(C), pp. 145-96 above, incorporated herein.

b. Age And Sex Of Victims

In Jacobs, the female victim was 32 years old (RTH 6619); the male victim was 3 years old. (RTH 6620.)

In Swanke the female victim was 22 years old. (RTT 21.)

3. Time And Place Of The Attack

a. Time Of Day

Jacobs began in the morning between 6:00 a.m. and 11:30 a.m. (RTH 112-13; 198; 206-07; 3007.) The Swanke attack began late at night, between 1:15 or 1:30 a.m. (RTH ; RTT 4549-53; 4552; 4561; 4599-4600.)

b. Place Of The Attack

The Jacobs' were attacked in their home. (RTH 4410.) Swanke was abducted off the street and found outside in a remote area. (RTH 4410; RTH 5061-68; 5768.)

4. Circumstances Of The Attack

a. Victim Abduction Before Assault

The Jacobs were attacked in their home. (RTH 4410.) Swanke was abducted off the street and found outside in a remote area. (RTH 4410; RTH 5061-68; 5768.)

b. Tying Or Restraint Of Victim Prior To Assault

There was no evidence that the Jacobs were tied or restrained prior to their attack. There is some evidence that Swanke was restrained, based on a line-like mark on her right wrist. (RTH 4436.)

c. Use Of Ligature

In Jacobs there were no ligature marks on either victim. (RTH 4413; 4166; 4201-02; 4339; 4413; 5223.) In Swanke there were reddish discolorations on the back of the right side of the neck and behind the left ear which could have been caused by the chain found around Swanke's neck.

(RTH 4182; 4186; 4188-89; 4280.)

d. Removal Of Victim's Clothing

In Jacobs, neither victim had clothing removed. (RTH 4412.) Swanke was naked from waist down except for socks. (RTH 4263; 4410-11; 5217-18; 5768.) Her clothing had been cut. (RTH 5768; 5896-97.)

e. Sexual Assault

In Jacobs there were no sexual overtones to the attacks. In Swanke there was a weak indication of acid phosphatase from a vaginal swab (RTK 2797; RTT 10730) and her clothes were removed from the waist down. (See above.) An unidentified pubic hair was also found on her body. (RTH 6880.)

5. Throat Cutting Wounds

a. Throat Cutting Multiple Strokes

Suzanne Jacobs' throat was cut with at least six strokes. (RTH 4157; 4171; 4433.) As to Colin Jacobs there was "definite evidence of . . . more than one stroke." (RTH 4170.) There were two slashes on the left and two on the right. (RTH 4170; 4435; 5161.)

In Swanke there were "at lease seven distinct strokes" on the left side and four on the right side (RTH 4279-80; 4285; 4433; 4434-35), and as many as 13 in total. (RTH 4285; 4433-34.)

b. Location Of Throat Cuts

In Jacobs the throat cuts were between the hyoid and thyroid. (RTH 4179-80; 4866.) In Swanke the cut was between the hyoid bone and the top of the thyroid cartilage. (RTH 3269.)

c. Depth Of Throat Cut; Jugular/Carotid Severed

In Jacobs the cuts were to, or close to the backbone, and the carotids and jugulars were cut. (RTH 4157; 4168; 5161.) In Swanke both carotids arteries and both jugular veins were cut. (RTH 4198.) The cut struck the

front portion of the backbone in two places. (RTH 4197; 4285; 4416-17.)

6. Nature Of Other Wounds

a. Stabbing

Suzanne Jacobs sustained three major stab wounds to her torso.[234] She also had bruises on her legs, arm and back. (RTH 4156.) Swanke had no stab wounds. (RTH 4406.) She had scratches on her back and buttocks. (RTH 4189; 4287-88.)

b. Facial Or Head Wounds

Neither victim in Jacobs had any facial or head wounds. (RTH 3281-82; 4430.) Swanke had marks on her face and chin. (RTH 4192; 4423-24; 4436.)

c. Hypoxia/Petechiae

Suzanne Jacobs showed evidence of petechial hemorrhaging in her eyes. (RTH 4165.) In Swanke the pathologist was unable to determine if petechiae were present due to the deterioration of the eyes. (RTH 4189; 4300; 4415; 5157.)

d. Defensive Wounds

Suzanne Jacobs had no defensive wounds to her hands. Colin Jacobs had some cuts on his fingers and hands. (RTT 453; 9395.) Swanke had a cut on her left ring finger. (RTH 4194; 4195-96; 4289.)

D. Expert Testimony Comparing The Offenses

See § 2.3.1(C)(8), pp. 181-91 above, incorporated herein.

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[234] These wounds were: (1) lower left back (RTH 4156); (2) upper chest in area of clavicle cutting into left subclavian vein and pulmonary artery (RTH 4156; 4167; 4335); mid-chest level (RTH 4156; 4335); (3) right upper portion of abdomen, cutting into the liver (RTH 4156; 4167; 4335)

E. Legal Principles

See § 2.3.1(F), pp. 202-03 above, incorporated herein.

F. The Swanke Attack Did Not Share Signature-Like Similarities Of The Jacobs Murders

Judge Hammes found the following similarities among all the offenses:[235]

1. The victims were vulnerable.

2. All of the women were similar in appearance.

3. At the time of the attack each of the women were alone or with a small child.

4. The crime scene suggested no motive.

5. The victims suffered throat wounds which, in Judge Hammes' view, were of "signatory significance." (RTH 25504-07.)

These factors fell far short of the unique distinctiveness required for admission to show identity.

Factors 1 and 3, vulnerability and being alone, do not make these victims unique. It is an unfortunate fact of life that those who are alone and vulnerable are more likely to be attacked.

Factor 2, the appearance of the victims, is also at most of minimal significance especially considering that Jacobs also included a 3 year-old make victim while Swanke did not.

Factor 5, lack of motive, is not a point of similarity between Jacobs and Swanke. In Jacobs there was no apparent motive but in Swanke there was evidence of a sexual motive. (See § 2.3.2(C)(4)(e), p. 215 above, incorporated herein.) Moreover, even if there were no motive, that would not

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[235] (But see §7.3, pp. 308-11 below, incorporated herein.)

make the assaults so unique as to be "signature" crimes.

Finally, Judge Hammes' conclusion that the throat cutting was of "signatory significance" is not supported by the record. While there were some basic similarities between the throat wounds the experts did not agree with Judge Hammes' assessment.

None of the experts concluded that the wounds were of signatory significance. (See § 2.3.1(C)(8), pp. 181-91 above, incorporated herein.) For example, Dr. Bucklin testified:

> I don't think anybody can say from the evidence that's here that the similarities make one assess one person as the assailant. There is no way that you can do this and be medically responsible. (RTH 5232.)

Additionally, Judge Hammes failed to consider a fundamental difference between the wounds inflicted on Suzanne Jacobs and Swanke. Suzanne Jacobs had three serious stab wounds to the torso while Swanke had no such wounds. This difference makes the fact that each suffered throat wounds even less distinctive.

Judge Hammes also failed to discuss the many substantial differences between Jacobs and Swanke:

1. Jacobs was committed in 1979; Swanke in 1984.
2. Jacobs involved a child victim; Swanke did not.
3. Jacobs was committed in the victims' home; Swanke was not.
4. Swanke involved abduction in a vehicle; Jacobs did not.
5. Jacobs occurred in the early to midmorning; Swanke was attacked late at night.
6. Swanke was restrained by a chain around her neck; the Jacobs were not.

7. Swanke had ligature marks; the Jacobs did not.

8. Swanke's clothing was cut and removed from the waist down; the Jacobs' was not.

9. Swanke had a defensive wound on her hand; Suzanne Jacobs did not.

10. Suzanne Jacobs had serious stab wounds to the torso; Swanke did not.

In a sum, when compared to cases such as *People v. Bean*, *supra*, the evidence in the present case falls far short of the "signature" required for cross-admissibility between Swanke and Jacobs.

G. The Error Violated Lucas' State And Federal Constitutional Rights

The state and federal Due Process Clauses protect a party from inflammatory and prejudicial matters that affect the fundamental fairness of the proceedings. (*Payne v. Tennessee* (1991) 501 U.S. 808, 825; *Dawson v. Delaware* (1992) 503 U.S. 159, 166-68; *Chambers v. Florida* (1940) 309 U.S. 227, 236-237; *Cooper v. Sowders* (6th Cir. 1988) 837 F.2d 284, 286; *Walker v. Engle* (6th Cir. 1983) 703 F.2d 959, 968; *People v. Jones* (1996) 13 Cal.4th 535, 585; *People v. Olivas* (1976) 17 Cal.3d 236, 250; *People v. Sam* (1969) 71 Cal.2d 194, 206.)

Because admission of other crimes evidence undermines fundamental fairness it "is to be received with 'extreme caution,' and all doubts about its connection to the crime charged must be resolved in the accused's favor." (*People v. Alcala* (1984) 36 Cal.3d 604, 631, citations omitted; see also, *People v. Holt* (1984) 37 Cal.3d 436, 451; *People v. Brown* (1993) 17 Cal.App.4th 1389, 1395.) Hence, the jurors' improper consideration of such evidence violated Lucas' federal constitutional due process rights under the

Fourteenth Amendment. (See *McKinney v. Rees* (9th Cir. 1993) 993 F.2d 1378, 1380-85; *Walker v. Engle* (6th Cir. 1983) 703 F.2d 959, 968; see also *State v. Hawk* (Tenn. Crim. App. 1985) 688 S.W.2d 467, 474.)

Furthermore, misjoinder of counts violates the Due Process Clause of the federal constitution. (*Bean v. Calderon* (9th Cir. 1998) 163 F.3d 1073 [joinder of strong and weak murder charges made trial fundamentally unfair]; *Panzavecchia v. Wainwright* (5th Cir. Unit B 1981) 658 F.2d 337; *Breeland v. Blackburn* (5th Cir. 1986) 786 F.2d 1239; *Proctor v. Butler* (11th Cir. 1987) 831 F.2d 1251, 1256-1257.)

Moreover, the error also violated the Due Process and Cruel and Unusual Punishment Clause of the federal constitution (8th and 14th Amendments) which require heightened reliability in the determination of guilt and death eligibility before a sentence of death may be imposed. (See *Beck v. Alabama* (1980) 447 U.S. 625, 627-46; see also *Kyles v. Whitley* (1995) 514 U.S. 419, 422; *Burger v. Kemp* (1987) 483 U.S. 776, 785; *Gilmore v. Taylor* (1993) 508 U.S. 333, 342.)

Furthermore, verdict reliability is also required by the Due Process Clause (14th Amendment) of the federal constitution. (*White v. Illinois* (1992) 502 U.S. 346, 363-64; *Donnelly v. DeChristoforo* (1974) 416 U.S. 637, 646.)

Finally, because Lucas was arbitrarily denied his state created right to exclusion of irrelevant and prejudicial other crimes evidence under Evidence Code § 352 and § 1101(b), the error violated his right to due process under the Fourteenth Amendment to the United States Constitution. (*Hicks v. Oklahoma* (1980) 447 U.S. 343, 346; see also *People v. Sutton* (1993) 19 Cal.App.4th 795, 804; *Hernandez v. Ylst* (9th Cir. 1991) 930 F.2d 714, 716.)

H. The Error Was Prejudicial

1. Allowing The Jury To Cross-Consider Other Crimes Is Highly Prejudicial

Other crimes evidence "has a 'highly inflammatory and prejudicial effect' on the trier of fact." (*People v. Thompson* (1980) 27 Cal.3d 303, 314.) This is especially true in a capital trial where "evidence of other crimes . . . may have a particularly damaging impact on the jury's determination whether the defendant should be executed. . . ." (*People v. McClellan* (1969) 71 Cal. 2d 793, 805; *People v. Jones* (1996) 13 Cal.4th 535, 585.) This is so because of the jurors' tendency to condemn the accused on the basis of perceived disposition to commit criminal acts. (*People v. Thompson*, *supra*, 27 Cal.3d at 317.)

2. The Jacobs' Evidence Was Closely Balanced

See § 2.3.1(I)(2), pp. 209-11 above, incorporated herein.

3. Because The Error Was Substantial The Judgement Should Be Reversed

Allowing the Swanke case to be used to prove identity in Jacobs was devastating to the defense. The evidence in Jacobs was far from overwhelming. Moreover, Swanke involved an eyewitness identification of Lucas' vehicle and electrophoresis comparison testimony which could have been carried over by the jury from Swanke to fill in the evidentiary gaps in Jacobs. (See § 2.3.5.1(H), pp. 293-99 below, incorporated herein for a summary of the prosecutor's extensive closing argument reliance on the other crimes evidence.) Accordingly, the judgment should be reversed. "'In a close case . . . any error of a substantial nature may require a reversal and any doubt as to its prejudicial character should be resolved in favor of the appellant.'

[Citation]." (*People v. Von Villas* (1992) 11 Cal.App.4th 175, 249.)[236]

Moreover, because the error violated Lucas' federal constitutional rights the judgment should be reversed unless the prosecution demonstrates beyond a reasonable doubt that it was harmless. (*Chapman v. California* (1967) 386 U.S. 18.) Given the closeness of the evidence in Jacobs and the devastating impact of the cross-admissibility ruling, the prosecution cannot meet its burden under *Chapman*. Therefore, the judgment should be reversed.

4. The Penalty Judgment Should Be Reversed Even If Guilt Is Not

Even if the error was not prejudicial as to the guilt judgment, it was prejudicial, individually and cumulatively, as to penalty. The penalty trial was closely balanced[237] and the error was substantial. Certainly, erroneously authorizing the jury to consider the Swanke evidence in support of finding Lucas guilty of the Jacobs murders, thereby improperly undermining lingering doubt as to Lucas' guilt, was a "substantial error."[238] Therefore, the prosecution cannot meet its *Chapman* burden of proving beyond a reasonable doubt that the error was harmless as to the defense mitigating theory of lingering doubt. (See Volume 6, § 6.5.1(D), pp. 1551-52, incorporated herein [substantial error at penalty is prejudicial under *Chapman*].) Further, even if

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[236] The prejudicial impact of joining the Jacobs and Santiago counts for trial and permitting the jury to consider the Santiago evidence in appraising Lucas' guilt or innocence on the Jacobs counts was heightened by a series of instructional errors concerning the juror's cross-consideration of evidence. (See § 2.3.4, pp. 231 below, incorporated herein.)

[237] See Volume 7, § 7.5.1(J)(3)(a), pp. 1619-22, incorporated herein [close balance at penalty demonstrated by near-deadlock, length of deliberations, request for readback of testimony, request for re-instruction, etc.].

[238] See Volume 7, § 7.5.1(J)(3)(a), pp. 1619-22, incorporated herein.

that error were viewed solely as an error of state law, reversal would be required, for there is at least "a reasonable (i.e., realistic) possibility" that but for that substantial error, the jury, giving due weight to the lingering doubt they likely would have otherwise harbored, would not have rendered a death verdict. (*People v. Brown* (1988) 46 Cal.3d 432, 448.)

2 JACOBS CASE

2.3 JACOBS CROSS-ADMISSIBILITY AND CONSOLIDATION ISSUES

ARGUMENT 2.3.3

THE STRANG/FISHER CRIMES WERE NOT ADMISSIBLE TO PROVE IDENTITY IN JACOBS, AND ACCORDINGLY THE TRIAL COURT ERRED IN (1) PERMITTING A JOINT TRIAL ON THESE INCIDENTS AND (2) AUTHORIZING THE JURY TO CONSIDER EVIDENCE CONNECTING LUCAS TO THE STRANG/FISHER CRIMES AS EVIDENCE CONNECTING HIM TO THE JACOBS INCIDENT

A. Introduction

Even though the jurors did not reach a verdict in the Strang/Fisher case, they were split 11 to 1 in favor of conviction. (RTT 12319; CT 5563.) Therefore, because each individual juror was permitted to cross-consider the offenses, any error in allowing joinder and cross-consideration of Strang/ Fisher must be considered on appeal. Because there was no independent evidence that connected Lucas to the Strang/Fisher murders, it was error to join those counts for trial with other charges to allow the jurors to rely on Strang/Fisher to convict on the other charges; and because many of the jurors likely relied upon the Strang/Fisher murders to convict Lucas on the Jacobs counts, the error was prejudicial and requires reversal of Lucas' convictions and sentence of death.

B. The Jurors Were Erroneously Permitted to Rely On Strang/Fisher To Convict On The Other Charges

An essential prerequisite to joinder and to permitting cross-admissibility of the Strang/Fisher case to prove identity under Evidence Code

§ 1101 was the existence of independent evidence that Lucas committed the Strang/Fisher murders. (*People v. Carpenter* (1997) 15 Cal.4th 312, 381-82; *People v. Medina* (1995) 11 Cal.4th 694, 763; *Williams v. Superior Court* (1984) 36 Cal.3d 441, 451; *People v. Bean* (1988) 46 Cal.3d 919, 936; *People v. Balderas* (1985) 41 Cal. 3d 144, 171; *People v. Albertson* (1944) 23 Cal.2d 550, 578-80.)

In the case of Strang/Fisher this prerequisite was not met. There was no independent substantial evidence that Lucas murdered Rhonda Strang and Amber Fisher. (See Volume 5, § 5.2, pp. 1277-1372, incorporated herein.) Accordingly, the counts were improperly joined and the jury was improperly permitted to rely on the Strang/Fisher charges to convict Lucas in the Jacobs case.

C. The Error Violated Lucas' State And Federal Constitutional Rights

The state and federal Due Process Clauses protect a party from inflammatory and prejudicial matters that affect the fundamental fairness of the proceedings. (*Payne v. Tennessee* (1991) 501 U.S. 808, 825; *Dawson v. Delaware* (1992) 503 U.S. 159, 166-68; *Chambers v. Florida* (1940) 309 U.S. 227, 236-237; *Cooper v. Sowders* (6th Cir. 1988) 837 F.2d 284, 286; *Walker v. Engle* (6th Cir. 1983) 703 F.2d 959, 968; *People v. Jones* (1996) 13 Cal.4th 535, 585; *People v. Olivas* (1976) 17 Cal.3d 236, 250; *People v. Sam* (1969) 71 Cal.2d 194, 206.)

Because admission of other crimes evidence undermines fundamental fairness it "is to be received with 'extreme caution,' and all doubts about its connection to the crime charged must be resolved in the accused's favor." (*People v. Alcala* (1984) 36 Cal.3d 604, 631, citations omitted; see also, *People v. Holt* (1984) 37 Cal.3d 436, 451; *People v. Brown* (1993) 17

Cal.App.4th 1389, 1395.) Hence, the jurors' improper consideration of such evidence violated Lucas' federal constitutional due process rights under the Fourteenth Amendment. (See *McKinney v. Rees* (9th Cir. 1993) 993 F.2d 1378, 1380-85; *Walker v. Engle* (6th Cir. 1983) 703 F.2d 959, 968; see also *State v. Hawk* (Tenn. Crim. App. 1985) 688 S.W.2d 467, 474.)

Furthermore, misjoinder of counts violates the Due Process Clause of the federal constitution. (*Bean v. Calderon* (9th Cir. 1998) 163 F.3d 1073 [joinder of strong and weak murder charges made trial fundamentally unfair]; *Panzavecchia v. Wainwright* (5th Cir. Unit B 1981) 658 F.2d 337; *Breeland v. Blackburn* (5th Cir. 1986) 786 F.2d 1239; *Proctor v. Butler* (11th Cir. 1987) 831 F.2d 1251, 1256-1257.)

Moreover, the error also violated the Due Process and Cruel and Unusual Punishment Clauses of the federal constitution (8th and 14th Amendments) which require heightened reliability in the determination of guilt and death eligibility before a sentence of death may be imposed. (See *Beck v. Alabama* (1980) 447 U.S. 625, 627-46; see also *Kyles v. Whitley* (1995) 514 U.S. 419, 422; *Burger v. Kemp* (1987) 483 U.S. 776, 785; *Gilmore v. Taylor* (1993) 508 U.S. 333, 342.)

Furthermore, verdict reliability is also required by the Due Process Clause (14th Amendment) of the federal constitution. (*White v. Illinois* (1992) 502 U.S. 346, 363-64; *Donnelly v. DeChristoforo* (1974) 416 U.S. 637, 646.)

Finally, because Lucas was arbitrarily denied his state created right to exclusion of irrelevant and prejudicial other crimes evidence under Evidence Code § 352 and § 1101(b), the error violated his right to due process under the Fourteenth Amendment to the United States Constitution. (*Hicks v. Oklahoma* (1980) 447 U.S. 343, 346; see also *People v. Sutton* (1993) 19 Cal.App.4th

795, 804; *Hernandez v. Ylst* (9th Cir. 1991) 930 F.2d 714, 716.)

D. The Error Was Prejudicial

Other crimes evidence "has a 'highly inflammatory and prejudicial effect' on the trier of fact." (*People v. Thompson* (1980) 27 Cal.3d 303, 314.) This is especially true in a capital trial where "evidence of other crimes . . . may have a particularly damaging impact on the jury's determination whether the defendant should be executed." (*People v. McClellan* (1969) 71 Cal. 2d 793, 805; *People v. Jones* (1996) 13 Cal.4th 535, 585.) This is so because of the jurors' tendency to condemn the accused on the basis of perceived disposition to commit criminal acts. (*People v. Thompson*, *supra*, 27 Cal.3d at 317.)

Joining the counts for trial and allowing the jurors to use the Strang/Fisher case on the issue of identity in Jacobs was highly prejudicial. The cross-admissibility ruling allowed the prosecution to heavily rely on the other crimes to fill in the evidentiary gaps in individual cases such as Jacobs. (See § 2.3.5.1(H), pp. 293-99 below, incorporated herein for a summary of the prosecutor's extensive closing argument reliance on the other crimes evidence.) Hence, because the Jacobs case was closely balanced (see § 2.3.1(I)(2), pp. 209-11 above, incorporated herein), the judgment should be reversed. "'In a close case . . . any error of a substantial nature may require a reversal and any doubt as to its prejudicial character should be resolved in favor of the appellant.' [Citation]." (*People v. Von Villas* (1992) 11 Cal.App.4th 175, 249.)

Moreover, because the error violated Lucas' federal constitutional rights the judgment should be reversed unless the prosecution demonstrates beyond a reasonable doubt that it was harmless. (*Chapman v. California* (1967) 386 U.S. 18.) Given the closeness of the evidence in Jacobs and the

devastating impact of the cross-admissibility ruling, the prosecution cannot meet its burden under *Chapman*. Therefore, the judgment should be reversed.

Further, the error was particularly prejudicial as to Jacobs because the 11 jurors who voted for guilt in Strang/Fisher likely relied on the Santiago and/or Swanke cases to reach that conclusion.[239] In turn, those eleven jurors likely relied on Strang/Fisher to convict on Jacobs due to the fact that both cases involved an adult and a child victim killed in a house. Accordingly, the error was prejudicial under the state (*People v. Watson* (1956) 46 Cal.2d 818) standard of prejudice.[240]

Even if the error was not prejudicial as to the guilt judgment, it was prejudicial, individually and cumulatively, as to penalty. The penalty trial was

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[239] Of course the eleven jurors could also have relied on Jacobs instead of Swanke and/or Santiago to vote for guilt as to Strang/Fisher. However, Swanke and Santiago each involved some form of direct identification evidence and Jacobs did not. Also, in Jacobs there was a third party confession while in Swanke and Santiago there was not. Further, the Santiago, Swanke and Strang/Fisher offenses all happened in 1984 while the Jacobs murders were in 1979. Thus, it is more likely that the eleven jurors relied on Swanke and Santiago to conclude that Lucas committed the Strang/Fisher murders.

Moreover, even if it cannot be determined which theory the jurors relied on, it cannot be assumed that they did not rely on a particular theory unless there is no factual support for the improper theory. (See *People v. Guiton* (1993) 4 Cal.4th 1116.) Hence, there was a factual basis for the jurors to rely on Santiago and/or Swanke to prove Strang/Fisher and then to use Strang/Fisher to convict on Jacobs and the prosecution cannot demonstrate that the jurors did not rely on this improper theory and, therefore, the judgment should be reversed.

[240] The prejudicial impact of joining the Jacobs and Strang/Fisher counts for trial and permitting the jury to consider the Strang/Fisher evidence in appraising appellant's guilt or innocence on the Jacobs counts was heightened by a series of instructional errors concerning the jury's cross-count consideration of evidence. (See § 2.3.4, pp. 231 below, incorporated herein.)

closely balanced[241] and the error was substantial. Certainly, erroneously authorizing the jury to consider the Santiago and Swanke cases to find Lucas guilty of the Jacobs murders was a "substantial error" since it undermined the lingering doubt theory at penalty. Therefore, the prosecution cannot meet its *Chapman* burden of proving beyond a reasonable doubt that the error was harmless as to the defense mitigating theory of lingering doubt. (See Volume 6, § 6.5.1(D), pp. 1551-52, incorporated herein [substantial error at penalty is prejudicial under *Chapman*].) Further, even if that error were viewed solely as an error of state law, reversal would be required, for there is at least "a reasonable (i.e., realistic) possibility" that but for that substantial error, the jury, giving due weight to the lingering doubt they likely would have otherwise harbored, would not have rendered a death verdict. (*People v. Brown* (1988) 46 Cal.3d 432, 448.)

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[241] See Volume 7, § 7.5.1(J)(3)(a), pp. 1619-22, incorporated herein [close balance at penalty demonstrated by near-deadlock, length of deliberations, request for readback of testimony, request for re-instruction, etc.].

2 JACOBS CASE

2.3 JACOBS CROSS-ADMISSIBILITY AND CONSOLIDATION ISSUES

2.3.4 THE CROSS-ADMISSIBILITY INSTRUCTIONS WERE ERRONEOUS AND PREJUDICIAL

A. Overview

Judge Hammes, after having erroneously permitted the joinder of all five incidents for trial and erroneously determined that each would be cross-admissible as to the other, aggravated the prejudicial impact of those errors with a series of instructional errors. The judge erroneously and prejudicially gave instructions which, among other deficiencies, unduly emphasized other crimes evidence, failed to require as a prerequisite to considering other crimes evidence on the issue of identity that the juries find that Lucas was guilty of the other crimes and that the other crimes and the crime under consideration shared signature-like similarities, failed to require unanimity as to the existence of the level of similarity the court did require, and failed to convey that where, as here, a defendant has presented compelling excuse evidence as to one crime, perceived similarities between crimes can serve as a basis for acquittal and not solely as a basis for conviction. These instructional errors, alone and in combination, deprived Lucas of his right to due process, fair trial by jury, reliable determinations of guilt and penalty, the right to present a defense, compulsory process and effective assistance of counsel, in violation of the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.

2 JACOBS CASE

2.3 JACOBS CROSS-ADMISSIBILITY AND CONSOLIDATION ISSUES

2.3.4 THE CROSS-ADMISSIBILITY INSTRUCTIONS WERE ERRONEOUS AND PREJUDICIAL

ARGUMENT 2.3.4.1

THE PRELIMINARY INSTRUCTIONS GAVE UNDUE AND PREJUDICIAL EMPHASIS TO THE OTHER CRIMES EVIDENCE

A. The Other Crimes Evidence Was Emphasized To The Exclusion Of Other Evidence

Prior to the presentation of evidence, the trial court gave a number of preliminary instructions which generally addressed procedural and evidentiary issues. Over a defense objection (RTH 36653-704) the only discussion of specific evidence in the preliminary instructions was in an instruction concerning other crimes evidence. (RTT 13-14.)[242] Such evidence, which had a high risk of undue prejudice to begin with (see § 2.3.5.1(H), pp. 293-99 below, incorporated herein), received undue emphasis by virtue of its inclusion in the preliminary instructions to the exclusion of all other specific evidence.[243]

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[242] The text of this preliminary other-crimes-evidence instruction is set forth at § 2.3.4.2(B), pp. 238-44 below, incorporated herein.

[243] When a generally applicable instruction is specifically made applicable to one aspect of the charge and not repeated with respect to another aspect, the inconsistency may prejudicially mislead the jurors. (*People v. Salas* (1976) 58 Cal.App.3d 460, 474; see also *United States v. Echeverri* (3rd Cir. 1988) 854 F.2d 638, 643 [giving a special unanimity instruction as to predicate acts under a RICO charge, but not as to predicate acts under a (continued...)

B. The Other Crimes Evidence Was Erroneously Emphasized in Violation Of State Law And The Federal Constitution

Even assuming that instruction on other crimes was appropriate and correct as given in the final instructions, including it in the preliminary instructions was an improper comment on the evidence. Even if judicial comment does not directly express an opinion about the defendant's guilt, an instruction that is one-sided or unbalanced violates the California Constitution (Art. I, sections 7, 15, 16 and 17), the California Rules of Evidence (§ 1101) and the defendant's federal constitutional rights under the 6th and 14th Amendments to due process and a fair, impartial trial by jury. (See *Starr v. United States* (1894) 153 U.S. 614, 626 [trial judge must use great care so that judicial comment does not mislead and "especially that it [is] not . . . one-sided"]; see also *Webb v. Texas* (1972) 409 U.S. 95, 97-98 [judge gave

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[243](...continued)
concurrent CCE (Continuing Criminal Enterprise) statute charge, violated due process, since jurors may have inferred from this discrepancy that unanimity was not required as to the CCE related predicate acts].)

"Although the average layperson may not be familiar with the Latin phrase inclusio unius est exclusio alterius, the deductive concept is commonly understood . . . ." (*People v. Castillo* (1997) 16 Cal.4th 1009, 1020 [conc. opn. of Brown, J.]; see also *United States v. Crane* (9th Cir. 1992) 979 F.2d 687, 690 [maxim expressio unius est exclusio alterius "is a product of logic and common sense"].) That is how this Court reasoned in *People v. Dewberry* (1959) 51 Cal.2d 548, 557:

> The failure of the trial court to instruct on the effect of a reasonable doubt as between any of the included offenses, when it had instructed as to the effect of such doubt as between the two highest offenses, and as between the lowest offense and justifiable homicide, left the instructions with the clearly erroneous implication that the rule requiring a finding of guilt of the lesser offense applied only as between first and second degree murder.

defense witness a special warning to testify truthfully but not the prosecution witnesses]; *Quercia v. United States* (1933) 289 U.S. 466, 470; *United States v. Laurins* (9th Cir. 1988) 857 F.2d 529, 537 [judge's comments require a new trial if they show actual bias or the jury "perceived an appearance of advocacy or partiality"]; see also *People v. Gosden* (1936) 6 Cal. 2d 14, 26-27 [judicial comment during instructions is reviewable on appeal without objection below].)

"Instructions must not, therefore, be argumentative or slanted in favor of either side, [citation]. Read as a whole they should neither 'unduly emphasize the theory of the prosecution, thereby deemphasizing proportionally the defendant's theory,' [citation] nor overemphasize the importance of certain evidence or certain parts of the case [citation]." *(United States v. McCracken* (5th Cir. 1974) 488 F.2d 406, 414; see also *United States v. Neujahr* (4th Cir. 1999) 173 F.3d 853; *United States v. Dove* (2nd Cir. 1990) 916 F.2d 41, 45.)

These principles were implicated by allowing preliminary instructions which incorporated the prosecution's theories but disallowing similar instructions which incorporated the defense theories. "There should be absolute impartiality as between the People and the defendant in the matter of instructions." (See *People v. Moore* (1954) 43 Cal.2d 517, 526; see also *Cool v. United States* (1972) 409 U.S. 100, 103 n. 4 [reversible error to instruct jury that it may convict solely on the basis of accomplice testimony but not that it may acquit based on the accomplice testimony]; *Reagan v. United States* (1895) 157 U.S. 301, 310.)

Failure to include the defense theory in the preliminary instructions also violated Lucas' federal constitutional right to present a defense.

The United States Supreme Court has again and again noted the

"fundamental" or "essential" character of a defendant's right both to present a defense, (*Crane v. Kentucky* (1986) 476 U.S. 683, 687; *California v. Trombetta* (1984) 467 U.S. 479, 485; *Webb v. Texas* (1972) 409 U.S. 95, 98; *Washington v. Texas* (1967) 388 U.S. 14, 19), and present witnesses as a part of that defense. (*Taylor v. Illinois* (1988) 484 U.S. 400, 408; *Rock v. Arkansas* (1987) 483 U.S. 44, 55; *Chambers v. Mississippi* (1973) 410 U.S. 284, 294, 302; *Webb, supra*, 409 U.S. at 98; *Washington, supra*, 388 U.S. at 19.) The Court has variously stated that an accused's right to a defense and a right to present witnesses emanate from the Sixth Amendment (*Taylor, supra*, 484 U.S. at 409; *United States v. Valenzuela-Bernal* (1982) 458 U.S. 858, 867) the Due Process Clause of the Fourteenth Amendment (*Rock, supra*, 483 U.S. at 51; *Trombetta, supra*, 467 U.S. at 485; *Chambers, supra*, 410 U.S. at 294; *Webb, supra*, 409 U.S. at 97; *In re Oliver* (1948) 333 U.S. 257), or both. (*Crane, supra*, 476 U.S. at 690; *Strickland v. Washington* (1984) 466 U.S. 668, 684-85; *Washington, supra*, 388 U.S. at 17-18.)

Further, trial rules or procedures which unfairly and unjustifiably favor the prosecution violate the Equal Protection and Due Process Clauses of the Fourteenth Amendment. (*Wardius v. Oregon* (1973) 412 U.S. 470, 475; *Lindsay v. Normet* (1972) 405 U.S. 56, 77; *Green v. Georgia* (1979) 442 U.S. 95, 97; *Webb v. Texas* (1972) 409 U.S. 95, 97-98; *Washington v. Texas* (1967) 388 U.S. 14; *Chambers v. Mississippi* (1973) 410 U.S. 284.)

Moreover, the error violated the federal constitution by undermining the reliability of the verdict. A fair and reliable trial is one of the most fundamental constitutional prerequisites to the lawful imposition of criminal liability in general and the death penalty in particular. The Due Process and Cruel and Unusual Punishment Clauses of the federal constitution (8th and 14th Amendments) require heightened reliability in the determination of guilt

and death eligibility before a sentence of death may be imposed. (See *Beck v. Alabama* (1980) 447 U.S. 625, 627-46; see also *Kyles v. Whitley* (1995) 514 U.S. 419, 422; *Burger v. Kemp* (1987) 483 U.S. 776, 785; *Gilmore v. Taylor* (1993) 508 U.S. 333, 342.)

Furthermore, verdict reliability is also required by the Due Process Clause (14th Amendment) of the federal constitution. (*White v. Illinois* (1992) 502 U.S. 346, 363-64; *Donnelly v. DeChristoforo* (1974) 416 U.S. 637, 646.)

C. The Error Was Prejudicial

The Jacobs evidence was closely balanced and the improper emphasis of the other crimes was a substantial error because the cross-admissibility ruling allowed the prosecution to heavily rely on the other crimes to fill in the evidentiary gaps in individual cases such as Jacobs. (See § 2.3.5.1(H), pp. 293-99 below, incorporated herein for a summary of the prosecutor's extensive closing argument reliance on the other crimes evidence.) (See *People v. Thompson*, *supra*, 27 Cal.3d at 314.) "'In a close case . . . any error of a substantial nature may require a reversal and any doubt as to its prejudicial character should be resolved in favor of the appellant.' [Citation]." (*People v. Von Villas* (1992) 11 Cal.App.4th 175, 249.) Hence, the guilt judgment should be reversed under the state harmless-error standard. (*People v. Watson* (1956) 46 Cal.2d 818, 836.)

Moreover, because the error violated Lucas' federal constitutional rights, the judgment should be reversed unless the prosecution demonstrates beyond a reasonable doubt that there is no reasonable possibility the error could have affected the proceedings. (*Chapman v. California* (1967) 386 U.S. 18, 23-24; see also *In re Rodriguez* (1987) 119 Cal.App.3d 457, 469-70 [*Chapman* standard applied to combined impact of state and federal

constitutional errors]; *People v. Williams* (1971) 22 Cal.App.3d 34, 58-59 [same].) Given the closeness of the evidence and the substantial impact of the error, the prosecution cannot meet this burden. Therefore, the judgment should be reversed under the federal harmless-error standard.

Even if the error was not prejudicial as to the guilt judgment, it was prejudicial, individually and cumulatively, as to penalty. The penalty trial was closely balanced[244] and the error was substantial. Certainly, unduly emphasizing the other offenses and thereby improperly undermining lingering doubt as to Lucas' guilt, was a substantial error. Therefore, the prosecution cannot meet its *Chapman* burden of proving beyond a reasonable doubt that the error was harmless as to the defense mitigating theory of lingering doubt. (See Volume 6, § 6.5.1(D), pp. 1551-52, incorporated herein [substantial error at penalty is reversible under *Chapman*].) Further, even if that error were viewed solely as an error of state law, reversal would be required, for there is at least "a reasonable (i.e., realistic) possibility" that but for that substantial error, the jury, giving due weight to the lingering doubt they likely would have otherwise harbored, would not have rendered a death verdict. (*People v. Brown* (1988) 46 Cal.3d 432, 448.)

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[244] See Volume 7, § 7.5.1(J)(3)(a), pp. 1619-22, incorporated herein [close balance at penalty demonstrated by near-deadlock, length of deliberations, request for readback of testimony, request for re-instruction, etc.]

2. JACOBS CASE

2.3 JACOBS CROSS-ADMISSIBILITY AND CONSOLIDATION ISSUES

2.3.4 THE CROSS-ADMISSIBILITY INSTRUCTIONS WERE ERRONEOUS AND PREJUDICIAL

ARGUMENT 2.3.4.2

THE OTHER CRIMES INSTRUCTION ERRONEOUSLY FAILED TO REQUIRE THE JURORS TO DETERMINE THAT THE DEFENDANT COMMITTED THE OTHER OFFENSE BEFORE CROSS-CONSIDERING IT

A. Introduction

A major issue for the jury in this case was how, and under what circumstances, it could utilize evidence concerning one charge to convict on another. However, over defense objection, the crucial jury instruction given on this issue, in both the preliminary and final instructions, erroneously failed to require the jury to find that the defendant committed the other crime before considering such crime as identity evidence as to another charge or charges. Apart from the question of whether the standard should have been proof beyond a reasonable doubt, clear and convincing evidence, or preponderance of the evidence, the omission of any foundational requirement at all from the instruction was prejudicial error.

B. Procedural And Factual Background

Prior to trial the prosecution successfully moved to consolidate and "cross-admit" all seven charges against Lucas. (RTH 22512-13; CT 5211-12.) It was the prosecution's theory that the crimes were so similar that if Lucas committed any one of the charged offenses this would be evidence that he committed the others. (See § 2.3.5.1(H), pp. 293-99 below, incorporated

herein.) Accordingly, the prosecution sought to have the jury instructed on this theory in both the preliminary and final instructions. (RTH 36653-56.)

The defense objected to the preliminary instruction on numerous grounds. (RTT 36653-706.) One of the grounds for the defense objection was the failure of the instructions to require the jury to first independently find that Lucas committed a charged crime before using evidence of that crime to prove any other charge. (RTH 36657-59.)[245]

The judge overruled this objection (RTT 36699) and included the following instruction with the preliminary instructions:

> As you know, each of the counts charged against Mr. Lucas states a distinct offense. At the end of trial you will have to decide each count separately. In deciding each count of murder separately, however, you will be able to consider evidence on the other murder counts, but in a limited way. When you consider any one murder count, the evidence on other murder counts, if believed, may not be considered by you to prove that Mr. Lucas is a person of bad character or that he has a disposition to commit crimes, but you may consider evidence on the other counts to determine whether a characteristic method exists in the commission of other offenses that is similar to the method used in the commission of the offense under consideration.
>
> Your determination of that question in accordance with the final instructions given to you may affect your decision on such issues as identity, motive, or intent of the perpetrator.
>
> For the limited purpose for which you may consider other count evidence, you must weigh it in the same manner as you do all other evidence in the case.
>
> A more detailed instruction on the use of the other count

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[245] On the separate issue of what burden should apply to this determination, the defense contended at trial that it should be proven beyond a reasonable doubt. (RTH 36659.) (See also § 2.3.4.6, pp. 276-77 below, incorporated herein, wherein it is argued that the proof beyond a reasonable doubt is the constitutionally required standard.)

evidence will be given to you with the final instructions. (RTT 13:27-14:21.)

During the discussion of the final instructions the defense again contended that the "other offenses" instructions should require the jury to find that Lucas committed the other charge before the charge could be considered as evidence on any other charge. (RTT 11490-94; CT 14651.) Although the defense contended that the standard should be beyond a reasonable doubt,[246] counsel made it clear that the standard to be used was a separate issue from the fundamental question of whether the jury must make a threshold finding that the accused committed the other charge before using that charge to convict on other charges:[247]

> Mr. Feldman: After that paragraph . . . insert "however, before such evidence as to one or more of the counts may be used together with the evidence of any other count, you must review each count separately to determine if the prosecution has proven identity as to each count." Now, whether or not [this] should be shown beyond a reasonable doubt depends on the court's willingness to adopt the language of *Albertson* [*People v. Albertson* (1944) 23 Cal.2d 550].
> The Court: Yeah. What you're suggesting is that I have a threshold level of identity required –
> Mr. Feldman: Based on *Albertson*, yes.
> The Court: – Independently as to each count before it can be used and that I reject –

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[246] The defense request for a beyond reasonable doubt standard did not waive the issue as to whether it was error to omit instruction on a lower standard. (See *People v. Carpenter* (1997) 15 Cal.4th 312 [request for proof beyond a reasonable doubt did not waive issue as to applicability of clear and convincing evidence standard]; see also Penal Code § 1259.)

[247] Defense counsel had also recognized that the standard to be used was a separate issue in their objection to the preliminary instruction. (RTH 36657-59.)

(RTH 11508:24-11509:8; see also 11512-13.)

Defense counsel argued that the judge's instruction would violate "the crux of *Albertson*" and due process because, for example, the Santiago identification could be corroborated by "bits and pieces" of evidence from the other counts which amounted to nothing more than mere suspicion:

> Mr. Stuetz: Assume you have Jodie Santiago with a weak identification; assume that. Now, what is the jury going to do under M.O. instructions which do not dictate how they can draw an inference or the limitations of an M.O. inference?
>
> They will be able to pick and choose evidence from other counts to corroborate Jodie Santiago's identification.
>
> They might decide that, "Hey, there is a little bit of a dog chain that we don't think there is proof beyond a reasonable doubt, but it looks suspicious to us. So let's lump Swanke, the dog chain, and possibly a little bit of similarity of a throat wound, and let's see if that goes to help corroborate Jodie Santiago.
>
> "Now we go to Garcia, and here we have opportunity. Well, maybe we do have opportunity in Swanke, but certainly we have maybe more opportunity in Garcia. So let's put opportunity over and support Jodie Santiago.
>
> "Now let's go to Strang/Fisher. Lo and behold, not only do we have opportunity, we have that she knew him. So now we have not only opportunity, but opportunity of a victim who knew the possible assailant. Let's lump that over to Santiago. Now who do we have – ."
>
> The Court: I am following your argument. I am following your argument.
>
> Mr. Stuetz: Okay. Now after they have done all of this they say, "Okay. Is Mr. Lucas guilty of Santiago beyond a reasonable doubt?" And the answer is yes. Then they go back and say, "well, if he's guilty of Santiago, he's guilty of everybody else," and that is what the prosecution wants. That's what Mr. Williams wants to argue to the jury. That type of argument is improper. It violates due process. (RTT 11512:26-11514:1.)

The judge responded that the jury should be able to "add up" the circumstantial evidence in each case:

> . . . [Y]ou may not . . . have a case clearly proving identity beyond a reasonable doubt, in and of itself, but you have several cases, all of which prove identity beyond a reasonable doubt. And it's all based on adding up . . . the circumstantial evidence in each case. (RTT 11515:12-17.)

Defense counsel responded that "taken to its logical extreme" the prosecution "could literally convict somebody on bits and pieces of evidence from each crime." (RTT 11515-16.)

The judge responded: "That's correct; absolutely." (RTT 11516.)

The judge went on to make clear that she anticipated the jury would interpret the instructions as follows:

1. If the jury believed the other charge evidence to be an "essential fact" then under the circumstantial evidence instruction (CT 14283; CALJIC 2.01) it would have to find that Lucas was guilty of the other charge beyond a reasonable doubt before using that charge to convict on another. (RTT 11516.)
2. However, if the jury did not consider the other charge to be an "essential fact" then, without any threshold finding that Lucas committed the other act, it was free to give it whatever weight it felt appropriate as to any other charge or charges. (RTT 11517.)

The judge expressed this view of the instructions as follows:

> What I am suggesting by this modified 2.50 and by . . . tieing [sic] this into circumstantial evidence is this:
>
> "As your conviction on the case under consideration, as your proof appears greater on it alone, the requirement for the

threshold on the other crimes evidence to help your proof goes down. And as your proof becomes weak in the current case, then the proof in the other cases necessarily becomes greater.

"So that if you take a case where the M.O. and the identity in other cases is absolutely essential before you could be convinced beyond a reasonable doubt in the case under consideration, then the cases – the other crimes evidence would have to be proved beyond a reasonable doubt on the M.O. and identity.

"If, in the current case, you're 95 percent of the way . . . to beyond a reasonable doubt and you need some tidbit to kick you over, then you don't have to find beyond a reasonable doubt on the other crimes evidence to help you there."

And while that is, again, an imperfect and very inexact way of describing it – because I don't think we can quantify things in that way – it's the best way I can say of saying that there is a sliding scale that's involved here. You don't have one fixed threshold for the use of the other crimes evidence.

It is like all circumstantial evidence, a slider, depending upon its value that you determine – the fact finder determines for the current case, and that slider has to be there.

So the defense is free to argue, "Ladies and gentlemen, you have got to have it beyond a reasonable doubt. You have got to find, under circumstantial evidence, that it is absolutely crucial to your finding on any one case, and, therefore, I submit to you have to find it beyond a reasonable doubt."

And the People are free to argue "it's not; it's a piece of circumstantial evidence. And you look at the circumstantial evidence instructions and you don't reach that threshold. You can use it as any other piece of circumstantial evidence."

And I think both are entitled to do that, and, finally, it's going to be the jury that decides how much importance they have to rely on the other crimes evidence to find any one count. (RTT 11516:21-11518:6.)

Following the close of evidence the judge gave final instructions on the issue which, like the preliminary instruction, did not include a threshold

finding requirement.[248]

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[248] The following instructions were given:

CONSIDERATION OF OTHER COUNTS' EVIDENCE

Evidence has been introduced in this case of more than one count of homicide. As you have been instructed, each count charged must be decided separately. However, you may, if you so choose, use evidence from other counts, together with any count under consideration, for certain limited purposes.

Other counts' evidence may be used by you, if you so choose, for the purpose of determining whether such evidence tends to show the identity of the person committing the crime charged in the count under consideration. You may also consider whether such evidence tends to negate the inference of the identity of the person committing the crime charged.

You may consider whether or not the evidence as to other counts tends to show a characteristic method, plan or scheme in the commission of criminal acts similar to any method, plan or scheme used in the commission of the offense in the count then under consideration. Whether or not the evidence shows such a characteristic method, plan or scheme is a matter solely for your determination.

If you should find a characteristic method, plan or scheme, you may also consider whether or not such a clear connection exists between the one offense under consideration and the other offense or offenses of which the defendant is accused that it may be logically concluded that if the defendant committed the other offense or offenses he also committed the crime under consideration.

You may also consider other counts' evidence together with the count under consideration to determine whether there existed in the mind of the perpetrator an intent which is a necessary element of the count under consideration or whether such intent may have been absent in some or all of the offenses charged.

You may also consider other counts' evidence together with the count under consideration to determine whether there

(continued...)

C. The Judge Erroneously Refused To Require A Threshold Finding Requirement

Other crimes evidence "has a 'highly inflammatory and prejudicial

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[248](...continued)
existed any common motive for the crime(s) charged or whether the evidence establishes different motives.

Other counts' evidence is a form of circumstantial evidence. Therefore, you must weigh such evidence in the same manner and subject to the same rules as I have previously provided to you regarding circumstantial evidence. You must decide the weight, if any, to which other crimes' evidence is entitled.

It is a matter solely for your determination as to whether or not any common scheme, plan or method applies to some, all or none of the counts. You may find that the other crimes' evidence may apply to some of the offenses but not to others.

You are cautioned that evidence of other counts cannot be used to prove that the defendant is a person of bad character or that he has a disposition to commit crimes. (CT 14307-09.)

COMMON METHOD, PLAN OR SCHEME – FACTS TO BE CONSIDERED – MARKS OF SIMILARITY AND DISSIMILARITY

In considering the possible existence of a characteristic method, plan or scheme involved in the commission of any of the offenses charged, you may look to factors of similarity and dissimilarity between the offenses. You may also look to the distinctiveness of marks of similarity and/or dissimilarity.

Factors of similarity that are not distinctive may yield little worth in determining whether two crimes reveal a common method, plan or scheme. On the other hand, factors of similarity that are highly distinctive or unique may be of value.

If there are no shared unique or highly distinct marks of similarity between crime, or if there are only marks of dissimilarity, an inference of common method, plan or scheme does not arise and such crimes would be of no evidentiary value in determining the identity of the perpetrator. (CT 14310.)

effect' on the trier of fact." (*People v. Thompson* (1980) 27 Cal.3d 303, 314.) Such evidence "is to be received with 'extreme caution,' and all doubts about its connection to the crime charged must be resolved in the accused's favor." (*People v. Alcala* (1984) 36 Cal.3d 604, 631, citations omitted; see also, *People v. Holt* (1984) 37 Cal.3d 436, 451; *People v. Brown* (1993) 17 Cal.App.4th 1389, 1395.)

In recognition of the substantial prejudice which may emanate from the jury's consideration of other crimes evidence, this Court has made it clear that there must be a threshold finding by the jury that the accused committed an alleged offense before that offense may be used as proof of the accused's guilt in another case. (See, *People v. Carpenter* (1997) 15 Cal.4th 312, 381-82; *People v. Medina* (1995) 11 Cal.4th 694, 763; *People v. Albertson, supra*, 23 Cal.2d at 578-80.)

While the standard which should apply to this threshold finding has been disputed (see *People v. Carpenter, supra* 15 Cal.4th at 381-82), there has never been any question that "the proof must . . . be sufficient to arouse more than mere suspicion; it must afford 'substantial evidence' that the prior offense was in fact committed by the defendant." [Citations.] (*People v. Albertson, supra*, 23 Cal.2d at 580; see also *Dowling v. United States* (1990) 493 U.S. 342, 348 [jury must be able to "reasonably conclude that the act occurred and that the defendant was the actor"].)[249]

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[249] *Albertson* discussed the degree of proof in the following passage:

> To thus emphasize the degree of proof required, varying terms have been used for guidance of the trial court. 'The evidence which can be so used of other crimes presupposes that the other crime is prima facie established by competent proof.' [Citation.] 'To render such evidence admissible, it must be shown that it

(continued...)

Hence, at a minimum, the substantial evidence requirement mandates a threshold finding by a preponderance of the evidence. (See *People v. Carpenter*, *supra*; *People v. Medina*, *supra*; CALJIC 2.50.1 [other crimes evidence must not be considered "for any purpose" unless the jury finds by a preponderance of the evidence that the "defendant committed the other crime . . . "].) Without such a threshold requirement the jury is free to bootstrap mere suspicion as to multiple charges into a spurious finding of proof beyond a reasonable doubt and an unwarranted conviction:

> Circumstantial proof of a crime charged cannot be intermingled with circumstantial proof of suspicious prior occurrences in such manner that it reacts as a psychological factor with the result that the proof of the crime charged is used to bolster up the theory or foster suspicion in the mind that the defendant must have committed the prior act, and the conclusion that he must have committed the prior act is then used in turn to strengthen the theory and induce the conclusion

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[249](...continued)
substantially establishes the defendant's guilt as to such other crime . . . or, in other words, it must be shown with reasonable certainty that the accused committed the other crime. . . .' [Citation.] '. . . The degree of proof required in this class of testimony is held on excellent authority to be positive or substantial, but not "beyond a reasonable doubt."' [Citations.] 'Before evidence of the commission of other crimes by accused is admitted, the trial court should satisfy itself that the evidence substantially establishes the other crimes, clear and convincing proof, and the making out of at least a prima facie case, being required; evidence of a vague and uncertain character, offered for the purpose of showing that the accused has been guilty of similar offenses, should not be admitted under any pretense whatever, nor is mere suspicion, or proof of a suspicious circumstance, sufficient. So, before guilty intent may be inferred from other similar crimes, they must be established by evidence which is legal and competent and plain, clear and conclusive. . . .' [Citation.] (*People v. Albertson*, *supra*, 23 Cal.2d at 580.)

> that he must also have committed the crime charged. This is but a vicious circle. (*People v. Albertson*, *supra*, 23 Cal.2d at 580-81.)

In the present case the judge improperly removed the threshold finding requirement and, thus, allowed the jurors to rely on other charges to convict even if they had nothing more than a suspicion that Lucas committed those charges. (RTT 11516-18.)

Moreover, the error was not cured by the circumstantial evidence instruction which instructed the jury that "each fact which is essential to complete a set of circumstances necessary to establish the defendant's guilt must be proved beyond a reasonable doubt." (CT 14283; CALJIC 2.01) As the judge herself recognized (RTT 11504-06, 11516-18), and as the prosecutor argued (RTT 12135), the jury would only have been required to find the other crime beyond a reasonable doubt under CALJIC 2.01 if the jury determined the other crime to be an "essential" fact or inference. If the other crime was not considered "essential," then no threshold finding was required before relying on it:

> If [the jury was] 95 percent of the way . . . to beyond a reasonable doubt and [they] need[ed] some tidbit to kick [them] over, then they [didn't] have to find beyond a reasonable doubt on the other crimes evidence to help [them] there. (RTT 11517.)

Moreover, the jury could also have reasonably concluded that no single other charge was "essential" because there were multiple other charges from which to choose. Hence, the jury could reasonably have thought that no single other crime was essential because another could be used in its place and, therefore, the other crimes were not essential and need not be proven beyond mere suspicion.

D. The Error Violated The Federal Constitution

As set forth above, the judge committed error which undermined the fundamental structure and reliability of the trial by allowing the jury to convict Lucas in reliance upon mere suspicion that he committed other charges. Hence, the error violated the federal constitutional principle that an accused may not be convicted of a crime based on mere suspicion. (See *In re Winship* (1970) 397 U.S. 358 [as a matter of due process under the Fourteenth Amendment, the prosecution must prove every essential element beyond a reasonable doubt].)

Moreover, the jury's improper consideration of inherently prejudicial other crimes evidence violated Lucas' federal constitutional due process rights under the Fourteenth Amendment by undermining his right to a fair and reliable adjudication of his guilt or innocence. (See *Dawson v. Delaware* (1992) 503 U.S. 159; *McKinney v. Rees* (9th Cir. 1993) 993 F.2d 1378, 1380-85; see also *State v. Hawk* (Tenn. Crim. App. 1985) 688 S.W.2d 467, 474.)

Further, the failure to require a jury determination as to the *Albertson* threshold requirement violated Lucas' Sixth Amendment right to trial by jury. "Implicit in the right to trial by jury afforded criminal defendants under the Sixth Amendment to the Constitution of the United States is the right to have that jury decide all relevant issues of fact and to weigh the credibility of witnesses." (*United States v. Hayward* (D.C. Cir. 1969) 420 F.2d 142, 144; see also *United States v. Gaudin* (1995) 515 U.S. 506, 511; *Davis v. Alaska* (1974) 415 U.S. 308, 318 [". . . counsel [must be] permitted to expose to the jury the facts from which jurors, as the sole triers of fact and credibility, [could] appropriately draw inferences relating to the reliability of the witness"]; *Bollenbach v. United States* (1946) 326 U.S. 607, 614 [". . . the question is not whether guilt may be spelt out of a record, but whether guilt

has been found by a jury according to the procedure and standards appropriate for criminal trials . . . "].) "A fundamental premise of our criminal trial system is that 'the jury is the lie detector.' [Citation.] Determining the weight and credibility of witness testimony, therefore, has long been held to be the 'part of every case [that] belongs to the jury, who are presumed to be fitted for it by their natural intelligence and their practical knowledge of men and the ways of men.' [Citation.]" (*United States v. Scheffer* (1998) 523 U.S. 303, 313.)

Additionally, the error also violated the Eighth and Fourteenth Amendment to the federal constitution which require heightened reliability in the determination of guilt and death eligibility before a sentence of death may be imposed. (See *Beck v. Alabama* (1980) 447 U.S. 625, 627-46; see also *Kyles v. Whitley* (1995) 514 U.S. 419, 422; *Burger v. Kemp* (1987) 483 U.S. 776, 785; *Gilmore v. Taylor* (1993) 508 U.S. 333, 342.)

Furthermore, verdict reliability is also required for all criminal convictions by the Due Process Clause (14th Amendment) of the federal constitution. (*White v. Illinois* (1992) 502 U.S. 346, 363-64; *Donnelly v. DeChristoforo* (1974) 416 U.S. 637, 646.)

Finally, because the error arbitrarily denied Lucas his state created right to the *Albertson* threshold finding, it violated his right to due process under the Fourteenth Amendment to the United States Constitution. (*Hicks v. Oklahoma* (1980) 447 U.S. 343, 346; see also *People v. Sutton* (1993) 19 Cal.App.4th 795, 804; *Hernandez v. Ylst* (9th Cir. 1991) 930 F.2d 714, 716.)

E. Because The Error Was Structural The Judgment Should Be Reversed

Conviction of an accused of a capital offense based on mere suspicion undermines the structural integrity of the trial. Accordingly, structural error was committed and the judgment should be reversed without a showing of

prejudice. (See e.g., *Arizona v. Fulminante* (1991) 499 U.S. 279, 309 [structural defects in the trial mechanism, which defy analysis by "harmless-error"standards are reversible per se]; see also *Sullivan v. Louisiana* (1993) 508 U.S. 275 .)

F. Because The Error Was Substantial, And The Jacobs Evidence Closely Balanced, The Judgment Should Be Reversed

The evidence in Jacobs was closely balanced. (See § 2.3.1(I)(2), pp. 209-11 above, incorporated herein.) "'In a close case . . . any error of a substantial nature may require a reversal and any doubt as to its prejudicial character should be resolved in favor of the appellant.' [Citation]." (*People v. Von Villas* (1992) 11 Cal.App.4th 175, 249.) Certainly, erroneously authorizing the jurors to bootstrap multiple charges into convictions based on mere suspicion, was a substantial error especially because the cross-admissibility ruling allowed the prosecution to heavily rely on the other crimes to fill in the evidentiary gaps in individual cases such as Jacobs. (See § 2.3.5.1(H), pp. 293-99 below, incorporated herein [summary of the prosecutor's extensive closing argument reliance on the other crimes evidence].) Therefore, the guilt judgment should be reversed under the state harmless-error standard. (*People v. Watson* (1956) 46 Cal.2d 818, 836.)

Moreover, because the error violated Lucas' federal constitutional rights, the judgment should be reversed unless the prosecution demonstrates beyond a reasonable doubt that there is no reasonable possibility the error could have affected the proceedings. (*Chapman v. California* (1967) 386 U.S. 18, 23-24; see also *In re Rodriguez* (1987) 119 Cal.App.3d 457, 469-70 [*Chapman* standard applied to combined impact of state and federal constitutional errors]; *People v. Williams* (1971) 22 Cal.App.3d 34, 58-59 [same].) Given the closeness of the evidence and the substantial impact of the

error, the prosecution cannot meet this burden. Therefore, the judgment should be reversed under the federal harmless-error standard.

G. The Error Was Prejudicial As To Penalty

Even if the error was not prejudicial as to the guilt judgment, it was prejudicial, individually and cumulatively, as to penalty. The penalty trial was closely balanced[250] and the error was substantial. Certainly, erroneously authorizing the jury to consider a mere suspicion as to the other offenses in support of finding Lucas guilty of the Jacobs murders, thereby improperly undermining lingering doubt as to Lucas' guilt, was a "substantial error." Therefore, the prosecution cannot meet its *Chapman* burden of proving beyond a reasonable doubt that the error was harmless as to the defense mitigating theory of lingering doubt. (See Volume 6, § 6.5.1(D), pp. 1551-52, incorporated herein [substantial error at penalty is prejudicial under *Chapman*].) Further, even if that error were viewed solely as an error of state law, reversal would be required, for there is at least "a reasonable (i.e., realistic) possibility" that but for that substantial error, the jury, giving due weight to the lingering doubt they likely would have otherwise harbored, would not have rendered a death verdict. (*People v. Brown* (1988) 46 Cal.3d 432, 448.)

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[250] See Volume 7, § 7.5.1(J)(3)(a), pp. 1619-22, incorporated herein [close balance at penalty demonstrated by near-deadlock, length of deliberations, request for readback of testimony, request for re-instruction, etc.].

2 JACOBS CASE

2.3 JACOBS CROSS-ADMISSIBILITY AND CONSOLIDATION ISSUES

2.3.4 THE CROSS-ADMISSIBILITY INSTRUCTIONS WERE ERRONEOUS AND PREJUDICIAL

ARGUMENT 2.3.4.3

THE INSTRUCTIONS IMPERMISSIBLY ALLOWED THE JURY TO CROSS-CONSIDER THE CHARGES ON THE ISSUE OF IDENTITY WITHOUT MAKING THE PREREQUISITE FINDING THAT THE OTHER OFFENSES SHARED SIGNATURE-LIKE SIMILARITIES

A. Introduction

Over defense objection, the prosecution was allowed to proceed on the theory that all the incidents charged against Lucas were cross-admissible on the issue of identity. The preliminary and final jury instructions as well as the prosecutor's argument focused on this prosecution theory.

However, the other crimes jury instructions erroneously allowed the jury to consider the other crimes evidence on the issue of identity even if the other crimes were not sufficiently distinctive to reflect the signature of a single perpetrator. Instead the jurors were instructed on a lesser foundational standard.

Accordingly, the judgment should be reversed.

B. Procedural Background

Over defense objection the judge ruled that all the charged offenses were sufficiently similar to permit their cross-admissibility on the issue of identity. (RTH 22512-13; CT 5211-12.) In so doing the judge purported to make the requisite foundational finding that each crime shared signature-like

similarities with each of the other charged offenses. (RTH 25504-510.)[251]

Also over defense objection, the judge failed to instruct the jurors that they must find the offenses to share sufficiently distinct characteristics to reflect the signature of a single perpetrator as a prerequisite to cross-considering the offenses on the issue of identity. Both the prosecution's preliminary instruction given prior to trial,[252] and the final instruction[253] defined the jurors' inquiry regarding the other crimes in terms of finding a "characteristic method, plan or scheme. . . ." (CT 14307.)

The defense, on the other hand, had requested that the foundational requirement be defined in terms of whether the crimes shared signature-like similarities as required by *People v. Alvarez* (1974) 44 Cal.App.3d 375) and *People v. Haston* (1968) 69 Cal.2d 233.[254] (RTT 11502-03; CT 14657.)

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[251] But see § 2.3.1, pp. 139-213, and § 2.3.2, pp. 213-23 above, incorporated herein, wherein Lucas argues that the Santiago and Swanke crimes were not admissible to prove identity in Jacobs, and accordingly the trial court erred in (1) permitting a joint trial on these incidents and (2) authorizing the jury to consider evidence connecting Lucas to the Santiago crimes as evidence connecting him to the Jacobs incident.

[252] See § 2.9.1(E), p. 534 below, incorporated herein.

[253] See 2.3.4.4(C), pp. 262-64, incorporated herein; CT 14307-09.

[254] The defense requested instruction provided as follows:

> In deciding whether there is a distinctive and unique modus operandi to give rise to an inference of identity, you must determine and evaluate whether there are unique and distinct common marks of similarity and marks of dissimilarity.
>
> If there are not shared unique or highly distinct marks of similarity, or if there are only marks of dissimilarity, an inference of identity does not arise and each count must be decided separately. Before you may draw an inference of

(continued...)

However, the judge rejected the defense position:

> Defense Counsel: . . . [I]f the jury finds there [are] only common marks, but they are not highly distinctive marks, it's our position under *Alvarez* that is not sufficient prima facie to raise an inference of identity under the M.O. line of cases . . . Does the court agree with that proposition?
>
> Judge Hammes: No. Because that line of cases is focusing on the use of M.O. alone, the jury may be dealing with M.O. combined with other pieces of circumstantial evidence. (RTH 11535-36.)

The judge did give an additional instruction which referenced "highly distinctive marks" but did not mention the signature requirement.[255] Nor did

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[254](...continued)
identity based on modus operandi, you must find that there are distinctive shared marks of similarity, and that any highly distinctive and unique shared marks of similarity, considered singly or in combination, with marks of dissimilarity, possess a sufficiently high degree of common features that they warrant the logical inference of identity which tends to isolate the same person as the perpetrator. The inference may be drawn only if the modus operandi presents a unique and distinct signature of the perpetrator. The strength of any inference of identity, depends upon the degree of distinctiveness of the individual shared marks, the number of minimally distinctive shared marks, and marks of dissimilarity. [Emphasis added.] (CT 14657; see also RTT 11692-93.)

[255] COMMON METHOD, PLAN OR SCHEME – FACTS TO BE CONSIDERED – MARKS OF SIMILARITY AND DISSIMILARITY

> In considering the possible existence of a characteristic method, plan or scheme involved in the commission of any of the offenses charged, you may look to factors of similarity and dissimilarity between the offenses. You may also look to the distinctiveness of marks of similarity and/or dissimilarity.
>
> Factors of similarity that are not distinctive may yield

(continued...)

this instruction instruct the jury on the necessity of making the required foundational finding before considering the other crimes evidence as evidence of identity on another count. (Compare the defense request (CT 14657).)[256]

C. Evidence Code § 403 Required The Judge To Instruct On The Preliminary Factual Finding Of Signatory Significance

This Court has made it clear that one offense is not admissible to prove identity as to another unless the offenses share signature-like similarities. (See § 2.3.1(F)(1), pp. 202-03 above, incorporated herein.) Hence, signatory distinctiveness is a preliminary factual prerequisite which the jury was required to find – as a whole, not as individual free agents – before cross-considering the offenses. (See Evidence Code § 403; see also § 2.3.4.5, pp. 271-75 below, incorporated herein.)

Moreover, because the defense requested instruction on this preliminary fact, it was mandatory for the judge to do so. (Evidence Code § 403(c)(1).) Accordingly, the failure to so instruct was error.

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[255](...continued)
little worth in determining whether two crimes reveal a common method, plan or scheme. On the other hand, factors of similarity that are highly distinctive or unique may be of value.

If there are no shared unique or highly distinct marks of similarity between crimes, or if there are only marks of dissimilarity, an inference of common method, plan or scheme does not arise and such crimes would be of no evidentiary value in determining the identity of the perpetrator. (CT 14310.)

[256] At most this instruction only required the jury to find a single unique or highly distinct mark. But the finding of one mark does not correctly state the foundational requirement. Rather the jury must determine whether under all the circumstances each crime shared sufficiently distinctive characteristics to reflect the signature of a single perpetrator. Absent such a finding the other crimes evidence should not have been considered on the issue of identity.

D. The Error Violated The Federal Constitution

Even though Evidence Code § 403 is a California statute, the error violated the Due Process Clause of the Fourteenth Amendment to the United States Constitution by arbitrarily denying Lucas' state created right. (*Hicks v. United States* (1980) 447 U.S. 343, 346; see also *People v. Sutton* (1993) 19 Cal.App.4th 795, 804; *Hernandez v. Ylst* (9th Cir. 1991) 930 F.2d 714, 716.)

Moreover, the error also violated Lucas' constitutional right to trial by jury. "Implicit in the right to trial by jury afforded criminal defendants under the Sixth Amendment to the Constitution of the United States is the right to have that jury decide all relevant issues of fact and to weigh the credibility of witnesses." (*United States v. Hayward* (D.C. Cir. 1969) 420 F.2d 142, 144; see also *United States v. Gaudin* (1995) 515 U.S. 506, 511; *Davis v. Alaska* (1974) 415 U.S. 308, 318 [". . . counsel [must be] permitted to expose to the jury the facts from which jurors, as the sole triers of fact and credibility, [could] appropriately draw inferences relating to the reliability of the witness"]; *Bollenbach v. United States* (1946) 326 U.S. 607, 614 [". . . the question is not whether guilt may be spelt out of a record, but whether guilt has been found by a jury according to the procedure and standards appropriate for criminal trials . . . "].) "A fundamental premise of our criminal trial system is that 'the jury is the lie detector.' [Citation.] Determining the weight and credibility of witness testimony, therefore, has long been held to be the 'part of every case [that] belongs to the jury, who are presumed to be fitted for it by their natural intelligence and their practical knowledge of men and the ways of men.' [Citation.]" (*United States v. Scheffer* (1998) 523 U.S. 303, 313.)

Additionally, because the error undermined the reliability of both the guilt and penalty verdicts the error also violated the Cruel and Unusual Punishment and Due Process Clauses of the federal constitution (8th and 14th

Amendments) which require heightened reliability in the determination of guilt and death eligibility before a sentence of death may be imposed. (See *Beck v. Alabama* (1980) 447 U.S. 625, 627-46; see also *Kyles v. Whitley* (1995) 514 U.S. 419, 422; *Burger v. Kemp* (1987) 483 U.S. 776, 785; *Gilmore v. Taylor* (1993) 508 U.S. 333, 342.)

Furthermore, verdict reliability is also required by the Due Process Clause (14th Amendment) of the federal constitution for any criminal conviction. (*White v. Illinois* (1992) 502 U.S. 346, 363-64; *Donnelly v. DeChristoforo* (1974) 416 U.S. 637, 646.)

The error also violated the Due Process Clause of the Fourteenth Amendment to the United States Constitution by arbitrarily denying Lucas his state created rights under California law, including Evidence Code § 403, to have the jury make the necessary foundational finding before considering what was otherwise a crucial but unreliable piece of evidence. (*Hicks v. United States* (1980) 447 U.S. 343, 346; see also *People v. Sutton* (1993) 19 Cal.App.4th 795, 804; *Hernandez v. Ylst* (9th Cir. 1991) 930 F.2d 714, 716.)

E. The Error Was Prejudicial As To Jacobs

The improper other crimes instruction was a substantial error because it improperly allowed the jurors to rely on the other charges to convict Lucas of the Jacobs charges.[257] Other crimes evidence "has a 'highly inflammatory and prejudicial effect' on the trier of fact." (*People v. Thompson* (1980) 27 Cal.3d 303, 314.) This is especially true in a capital trial where "evidence of

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[257] The cross-admissibility ruling allowed the prosecution to heavily rely on the other crimes to fill in the evidentiary gaps in individual cases such as Jacobs. (See § 2.3.5.1(H), pp. 293-99 below, incorporated herein for a summary of the prosecutor's extensive closing argument reliance on the other crimes evidence.)

other crimes . . . may have a particularly damaging impact on the jury's determination whether the defendant should be executed. . . ." (*People v. McClellan* (1969) 71 Cal. 2d 793, 805; *People v. Jones* (1996) 13 Cal.4th 535, 585.) This is so because of the jurors' tendency to condemn the accused on the basis of perceived disposition to commit criminal acts. (*People v. Thompson*, *supra*, 27 Cal.3d at 317.) Therefore, the guilt judgment should be reversed under the state harmless-error standard. (*People v. Watson* (1956) 46 Cal.2d 818, 836.) "'In a close case . . . any error of a substantial nature may require a reversal and any doubt as to its prejudicial character should be resolved in favor of the appellant.' [Citation]." (*People v. Von Villas* (1992) 11 Cal.App.4th 175, 249.)

Moreover, because the error violated Lucas' federal constitutional rights, the judgment should be reversed unless the prosecution demonstrates beyond a reasonable doubt that there is no reasonable possibility the error could have affected the proceedings. (*Chapman v. California* (1967) 386 U.S. 18, 23-24; see also *In re Rodriguez* (1987) 119 Cal.App.3d 457, 469-70 [*Chapman* standard applied to combined impact of state and federal constitutional errors]; *People v. Williams* (1971) 22 Cal.App.3d 34, 58-59 [same].) Given the closeness of the evidence and the substantial impact of the error, the prosecution cannot meet this burden. Therefore, the judgment should be reversed under the federal harmless-error standard.

Even if the error was not prejudicial as to the guilt judgment, it was prejudicial, individually and cumulatively, as to penalty. The penalty trial was closely balanced[258] and the error was substantial. Certainly, erroneously

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[258] See Volume 7, § 7.5.1(J)(3)(a), pp. 1619-22, incorporated herein [close balance at penalty demonstrated by near-deadlock, length of (continued...)

authorizing the jury to consider the Santiago and Swanke cases to find Lucas guilty of the Jacobs murders was a "substantial error" since it undermined the lingering doubt theory at penalty. Therefore, the prosecution cannot meet its *Chapman* burden of proving beyond a reasonable doubt that the error was harmless as to the defense mitigating theory of lingering doubt. (See Volume 6, § 6.5.1(D), pp. 1551-52, incorporated herein [substantial error at penalty is prejudicial under *Chapman*].) Further, even if that error were viewed solely as an error of state law, reversal would be required, for there is at least "a reasonable (i.e., realistic) possibility" that but for that substantial error, the jury, giving due weight to the lingering doubt they likely would have otherwise harbored, would not have rendered a death verdict. (*People v. Brown* (1988) 46 Cal.3d 432, 448.)

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[258](...continued)
deliberations, request for readback of testimony, request for re-instruction, etc.].

2 JACOBS CASE

2.3 JACOBS CROSS-ADMISSIBILITY AND CONSOLIDATION ISSUES

2.3.4 THE CROSS-ADMISSIBILITY INSTRUCTIONS WERE ERRONEOUS AND PREJUDICIAL

ARGUMENT 2.3.4.4

THE OTHER CRIMES INSTRUCTION UNCONSTITUTIONALLY FAILED TO PRESENT THE DEFENSE SIDE OF THE ISSUE

A. Introduction

The jury was generally instructed to decide each count separately. (CT 345.) However, the court gave a special instruction which permitted the jury to consider the other counts evidence "for certain limited purposes." (CT 14307.) This instruction improperly, unfairly and unconstitutionally presented only the prosecution's side of the issue. That is, it failed to inform the jury that if the defendant did not commit one of the other offenses the jury could consider this as evidence that he did not commit the crime under consideration.

B. Legal Principles

Other crimes evidence is admissible to prove identity if the different acts "share common features that are sufficiently distinctive so as to support the inference that the same person committed both acts. [Citation.] 'The pattern and characteristics of the crimes must be so unusual and distinctive as to be like a signature.' [Citation.]" (*People v. Ewoldt* (1994) 7 Cal.4th 380, 403.) On the other hand, the inference of identity can be negated by evidence that there is no connecting link between the prior and present acts and that they were independent of one another. (*Id.* at 397; see also, *People v. Bean*

(1988) 46 Cal.3d 919, 937.)

Typically the jury must decide whether the common marks are "sufficiently distinctive that they bear defendant's unique 'signature.'" (*Ibid*; see also, *People v. Ewoldt*, *supra*, 7 Cal.4th at 403.)

However, if the jury determines that the defendant did not commit one of the acts at issue – and especially if such determination is based upon alibi evidence – the jury should still be required to determine whether the common marks are sufficiently distinctive to support the inference that the same person committed all of the acts. For, if this is so, then the fact that the defendant did not commit one of the acts is evidence upon which the jury could reasonably rely to decide that the defendant did not commit the other acts as well. (See, *People v. Huston* (1989) 210 Cal.App.3d 192, 214 [". . . [T]he similar descriptions and modi operandi for the various robberies made an alibi defense to one charge a defense to all . . ."].)

C. The Instruction In The Present Case Unconstitutionally Precluded The Jury From Considering The Defense Side Of The Issue

In the present case the court's instruction did not permit the jury to consider both sides of the issue. The court instructed the jury as follows:

> Evidence has been introduced in this case of more than one count of homicide. As you have been instructed, each count charged must be decided separately. However, you may, if you so choose, use evidence from other counts, together with any count under consideration, for certain limited purposes.
>
> Other counts' evidence may be used by you, if you so choose, for the purpose of determining whether such evidence tends to show the identity of the person committing the crime charged in the count under consideration. You may also consider whether such evidence tends to negate the inference of the identity of the person committing the crime charged.
>
> You may consider whether or not the evidence as to other counts tends to show a characteristic method, plan or

scheme in the commission of criminal acts similar to any method, plan or scheme used in the commission of the offense in the count then under consideration. Whether or not the evidence shows such a characteristic method, plan or scheme is a matter solely for your determination.

If you should find a characteristic method, plan or scheme, you may also consider whether or not such a clear connection exists between the one offense under consideration and the other offense or offenses of which the defendant is accused that it may be logically concluded that if the defendant committed the other offense or offenses he also committed the crime under consideration.

You may also consider other counts' evidence together with the count under consideration to determine whether there existed in the mind of the perpetrator an intent which is a necessary element of the count under consideration or whether such intent may have been absent in some or all of the offenses charged.

You may also consider other counts' evidence together with the count under consideration to determine whether there existed any common motive for the crime(s) charged or whether the evidence establishes different motives.

Other counts' evidence is a form of circumstantial evidence. Therefore, you must weigh such evidence in the same manner and subject to the same rules as I have previously provided to you regarding circumstantial evidence. You must decide the weight, if any, to which other crimes' evidence is entitled.

It is a matter solely for your determination as to whether or not any common scheme, plan or method applies to some, all or none of the counts. You may find that the other crimes' evidence may apply to some of the offenses but not to others.

You are cautioned that evidence of other counts cannot be used to prove that the defendant is a person of bad character or that he has a disposition to commit crimes. (CT 14307-09.)

While this instruction did suggest to the jury that it could consider whether the evidence "tends to negate the inference of the identity of the person committing the crime charged," in context, this referred to the absence

of a common link among the various acts and not to reliance upon the existence of a common link as a basis for finding that if the defendant did not commit one offense he did not commit the other. Moreover, to the extent that this language could have been read to generally encompass the omitted principle, such a reading was rendered improbable by the more specific language which followed.[259] That language expressly limited the jury's consideration of the other counts to the prosecution's position:

> You may consider whether or not the evidence as to other counts tends to show a characteristic method, plan or scheme in the commission of criminal acts similar to any method, plan or scheme used in the commission of the offense in the count then under consideration. Whether or not the evidence shows such a characteristic method, plan or scheme is a matter solely for your determination.
>
> If you should find a characteristic method, plan or scheme, you may also consider whether or not such a clear connection exists between the one offense under consideration and the other offense or offenses of which the defendant is accused, that it may be logically concluded that if the defendant committed the other offense or offenses he also committed the crime under consideration. (CT 14307-08.)

This language was prejudicially slanted toward the prosecution because it did not inform the jury that it could also consider whether it could logically be concluded that if the defendant didn't commit the other offense or offenses, he also didn't commit the crime under consideration.

D. The Instruction Unjustifiably Favored The Prosecution

The instruction set forth in the preceding section also unfairly favored

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[259] When a generally applicable instruction is specifically made applicable to one aspect of the charge and not repeated with respect to another aspect, the inconsistency may prejudicially mislead the jurors. (See § 2.3.4.1(A), p. 231-32, n. 243 above, incorporated herein.)

the prosecution over the defense because, in the absence of corresponding defense language, it pointed the jurors toward finding a clear connection between the offenses. The instruction told the jurors that it's within their sole discretion (no burden of proof, no unanimity requirement, etc.) to determine whether or not there was a method/plan/scheme between the Jacobs case and any/all of the other cases; and if the jurors so found, then they could also consider whether the above-described method/plan/scheme between the Jacobs case and any/all of the other cases implicated such a "clear connection" between Jacobs and any/all of the other cases, that Lucas was guilty of Jacobs. So the trial court expressly pointed jurors from "sole discretion," to "clear connection," to conviction. Hence, it was improperly slanted in favor of the prosecution. (See e.g., *People v. Moore* (1954) 43 Cal.3d 517, 526-27.) Moreover, the instruction effectively informed the jurors that the requirement of proof beyond a reasonable doubt can be satisfied in this situation by "sole discretion" plus "clear connection." But, regardless of whether the instruction eviscerated the standard of proof beyond a reasonable doubt, it improperly placed undue emphasis on the "other crimes" evidence. (See § E, below.)

E. The Instruction Violated Lucas' Federal Constitutional Rights

The kind of one-sided instruction given in the present case violated fundamental principles of due process and fair play.

The United States Supreme Court has recognized the need for fairness between the defense and the prosecution. In *Wardius v. Oregon* (1973) 412 U.S. 470, 475, fn. 6, the U.S. Supreme Court warned that, "state trial rules which provide nonreciprocal benefits to the State when the lack of reciprocity interferes with the defendant's ability to secure a fair trial" violate the defendant's due process rights under the Fourteenth Amendment. (See also *Washington v. Texas* (1967) 388 U.S. 14, 22; *Green v. Georgia* (1979) 442

U.S. 95, 97; *Webb v. Texas* (1972) 409 U.S. 95, 97-98; *Izazaga v. Superior Court* (1991) 54 Cal.3d 356, 372-77; cf. Goldstein, *The State and the Accused: Balance of Advantage in Criminal Procedure*, 69 Yale L.J. 1149, 1180-92 (1960).) Noting that the Due Process Clause "does speak to the balance of forces between the accused and his accuser," *Wardius* held that "in the absence of a strong showing of state interests to the contrary" there "must be a two-way street" as between the prosecution and the defense. (*Wardius*, 412 U.S. at 474.)

Although *Wardius* and the other cases cited above involved discovery and evidentiary standards, the same principle applies to jury instructions. (See *Cool v. United States* (1972) 409 U.S. 100, 103 n. 4 [reversible error to instruct jury that it may convict solely on the basis of accomplice testimony but not that it may acquit based on the accomplice testimony].) Thus, "[t]here should be absolute impartiality as between the People and the defendant in the matter of instructions." (See *People v. Moore*, *supra*, 43 Cal.2d at 526, accord, *Reagan v. United States* (1895) 157 U.S. 301, 310.) "Instructions must not, therefore, be argumentative or slanted in favor of either side, [citation]. Read as a whole they should neither 'unduly emphasize the theory of the prosecution, thereby deemphasizing proportionally the defendant's theory,' [citation] nor overemphasize the importance of certain evidence or certain parts of the case [citation]." *(United States v. McCracken* (5th Cir. 1974) 488 F.2d 406, 414; see also *United States v. Neujahr* (4th Cir. 1999) 173 F.3d 853; *United States v. Dove* (2nd Cir. 1990) 916 F.2d 41, 45.) In the present case, the other crimes instruction violated this mandate and gave an unfair advantage to the prosecution in violation of the Sixth and Fourteenth Amendments.

Moreover, the instruction was an improper comment on the evidence

because it directed the jury's attention to specific evidence and "impl[ied] the conclusion to be drawn from that evidence." (*People v. Harris* (1989) 47 Cal.3d 1047, 1098 fn. 31; see also, *People v. Wright* (1988) 45 Cal.3d 1126, 1135.) Even if judicial comment does not directly express an opinion about the defendant's guilt, an instruction that is one-sided or unbalanced violates the California Constitution (Art. I, sections 7, 15, 16 and 17), the California Rules of Evidence (§ 1101) and the defendant's federal constitutional rights under the 6th and 14th Amendments to due process and a fair, impartial trial by jury. (See *Starr v. United States* (1894) 153 U.S. 614, 626 [trial judge must use great care so that judicial comment does not mislead and "especially that it [is] not . . . one-sided"]; see also *Webb v. Texas, supra,* 409 U.S. at 97-98 [judge gave defense witness a special warning to testify truthfully but not the prosecution witnesses]; *Quercia v. United States* (1933) 289 U.S. 466, 470; *United States v. Laurins* (9th Cir. 1988) 857 F.2d 529, 537 [judge's comments require a new trial if they show actual bias or the jury "perceived an appearance of advocacy or partiality"]; see also *People v. Gosden* (1936) 6 Cal. 2d 14, 26-27 [judicial comment during instructions is reviewable on appeal without objection below].)

Further, the error violated Lucas' right to present a defense by removing crucial defense evidence from the jury's consideration in violation of Lucas' state (Article I, section 7, 15, 16 and 17) and federal (6th and 14th Amendments) constitutional rights to due process, fair trial by jury, and compulsory process. The United States Supreme Court has again and again noted the "fundamental" or "essential" character of a defendant's right both to present a defense, (*Crane v. Kentucky* (1986) 476 U.S. 683, 687; *California v. Trombetta* (1984) 467 U.S. 479, 485; *Webb v. Texas, supra*, 409 U.S. at 98; *Washington v. Texas, supra*, 388 U.S. at 19), and present witnesses as a part

of that defense. (*Taylor v. Illinois* (1988) 484 U.S. 400, 408; *Rock v. Arkansas* (1987) 483 U.S. 44, 55; *Chambers v. Mississippi* (1973) 410 U.S. 284, 294, 302; *Webb*, *supra*, 409 U.S. at 98; *Washington*, *supra*, 388 U.S. at 19.) The Court has variously stated that an accused's right to a defense and a right to present witnesses emanate from the Sixth Amendment (*Taylor*, *supra*, 484 U.S. at 409; *United States v. Valenzuela-Bernal* (1982) 458 U.S. 858, 867) the Due Process Clause of the Fourteenth Amendment (*Rock*, *supra*, 483 U.S. at 51; *Trombetta*, *supra*, 467 U.S. at 485; *Chambers*, *supra*, 410 U.S. at 294; *Webb*, *supra*, 409 U.S. at 97; *In re Oliver* (1948) 333 U.S. 257), or both. (*Crane*, *supra*, 476 U.S. at 690; *Strickland v. Washington* (1984) 466 U.S. 668, 684-85; *Washington*, *supra*, 388 U.S. at 17-18.)

Finally, because the error arbitrarily denied Lucas his state created rights to balanced jury instructions (e.g., *People v. Moore, supra*, 43 Cal.3d at 526-27), it violated his right to due process under the Fourteenth Amendment to the United States Constitution. (*Hicks v. Oklahoma* (1980) 447 U.S. 343, 346; see also *People v. Sutton* (1993) 19 Cal.App.4th 795, 804; *Hernandez v. Ylst* (9th Cir. 1991) 930 F.2d 714, 716.)

F. The Error Was Prejudicial

The error was particularly prejudicial in the present case because all the jurors found Lucas not guilty on the charge to which Lucas had presented substantial alibi evidence (Garcia) and one juror found that Lucas was not guilty of the Strang/Fisher charges. Thus, due to the erroneous instruction, the jurors were <u>not</u> instructed to consider the defendant's alibi as to Garcia and the third party guilt evidence as to Strang/Fisher (Robert Strang) as a basis for acquitting Lucas on the other counts and yet they were instructed that any perceived similarities between the crimes were a basis for convicting Lucas. As in *Cool v. United States*, *supra*, 409 U.S. at 103 n. 4, this inequity warrants

reversal.

Also, because the erroneous instruction removed a defense theory from the jury's consideration, the judgment should be reversed. (See *People v. Rivera* (1984) 157 Cal.App.3d 736, 743; *People v. Anderson* (1983) 144 Cal.App.3d 55, 63; *United States v. Hairston* (9th Cir. 1995) 64 F.3d 491, 495; *United States v. Zuniga* (9th Cir. 1993) 6 F.3d 569, 571; *United States v. Escobar de Bright* (9th Cir. 1984) 742 F.2d 1196, 1201.)

Further, the guilt judgment should be reversed under the state harmless-error standard. (*People v. Watson* (1956) 46 Cal.2d 818, 836.) "'In a close case . . . any error of a substantial nature may require a reversal and any doubt as to its prejudicial character should be resolved in favor of the appellant.' [Citation]." (*People v. Von Villas* (1992) 11 Cal.App.4th 175, 249.) In the present case the error was substantial because the cross-admissibility ruling allowed the prosecution to heavily rely on the other crimes to fill in the evidentiary gaps in individual cases such as Jacobs. (See § 2.3.5.1(H), pp. 293-99 below, incorporated herein for a summary of the prosecutor's extensive closing argument reliance on the other crimes evidence.) Therefore, the judgment should be reversed under the *Watson* standard.

Moreover, because the error violated Lucas' federal constitutional rights, the judgment should be reversed unless the prosecution demonstrates beyond a reasonable doubt that there is no reasonable possibility the error could have affected the proceedings. (*Chapman v. California* (1967) 386 U.S. 18, 23-24; see also *In re Rodriguez* (1987) 119 Cal.App.3d 457, 469-70 [*Chapman* standard applied to combined impact of state and federal constitutional errors]; *People v. Williams* (1971) 22 Cal.App.3d 34, 58-59 [same].) Given the closeness of the evidence and the substantial impact of the error, the prosecution cannot meet this burden. Therefore, the judgment

should be reversed under the federal harmless-error standard.

Even if the error was not prejudicial as to the guilt judgment, it was prejudicial, individually and cumulatively, as to penalty. The penalty trial was closely balanced[260] and the error was substantial. Certainly, erroneously authorizing the jury to consider the Santiago and Swanke cases to find Lucas guilty of the Jacobs murders was a "substantial error" since it undermined the lingering doubt theory at penalty. Therefore, the prosecution cannot meet its *Chapman* burden of proving beyond a reasonable doubt that the error was harmless as to the defense mitigating theory of lingering doubt. (See Volume 6, § 6.5.1(D), pp. 1551-52, incorporated herein [substantial error at penalty is prejudicial under *Chapman*].) Further, even if that error were viewed solely as an error of state law, reversal would be required, for there is at least "a reasonable (i.e., realistic) possibility" that but for that substantial error, the jury, giving due weight to the lingering doubt they likely would have otherwise harbored, would not have rendered a death verdict. (*People v. Brown* (1988) 46 Cal.3d 432, 448.)

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[260] See Volume 7, § 7.5.1(J)(3)(a), pp. 1619-22, incorporated herein [close balance at penalty demonstrated by near-deadlock, length of deliberations, request for readback of testimony, request for re-instruction, etc.].

2 JACOBS CASE

2.3 JACOBS CROSS-ADMISSIBILITY AND CONSOLIDATION ISSUES

2.3.4 THE CROSS-ADMISSIBILITY INSTRUCTIONS WERE ERRONEOUS AND PREJUDICIAL

ARGUMENT 2.3.4.5

THE OTHER CRIMES INSTRUCTION ERRONEOUSLY FAILED TO REQUIRE JUROR UNANIMITY AS TO THE EXISTENCE OF THE REQUISITE CROSS-OFFENSE SIMILARITY NEEDED AS A PREREQUISITE TO CONSIDERATION OF OTHER CRIMES EVIDENCE

The other crimes evidence instruction required the jury to find as a foundational fact before considering other crimes evidence, that the other crimes "show a characteristic method, plan or scheme, in the commission of criminal acts similar to any method, plan or scheme used in the commission of the offense in the count then under consideration." (CT 14307.) However, the instruction erroneously failed to inform the jury that its preliminary finding must be agreed upon unanimously by all twelve jurors before the other crimes evidence could be considered.

This Court has held that juror unanimity is not required as to foundational evidentiary matters. (See *People v. Miranda* (1987) 44 Cal.3d 57, 99 [unanimity not required as to other crimes used for penalty aggravation]; see also, *People v. Hamilton* (1988) 46 Cal.3d 123, 145.)

However, this rule undermines the defendant's federal constitutional rights to due process and fair trial by jury (U.S. Const. 6th and 14th Amendments):

> In California, jury unanimity is required in criminal cases. Presumably, then, jury unanimity is also required in finding preliminary facts in such cases. In California, as elsewhere, jurors can return a guilty verdict only if they find the accused guilty beyond a reasonable doubt. Presumably, that standard applies to preliminary facts that are also elements of the offense. But the standard may apply to other preliminary facts. At least where circumstantial evidence has been received, jurors are told that each fact which is essential to complete a set of circumstances necessary to establish guilt must be proved beyond a reasonable doubt. In other words, before an inference essential to establish guilt may be found to have been proved beyond a reasonable doubt, each fact or circumstance upon which such inference necessarily rests must be proved beyond a reasonable doubt. [Footnotes omitted.] (Mendez, *California Evidence*, West Publishing (1993) § 17.08 p 344.)

In the present case the determination of whether one offense should be considered to prove identity as to any other offense was an essential fact which the jury should have been required to find unanimously. Hence, individual jurors were permitted to rely on a "similar" offense even though a majority of the jurors had found it was not "similar." For example, as to Jacobs, three jurors could have relied on Santiago, three on Swanke, three on Strang/Fisher and three on Garcia all culminating in conviction on Jacobs. If nothing else, such a process is an unconstitutionally unreliable basis upon which to predicate a capital conviction and sentence of death. Such unreliability violated Lucas' Eighth and Fourteenth Amendment rights to due process and a reliable guilt and penalty determination. (See *Beck v. Alabama* (1980) 447 U.S. 625, 627-46; see also *Kyles v. Whitley* (1995) 514 U.S. 419, 422; *Burger v. Kemp* (1987) 483 U.S. 776, 785; *Gilmore v. Taylor* (1993) 508 U.S. 333, 342.) Moreover, the failure to properly instruct the jury violated Lucas' state (Cal. Const. Art. I, §§ 7, 15 and 16) and federal constitutional

rights to due process and fair trial by jury (6th and 14th Amendments) which require that the jury fully understand the law and that the jury fairly and accurately apply that law. (See *Estelle v. McGuire* (1991) 502 U.S. 62, 70-72 [due process implicated if jurors misunderstood instructions]; see also *United States v. Gaudin* (1995) 515 U.S. 506, 514 [it is "the jury's constitutional responsibility. . . not merely to determine the facts, but to apply the law to those facts . . ."].)

Further, "[i]mplicit in the right to trial by jury afforded criminal defendants under the Sixth Amendment to the Constitution of the United States is the right to have that jury decide all relevant issues of fact and to weigh the credibility of witnesses." (*United States v. Hayward* (D.C. Cir. 1969) 420 F.2d 142, 144; see also *United States v. Gaudin* (1995) 515 U.S. 506, 511; *Davis v. Alaska* (1974) 415 U.S. 308, 318 [". . . counsel [must be] permitted to expose to the jury the facts from which jurors, as the sole triers of fact and credibility, [could] appropriately draw inferences relating to the reliability of the witness"]; *Bollenbach v. United States* (1946) 326 U.S. 607, 614 [". . . the question is not whether guilt may be spelt out of a record, but whether guilt has been found by a jury according to the procedure and standards appropriate for criminal trials . . . "].) "A fundamental premise of our criminal trial system is that 'the jury is the lie detector.' [Citation.] Determining the weight and credibility of witness testimony, therefore, has long been held to be the 'part of every case [that] belongs to the jury, who are presumed to be fitted for it by their natural intelligence and their practical knowledge of men and the ways of men.' [Citation.]" (*United States v. Scheffer* (1998) 523 U.S. 303, 313.)

The error was prejudicial because, in combination with other errors, the jury was permitted to convict on the Jacobs charges based on a mere suspicion

that Lucas committed the Garcia and/or Strang/Fisher murders. (See § 2.3.4.2, pp. 238-52 above, incorporated herein.)

The evidence in Jacobs was closely balanced. (See § 2.3.1(I)(2), pp. 209-11 above, incorporated herein.) "'In a close case . . . any error of a substantial nature may require a reversal and any doubt as to its prejudicial character should be resolved in favor of the appellant.' [Citation]." (*People v. Von Villas* (1992) 11 Cal.App.4th 175, 249.) Certainly, erroneously authorizing the jurors to bootstrap multiple charges into convictions based on mere suspicion, was a substantial error especially because the cross-admissibility ruling allowed the prosecution to heavily rely on the other crimes to fill in the evidentiary gaps in individual cases such as Jacobs. (See § 2.3.5.1(H), pp. 293-99 below, incorporated herein for a summary of the prosecutor's extensive closing argument reliance on the other crimes evidence.)

Moreover, given the close balance of the evidence as to the Jacobs' charges, the prosecution cannot meet its burden under *Chapman v. California* (1967) 386 U.S. 18, of proving beyond a reasonable doubt that the error was harmless.

Even if the error was not prejudicial as to the guilt judgment, it was prejudicial, individually and cumulatively, as to penalty. The penalty trial was closely balanced[261] and the error was substantial. Certainly, erroneously authorizing the jury to consider the Santiago and Swanke cases to find Lucas guilty of the Jacobs murders was a "substantial error" since it undermined the

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[261] See Volume 7, § 7.5.1(J)(3)(a), pp. 1619-22, incorporated herein [close balance at penalty demonstrated by near-deadlock, length of deliberations, request for readback of testimony, request for re-instruction, etc.].

lingering doubt theory at penalty. Therefore, the prosecution cannot meet its *Chapman* burden of proving beyond a reasonable doubt that the error was harmless as to the defense mitigating theory of lingering doubt. (See Volume 6, § 6.5.1(D), pp. 1551-52, incorporated herein [substantial error at penalty is prejudicial under *Chapman*].) Further, even if that error were viewed solely as an error of state law, reversal would be required, for there is at least "a reasonable (i.e., realistic) possibility" that but for that substantial error, the jury, giving due weight to the lingering doubt they likely would have otherwise harbored, would not have rendered a death verdict. (*People v. Brown* (1988) 46 Cal.3d 432, 448.)

2 JACOBS CASE

2.3 JACOBS: CROSS-ADMISSIBILITY AND CONSOLIDATION ISSUES

2.3.4 THE CROSS-ADMISSIBILITY INSTRUCTIONS WERE ERRONEOUS AND PREJUDICIAL

ARGUMENT 2.3.4.6

THE STANDARD FOR DETERMINING WHETHER THE DEFENDANT COMMITTED THE OTHER OFFENSES SHOULD HAVE BEEN PROOF BEYOND A REASONABLE DOUBT[262]

In § 2.3.4.2, pp. 238-52 above, incorporated herein, it was established that the trial court's instruction on the cross-admissibility of the other charges failed to require the jury to find that the defendant committed the other offense before "cross-considering" that offense. Because the jury was not required to make such finding under any standard, it should not be necessary to reach the question of what standard should have been utilized. However, if the issue is addressed, the standard should be proof beyond a reasonable doubt.

Due process "protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." (*In re Winship* (1970) 397 U.S. 358, 364.) It requires the state to prove "'every ingredient of an offense beyond a reasonable doubt. . . .'" (*Sandstrom v. Montana* (1979) 442 U.S. 510, 524, quoting *Patterson v. New York* (1977) 432 U.S. 197, 215.) "[A] jury's verdict cannot stand if the instructions provided the jury do not require it to find each

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[262] *People v. Medina* (1995) 11 Cal.4th 694, 762-63 is to the contrary. However, *Medina* should be reconsidered in light of the federal constitutional arguments raised in the present case which were not addressed in *Medina*.

element of the crime under the proper standard of proof. [Citation.]" (*Cabana v. Bullock* (1986) 474 U.S. 376, 384.)

In the present case, the instructions allowed the jury to utilize other crimes to convict the defendant even though such crimes were not proven beyond a reasonable doubt. Accordingly, the jury was permitted to return a verdict of guilt without finding Lucas guilty beyond a reasonable doubt, thus reducing the prosecution's burden of proof in violation of Lucas' Sixth and Fourteenth Amendment rights to due process and trial by jury. (See *People v. Figaro* (1986) 41 Cal.3d 714; *Sandstrom v. Montana* (1979) 442 U.S. 510.)

Because such an error is structural, the judgment should be reversed without a showing of prejudice. (See *Sullivan v. Louisiana* (1993) 508 U.S. 275.)

Alternatively, the judgment should be reversed unless the prosecution demonstrates beyond a reasonable doubt that it was harmless. (*Chapman v. California* (1967) 386 U.S. 18.)[263]

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[263] The cross-admissibility ruling allowed the prosecution to heavily rely on the other crimes to fill in the evidentiary gaps in individual cases such as Jacobs. (See § 2.3.5.1(H), pp. 293-99 below, incorporated herein for a summary of the prosecutor's extensive closing argument reliance on the other crimes evidence.)

2 JACOBS CASE

2.3 JACOBS: CROSS-ADMISSIBILITY AND CONSOLIDATION ISSUES

2.3.5 LUCAS WAS DENIED A FULL AND FAIR HEARING ON CROSS-ADMISSIBILITY AND CONSOLIDATION

ARGUMENT 2.3.5.1

THE JUDGE ERRONEOUSLY REFUSED TO CONSIDER THE CONFESSION OF JOHNNY MASSINGALE AND OTHER DEFENSE EVIDENCE IN DECIDING THE CROSS-ADMISSIBILITY/ CONSOLIDATION MOTION

A. Introduction

One of the most important in limine decisions for the trial judge was whether to allow consolidation and cross-admissibility of the five different incidents. Cross-admissibility was critical to the prosecution's case because it allowed the jury to rely on all the other counts in deciding whether the prosecution had met its burden to prove the identity of the culprit as to any particular count. Without consolidation and cross-admissibility each count would have to stand on its own.[264]

In support of its motion for cross-admissibility and consolidation the prosecution presented much of its case-in-chief evidence. (See § 2.3.1(C), pp. 145-96 above, incorporated herein.) However, in response to Lucas' request to present defense evidence in opposition to cross-admissibility (such as the

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[264] Even though the jurors rejected the prosecution's theory that the same person committed all of the charged offenses, they still likely relied on the other charges to convict Lucas on the Jacobs, Swanke and Santiago counts. (See § 2.3.5.1(H), pp. 293-99 below, incorporated herein.)

confession of Johnny Massingale to the Jacobs murders), the trial judge ruled that defense evidence would not be permitted.

This ruling was an abuse of discretion which violated Lucas' rights under the Due Process Clause of the 14th Amendment and the Cruel and Unusual Punishment Prohibition of the Eighth Amendment of the federal constitution.[265] This is so because cross-admissibility must not be granted without considering the extent to which the evidence implicates the defendant in the various offenses at issue. Furthermore, cross-admissibility analysis also requires the trial court to weigh the probative value of the evidence in the context of Evidence Code § 352 and consider the impact of joining a strong case with a weak one. Obviously, these determinations cannot be fairly and reliably made without considering both the prosecution and defense evidence. Accordingly, because the trial judge granted cross-admissibility without knowing and considering all the material facts, her ruling was an abuse of discretion. (See *In re Cortez* (1971) 6 Cal.3d 78, 85-86 [sound exercise of discretion requires that all material facts are known and considered].)

And, because the cross-admissibility ruling severely prejudiced Lucas, the judgment should be reversed.

B. Procedural Background

See § 2.3.1(B), pp. 140-45 above, incorporated herein.

C. Statement Of Facts

The evidence presented at the cross-admissibility/consolidation hearing

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[265] Consolidation/cross-admissibility issues must be evaluated with greater caution in a capital case. (See e.g., *People v. Musselwhite* (1998) 17 Cal.4th 1216, 1244; *Williams v. Superior Court* (1984) 36 Cal.3d 441, 454.)

is set forth at § 2.3.1(C), pp. 145-96 above, incorporated herein.[266] However, this evidence is presented entirely from the prosecution's perspective because no defense evidence was allowed. Crucial defensive matters which the judge did not consider included the following:

Challenges to the accuracy and reliability of the prosecution's scientific evidence, including serology (CT 3895-97), handwriting analysis (CT 3882), hair analysis (CT 3881), and wound comparison evidence (CT 3896-98); Massingale's confession in Jacobs (see § 2.2(N)(1)(e), pp. 110-13, incorporated herein), the foreign pubic hair in Swanke (see Volume 4, § 4.2(B)(2)(d), pp.1116-17, incorporated herein), the alibis in Santiago (see Volume 3, § 3.2(B)(4), pp. 805-06, incorporated herein) and Garcia (see Volume 5, § 5.1.2(B)(1), pp. 1268-70, incorporated herein), and the third party guilt evidence in Strang/Fisher. (See Volume 5, § 5.2.2(B)(1-7, 9-10), pp. 1294-1307, incorporated herein.)

D. Defense Evidence Must Be Considered In Deciding Cross-Admissibility Under Evidence Code § 1101(b) And § 352 As Well As Article I, § 28(d) Of The California Constitution

1. Cross-Admissibility Requires Independent Evidence Of The Defendant's Guilt As To The Other Offenses

The admissibility of other crimes evidence depends upon "a closely reasoned review" regarding three factors: 1) materiality of the fact sought to be proved or disproved; 2) tendency of the prior crime to prove or disprove the material fact and 3) rules or policies requiring exclusion. (*People v. Ewoldt* (1994) 7 Cal.4th 380, 408; see also *People v. Thompson* (1988) 45 Cal.3d 86, 109; *People v. Bigelow* (1984) 37 Cal.3d 731, 747.)

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[266] See also CT 3879-98.

In performing this "closely reasoned review" a fundamental consideration is the extent to which the accused can be independently linked to the other offenses. This is so because the probative value of the other offenses is inevitably tied to the foundational prerequisite that the accused committed the other offense. If the independent evidence points to the accused as the culprit then the probative value is increased. To the extent that the independent evidence does not point to the accused or points to another then the probative value is lessened. (See § 2.3.4.2(C), pp. 245-48 above, incorporated herein.) Without such an independent analysis of each offense the issue of cross-admissibility, and ultimately the jury's verdicts, will be based on improper "bootstrapping." (*People v. Albertson* (1944) 23 Cal.2d 550, 580-81.)

Moreover, consideration of the independent evidence of the defendant's guilt as to the other offenses is also necessary for the proper exercise of discretion under Evidence Code § 352 which requires the court to balance the probative value of the evidence against the prejudicial impact. (See Witkin, *California Evidence* (4th Ed.) § 86.) One of the "chief elements" of probative value for § 352 purposes is relevance. (Simons on Evidence (West 2002) § 1:28, p. 26.) Hence, the trial court must consider the extent to which the evidence "tends logically, naturally, and by reasonable inference to prove the issue on which it is offered. . . ." (*Ibid.*)

In sum, the trial court cannot properly exercise its discretion as to the admissibility of other crimes evidence without considering the extent to which the accused is implicated in those crimes.

2. The Defendant's Connection With The Other Offenses Cannot Be Reliably Evaluated Without Consideration Of The Defense Evidence

As discussed above, the admission of other offenses under § 1101(b) and § 352 requires a "closely reasoned review." Moreover, this review is especially important in a capital case which requires heightened reliability in both the guilt and penalty determinations. (See *Beck v. Alabama* (1980) 447 U.S. 625, 627-46; see also *Kyles v. Whitley* (1995) 514 U.S. 419, 422; *Burger v. Kemp* (1987) 483 U.S. 776, 785; *Gilmore v. Taylor* (1993) 508 U.S. 333, 342.) The reviewing court "must resolve the issue in light of the whole record – i.e., the entire picture of the defendant put before the jury – and may not limit [its] appraisal to isolated bits of evidence selected by the respondent." (*Id.* at 576-577; see also *People v. Guiton* (1993) 4 Cal.4th 1113, 1130; *People v. Silberman* (1989) 212 Cal.App.3d 1099, 1110-11; cf., *People v. Johnson* (1980) 26 Cal.3d 557, 577 [in reviewing record for sufficiency of evidence on appeal the court does not "limit its review to the evidence favorable to the respondent"].) "Only with an adversary process can the reliable evidence be sorted out from the unreliable." (*Elledge v. Dugger* (11th Cir. 1987) 823 F.2d 1439, 1452.)

It goes without saying that a "closely reasoned review" of reliability and probative value cannot be accomplished if only the prosecution's evidence is considered.

Moreover, the California Constitution (Article I, § 28(d)) provides that "relevant evidence shall not be excluded in any criminal proceeding, including pretrial . . . motions and hearings" [emphasis added] except under statutes relating to privilege, hearsay or under Evidence Code Sections 352, 782 and 1103. Clearly the consolidation/cross-admissibility hearing was a "criminal

proceeding" as to which the defense evidence was material and relevant within the meaning of Article I, § 28(d).

E. Failure To Consider The Defense Evidence Violated The Federal Constitution

If state law were construed to allow admission of other crimes based solely on the prosecution's evidence, the Due Process Clause of the federal constitution would be implicated. The right to present evidence is a linchpin of the due process right to a fair hearing and that right was violated here. (See *People v. Vickers* (1972) 8 Cal.3d 451, 457-58 [fundamental fairness requires full access to the courts and a meaningful opportunity to be heard].) Allowing only the prosecution to present evidence also violated due process by unjustifiably creating an imbalance between the prosecution and defense. "[I]n the absence of a strong showing of state interests to the contrary" there "must be a two-way street" as between the prosecution and the defense. (*Wardius v. Oregon* (1973) 412 U.S. 470, 475.) Hence, the Due Process and Equal Protection Clauses of the Fourteenth Amendment are violated by unjustified and uneven application of criminal procedures in a way that favors the prosecution over the defense. (*Ibid.*; see also *Lindsay v. Normet* (1972) 405 U.S. 56, 77 [arbitrary preference to particular litigants violates equal protection]; *Green v. Georgia* (1979) 442 U.S. 95, 97 [defense precluded from presenting hearsay testimony which the prosecutor used against the co-defendant]; *Webb v. Texas* (1972) 409 U.S. 95, 97-98 [judge gave defense witness a special warning to testify truthfully but not the prosecution witnesses]; *Washington v. Texas* (1967) 388 U.S. 14 [accomplice permitted to testify for the prosecution but not for the defense]; *Chambers v. Mississippi* (1973) 410 U.S. 284 [unconstitutional to bar defendant from impeaching his own witness although the government was free to impeach that witness].)

Additionally, the Sixth and Fourteenth Amendments to the federal constitution guarantee the rights to due process, confrontation, compulsory process, counsel and to present a defense. (See *Chambers v. Mississippi*, *supra*, 410 U.S. at 294; *Webb v. Texas, supra,* 409 U.S. 95; *Washington v. Texas, supra,* 388 U.S. at 17-19; see Volume 3, § 3.6.2(B), pp. 953-54, incorporated herein.) The right to call witnesses is also expressly guaranteed under the California Constitution. (See *People v. Chavez* (1980) 26 Cal.3d 334, 353.)

Furthermore, the Fourteenth Amendment requires that no one can be deprived of liberty without at least the basic due process rudiments of a day in court; at a minimum, the rights to counsel, to examine the witnesses against him, and to offer testimony. (*Rock v. Arkansas* (1987) 483 U.S. 44, 51.)

Thus, both the California and federal constitutions guarantee the defendant a right to "his day in court" (*In re Oliver* (1948) 333 U.S. 257, 273), free from arbitrary adjudicative procedures. (*Truax v. Corrigan* (1921) 257 U.S. 312, 332 [due process clause requires that every man shall have the protection of "his day in court," and the benefit of the general law, a law which hears before it condemns, which proceeds not arbitrarily or capriciously but upon inquiry]; *Futentes v. Shevin* (1972) 407 U.S. 67, 80 [the opportunity to be heard is one of the immutable principles of justice which inhere in the very idea of free government and is a central component of procedural due process]; *People v. Ramirez* (1979) 25 Cal.3d 260, 268 [California Due Process Clause protects against arbitrary adjudications].)

The constitutional principles set forth above were applicable to the cross-admissibility hearing in the present case. In *Holt v. Virginia* (1965) 381 U.S. 131, 136, the United States Supreme Court concluded that "[t]he right to be heard must necessarily embody a right to file motions and pleadings

essential to present claims and raise relevant issues." (See also *Bell v. Burson* (1971) 402 U.S. 535, 541-42.) Implicit within these decisions was the right to an evidentiary hearing to resolve disputed material issues of fact. The right to object and the right to file motions would be useless if the accused is arbitrarily precluded from introducing evidence in support of those motions. (See *Reece v. Georgia* (1955) 350 U.S. 85, 89 ["the right to object to a grand jury presupposes an opportunity to exercise that right"]; *People v. Vickers*, *supra*, 8 Cal.3d at 457-58.)

Moreover, the total exclusion of defense evidence at the cross-admissibility hearing reduced the reliability of the proceeding in violation of the Due Process and Cruel and Unusual Punishment Clauses of the federal constitution (8th and 14th Amendments) in a capital trial. (See *Beck v. Alabama* (1980) 447 U.S. 625, 627-46; see also *Kyles v. Whitley* (1995) 514 U.S. 419, 422; *Burger v. Kemp* (1987) 483 U.S. 776, 785; *Gilmore v. Taylor* (1993) 508 U.S. 333, 342.)

Further, because Lucas was arbitrarily denied his state created right to present relevant and material evidence under the California Evidence Code (§ 350-§ 352) and the California Constitution Article I, § 28(d), the error violated his right to due process under the Fourteenth Amendment to the United States Constitution. (*Hicks v. Oklahoma* (1980) 447 U.S. 343, 346; see also *People v. Sutton* (1993) 19 Cal.App.4th 795, 804; *Hernandez v. Ylst* (9th Cir. 1991) 930 F.2d 714, 716.)

F. The Cross-Admissibility Ruling Was Unfair And Unreliable Because The Judge Refused To Consider The Defense Evidence

In the present case the trial judge categorically refused to allow defense evidence to offset the weight or strength of the prosecution's evidence: "the court has to make its ruling based upon what it sees by the offers of proof by

the People or their evidence. . . . I think the door should be closed. . . ." (RTH 14041:28-14042:2; 14043; 14210; 18716-17.)[267]

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[267] Additional portions of the record on this question include the following:

> ". . . I don't want to get into. . .the defense putting on its entire case or selected portions of its case in the in limine motions. I find no legal ground for getting into the defense case, affirmative evidence to prove or disprove various weights of the testimony. Without a legal foundation for getting into defense evidence at this time, I simply am going to indicate that my ruling now is that that is improper. So it would not be admissible to bring in foundation on this note, and attempt to bring back Harris, and I see that as part of the larger issue that I have indicated I think several months back I was concerned about. That is, that I found no basis for bringing in defense evidence prior to trial.
>
> Mr. Landon: Could I get a clarification on that last statement, your honor?
>
> The Court: Yes.
>
> Mr. Landon: Are you saying then across the board, not just limited to the several areas that you have been addressing, but across the board you would need justification from the defense in order to present any defense evidence relating to consolidation or any of the other issues?
>
> The Court: Correct. I'm talking about affirmative factual evidence. I think this had been raised previously. If we'll show you some of our evidence we'll show you some of these are going to become weak. I indicated back then that I had some concerns because I didn't think that was appropriate to bring into in limine motions for various reasons I already outlined. But I feel more strongly as I go along it would not be appropriate to put on affirmative factual evidence. We're not talking about your right to bring in, of course, nothing to do with your right to bring in *Kelly-Frye* witnesses on serology. That is a different question. We're talking about weight evidence.
>
> Mr. Landon: What about, if I may, a situation where a

(continued...)

[267](...continued)
prosecution witness has been presented, and the defense has not gone into certain evidence that would have been direct evidence with that particular witness but would in our opinion bear some relationship and importance in the court's consideration of the total evidence in consolidation?

Mr. Feldman: There are specific witnesses, your honor, and I have a list. I have kept up as best I could a certain list of situations where you indicated, and I'm thinking Michael Jacobs off the top of my head. There were areas with respect to Jacobs which you indicated would be appropriate as affirmative defense but I (sic) which in your view, as I understood it at the time, and which we tactically determined to reserve until our case. I mean, there are illustrations, and I probably could get to – I'm not saying it is real long, but there are probably five or six witnesses, anyway, where I specifically noted out areas that consistent with what I perceive to be the court's policy areas were not explored on cross-examination, or alternatively areas weren't affirmatively presented because of what was then perceived to be the court's perception regarding what we would be entitled to do.

The Court: I think, as I recall, that was basically your decision. You didn't want to bring on any affirmative defense evidence, and you felt that that affirmative defense evidence might be relevant in the consolidation issue, but I can't – it is difficult for me to make this in a vacuum. I'm just saying as far as weight is concerned. If the issue is that somebody's case may be weak or strong depending on what the defense can produce affirmatively, I don't think it is the appropriate time to bring it in. I don't think it is during the in limine motion regarding cross admissibility and consolidation that it is appropriate to have defense evidence at that point. The court's 352 evaluation will go on the People's offers of proof or their evidence that they put forth.

Mr. Feldman: One serious problem I have with that is, for instance, John Massingale. As an offer of proof, we don't have in the record that Massingale – we don't have the witnesses testifying, be it Bill Green or David Ayers, law

(continued...)

[267](...continued)
enforcement officers, that took his confession that, in fact, a confession was made.

In the defense view the court's ruling permits the prosecution to tender the Jacobs case evidence without any reference to the facts of Massingale, the Massingale confession itself, which then requires the court in a vacuum to determine that the Jacobs case is either strong or weak, however, you see it, without hearing that piece of evidence which might be certainly strong defense evidence to indicate the weakness of the Jacobs case and potentially dispositive in you mind on the issue of severance. (RTH 14036:18-28; 14037:2-14039:16.)

The Court: Well, I still go back to my original thought, that the – that it is inappropriate to have defense evidence, including the Massingale case, brought into the in limine motions on the cross admissibility. In essence, first of all, there's no law to support it that I know of. But there are good reasons if you just started thinking about why that wouldn't be appropriate, and I think I've outlined those before, but in general it is that the defense can control what they bring into in limine motions, and it would behoove them to present pictures one way or the other if that would be advisable to do. You have to try the entire case completely before the court.

Then if the defense changed – you can see, you'd have to decide whether you can put your defendant on. You could change the decision and put on something different at trial. The parameters could completely switch over by the time you got into a trial situation. I can't see that as a matter of policy that there would be any appropriate way that that should be brought in, and opening the door ever for a slight thing like Massingale would be why you wouldn't open it up on for everything.

The court has to make its ruling based upon what it sees by the offers of proof by the People or their evidence as they've put it in and go from there.

Mr. Feldman: For the record then, out of an abundance of caution, there would be a defense motion to strike all the prosecution's evidence on consolidation on the grounds that the court's ruling would potentially compromise Mr. Lucas' due

(continued...)

[267](...continued)
process rights to a fair hearing in view of the fact this (sic) the court's ruling of necessity permits only the prosecution to present evidence and denies the opportunity to present rebuttal evidence even in the face of potential perjury of law enforcement officers, specifically Fullmer and Henderson, which information was disclosed by way of the *Pitchess* hearing. In the in limine hearings we cannot present the results, if any, of the *Pitchess* disclosure to your honor in limine. So I think really our only remedy is to request the court strike all the consolidation testimony.

The Court: Well, first of all, the only reason the consolidation testimony is put in is that the defense would not stipulate to any offers of proof. So you demanded that the People put on their evidence as opposed to making the offers of proof.

The question is does that open the door so you put on your whole case on the question of strong case weak case, and the answer to that is no. I don't see anything that permits that.

On the question of the *Pitchess*, I don't know. I have to think about that independently. All I'm saying is you have to give me an offer of proof. Certainly you've been given extremely wide latitude on the cross-examination of all these witnesses. The question is how far do you go after that? I think the door should be closed, frankly, because I think once you open it up you have an enormous kettle of fish that can't be dealt with. If you have any specific area where anyone can say why, we'll have our hearing on it. (RTH 14041:7-14043:6.)

The Court: I want to bring up two very brief things. One was last week I had opened up the area of calling defense witnesses on the area of consolidation that would be affirmative defense witnesses. I indicated I saw no law, and my ruling would be that it would not be permissible to – impermissible to call in all defense witnesses on the strong-case weak-case issue. And specifically I was thinking of a hundred twenty plus witnesses that had been discussed at a very early stage by the defense. And Mr. Landon asked for some clarification on that. I wanted to give a bit of clarification on that. (RTH 14210:3-

(continued...)

[267](...continued)
13.)

The Court: . . . Now the question is can you call in prosecution witnesses on side issues, not the major issues in the case. The major issue on consolidation has to do with the throat slashing, without any question; that is the central issue. The question is whether you can call in their witnesses on all the myriad of side issues to show whether they are credible or not credible so that I can, therefore, weigh whether it's a strong or weak case, depending on whether I think a witness is credible or not.

I don't think that either is what consolidation is all about. I can't now determine all of their witnesses in advance and say, "Well, yes, that looks like a strong I.D. witness, but actually in looking at their testimony and looking at their demeanor, I think they are a lousy witness. So, therefore, instead of being strong, your case is weak."

I don't think that's what consolidation is about. It's based on offers of proof. If they have got an eye witness and the eye witness is coming in to say something, then that generally is going to be an I.D. witness, then that is generally going to be a strong case.

Mr. Feldman: But the court just illustrated an example of looking at a witness and saying not a strong witness. That's precisely, in our view, the 352 requirement that you have to do. You must engage in that kind of balancing process or else Mr. Lucas is prejudiced by the possibility that the Swanke case, say, can, as a result of literally guilt by association, knock him down on all the other cases; domino effect. I mean, that's literally what we're concerned about, and to the extent we can prevent a domino effect, which is unfair – presumptively unfair because it only stands or falls on one situation where proof beyond a reasonable doubt may occur, our view is you have to assess the credibility and we are being prevented from showing those areas.

On the other hand, there is no such constraint on the prosecution. The prosecution has had the opportunity to call anybody they have chosen to throughout these proceedings, and

(continued...)

Hence, the judge exercised her discretion under § 1101(b) and § 352 with a view of the evidence which was fundamentally skewed in favor of the prosecution. None of the major defense theories, including third party guilt, alibi, challenges to the scientific evidence, etc., were considered. It is little wonder, therefore, that Judge Hammes ultimately made the following findings:

> The Court: I also make the following findings which support the cross-admissibility of all cases within [sic] each other for purposes of showing identity and intent:
>
> Setting aside for the moment the evidence of shared marks in all the Lucas cases that indicate a sole perpetrator, there are independent factors about each of the crimes which link David Lucas to each crime. It is the fact that Mr. Lucas is connected up through separate pieces of independent evidence to each of the crimes already linked together by signatory common marks that produces strong reliability in the identification.
>
> In these cases, cross-admissibility of each of the crimes into the others is highly probative and necessary to the People's case. Each case adds an important element to the identification

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[267](...continued)
I just would submit that as a matter of –

> The Court: That's not true either. You can make an objection at any point and say, "Why are we hearing this." All counsel came in to me at the beginning saying it had already been predecided that the People had to call the witnesses because you weren't going to stipulate to anything. So they had to call the witnesses on consolidation. And the throat slashing was central and I had to look at the throat slashings to make a determination as to whether they showed a similar pattern or whether they didn't show a similar pattern.
>
> But I cannot sit as a judge in limine and make credibility decisions on all the witnesses as a function of deciding the strength or weakness of the People's case. That ultimately is going to be the jury's decision whether it is strong evidence or weak evidence on those points. (RTH 18716:21-18718:23.)

> issue, and I believe that cross-admissibility of each of the cases in -093 into -195 is far more likely to enhance the truth-finding process than it is to detract from it. (RTH 25509:25-25510:14.)

The court also found that "none [of the prejudicial] factors, individually, or in combination, [are] sufficient to outweigh the highly probative nature of the other crimes evidence." (RTH 25511.)

These findings were not based on a sound exercise of discretion which requires that "all the material facts . . . must be both known and considered. . . ." (*In re Cortez* (1971) 6 Cal.3d 78, 85-86; see also *People v. Jordan* (1986) 42 Cal.3d 308, 316; *Carroll v. Abbott Laboratories, Inc.* (1982) 32 Cal.3d 892, 897-98; *Harris v. Superior Court* (1977) 19 Cal.3d 786, 796; *People v. Giminez* (1975) 14 Cal.3d 68, 72; *People v. Rist* (1976) 16 Cal.3d 211, 219; *People v. Stewart* (1985) 171 Cal.App.3d 59, 65; *Gossman v. Gossman* (1942) 52 Cal.App.2d 184, 195; 9 Witkin, Cal. Procedure, Appeal, § 358, 406-408.) In short, the trial judge did not exercise "informed discretion." (*People v. Belmontes* (1983) 34 Cal.3d 335, 348 fn. 8.)

G. Allowing Cross-Admissibility Violated Lucas' Federal Constitutional Rights

The state and federal Due Process Clauses protect a party from inflammatory and prejudicial matters that affect the fundamental fairness of the proceedings. (*Payne v. Tennessee* (1991) 501 U.S. 808, 825; *Dawson v. Delaware* (1992) 503 U.S. 159, 166-68; *Chambers v. Florida* (1940) 309 U.S. 227, 236-237; *Cooper v. Sowders* (6th Cir. 1988) 837 F.2d 284, 286; *Walker v. Engle* (6th Cir. 1983) 703 F.2d 959, 968; *People v. Jones* (1996) 13 Cal.4th 535, 585; *People v. Olivas* (1976) 17 Cal.3d 236, 250; *People v. Sam* (1969) 71 Cal.2d 194, 206.)

Because admission of other crimes evidence undermines fundamental

fairness it "is to be received with 'extreme caution,' and all doubts about its connection to the crime charged must be resolved in the accused's favor." (*People v. Alcala* (1984) 36 Cal.3d 604, 631, citations omitted; see also *People v. Brown* (1993) 17 Cal.App.4th 1389, 1395; *People v. Holt* (1984) 37 Cal.3d 436, 451.) Hence, the jurors' improper consideration of such evidence violated Lucas' federal constitutional due process rights under the Fourteenth Amendment. (See *McKinney v. Rees* (9th Cir. 1993) 993 F.2d 1378, 1380-85; *Walker v. Engle* (6th Cir. 1983) 703 F.2d 959, 968; see also *State v. Hawk* (Tenn. Crim. App. 1985) 688 S.W.2d 467, 474.)

Moreover, the jury's erroneous consideration of the other offenses in the present case undermined the reliability of both the guilt and penalty verdicts by allowing the jury to rely on speculative and unreliable evidence. An unreliable verdict of conviction for any criminal offense violates the Due Process Clause (14th Amendment) of the federal constitution. (*White v. Illinois* (1992) 502 U.S. 346, 363-64; *Donnelly v. DeChristoforo* (1974) 416 U.S. 637, 646.)

And, in a capital case both Due Process and Cruel and Unusual Punishment Clauses of the federal constitution (8th and 14th Amendments) require heightened reliability in the determination of guilt and death eligibility before a sentence of death may be imposed. (See *Beck v. Alabama* (1980) 447 U.S. 625, 627-46; see also *Kyles v. Whitley* (1995) 514 U.S. 419, 422; *Burger v. Kemp* (1987) 483 U.S. 776, 785; *Gilmore v. Taylor* (1993) 508 U.S. 333, 342.) This Court has also recognized this special "need for reliability" in capital cases. (See *People v. Horton* (1995) 11 Cal.4th 1068, 1134-35.)

Further, because Lucas was arbitrarily denied his state created right to exclusion of prejudicial evidence under Evidence Code § 352 and 1101(b) and to present relevant and material evidence under the California Evidence

Code (§ 350-§ 352) and the California Constitution, Art. I, § 28(d), the error violated his right to due process under the Fourteenth Amendment to the United States Constitution. (*Hicks v. Oklahoma* (1980) 447 U.S. 343, 346; see also *People v. Sutton* (1993) 19 Cal.App.4th 795, 804; *Hernandez v. Ylst* (9th Cir. 1991) 930 F.2d 714, 716.)

In sum, the jury's improper consideration of other crimes evidence undermined the fairness and reliability of the guilt and penalty trials in violation of the federal constitution.

H. The Cross-Admissibility Ruling Was Prejudicial

Other crimes evidence "has a 'highly inflammatory and prejudicial effect' on the trier of fact." (*People v. Thompson* (1980) 27 Cal.3d 303, 314.) This is especially true in a capital trial where "evidence of other crimes . . . may have a particularly damaging impact on the jury's determination whether the defendant should be executed. . . ." (*People v. McClellan* (1969) 71 Cal. 2d 793, 805; *People v. Jones* (1996) 13 Cal.4th 535, 585.) This is so because of the jurors' tendency to condemn the accused on the basis of perceived disposition to commit criminal acts. (*People v. Thompson*, *supra*, 27 Cal.3d at 317.)

In the present case the erroneous cross-admissibility ruling was prejudicial to Lucas. Even though the jury acquitted Lucas on Garcia and hung on Strang/Fisher the impact of allowing cross-admissibility was highly prejudicial to the defense, especially as to the Jacobs charges.[268]

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[268] In fact, the Strang/Fisher verdict affirmatively demonstrates that the jurors did heavily rely on cross-admissibility. Notwithstanding the absence of any independent evidence linking Lucas to the Strang/Fisher murders (see § 2.3.3, pp. 224-29 above, incorporated herein), 11 jurors voted to convict Lucas of those offenses. (RTT 12319.) The only basis upon which those 11

(continued...)

The evidence as to the Jacobs counts was closely balanced. (See § 2.3.1(I)(2), pp. 209-11 above, incorporated herein.) Hence, the jury's consideration of the Swanke and Santiago counts, each of which included direct identification evidence,[269] likely played an important role in helping the jury convict Lucas of the Jacobs counts, which did not include such direct identification testimony. Moreover, mere suspicion that Lucas was guilty of the Garcia and/or Strang/Fisher counts could also have contributed to the guilty verdicts. (See § 2.3.4.2(C), pp. 245-48 above, incorporated herein.)

And, not surprisingly, the prosecution relied heavily on the cross-admissibility theory throughout the trial. The prosecution reliance on the other offenses was emphasized to the jury from the outset. Before any evidence was taken, the judge included a preliminary instruction–over defense objection–that alerted the jury to the prosecution's theory that the evidence in each separate count could be considered to reinforce the prosecution's case in the other counts. (See § 2.3.4.1, pp. 232-37 above, incorporated herein.)

During trial the district attorney also relied heavily on the cross-admissibility theory as exemplified by the prosecution's throat wound exhibit which displayed photos of all seven wounds. (See RTT 961; Exhibit 29.)

Then, as the centerpiece of his argument, the district attorney contended that the question of who committed these offenses could be answered with one word: "pathology." (RTT 11751.) In total, 15 transcript

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[268](...continued)
jurors could have voted for guilt in Strang/Fisher was by consideration of the other offenses.

[269] In the Swanke case, there was identification of Lucas' truck. In the Santiago case, there was identification of Lucas, his seat covers, and his house. (See Volume 3, § 3.2(A)(20), p. 787, incorporated herein.)

pages contain cross-admissibility argument by the prosecutor, which was made while referring to a special visual aid specially prepared by the prosecutor (see e.g., RTT 12160):

> Mr. Williams: Ask yourself, as we move to our examination of these victims, does one person's injuries tell us anything? Probably not. Does two people who died the same way tell us something? Yes. Do three people who died the same way start to tell us something more? Absolutely. (RTT 11757:2-6.)
>
> . . . And the cause of death, once again, the same. Is there is a pattern building here, ladies and gentlemen? Is it a pattern building here? The evidence says yes, a pattern is building here. (RTT 11757:26-11758:1.)
>
> . . . And what is this telling us? Do we have one person doing this? Three people? Five people? We have one person. (RTT 11760:5-7.)
>
> . . . Now you have six throat wounds, ladies and gentlemen, and they are all similar in nature. They are all distinct. They are all unique. And they demonstrate that one single person was responsible for these injuries. (RTT 11760:22-25.)
>
> . . . This, ladies and gentlemen, is not the work of several people. It is the work of one single person, a butcher, a single solitary butcher, a butcher with a lust for death and nothing short of that. (RTT 11761:20-23.)
>
> . . . When you are considering any one particular count, say count five, and you want to attempt to determine the guilt and you are determining the guilt of Mr. Lucas on one particular count, it is permissible for you, ladies and gentlemen, to consider the other counts – the other eight counts for certain specific purposes.
>
> You may consider the other eight counts for motive. You may consider the other eight counts for the determination of a finding whether or not you find a specific plan, scheme, or common method of operation.
>
> And, in other words, what we mean here is this: while considering a count, if you find that in the other counts those things exist, a motive, you may find a motive in the count under

consideration, based upon your evaluation of those other counts.

There are additional things that you may consider. You can consider the intent of the perpetrator of these crimes.

Again, hypothetically, you're considering one particular count. You may consider the other counts for the specific purpose of determining the intent of the perpetrator on the count you are specifically considering or that is under consideration.

So you are not limited – you are not put in a little isolation chamber for each individual count and to the exclusion of all the other evidence and moving to another chamber for count two and count three and count four to the exclusion of all other evidence.

You may consider that other evidence of all of the other counts for these specific purposes. You may consider the other counts on the issue of identity.

If you are considering, again, hypothetically, count five and determining whether or not the prosecution has made their burden of proof beyond a reasonable doubt on the issue of the identity of the killer, you may consider the other counts in arriving at that conclusion. You don't need to exclude or erase from your mind the consideration of the other counts.

I think best put, in the instruction itself, you can ask your questions – when you are considering one count and analyzing the effect of the other counts, the other counts, ask yourself the question: "May it logically be concluded that if the defendant committed the other offense or offenses, he also committed the crime under consideration?"

That is a very important instruction for you to remember, because you are not limited to one specific count and the only evidence that is applicable to that one count. You can consider all of the evidence applicable to all of the counts for the reasons given. (RTT 11812:14-11814:6.)

. . . And with regard to pathology, you saw the graph this morning: the plane of transection, the vital organs transected, the depth of the transections, the cuttings, the type of cutting instrument, the fact that every one of them had multiple cutting movements in the cuts, and that the cause of death was identical, with the exception of Jodie Santiago.

And what else was important in that graph was what

evidence of choking was there.

Suzanne Jacobs, petechial hemorrhage. Gayle Garcia, petechial hemorrhaging, suffusion. Jodie Robertson, the rope burn ligature mark. Rhonda Strang, petechial hemorrhaging and suffusion and the marks along the lower rim of the cut which were consistent with being caused by manual choking with that gold chain underneath the hands of Mr. Lucas. And then, of course, the last adult victim, Anne Swanke, with that animal choke chain around her neck.

And unique to this also is the fact that the two children, there was no evidence of any choking on the children.

So this man making this statement, ladies and gentlemen, chokes. He chokes and satisfies his lust by carving the throat of his victims.

Is this all coincidence? If it is not the defendant, if it is not Mr. Lucas, who is it? It is no one else, ladies and gentlemen. It is, indeed, Mr. Lucas.

The evidence is overwhelming that Mr. Lucas is guilty of six first degree murders; six first degree murders, and those first degree murders were committed with the use of a knife. (RTT 11833:25-11834:25.)

. . . On the issue of pathology, ladies and gentlemen, we're not asking you to ignore the experts. Absolutely not. Do not ignore the experts.

I want you to take in to consideration the experts, and the reason I want you to is the very reason that I made that graph. I had that graph made up that I showed Wednesday morning, because the facts on that graph came from the very testimony that was taken from this witness stand from all of those doctors about the similarity of those cuts.

Yes, there are some differences. There are differences. But just think about some of the comments by the people that are involved in this ugly business sometimes we're in, this murder stuff.

Dr. Bucklin. 40 years. "I can't remember one, but there was one in Texas, a carpet knife."

Dr. Katsuyama. 20 years. 25 years, whatever it is. Can't remember any other than this series of murders.

Detective Henderson, the same kind of remarks.

Dr. Wecht, one or two a year.

> And we're told that there is not evidence of choking on all of the adult victims. That is just contrary to the evidence, ladies and gentlemen. Every single doctor told you that there is evidence of choking of some type; whether it be by petechial hemorrhaging, whether it be by the suffusion.
>
> Dr. Wecht: Suffusion, yes, in the Strang case, he testified. Could very easily have been done at or about the time of the struggle that Rhonda Strang died.
>
> And if there isn't petechial hemorrhaging or suffusion, what else do we have? We have got ligature marks. Every one of those women were choked. The children were not. (RTT 12160:16-12161:17.)

In sum, the judge's cross-admissibility ruling was a substantial error in a close case. "'In a close case . . . any error of a substantial nature may require a reversal and any doubt as to its prejudicial character should be resolved in favor of the appellant.' [Citation]." (*People v. Von Villas* (1992) 11 Cal.App.4th 175, 249.) The guilt judgment should be reversed under the state harmless-error standard. (*People v. Watson* (1956) 46 Cal.2d 818, 836.)

Moreover, because the error violated Lucas' federal constitutional rights, the judgment should be reversed unless the prosecution demonstrates beyond a reasonable doubt that there is no reasonable possibility the error could have affected the proceedings. (*Chapman v. California* (1967) 386 U.S. 18, 23-24; see also *In re Rodriguez* (1987) 119 Cal.App.3d 457, 469-70 [*Chapman* standard applied to combined impact of state and federal constitutional errors]; *People v. Williams* (1971) 22 Cal.App.3d 34, 58-59 [same].) Given the closeness of the evidence and the substantial impact of the error, the prosecution cannot meet this burden. Therefore, the judgment should be reversed under the federal harmless-error standard.

Even if the error was not prejudicial as to the guilt judgment, it was prejudicial, individually and cumulatively, as to penalty. The penalty trial was

closely balanced[270] and the error was substantial. Certainly, erroneously authorizing the jury to consider the Santiago and Swanke cases to find Lucas guilty of the Jacobs murders was a "substantial error" since it undermined the lingering doubt theory at penalty. Therefore, the prosecution cannot meet its *Chapman* burden of proving beyond a reasonable doubt that the error was harmless as to the defense mitigating theory of lingering doubt. (See Volume 6, § 6.5.1(D), pp. 1551-52, incorporated herein [substantial error at penalty is prejudicial under *Chapman*].) Further, even if that error were viewed solely as an error of state law, reversal would be required, for there is at least "a reasonable (i.e., realistic) possibility" that but for that substantial error, the jury, giving due weight to the lingering doubt they likely would have otherwise harbored, would not have rendered a death verdict. (*People v. Brown* (1988) 46 Cal.3d 432, 448.)

I. Alternatively The Matter Should Be Remanded For A New Cross-Admissibility Determination Before A Different Judge

As demonstrated above, the trial court's improper cross-admissibility and consolidation rulings prejudiced Lucas at both phases of trial and requires reversal of Lucas' convictions and sentence of death. Alternatively, if the Court believes it possible to remedy the denial of a fair hearing on the issues of cross-admissibility and consolidation by remanding for a new hearing on these issues at which Lucas will be permitted to present defense evidence, the hearing should be conducted before a different judge.

When the trial court has failed to properly exercise its discretion,

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[270] See Volume 7, § 7.5.1(J)(3)(a), pp. 1619-22, incorporated herein [close balance at penalty demonstrated by near-deadlock, length of deliberations, request for readback of testimony, request for reinstruction, etc.].

remand for a new hearing may be an appropriate remedy. (See e.g., *People v. Leahy* (1994) 8 Cal.4th 587, 610-11; see also *People v. Van Bushkirk* (1976) 61 Cal.App.3d 395, 405-07; cf. *People v. McGlothin* (1998) 67 Cal.App.4th 468 [remand for new sentencing hearing where trial judge failed to consider relevant factors in making Penal Code § 1385 ruling; *People v. Taylor* (2000) 80 Cal.App.4th 804, 814 [failure to exercise Penal Code § 1385 discretion based on all relevant mitigating factors].)

Having already determined and ruled that Lucas should be executed, it would be virtually impossible for Judge Hammes to remain totally impartial on remand no matter how "objective and disciplined [she] may be. . . ." (*People v. Kaanehe* (1977) 19 Cal.3d 1, 15.) Therefore, if the matter is remanded, it should be heard by a different judge. (See *Rose v. Superior Court* (2000) 81 Cal.App.4th 564, 576; *People v. Stanley* (1984) 161 Cal.App.3d 144, 156; *United States v. Mikaelian* (9th Cir. 1999) 168 F.3d 380, 387-88; *United States v. Clark* (2nd Cir. 1973) 475 F.2d 240, 251.)

2 JACOBS CASE

2.3 JACOBS: CROSS-ADMISSIBILITY AND CONSOLIDATION ISSUES

2.3.5 LUCAS WAS DENIED A FULL AND FAIR HEARING ON CROSS-ADMISSIBILITY AND CONSOLIDATION

ARGUMENT 2.3.5.2

THE TRIAL JUDGE ERRONEOUSLY FAILED TO CONSIDER EXPERT TESTIMONY REGARDING THE INABILITY OF JURORS TO HEED LIMITING INSTRUCTIONS IN CROSS-ADMISSIBILITY CASES

A. Introduction

Cross-admissibility and consolidation were crucial contested issues. An important consideration in resolving these issues was whether or not the jury could properly consider the other crimes evidence. In this regard the judge erred in refusing to consider defense expert testimony on this issue.

B. Procedural Background

On April 20, 1988 Judge Hammes addressed the admissibility of testimony from Professor Steven Penrod, a proposed defense expert on the impact of joinder of criminal charges. The defense argued that, as a matter of res judicata, Penrod is qualified as an expert by virtue of Judge Orfield's prior rulings allowing Penrod to testify at the severance hearing. (RTH 24040; CT 5176-77.) The prosecution responded that *People v. Ruiz*[271] takes care of the

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[271] *People v. Ruiz* (1988) 44 Cal.3d 589 held that a defendant must prove substantial or clear prejudice in order to establish an abuse of discretion arising from a failure to sever; mere lack of cross-admissibility, or the involvement of capital charges, is not enough.

joinder effect.[272] The prosecutor also argued that *Lockhart*[273] rejected this type of methodology. (RTH 24031; CT 5176-77.)

Judge Hammes acknowledged that joinder can prejudice the defendant (RTH 24126), but criticized Penrod's studies because they did not deal with "real life" situations. (RTH 24036; CT 5176-77.) The judge rejected the argument that she was bound by Judge Orfield's ruling (RTH 24041) and ruled that Professor Penrod's studies were irrelevant to the issues before the court. (RTH 24037; CT 5176-77.) The court also stated that there were too many variables that were not under the control of the experimenter including the cross-sectionality requirement. (RTH 24038; CT 5176-77.) In sum, Judge Hammes effectively used a *Kelly*[274] analysis to exclude the studies. (RTH 24128; CT 5178-79.)[275]

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[272] Penrod was allowed to testify at the severance hearing before Judge Orfield. (RTO 7098; 7099-7190. However, Judge Hammes did not consider herself bound by any of the prior testimony absent stipulation of the parties. Judge Hammes ruled, over objection of the prosecution, that the consolidation motion must be "re-heard" in limine. (RTH 16947; 17880.) Judge Hammes did not consider any of the prior testimony except those portions to which the parties stipulated. (See RTH 23167; In Limine Court's Exhibit 13; see also RTH 18640-41.)

[273] *Lockhart v. McCree* (1986) 476 U.S. 162.

[274] *People v. Kelly* (1976) 17 Cal.3d 24.

[275] The day after Judge Hammes' ruling the defense asked for reconsideration arguing that *People v. McDonald* (1984) 37 Cal.3d 351 justified admission of Penrod's testimony. (RTH 24076; CT 5178-79.) However, the judge repeated her conclusions that Penrod's studies did not adequately reflect the realities of life. She also observed that jurors frequently do follow cautionary instructions. (RTH 24067; CT 5178-79.) The judge again rejected the defense argument that she was bound by Judge Orfield's ruling regarding Penrod. (RTH 24072-5; CT 5178-79.)

C. Legal Principles

The trial judge is required to balance prejudice and probative value under Evidence Code § 352 when deciding whether or not to allow the admission of evidence of other offenses. (See *People v. Green* (1980) 25 Cal.3d 1, 25.) A crucial factor in this equation is whether or not the jury will be able to follow the limiting instructions. It is often assumed that limiting and cautionary instructions can cure or protect against prejudicial matters to which the jurors were exposed. However, "[I]t is the essence of sophistry and lack of realism to think that an instruction or admonition to a jury to limit its consideration of highly prejudicial evidence to its limited relevant purpose can have any realistic effect." (*People v. Gibson* (1976) 56 Cal.App.3d 119, 130; *People v. Coleman* (1985) 38 Cal.3d 69, 94 [limiting instruction inadequate to ensure that jurors would consider inflammatory hearsay only for limited purpose of supplying basis for expert opinion]; *People v. Guerrero* (1976) 16 Cal.3d 719, 729 ["no limiting instruction, however thoughtfully phrased or often repeated, could erase from the jurors' minds [the inadmissible evidence"]; *Krulewitch v. United States* (1949) 336 U.S. 440, 453, Jackson, J. concurring ["The naive assumption that prejudicial effects can be overcome by instructions to the jury, [citation] all practicing lawyers know to be unmitigated fiction. [Citation]"].)

D. The Judge Prejudicially Erred In Refusing To Consider Dr. Penrod's Testimony

In the present case the defense sought to introduce the testimony of Professor Penrod to provide empirical insight into the issue of whether jurors are able to follow limiting instructions as to cross-admissible evidence. Penrod testified, based on his studies, that the jurors would not be able to follow an instruction which permitted limited consideration of the other

offenses:

> PENROD: I am saying that when they were told they could not use it under any circumstances, they went ahead and used it. If you propose to give them instructions that gives them discretion, my results clearly indicate that they are not capable of exercising that discretion, at least with the instructions that I used. They are not capable of exercising that discretion because they went ahead and they used it even when they were mandated not to.
>
> THE COURT: You don't think that if an instruction focused them and [said], 'You may consider these other crimes and you may consider it for how it would affect your determination on motive or identi[t]y' or so forth, that they would, therefore, ignore that instruction and they wouldn't focus on that instruction?
>
> PENROD: They would go ahead and use the evidence and use it indiscriminately.
>
> THE COURT: Okay. (RTH 24113.)

The judge's refusal to admit or consider this evidence was prejudicial error because it deprived the judge of important evidence which would have militated against granting the prosecution's consolidation motion. Had the trial judge admitted into evidence and given due weight to Professor Penrod's testimony, and appropriately conducted the required § 352 and due process weighing of probative value versus prejudicial effect, the judge would not have ruled the separate incidents cross-admissible or permitted a consolidated trial.

The error violated Lucas' federal constitutional rights because excluding Dr. Penrod's testimony denied the defense a full and fair opportunity to litigate the cross-admissibility and consolidation issues. (See § 2.3.5.1(E), pp. 282-84 above, incorporated herein.) Further, because the error arbitrarily denied Lucas his state created rights to a balancing of probative value against prejudice (Evidence Code § 352), a determination of

admissibility under Evidence Code § 1101(b), and to present relevant and material evidence under the California Evidence Code (§ 350-§ 352) and the California Constitution (Art. I, § 28(d)), it violated his right to due process under the Fourteenth Amendment to the United States Constitution. (*Hicks v. Oklahoma* (1980) 447 U.S. 343, 346; see also *People v. Sutton* (1993) 19 Cal.App.4th 795, 804; *Hernandez v. Ylst* (9th Cir. 1991) 930 F.2d 714, 716.)

The error was prejudicial because consolidating the cases and allowing the jury to cross-consider all the joined charges was a substantial constitutional error[276] in a closely balanced case. (See § 2.3.5.1(H), pp. 293-99 above, incorporated herein.)

Moreover, because the error violated Lucas' federal constitutional rights the judgment should be reversed unless the prosecution demonstrates beyond a reasonable doubt that it was harmless. (*Chapman v. California* (1967) 386 U.S. 18.) Given the closeness of the evidence in Jacobs and the devastating impact of the cross-admissibility ruling, the prosecution cannot meet its burden under *Chapman*. Therefore, the judgment should be reversed.

Even if the error was not prejudicial as to the guilt judgment, it was prejudicial, individually and cumulatively, as to penalty. The penalty trial was closely balanced[277] and the error was substantial. Certainly, erroneously

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[276] The cross-admissibility ruling allowed the prosecution to heavily rely on the other crimes to fill in the evidentiary gaps in individual cases such as Jacobs. (See § 2.3.5.1(H), pp. 293-99 above, incorporated herein for a summary of the prosecutor's extensive closing argument reliance on the other crimes evidence.)

[277] See Volume 7, § 7.5.1(J)(3)(a), pp. 1619-22, incorporated herein [close balance at penalty demonstrated by near-deadlock, length of deliberations, request for readback of testimony, request for re-instruction, etc.].

authorizing the jury to consider the Santiago and Swanke cases to find Lucas guilty of the Jacobs murders was a "substantial error" since it undermined the lingering doubt theory at penalty. Therefore, the prosecution cannot meet its *Chapman* burden of proving beyond a reasonable doubt that the error was harmless as to the defense mitigating theory of lingering doubt. (See Volume 6, § 6.5.1(D), pp. 1551-52, incorporated herein [substantial error at penalty is prejudicial under *Chapman*].) Further, even if that error were viewed solely as an error of state law, reversal would be required, for there is at least "a reasonable (i.e., realistic) possibility" that but for that substantial error, the jury, giving due weight to the lingering doubt they likely would have otherwise harbored, would not have rendered a death verdict. (*People v. Brown* (1988) 46 Cal.3d 432, 448.)

E. Alternatively The Matter Should Be Remanded For A New Cross-Admissibility Determination Before A Different Judge

As demonstrated above, the trial court's improper cross-admissibility and consolidation rulings prejudiced Lucas at both phases of trial and requires reversal of Lucas' convictions and sentence of death. Alternatively, if the Court believes it possible to remedy the denial of a fair hearing on the issues of cross-admissibility and consolidation by remanding for a new hearing on these issues at which Lucas will be permitted to present defense evidence, the hearing should be conducted before a different judge. (See § 2.3.5.1(I), pp. 299-300 above, incorporated herein.)

2 JACOBS CASE

2.3 JACOBS: CROSS-ADMISSIBILITY AND CONSOLIDATION ISSUES

2.3.5 LUCAS WAS DENIED A FULL AND FAIR HEARING ON CROSS-ADMISSIBILITY AND CONSOLIDATION

ARGUMENT 2.3.5.3

THE JUDGE ERRONEOUSLY FAILED TO RULE ON THE CROSS-ADMISSIBILITY OF EACH OFFENSE INDEPENDENTLY

A. Introduction

In ruling that all the charges were cross-admissible the judge considered the offenses as a whole rather than determining cross-admissibility on a case-by-case basis. This failure to conduct the required independent analysis necessitates remand.

B. Procedural Background

The judge's ruling on cross-admissibility reflected a consideration of all the charges together rather than an independent consideration of each charge:

> The Court: I start from the finding therefore, as stated, that throat cutting cases are substantially significant in themselves.
>
> The following shared mark I consider to be of signatory significance, significant enough almost by itself, and certainly strong enough in combination with the above factors, to lead to the conclusion that one perpetrator was responsible for all the Lucas case victims: that factor is the unique cut involved in the Lucas case throat wounds. (RTH 25506:22-25507:2.)
>
> . . .
>
> Dr. Katsuyama testified that based on the very close

similarities in location and extent of the Lucas case neck cuts, "One has to consider the possibility that one person may have committed them all." (RTH 25508:27-25509:2

Dr. Bucklin's testimony revealed that the Lucas case cuts share a combination of similarities not shared by any of the other San Diego throat cut cases over the past 20 years. He also testified that the Lucas cases were not so similar in his opinion that he would testify – nor would he expect any responsible pathologist to testify – that the wounds themselves suggest one perpetrator. Of note to this court, he also said that he could not personally conceive of any two homicide injuries so similar that he would feel comfortable testifying the injuries themselves suggested one perpetrator. (RTH 25509:3-25509:13.)

. . .

In these cases, cross-admissibility of each of the crimes into the others is highly probative and necessary to the People's case. Each case adds an important element to the identification issue, and I believe that cross-admissibility of each of the cases in -093 into -195 is far more likely to enhance the truth-finding process than it is to detract from it. (RTH 25510:8-14.)

C. Legal Principles

This Court has made it clear that the cross-admissibility of one charge to prove another must be determined by independent comparison of the one charge with the other. (See § 2.3.5.1(D)(1), pp. 279-81 above, incorporated herein.)

D. By Failing To Conduct Independent Cross-Admissibility Analysis Judge Hammes Abused Her Discretion

In the present case the judge failed to conduct the required independent examination of the charges at issue and, therefore, abused her discretion. "[W]here fundamental rights are affected by the exercise of discretion by the trial court, . . . such discretion can only be truly exercised if there is no misconception by the trial court as to the legal basis for its action." (*In re*

Carmaleta B. (1978) 21 Cal.3d 482, 496; *People v. Lara* (2001) 86 Cal.App.4th 139, 166; *People v. Davis* (1984) 161 Cal.App. 3d 796, 802-803.) To exercise the power of judicial discretion, all material facts and evidence must be both known and considered, together with legal principles essential to an informed, intelligent and just decision. [Citation.]" (*People v. Lara, supra*, 86 Cal.App.4th at 166.) "A court which is unaware of the scope of its discretionary powers can no more exercise informed discretion than one whose sentence is or may have been based on misinformation regarding a material aspect of a defendant's record." (*Ibid.*; see also *People v. Belmontes* (1983) 34 Cal.3d 335, 348, fn. 8.)

Hence, if the judge applies an incorrect standard or misapplies the standard then the court has not "properly exercised" is discretion. (*People v. Lara, supra*; see also *People v. Rist* (1976) 16 Cal.3d 211, 220 [trial court's failure to consider all factors relevant to admissibility of prior conviction]; see also *People v. Green* (1980) 25 Cal.3d 1, 25 [record must affirmatively demonstrate that court conducted correct balancing required by Evidence Code § 352]; *People v. Jiminez* (1978) 21 Cal.3d 595, 609 [cannot presume that correct standard was applied when the record is silent].)

E. The Error Violated The Federal Constitution

The state and federal Due Process Clauses protect a party from inflammatory and prejudicial matters that affect the fundamental fairness of the proceedings. (*Payne v. Tennessee* (1991) 501 U.S. 808, 825; *Dawson v. Delaware* (1992) 503 U.S. 159, 166-68; *Chambers v. Florida* (1940) 309 U.S. 227, 236-237; *Cooper v. Sowders* (6th Cir. 1988) 837 F.2d 284, 286; *Walker v. Engle* (6th Cir. 1983) 703 F.2d 959, 968; *People v. Jones* (1996) 13 Cal.4th 535, 585; *People v. Olivas* (1976) 17 Cal.3d 236, 250; *People v. Sam* (1969) 71 Cal.2d 194, 206.)

Because admission of other crimes evidence undermines fundamental fairness it "is to be received with 'extreme caution,' and all doubts about its connection to the crime charged must be resolved in the accused's favor." (*People v. Alcala* (1984) 36 Cal.3d 604, 631, citations omitted; see also, *People v. Holt* (1984) 37 Cal.3d 436, 451; *People v. Brown* (1993) 17 Cal.App.4th 1389, 1395.) Hence, the jurors' improper consideration of such evidence violated Lucas' federal constitutional due process rights under the Fourteenth Amendment. (See *McKinney v. Rees* (9th Cir. 1993) 993 F.2d 1378, 1380-85; *Walker v. Engle* (6th Cir. 1983) 703 F.2d 959, 968; see also *State v. Hawk* (Tenn. Crim. App. 1985) 688 S.W.2d 467, 474.)

Moreover, the jury's erroneous consideration of the other offenses in the present case undermined the reliability of both the guilt and penalty verdicts by allowing the jury to rely on speculative and unreliable evidence. An unreliable verdict of conviction for any criminal offense violates the Due Process Clause (14th Amendment) of the federal constitution. (*White v. Illinois* (1992) 502 U.S. 346, 363-64; *Donnelly v. DeChristoforo* (1974) 416 U.S. 637, 646.)

And, in a capital case both due process and the Cruel and Unusual Punishment Clause of the federal constitution (8th and 14th Amendments) require heightened reliability in the determination of guilt and death eligibility before a sentence of death may be imposed. (See *Beck v. Alabama* (1980) 447 U.S. 625, 627-46; see also *Kyles v. Whitley* (1995) 514 U.S. 419, 422; *Burger v. Kemp* (1987) 483 U.S. 776, 785; *Gilmore v. Taylor* (1993) 508 U.S. 333, 342.) This Court has also recognized this special "need for reliability" in capital cases. (See *People v. Horton* (1995) 11 Cal.4th 1068, 1134-35.)

Further, because the error arbitrarily denied Lucas his state created rights to a balancing of probative value against prejudice (Evidence Code §

352 and § 1101(b)) and to present relevant and material evidence under the California Evidence Code (§ 350-§ 352) and the California Constitution (Art. I, § 28(d)), it violated his right to due process under the Fourteenth Amendment to the United States Constitution. (*Hicks v. Oklahoma* (1980) 447 U.S. 343, 346; see also *People v. Sutton* (1993) 19 Cal.App.4th 795, 804; *Hernandez v. Ylst* (9th Cir. 1991) 930 F.2d 714, 716.)

In sum, the jury's improper consideration of other crimes evidence undermined the reliability of the guilt and penalty verdicts in violation of the federal constitution.

F. The Judgment Should Be Reversed

See § 2.3.5.1(H), pp. 293-99 above, incorporated herein.

G. Alternatively The Matter Should Be Remanded For A New Cross-Admissibility Hearing Before A Different Judge

See § 2.3.5.1(I), pp. 299-300 above, incorporated herein.

2 JACOBS CASE

2.3 JACOBS: CROSS-ADMISSIBILITY AND CONSOLIDATION ISSUES

2.3.5 LUCAS WAS DENIED A FULL AND FAIR HEARING ON CROSS-ADMISSIBILITY AND CONSOLIDATION

ARGUMENT 2.3.5.4

BY BOOTSTRAPPING HER FINDINGS THE JUDGE DENIED LUCAS A FAIR AND RELIABLE IN LIMINE DETERMINATION AS TO CROSS-ADMISSIBILITY AND OTHER CRUCIAL EVIDENTIARY ISSUES

A. Introduction

In a number of her rulings Judge Hammes relied on cross-consideration of the several charges against Lucas. This created a logical flaw in the judge's rulings. Because the rulings were interdependent each relied on the validity of the other without that validity having been independently established. Thus, the rulings were erroneously bootstrapped.

B. The Judge Assumed Lucas Was Guilty Of Each Separate Offense In Finding That The Offenses Were Cross-Admissible

In making her findings that the offenses were cross-admissible Judge Hammes relied on her findings that Lucas was guilty of each of the charged offenses:

> Setting aside for the moment the evidence of shared marks in all the Lucas cases that indicate a sole perpetrator, there are independent factors about each of the crimes which link David Lucas to each crime. It is the fact that Mr. Lucas is connected up through separate pieces of independent evidence to each of the crimes already linked together by signatory common marks that produces strong reliability in the identification. [¶] In

> these cases, cross-admissibility of each of the crimes into the others is highly probative and necessary to the People's case. Each case adds an important element to the identification issue, and I believe that cross-admissibility of each of the cases in -093 into -195 is far more likely to enhance the truth-finding process than it is to detract from it. (RTH 25509-10.)

C. The Judge Assumed The Offenses Were Cross-Admissible In Finding That Lucas Was Guilty Of Each Individual Offense

On the other hand, in making findings in each specific case as to crucial evidentiary issues bearing on whether Lucas had been proven guilty Judge Hammes relied on the cross-admissibility of the other offenses.

For example, Judge Hammes' ruling excluding Lucas' eyewitness identification experts was based in part upon the judge's conclusion that Jodie Santiago's identification was corroborated by the evidence that Lucas committed the other charged offenses:

> . . . [W]e have to add in all of the other cases which independently come in and begin drawing a picture that is absolutely, very, very plain. (RTH 24900.)

The identification ruling was crucial because it was essential to the prosecution's case in Santiago, and in turn, could be considered as guilt in the other offenses by virtue of cross-admissibility.

Similarly, in finding that the lost fingerprint from the Love Insurance note was not exculpatory, the judge assumed the offenses were cross-admissible and relied on "the evidence in all the Lucas cases. . . ." (RTH 25438-39.) This ruling was crucial because it impacted the prosecution evidence in Jacobs.

D. The In Limine Rulings Were Unfair And Unreliable Due To The Bootstrapping

As set forth above, Judge Hammes' cross-admissibility finding was predicated on Lucas' assumed guilt of the individual charges, while Lucas' assumed guilt of the individual charges was predicated upon the finding of cross-admissibility. This bootstrapping process precluded the judge from making a fair and reliable independent determination as to the foundational assumptions upon which her in limine rulings depended. Hence, the in limine rulings were erroneous. (Cf., *People v. Albertson* (1944) 23 Cal.2d 550, 580-81.)[278]

E. The Error Violated The Federal Constitution

The judge's bootstrapping denied Lucas his constitutional right to a full and fair hearing of the in limine motions.

Both the California and federal constitutions guarantee the defendant a right to "his day in court" (*In re Oliver* (1948) 333 U.S. 257, 273), free from arbitrary adjudicative procedures. (*Truax v. Corrigan* (1921) 257 U.S. 312, 332 [due process clause requires that every man shall have the protection of "his day in court," and the benefit of the general law, a law which hears before it condemns, which proceeds not arbitrarily or capriciously but upon inquiry]; *Futentes v. Shevin* (1972) 407 U.S. 67, 80 [the opportunity to be heard is one

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[278] "Circumstantial proof of a crime charged cannot be intermingled with circumstantial proof of suspicious prior occurrences in such manner that it reacts as a psychological factor with the result that the proof of the crime charged is used to bolster up the theory or foster suspicion in the mind that the defendant must have committed the prior act, and the conclusion that he must have committed the prior act is then used in turn to strengthen the theory and induce the conclusion that he must also have committed the crime charged. This is but a vicious circle." (*People v. Albertson*, *supra*, 23 Cal.2d at 580-81.)

of the immutable principles of justice which inhere in the very idea of free government and is a central component of procedural due process]; *People v. Ramirez* (1979) 25 Cal.3d 260, 268 [California Due Process Clause protects against arbitrary adjudications].) The Fourteenth Amendment requires that no one can be deprived of liberty without at least basic due process protections; at a minimum, the rights to counsel, to examine the witnesses against him, and to offer testimony. (*Rock v. Arkansas* (1987) 483 U.S. 44, 51.) For example, there must be a fair judicial hearing with proper development of facts before a physical restraint of the accused can be ordered. (*Davidson v. Riley* (2nd Cir. 1995) 44 F.3d 1118, 1125-26.) In the present case, the judge's bootstrapping deprived Lucas of "his day in court" in the crucial consolidation/cross-admissibility proceeding because the evidence was not fully considered. "Implicit in the right to trial by jury afforded criminal defendants under the Sixth Amendment to the Constitution of the United States is the right to have that jury decide all relevant issues of fact and to weigh the credibility of witnesses." (*United States v. Hayward* (D.C. Cir. 1969) 420 F.2d 142, 144; see also *United States v. Gaudin* (1995) 515 U.S. 506, 511; *Davis v. Alaska* (1974) 415 U.S. 308, 318 [". . . counsel [must be] permitted to expose to the jury the facts from which jurors, as the sole triers of fact and credibility, [could] appropriately draw inferences relating to the reliability of the witness"]; *Bollenbach v. United States* (1946) 326 U.S. 607, 614 [". . . the question is not whether guilt may be spelt out of a record, but whether guilt has been found by a jury according to the procedure and standards appropriate for criminal trials . . . "].) "A fundamental premise of our criminal trial system is that 'the jury is the lie detector.' [Citation.] Determining the weight and credibility of witness testimony, therefore, has long been held to be the 'part of every case [that] belongs to the jury, who are

presumed to be fitted for it by their natural intelligence and their practical knowledge of men and the ways of men.' [Citation.]" (*United States v. Scheffer* (1998) 523 U.S. 303, 313.)

Further, because the error arbitrarily denied Lucas his state created rights to a balancing of probative value against prejudice (Evidence Code § 352), a determination of admissibility under Evidence Code § 1101(b), and to present relevant and material evidence under the California Evidence Code (§ 350-§ 352) and the California Constitution (Art. I, § 28(d)), it violated his right to due process under the Fourteenth Amendment to the United States Constitution. (*Hicks v. Oklahoma* (1980) 447 U.S. 343, 346; see also *People v. Sutton* (1993) 19 Cal.App.4th 795, 804; *Hernandez v. Ylst* (9th Cir. 1991) 930 F.2d 714, 716.)

Additionally, the judge's bootstrapping of the in limine rulings undermined the reliability of her rulings and, as a consequence, also undermined the reliability of the guilt and penalty verdicts. An unreliable verdict of conviction for any criminal offense violates the federal constitution. Verdict reliability is required by the Due Process Clause (14th Amendment) of the federal constitution. (*White v. Illinois* (1992) 502 U.S. 346, 363-64; *Donnelly v. DeChristoforo* (1974) 416 U.S. 637, 646.)

Moreover, in a capital case due process and the Cruel and Unusual Punishment Clause of the federal constitution (8th and 14th Amendments) require heightened reliability in the determination of guilt and death eligibility before a sentence of death may be imposed. (See *Beck v. Alabama* (1980) 447 U.S. 625, 627-46; see also *Kyles v. Whitley* (1995) 514 U.S. 419, 422; *Burger v. Kemp* (1987) 483 U.S. 776, 785; *Gilmore v. Taylor* (1993) 508 U.S. 333, 342.)

F. The Error Was Prejudicial

Because the bootstrapping pervaded the reliability and integrity of crucial in limine rulings that impacted the entire trial, structural error was committed and the judgment should be reversed without a showing of prejudice. (See e.g., *Arizona v. Fulminante* (1991) 499 U.S. 279, 309 [structural defects in the trial mechanism, which defy analysis by "harmless-error"standards are reversible per se]; see also *Sullivan v. Louisiana* (1993) 508 U.S. 275.)

Alternatively, the guilt judgment should be reversed under the state harmless-error standard. (*People v. Watson* (1956) 46 Cal.2d 818, 836.) "'In a close case . . . any error of a substantial nature may require a reversal and any doubt as to its prejudicial character should be resolved in favor of the appellant.' [Citation]." (*People v. Von Villas* (1992) 11 Cal.App.4th 175, 249.) In the present case the error was substantial because other crimes evidence "has a 'highly inflammatory and prejudicial effect' on the trier of fact." (*People v. Thompson* (1980) 27 Cal.3d 303, 314.) This is especially true in a capital trial where "evidence of other crimes . . . may have a particularly damaging impact on the jury's determination whether the defendant should be executed. . . ." (*People v. McClellan* (1969) 71 Cal.2d 793, 805; *People v. Jones* (1996) 13 Cal.4th 535, 585.) This is so because of the jurors' tendency to condemn the accused on the basis of perceived disposition to commit criminal acts. (*People v. Thompson*, *supra*, 27 Cal.3d at 317.)[279] And, the Jacobs charges were closely balanced. (See § 2.3.1(I)(2),

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[279] The cross-admissibility ruling allowed the prosecution to heavily rely on the other crimes to fill in the evidentiary gaps in individual cases such as Jacobs. (See § 2.3.5.1(H), pp. 293-99 above, incorporated herein for a summary of the prosecutor's extensive closing argument reliance on the other (continued...)

pp. 209-11 above, incorporated herein.) Therefore, the judgment should be reversed under the *Watson* standard.

Moreover, because the error violated Lucas' federal constitutional rights, the judgment should be reversed unless the prosecution demonstrates beyond a reasonable doubt that there is no reasonable possibility the error could have affected the proceedings. (*Chapman v. California* (1967) 386 U.S. 18, 23-24; see also *In re Rodriguez* (1987) 119 Cal.App.3d 457, 469-70 [*Chapman* standard applied to combined impact of state and federal constitutional errors]; *People v. Williams* (1971) 22 Cal.App.3d 34, 58-59 [same].) Given the closeness of the evidence and the substantial impact of the error, the prosecution cannot meet this burden. Therefore, the judgment should be reversed under the federal harmless-error standard.

Even if the error was not prejudicial as to the guilt judgment, it was prejudicial, individually and cumulatively, as to penalty. The penalty trial was closely balanced[280] and the error was substantial. Certainly, erroneously authorizing the jury to consider the Santiago and Swanke cases to find Lucas guilty of the Jacobs murders was a "substantial error" since it undermined the lingering doubt theory at penalty. Therefore, the prosecution cannot meet its *Chapman* burden of proving beyond a reasonable doubt that the error was harmless as to the defense mitigating theory of lingering doubt. (See Volume 6, § 6.5.1(D), pp. 1551-52, incorporated herein [substantial error at penalty is

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[279](...continued)
crimes evidence.)

[280] See Volume 7, § 7.5.1(J)(3)(a), pp. 1619-22, incorporated herein [close balance at penalty demonstrated by near-deadlock, length of deliberations, request for readback of testimony, request for re-instruction, etc.].

prejudicial under *Chapman*].) Further, even if that error were viewed solely as an error of state law, reversal would be required, for there is at least "a reasonable (i.e., realistic) possibility" that but for that substantial error, the jury, giving due weight to the lingering doubt they likely would have otherwise harbored, would not have rendered a death verdict. (*People v. Brown* (1988) 46 Cal.3d 432, 448.)

G. If The Judgment Is Not Reversed, The Matter Should Be Remanded For A New Evidentiary Hearing

1. The Matter Should Be Remanded

The accused's fundamental federal constitutional right to due process is implicated when the defense is not given a fair opportunity to litigate evidentiary issues. (See § 2.3.5.1(E), pp. 282-84 above, incorporated herein.) Accordingly, because the in limine rulings had a crucial bearing on the reliability and fairness of the trial, the matter should be remanded for a new hearing on the motion without resort to improper bootstrapping. (See *People v. Leahy*, *supra*, 8 Cal.4th at 610-11 [remand as proper remedy for erroneous in limine hearing on admissibility of expert testimony].)

2. On Remand A Different Judge Should Be Assigned

Having already determined and ruled that Lucas should be executed, it would be virtually impossible for her to remain totally impartial no matter how "objective and disciplined [she] may be. . . ." (*People v. Kaanehe* (1977) 19 Cal.3d 1, 15.) Therefore, if the matter is remanded, it should be heard by a different judge. (See *Rose v. Superior Court* (2000) 81 Cal.App.4th 564, 576; *People v. Stanley* (1984) 161 Cal.App.3d 144, 156; *United States v. Mikaelian* (9th Cir. 1999) 168 F.3d 380, 387-88; *United States v. Clark* (2nd Cir. 1973) 475 F.2d 240, 251.)

2 JACOBS CASE

2.3 JACOBS: CROSS-ADMISSIBILITY AND CONSOLIDATION ISSUES

2.3.5 LUCAS WAS DENIED A FULL AND FAIR HEARING ON CROSS-ADMISSIBILITY

ARGUMENT 2.3.5.5

THE JUDGE ERRONEOUSLY DENIED AN EVIDENTIARY HEARING ON WHETHER THE PROSECUTION'S MOTION TO CONSOLIDATE WAS A VINDICTIVE RESPONSE TO LUCAS' ATTEMPT TO EXERCISE HIS RIGHT TO A SPEEDY TRIAL

A. Introduction

In response to Lucas' assertion of his statutory speedy trial rights, the prosecution intentionally moved to consolidate the two cases and amended its Notices of Aggravation. The defense successfully obtained an appellate order for a speedy trial in case number 75195. However, the prosecution responded by filing an eleventh hour motion to consolidate the two cases, thus undermining the appellate court's order and defeating Lucas' speedy trial rights.[281] Hence, under the circumstances, there was at least prima facie evidence that the prosecution's motion to consolidate was vindictive, and a denial of due process.[282] However, the trial court unfairly precluded the

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[281] Judge Hammes recognized that the consolidation motion was "a surprise change in position for The People." (RTH 25502.)

[282] A fair and impartial trial is a fundamental component of the accused's 14th Amendment right not to be deprived of liberty without due process of law. This right includes the right to be charged and prosecuted by a district attorney who is free "from any personal or emotional involvement in a controversy which might bias his objective exercise of judgment." (continued...)

defense from presenting evidence on this issue.[283] Accordingly, the matter should be remanded for an evidentiary hearing before a different judge.

B. Procedural And Factual Background

The Jacobs and Garcia cases (herein after "CR 75195") were set for trial August 4, 1986, to be followed by the Santiago/Swanke/Strang/Fisher cases (herein after "CR 73093") set for August 25, 1986. On July 28, 1986, Lucas brought a motion under *People v. Marsden* (1979) 2 Cal.3d 118, 123, and his counsel in CR 75195 case was relieved. On August 4, 1986, the trial date for CR 75195, new counsel was appointed and the case was continued to August 25, 1986, for the purpose of selecting a new trial date.[284] At the

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[282](...continued)
(*People v. Superior Court (Greer)* (1977) 19 Cal.3d 255, 267 fn. 8.) The court recognized this "judicial requirement of prosecutorial impartiality . . . precisely because the prosecutor enjoys such broad discretion that the public he serves and those he accuses may justifiably demand that he perform his functions with the highest degree of integrity and impartiality, and with the appearance thereof." (*Id.* at 266-267.) Similarly, in *People v. Superior Court (Marten)* (1979) 98 Cal.App.3d 515, the court observed that a "conflict of interest which might prejudice [the prosecutor] against the accused 'will . . . exist, where in the course of his official duties he acquires a conflicting 'personal' interest, or 'personal or emotional involvement,' or 'emotional stake' in the case, or where there is 'intense personal involvement' in his public duties, or where there is 'personal, as opposed to purely professional... involvement,' or 'the prosecutor is improperly utilizing the criminal proceeding as a vehicle to aid' his personal or fiduciary interests." (*Id.* at 521.)

[283] The defense motion was to recuse the individual deputy district attorneys as well as the entire office. (CT 3702-03.) The motion was also for the purpose of challenging the prosecution's consolidation motion. (CT 3703; 3710-13; 3720-22.)

[284] Also on August 4, 1986, CR 73093 case was continued to November 3, 1986.

hearing in CR 75195 on August 25, 1986, Lucas refused to further waive his right to a speedy trial and he asked that his trial in CR 75195 be set in within 60 days of August 25, 1986, as required by Penal Code § 1382(a)(2). This request was denied and, over the objection of Lucas and his counsel, trial in CR 75195 was put off until February 2, 1987. (RTO 7776-77.)

However, the Court of Appeal granted Lucas' writ petition and ordered the trial judge to vacate the trial date of February 2, 1987, in CR 75195 and to set a new trial date within 60 days of August 25, 1986.[285] Judge Orfield complied with the appellate court's order and set October 23, 1986 as the trial date in Case CR 75195. (RTO 7813)

On October 28, 1986, defense counsel in CR 75195 filed a motion to trail CR 75195 on a day-to-day basis until resolution of pretrial motions. (RTO 8126.) On November 3, 1986 CR 75195 was trailed, pending resolution of the pretrial motions. (RTO 8427.)

On November 13, 1986, CR 75195 was assigned to Judge Kennedy and sent out for trial. (RTO 8970.)

On November 19, 1986, counsel in CR 73093 reminded Judge Orfield of the December 1 trial date in CR 73093 and notified him of a forthcoming continuance motion. Mr. Landon stated "obviously with Mr. Lucas in trial on CR 75195, we will not be able to go on 73093." The D.A. seemed to agree stating: "We all agreed that in the event 75195 got under way that the other case [CR 73093] would trail behind it." (RTO 8996.) However, the prosecution thwarted Lucas' right to a speedy trial by filing a motion to consolidate CR 75195 with CR 73093. Both cases were eventually assigned

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[285] It is requested that this Court take judicial notice of this opinion. (See Evidence Code § 452(a).)

to Judge Hammes to resolve the consolidation issues and to try the cases, either separately or jointly. (CT 2722; 4808; 4811.)

Before Judge Hammes the defense filed a supplemental motion alleging prosecutorial vindictiveness as another ground for denying consolidation and as a ground for recusal of the San Diego county District Attorney's Office. (CT 3702-3824; RTH 25366; 23474-87; 12593-96.) A number of additional pleadings were filed on this issue.[286]

However, Judge Hammes eventually denied the defense request for an evidentiary hearing on vindictiveness and denied the defense motions without hearing any testimony. (RTH 25460; 25465.) Judge Hammes eventually granted the prosecution's motion to consolidate and denied the defense motion to sever. (RTH 25513; CT 5211-12.)

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[286] On June 2, 1988, the prosecution filed a supplemental statement of facts in support of motion to consolidate matters for trial. (CT 3879-98; 12651-70.) The prosecution also filed points and authorities in response to the defense motion to recuse the prosecuting attorney, supplemental response to the prosecution's consolidation motion and motion to preclude consolidation based on vindictive prosecution. (CT 3909-20; Appendices 3921-3930; 12671-83; Appendices 12684-93.) The State Attorney General filed a response in opposition to the defense motion to recuse the San Diego County District Attorney's Office. (CT 3899-3907; 12695-703.)

On June 6, 1988, the defense filed a reply to the State Attorney General and District Attorney's response to their motion to recuse the San Diego District Attorney's Office and supplemental points and authorities in opposition to consolidation. (CT 3931-3973; RTH 23791-833.) The defense also filed a subpoena duces tecum issued to Deputy District Attorneys Thomas McArdle, Daniel Williams and George Clarke regarding documents pertaining to the consolidation motion. (CT 12785-90.)

The court then heard argument on the prosecution's motion for consolidation. The court found that the motion for consolidation was not untimely, the defense motion for severance of charges within both cases was denied and all charges within both cases were joined for trial. (CT 5211-12.)

On August 23, 1988, jury selection commenced in CR 75195 (together with CR 73093). (CT 5237-38; 15535-36.) This was almost two years after the original trial date set pursuant to the Court of Appeal's order.

C. Prosecutorial Charging Decisions Motivated By Vindictiveness Are "Patently Unconstitutional"

The federal constitutional protection against prosecutorial vindictiveness "is based on the fundamental notion that it 'would be patently unconstitutional' to 'chill the assertion of constitutional rights by penalizing those who choose to exercise them.' [Citation.]" (*In re Bower* (1985) 38 Cal.3d 865, 873; see also *United States v. Jackson* (1968) 390 U.S. 570, 581.)[287] The same fundamental notion should also apply to the exercise of state created rights because the danger to the system is the same regardless of whether the legal right is based on the federal constitution or state law: "[A] judicial process which permit[s] the prosecution to increase the charges against a defendant who successfully exercised a constitutional or procedural right at trial would have a chilling effect upon the assertion of those rights and could undermine the integrity of the entire proceeding." (*In re Bower*, *supra*, 38 Cal.3d at 878; see also *Hicks v. Oklahoma* (1980) 447 U.S. 343 [arbitrary denial of state created right violates Due Process Clause of the federal constitution].) For example, "the prophylactic rule enunciated in [*Blackledge v. Perry* (1974) 417 U.S. 21] [was needed to] protect against both the possibility that defendant will be deterred from exercising a legal right, as well as the danger that the state might be retaliating against the defendant. . . ." [Emphasis added.] (*Twiggs v. Superior Court* (1983) 34 Cal.3d 360, 369-70;

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[287] Prosecutorial vindictiveness implicates the Due Process Clause of the federal constitution (Fourteenth Amendment). (*Blackledge v. Perry* (1974) 417 U.S. 21.)

see also *In re Bower*, *supra*, 38 Cal.3d at 876-77.) In fact, the right which was exercised in *Blackledge* was a "statutory right to trial de novo." (*Blackledge*, 417 U.S. at 28.)

The Due Process Clause of the California Constitution also prohibits prosecutorial charging decisions which are based on vindictiveness. (See *People v. Rivera* (1981) 127 Cal.App.3d 136, 141-44; *In re David B.* (1977) 68 Cal.App.3d 931; 935-36.)

D. Whether The Presumption Of Vindictiveness Applies

Blackledge v. Perry (1974) 417 U.S. 21 employed a presumption of vindictiveness to find a violation of due process principles without a showing of actual vindictiveness. "Thus, the court emphasized that no evidence of bad faith or maliciousness on the part of the prosecutor was produced or required." (*In re Bower*, *supra* 38 Cal.3d at 874; see also *United States v. Groves* (9th Cir. 1978) 571 F.2d 450, 453-54 [an "appearance of vindictiveness" is enough to impose a heavy burden on the prosecution to prove a lack thereof]; *United States v. Ruesga-Martinez* (9th Cir. 1976) 534 F.2d 1367, 1369 [same].) "Due process of law requires that such a potential for vindictiveness must not enter into North Carolina's two-tiered appellate process." (*Blackledge* 417 U.S. at 28; see also *North Carolina v. Pearce* (1969) 395 U.S. 711.)

In later cases, the *Pearce-Perry* presumption of vindictiveness was held not to arise where charges were increased prior to the attachment of jeopardy. (*Borden Kircher v. Hayes* (1978) 434 U.S. 357; *United States v. Goodwin* (1982) 457 U.S. 368.)

This Court has made a similar distinction between pre-jeopardy and post-jeopardy situations:

> Here, defendant was not yet in jeopardy . . . In *Edwards* [*People v. Edwards* (1991) 54 Cal.3d 787, 828] we noted that the

> attachment of jeopardy was an "important factor" in determining vindictiveness [citation] and although *Edwards* did not absolutely prohibit a court from presuming vindictiveness in a pretrial setting, neither *Edwards* nor any other California case has done so. [Citations.] (*People v. Michaels* (2002) 28 Cal.4th 486, 515.)

In the present case, the fact that jeopardy had not yet attached militates against finding a presumption of prejudice. On the other hand, the case as to which Lucas had exercised his speedy trial right had actually been sent out for trial before the prosecution moved for consolidation. (See RTO 8970.)

E. Assuming The Presumption Of Vindictiveness Does Not Apply, Lucas Should Have Been Given An Opportunity To Prove Actual Vindictiveness

"[Where] vindictiveness is not presumed, the defense must present evidence showing that the prosecutor's charging decision was motivated by a desire to punish [the defendant] for doing something the law plainly allows him to do." [Internal quotation marks and citations omitted.] (*People v. Michaels* (2002) 28 Cal.4th 486, 515.)

Accordingly, in situations where vindictiveness is not presumed fundamental fairness requires an evidentiary hearing during which the accused is given an opportunity to meet the required showing of actual vindictiveness. (See, e.g., *People v. Michaels*, *supra*, [the trial court held an evidentiary hearing even though there was "nothing suspicious" about the prosecutor's belated filing of special circumstance allegations]. It is fundamentally unfair to impose an evidentiary burden upon an accused without allowing him or her an opportunity to satisfy that burden.

The right to present evidence is a linchpin of the due process right to a fair hearing. (See *Payne v. Superior Court* (1976) 17 Cal.3d 908, 914; *In*

re William F. (1974) 11 Cal.3d 249, 255 [due process requires fundamental fairness in the fact-finding process]; *People v. Vickers* (1972) 8 Cal.3d 451, 457-58 [fundamental fairness requires full access to the courts and a meaningful opportunity to be heard]; see also *Holt v. Virginia* (1965) 381 U.S. 131, 136 [the right to object and the right to file motions would be useless if the accused is arbitrarily precluded from introducing evidence in support of those motions]; *Reece v. Georgia* (1955) 350 U.S. 85, 89; see also § 2.3.5.1(E), pp. 282-84 above, incorporated herein.)

Further, the United States Supreme Court has again and again noted the "fundamental" or "essential" character of a defendant's right both to present a defense, (*Crane v. Kentucky* (1986) 476 U.S. 683, 687; *California v. Trombetta* (1984) 467 U.S. 479, 485; *Webb v. Texas* (1972) 409 U.S. 95, 98; *Washington v. Texas* (1967) 388 U.S. 14, 19), and present witnesses as a part of that defense. (*Taylor v. Illinois* (1988) 484 U.S. 400, 408; *Rock v. Arkansas* (1987) 483 U.S. 44, 55; *Chambers v. Mississippi* (1973) 410 U.S. 284, 294, 302; *Webb*, *supra*, 409 U.S. at 98; *Washington*, *supra*, 388 U.S. at 19.) The Court has variously stated that an accused's right to a defense and a right to present witnesses emanates from the Sixth Amendment (*Taylor*, *supra*, 484 U.S. at 409; *United States v. Valenzuela-Bernal* (1982) 458 U.S. 858, 867) the Due Process Clause of the Fourteenth Amendment (*Rock*, *supra*, 483 U.S. at 51; *Trombetta*, *supra*, 467 U.S. at 485; *Chambers*, *supra*, 410 U.S. at 294; *Webb*, *supra*, 409 U.S. at 97; *In re Oliver* (1948) 333 U.S. 257), or both. (*Crane*, *supra*, 476 U.S. at 690; *Strickland v. Washington* (1984) 466 U.S. 668, 684-85; *Washington*, *supra*, 388 U.S. at 17-18.)

In the present case Lucas sought a hearing so that the testimony of principal witnesses (including the deputy district attorneys responsible for the decision to seek consolidation) could be heard and evaluated by the trier of

fact. Denial of that hearing violated the Due Process and Compulsory Process Clauses of the state (Article I, sections 1, 7, 15, 16, 17 and 28(d)) and federal (6th and 14th Amendments) constitutions. Moreover, because the error arbitrarily denied Lucas his state created rights to present evidence (California Constitution Art. I, sections 1, 7, 15, 16, 17 and 28(d); California Evidence Code § 350-§ 352) it violated his right to due process under the Fourteenth Amendment to the United States Constitution. (*Hicks v. Oklahoma* (1980) 447 U.S. 343, 346; see also *People v. Sutton* (1993) 19 Cal.App.4th 795, 804; *Hernandez v. Ylst* (9th Cir. 1991) 930 F.2d 714, 716.)

F. The Judgement Should Be Reversed

The error requires reversal because the district attorney's fairness is essential to the integrity of the process. Accordingly, structural error was committed and the judgment should be reversed without a showing of prejudice. (See e.g., *Arizona v. Fulminante* (1991) 499 U.S. 279, 309 [structural defects in the trial mechanism, which defy analysis by "harmless-error"standards are reversible per se]; see also *Sullivan v. Louisiana* (1993) 508 U.S. 275 .)

Alternatively, the guilt judgment should be reversed under the state harmless-error standard. (*People v. Watson* (1956) 46 Cal.2d 818, 836.) "'In a close case . . . any error of a substantial nature may require a reversal and any doubt as to its prejudicial character should be resolved in favor of the appellant.' [Citation]." (*People v. Von Villas* (1992) 11 Cal.App.4th 175, 249.) In the present case the error was substantial and the Jacobs charges were closely balanced. (See § 2.3.1(I)(2), pp. 209-11 above, incorporated herein.) Therefore, the judgment should be reversed under the *Watson* standard.

Moreover, because the error violated Lucas' federal constitutional

rights, the judgment should be reversed unless the prosecution demonstrates beyond a reasonable doubt that there is no reasonable possibility the error could have affected the proceedings. (*Chapman v. California* (1967) 386 U.S. 18, 23-24; see also *In re Rodriguez* (1987) 119 Cal.App.3d 457, 469-70 [*Chapman* standard applied to combined impact of state and federal constitutional errors]; *People v. Williams* (1971) 22 Cal.App.3d 34, 58-59 [same].) Given the closeness of the evidence and the substantial impact of the error, the prosecution cannot meet this burden. Therefore, the judgment should be reversed under the federal harmless-error standard.

Finally, even if the error was not prejudicial as to guilt, it was prejudicial as to penalty, under both the state and federal standards of prejudice because it undermined the mitigating theory of lingering doubt. (See Volume 1, § 1.4.2(H), p. 48, incorporated herein.)

G. Alternatively, The Matter Should Be Remanded For An Evidentiary Hearing Before A Different Judge

Retaliatory or vindictive charging practices by the prosecution "undermine the integrity of the entire proceeding." (*In re Bower*, *supra*, 38 Cal.3d at 878.) An essential component of a fair, just and reliable criminal trial is a prosecutor who is fair and even handed. The District Attorney's Office is "obligated not only to prosecute with vigor, but also to seek justice." (*People v. Conner* (1983) 34 Cal.3d 141, 148.) "Historically, courts have recognized their power to recuse in order to assure fairness to the accused and to sustain public confidence in the integrity and impartiality of the criminal justice system." (*Id.* at 148.) "The protection of prosecutorial impartiality is . . . a major purpose of the court's recusal power." (*People v. (Billy Ray) Hamilton* (1988) 46 Cal.3d 123, 140.)

Accordingly, because Lucas was not given a fair opportunity to prove

prosecutorial vindictiveness in the present case, the matter should be remanded for an evidentiary hearing (see *People v. Leahy* (1994) 8 Cal.4th 587, 610-11; *People v. Taylor* (2000) 80 Cal.App.4th 804, 814) before a different judge.[288] (See *Rose v. Superior Court* (2000) 81 Cal.App.4th 564, 576; *People v. Stanley* (1984) 161 Cal.App.3d 144; *United States v. Mikaelian* (9th Cir. 1999) 168 F.3d 380, 387-88; *United States v. Clark* (2nd Cir. 1973) 475 F.2d 240, 251.)

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[288] Having already determined and ruled that Lucas should be executed, it would be virtually impossible for her to remain totally impartial no matter how "objective and disciplined [she] may be. . . ." (*People v. Kaanehe* (1977) 19 Cal.3d 1, 15.) Therefore, if the matter is remanded, it should be heard by a different judge. (See *Rose v. Superior Court* (2000) 81 Cal.App.4th 564, 576; *People v. Stanley* (1984) 161 Cal.App.3d 144, 156; *United States v. Mikaelian* (9th Cir. 1999) 168 F.3d 380, 387-88; *United States v. Clark* (2nd Cir. 1973) 475 F.2d 240, 251.)

Moreover, the fact that Judge Hammes didn't even see a reason for a hearing suggests hostility to, and inability to, fairly consider the evidence to be presented.

2 JACOBS CASE

2.4 LOVE INSURANCE NOTE: ADMISSIBILITY ISSUES

2.4.1 ARGUMENT OVERVIEW

Evidence of the allegedly incriminating handprinting sample was improperly admitted, improperly considered without preliminary findings prerequisite to reliability and relevance, improperly lent incriminating significance by inadmissible lay opinion and "expert" witness testimony which the defense was denied a fair opportunity to challenge, and was improperly shielded from defense evidence casting doubt on its probative significance. What came into evidence was not the actual handprinting sample allegedly found at the scene of the crime, but a purported photo of that handprinting sample. The actual printing on the note was destroyed by the prosecution's repeated efforts to lift a fingerprint from the note, efforts made necessary by the prosecution's having failed to preserve a fingerprint originally raised – a fingerprint that could have excluded Lucas as the person who had dropped the note at the crime scene.

In the argument that follows it is contended that the purported photo of the handprinting should not have been admitted for a series of reasons: loss of the useable latent fingerprint lifted from the note; failure of the trial judge to make the required preliminary findings to authenticate the photo; failure of the prosecution to provide certification of the photo and failure to satisfy the best evidence rule.

Further, even if the photo was properly admitted, the trial judge erred in failing to consider whether the expert handprinting comparison opinion of the prosecution experts satisfied *People v. Kelly* (1976) 17 Cal.3d 24.

Moreover, in denying the § 352 and due process challenges to the handprinting expert, the judge erroneously shifted the burden to the defense

and unfairly failed to consider evidence relevant to the reliability of the expert testimony including defense expert testimony, proficiency studies and in-court testing.

And, even if the photo as well as the prosecution expert and lay witness handprinting opinions were properly admitted at trial, the reliability of the jurors' ultimate decision was undermined by exclusion at trial of the proficiency studies, defense experts, in-court testing and lay opinion evidence that the handprinting was that of another person. The judge further erred by allowing the lay opinion of Frank Clark that Lucas authored the note while refusing to allow the statement of Rochelle Coleman that the printing on the Love Insurance note was David Woods'.

Finally, the judge erred in failing to fulfill her duty under Evidence Code § 403 to instruct the jurors that they must first make a preliminary finding of uniqueness before considering the handprinting comparison opinion evidence.

2 JACOBS CASE

2.4 LOVE INSURANCE NOTE: ADMISSIBILITY ISSUES

ARGUMENT 2.4.2

THE LOVE INSURANCE NOTE WAS INADMISSIBLE BECAUSE THE PROSECUTION LOST A USABLE LATENT FINGERPRINT WHICH HAD BEEN LIFTED FROM THE NOTE

A. Introduction

Without the handwriting comparison allegedly identifying Lucas as the author of the note, the evidence against Lucas would have been extremely thin – especially in light of the fact that another person, Johnny Massingale, confessed to the Jacobs' murders. (See § 2.2(N)(1)(e), pp. 110-13 above, incorporated herein.) Hence, the Love Insurance note and the fingerprint found on the note were important pieces of evidence. For example, if the print had excluded Lucas but not Massingale, this would have provided important circumstantial evidence bolstering the defense theory and undermining the prosecution theory. Additionally, the presence of another person's fingerprint on the note would have provided additional support for the defense argument that the handprinting comparison did not establish that Lucas authored the note. As a result, the destruction of the original note and the loss of the fingerprint violated Lucas' state and federal constitutional rights.[289]

B. Factual And Legal Background

Pat Stewart, the Jacobs evidence technician, was employed by the San

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[289] For purposes of the lost evidence motion (*Hitch/Trombetta*), Judge Kennedy, who never ruled on the motion, took judicial notice of the preliminary hearing transcripts for both cases. (RTK 655.) However, except for certain stipulated matters the evidence upon which Judge Hammes relied was presented during the in limine proceedings. (See RTH 18640-41; 23167; In Limine Court Exhibit 13.)

Diego Police Department in May 1979. In May 1979, his duties included gathering evidence at the Jacobs crime scene, photographing it and so on. (RTH 3126-27.) Stewart observed a small note on the throw rug in the bathroom. (RTH 3143; see also RTH 5251 [William L. Green].)[290] The note he found was the one depicted in Exhibit 2, the Love Insurance note. (RTH 3143.) After seizing the note, the normal course would have been to place it into a plastic bag which was then placed into a brown manilla envelope, tag it and place it aside for transport to lab and analysis. (RTH 3149.)

Several days after the note was seized Stewart received a request from Detective Gary Gleason to use ninhydrin on the note to try to raise fingerprints on it. (RTH 3155-56.) Stewart did this on May 11 and some latent print images were raised. (RTH 3157.) The procedure in effect in 1979 was to photograph the note after spraying it with ninhydrin. (RTH 3158.) Then the note would have been given to Gleason who would then turn it over to Leigh Emmerson, a latent fingerprint expert. (RTH 3159; CT 4818-20; CT 15239-41.) Stewart did not photograph the note after spraying it with ninhydrin. However, he did take the pictures of the note before it had been sprayed. (RTH 3160; CT 4818-20; CT 15239-41.)[291]

After the print was raised the note was given to Emmerson. (RTH 3331-34.) Emmerson found five or six points of identification on the note which gave it value as an elimination print. (RTH 3335.) Emmerson told the detectives that he could not say who touched the note but he could say who didn't touch it. He told them it was a "good piece of evidence." (RTH 3340;

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[290] Both the note and the rug were pink. (RTT 11912-13.)

[291] Investigator William Green testified that the use of ninhydrin is standard operating procedure. (RTH 5280.) Green was also aware that fingerprints raised with ninhydrin disappear over time. (RTH 5280.)

see also 5203-04 [Torres].)

Emmerson instructed the detectives to save the print which meant that it should be photographed. (RTH 3346.) Emmerson's policy in such cases was to tell homicide that the print was valuable and that it should be photographed as ninhydrin tends to fade with time, and, therefore, the photograph was necessary to preserve the print. (RTH 3336-37.) The evidence technician had the responsibility for photographing the note, not Emmerson's department. (RTH 3339.) Emmerson followed all normal procedures with respect to the Love Insurance note. (RTH 3344.)[292]

Detective Gary Gleason testified that there were practices regarding the retention of any photographs taken of ninhydrin fingerprints. (RTH 6424.) If a photograph were taken, it would have been kept in the master file for an unsolved case or in the homicide division files for a solved case. (RTH 6425.)

However, when the case was later investigated in December, 1980, no photograph of the fingerprint could be found. (RTH 7019.) Moreover, the print on the original note had disappeared. Efforts were made to raise the print again but nothing worked. (RTH 3152-53; 3166.) It was even sent to the FBI, but they could not do anything either. (RTH 3152-53; 3168.)

As a result, the fingerprint was lost and, as a consequence of the repeated efforts to raise a fingerprint, the original printing on the note was obliterated. (RTH 3152-53.) The printing on the note was portrayed in a photograph taken by Emmerson, but for handwriting comparison purposes, use of the original note is the preferred practice. (RTH 13856.)

Harold Ille was the manager of Love Insurance in July 1979. (RTH

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[292] A photograph of the fingerprint would have been sufficient for comparison purposes. (RTH 3345; 25200 [Torres].)

3217.) They specialized in the assigned risks program. (RTH 3218; 3220.) On July 7, 1979, two months after the Jacobs homicides, Lucas, who had a prior drunk driving charge, applied for insurance. (RTH 3222-23.) The policy was approved and became effective July 31, 1979. (RTH 3224-25.) The phone number for Love Insurance was 280-1700. (RTH 3217.)

Due to the loss of the fingerprint and destruction of the original note, the defense moved for relief under *People v. Hitch* (1974) 12 Cal.3d 641. The trial court found that *Hitch* had been supplanted by *California v. Trombetta* (1984) 467 U.S. 479. (RTH 25409-412.)[293]

Applying *Trombetta*, the trial judge found that the Love Insurance note would not have been exculpatory because, in her view, Lucas was the person who authored the note:

> . . .[A]lthough the preservation of the partial fingerprint on the Love Insurance note might conceivably have contributed to Mr. Lucas' defense, a dispassionate review of the evidence in the Jacobs case, in light of the evidence in all of the Lucas cases and particularly including the clear and unmistakable evidence of Mr. Lucas' printing on the note, leads this court to conclude that the chances are virtually nonexistent that the partial print, if preserved, would have been exculpatory to Mr. Lucas. (RTH 25438-39.)

In particular, the judge rejected the defense contention that handwriting comparison is unreliable.

> [The testimony of the defense handwriting experts] was not persuasive to this court. Their abstract criticism did nothing to detract from the graphic blow-up displays in this case prepared by Mr. Harris and showing without question, to any lay person,

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[293] The defense had also argued that the issue should be resolved based on pre-Proposition 8 California law under *Hitch*. (RTH 25369.) This argument was rejected. (CT 5192-93.)

> the incredibly close match between the Love Insurance note printing and the exemplars from Mr. Lucas. No matter what the partial print with only three points would have shown, in this court's opinion it would not undermine the graphic evidence that it is, in fact, Mr. Lucas' printing on the Love Insurance note. (RTH 25439-40.)[294]

The judge did not address the defense theory that even if the note was authored by Lucas, it may have nonetheless been left by Massingale who could have been wearing Lucas' clothing obtained at the San Diego Salvation Army. (See § 2.4.2(C)(3), pp. 342-44 below, incorporated herein.)

C. Because Destruction Of The Note And Loss Of The Print Violated The Federal Constitution Sanctions Should Have Been Imposed

1. Fundamental Fairness Requires The State To Preserve Evidence That May Play A Significant Role In The Trial

Under the Due Process Clauses of the state and federal constitutions, "criminal prosecutions must comport with prevailing notions of fundamental fairness." (*California v. Trombetta* (1984) 467 U.S. 479, 485; see also *People v. Nation* (1980) 26 Cal.3d 169; *People v. Hitch* (1974) 12 Cal. 3d 641.) The United States and California Supreme Courts have long held that fundamental fairness "require[s] that criminal defendants be afforded a meaningful opportunity to present a complete defense," including the right of access to exculpatory evidence. (*California v. Trombetta*, *supra*, 467 U.S. at 485; *People v. Hitch,* 12 Cal. 3d at 652; see also, *Barnard v. Henderson* (5th Cir.

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[294] The judge also did not consider the defense experts, proficiency studies and other defense evidence challenging her underlying assumption that handprinting styles were sufficiently unique to permit a reliable determination based on similarities between two printing samples that the samples were printed by the same person. (See § 2.5.4(C), pp. 400-02 below, incorporated herein.)

1975) 514 F.2d 744, 746 ["Fundamental fairness is violated when a criminal defendant is denied the opportunity to have an expert of his choosing, bound by appropriate safeguards imposed by the Court, examine a piece of critical evidence whose nature is subject to varying expert opinion"].) The State has a constitutional obligation to preserve "evidence that might be expected to play a significant role in the suspect's defense." (*California v. Trombetta*, 467 U.S. at 488; see also *People v. Roybal* (1998) 19 Cal.4th 481, 509-510.)

In *California v. Trombetta*, the United States Supreme Court held that the State violates a defendant's right to due process when it destroys evidence that has "constitutional materiality" – i.e., evidence that (1) has "an exculpatory value that was apparent before the evidence was destroyed" and (2) is "of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means." (467 U.S. at 489.)

In *Trombetta*, the defendants, who were prosecuted for drunk driving, challenged the destruction of their breath samples after tests performed by the state using an Intoxilyzer machine showed that the samples contained alcohol. The defendants claimed that "had a breath sample been preserved, [they] would have been able to impeach the incriminating Intoxilyzer results." (*Id.* at 483.) The court found no due process violation, however, because the possibility that an independent test of the breath samples would have exculpated the defendants was "extremely low," because there was evidence that the defendants could have impeached the Intoxilyzer results by other means, and because police destruction of the samples was " in accord with their normal practice." (*Id.* at 479, 489-490.)

2. Bad Faith Must Be Shown If The Evidence Was Only "Potentially Useful" To The Defense

Four years after *Trombetta*, the United States Supreme Court decided *Arizona v. Youngblood* (1998) 488 U.S. 51, another case addressing the state's obligation to preserve evidence. In *Youngblood*, the issue was whether the state properly preserved semen samples of the perpetrator in a sexual molestation case. The state allegedly allowed the evidence to deteriorate before testing it, so the test results were inconclusive. The evidence was made available to the defendant, who declined to test it himself, and the state did not use the test results against the defendant at trial. Nevertheless, the defendant argued that if the state had properly preserved the evidence, it might have exonerated him.

On these facts, the Court concluded that the exculpatory value of the semen evidence was not known to the state when the state allegedly mishandled it. Rather, "this evidence was simply an avenue of investigation that might have led in any number of directions." (*Id.* at 56.) The evidence did not meet the standard announced in *Trombetta* because "no more can be said than that it could have been subjected to tests, the results of which might have exonerated the defendant." (*Id.* at 57.) Accordingly, the Court held that a state's failure to preserve evidence that is only "potentially useful" (*Id.* at 58) does not violate due process unless the defendant can show that the state acted in bad faith.[295] The bad faith requirement "avoids imposing on the police an

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[295] The bad faith requirement of *Youngblood* is highly controversial and has been flatly rejected by many courts as a matter of state constitutional law. (See, Annot., *Failure of Police to Preserve Potentially Exculpatory Evidence as Violating Criminal Defendant's Rights under State Constitution*, 40 A.L.R. 5th 113 (2000). The controversy surrounding the case will no doubt continue

(continued...)

undifferentiated and absolute duty to retain and to preserve all material that might be of conceivable evidentiary significance in a particular prosecution."

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[295](...continued)
in light of the very recent history of that case. As explained in *Grinols v. State* (Alaska App. 2000) 10 P.3d 600, 616 n. 52:

> A recent instance of . . . delayed justice was reported in the Anchorage Daily News of August 12, 2000, page A-5.
>
> In 1983, a man named Larry Youngblood was arrested in Arizona for kidnapping and sexually abusing a young boy. The boy identified Youngblood from a photo lineup as the man who attacked him. Youngblood insisted that the boy had mistakenly identified him, but he was convicted.
>
> On appeal, Youngblood claimed that he had been denied due process of law because the police had not thought to refrigerate the victim's underwear and t-shirt so that the semen stains on this clothing could be subjected to the types of serological testing available at that time. The Arizona Court of Appeals concluded that this negligent handling of the evidence constituted a denial of due process, and they reversed Youngblood's conviction. (See *State v. Youngblood*, 153 Ariz. 50 [734 P.2d 592] (1986).) But the State of Arizona pursued Youngblood's case to the United States Supreme Court, and the Supreme Court reinstated Youngblood's conviction. In *Arizona v. Youngblood*, 488 U.S. 51, 109 S.Ct. 333, 102 L.Ed.2d 281 (1988), the Supreme Court held that even when the police negligently fail to preserve evidence, there is no violation of due process. Rather, the Court decided, due process is violated only when the police act in bad faith–when they intentionally destroy or fail to preserve evidence that they believe may be exculpatory. (*Id.*, 488 U.S. at 57-58, 109 S.Ct. at 337.) Recently, the physical evidence from Youngblood's case was re-examined using DNA testing. The DNA tests conclusively established that Youngblood was not the boy's attacker. A spokesman from the Tucson Police Department crime lab told the media that there was "no uncertainty" in the test results. After spending 17 years in prison for crimes he did not commit, Youngblood is now free.

(*Id* at 58.)

Numerous courts from California and other jurisdictions have concluded that *Youngblood's* bad faith requirement does not apply where the exculpatory value of the evidence was apparent before its destruction, and there is no reasonably available comparable evidence.[296] In other words, only if the two requirements of *Trombetta* are not met does the good or bad faith

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[296] See, *People v. Roybal* (1998) 19 Cal.4th 481, 510 [*Youngblood* applies only when the defendant's challenge is to "the failure of the State to preserve evidentiary material of which no more can be said than that it could have been subjected to tests, the results of which might have exonerated the defendant"]; *People v. Pastor Cruz* (1993) 16 Cal.App.4th 322 ["[E]ven in the absence of bad faith, the failure of the prosecution to preserve evidence that 'might be expected to play a significant role in the suspect's defense' does violate due process"]; *United States v. Bohl* (10th Cir. 1994) 25 F.3d 904, 910 [bad faith requirement applies where "the exculpatory value of the evidence is indeterminate and all that can be confirmed is that the evidence was 'potentially useful' for the defense"]; *Lile v. McKune* (D. Kan. 1999) 45 F.Supp.2d 1157, 1163 [noting that more stringent analysis applies if evidence is only "potentially useful" to the defendant]; *United States v. Belcher* (W.D.Va. 1991) 762 F.Supp. 666, 672 [*Youngblood*'s bad faith requirement does not apply where "the destroyed evidence at issue is absolutely crucial and determinative to this prosecution's outcome"]; *State v. Blackwell* (Ga. App. 2000) 245 Ga. App. 135 [537 S.E.2d 457] ["*Youngblood's* bad faith requirement does not apply where–as here–the exculpatory value of the evidence was apparent before its destruction, and there is no reasonably available comparable evidence"]; *People v. Newberry* (Ill. 1995) 166 Ill.2d 310 [652 N.E.2d 288, 291] [no bad faith showing required where destroyed evidence "is more than just 'potentially useful'"]; *Stuart v.* State (Idaho 1995) 127 Idaho 806 [907 P.2d 783, 793] [*Youngblood* only applies where evidence at issue is of "unknown value"]; State *v. Greenwold* (Wis. Ct. App. 1994) 189 Wis.2d 59 [525 N.W.2d 294, 297] ["the *Youngblood* analysis suggests that if the materiality of the evidence rises above being potentially useful to clearly exculpatory, a bad faith analysis need not be evoked"]; *People v. Eagen* (Colo. Ct. App. 1994) 892 P.2d 426, 428 [*Youngblood* applies only when "the exculpatory value of the evidence does not satisfy the *Trombetta* standard"].

of the State become relevant.

3. The *Trombetta* Requirements Were Met In The Present Case

The investigators recognized the exculpatory value of the fingerprint from the outset. Leigh Emmerson, the fingerprint examiner for the San Diego Police Department, informed the detectives that the print could be used to exclude potential suspects. (See RTH 3335.) He further informed them that the print was "a good piece of evidence" and should be photographed. (RTH 3340; 5203-04.)

The trial court found that the print was not exculpatory because any lay-person would certainly conclude that Lucas was the author of the note. (RTH 25439-40.) This finding was erroneous because the judge incorrectly assumed that any person – whether lay or expert – may reliably make identifications based on handprinting comparisons such as those on the Love Insurance note. The proficiency studies, which the judge refused to even consider, demonstrated that even handwriting "experts" are wrong from 30% to 50% of the time. (See § 2.5.3(C), pp. 383-85 below, incorporated herein.) In the face of these studies, the judge's finding that Lucas authored the note is not sufficiently reliable to justify her conclusion that the fingerprint would not have been exculpatory.

Moreover, even if the jury did conclude that Lucas wrote the note, this would not have undermined the exculpatory value of the fingerprint. The note could still have been left by a third party such as Johnny Massingale even if Lucas wrote it. As the defense argued, Lucas' authorship of the note would not have prove that he "possessed the note for all purposes, for all times, and, therefore . . . it was dropped by Lucas." (RTH 25408.) Massingale admitted that he often stayed in Salvation Army Missions when he traveled. (RTT 664) And, in 1979 Massingale stayed at the downtown San Diego Rescue Mission

a few times. (RTT 664; 2471-73; 9471-74.) The mission provided clothing to people who stayed there. (*Ibid.*)[297] David Lucas also stayed at the mission in 1979 when living at the New Horizon residential facility. (RTT 1955-57.)[298]

4. Because *Trombetta* Was Satisfied, No Showing Of Bad Faith Was Required

As set forth above, § 2.4.2(C)(2), pp. 339-43, incorporated herein, the bad faith requirement of *Arizona v. Youngblood* should not be applicable where the *Trombetta* standard is met. Hence, Lucas should not be required to show bad faith.

5. The *Trombetta* And *Youngblood* Requirements Should Be Relaxed Where The Lost Evidence Impairs The Reliability Of The Guilt And/Or Penalty Adjudication In A Capital Case

It is well settled both the guilt and penalty phases of a capital trial require heightened reliability. (See *Beck v. Alabama* (1980) 447 U.S. 625, 627-46; see also *Kyles v. Whitley* (1995) 514 U.S. 419, 422; *Burger v. Kemp* (1987) 483 U.S. 776, 785; *Gilmore v. Taylor* (1993) 508 U.S. 333, 342; *White v. Illinois* (1992) 502 U.S. 346, 363-64; *Donnelly v. DeChristoforo* (1974) 416 U.S. 637, 646.)

In the present case the loss of the Love Insurance fingerprint and destruction of the note impaired the reliability of the verdicts in two ways:

(1) the fingerprint was important evidence in determining who left

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[297] In fact, in Massingale's confession he admitted to getting more clothes from the Mission immediately after the murders. (RTT 8490-91; 8513-16.)

[298] The Salvation Army Mission and the New Horizon program were in the same building. (RTT 1956-57.)

the Love Insurance note at the scene; and

(2) the destruction of the original note reduced the reliability of the handprinting comparison evidence. (See § 2.5.7, pp. 438-44 below, incorporated herein.)

Accordingly, even if it is concluded that Lucas did not satisfy the requirements of *Trombetta* and *Youngblood* as applied in noncapital cases, the defense motion should have been granted in light of the heightened capital case reliability requirements of the Eighth and Fourteenth Amendments of the federal constitution.

6. Lucas' Federal Constitutional Rights Were Violated And The Purported Photo Of The Note Should Have Been Excluded

Judge Hammes's denial of Lucas' motion violated his federal constitutional rights under the Eighth and Fourteenth Amendments of the federal constitution. First, the judge's failure to correctly apply *Trombetta* violated the Due Process Clause of the federal constitution. Second, under the heightened reliability requirements in capital cases, the Due Process Clause and the Eighth Amendments were violated by allowing in the photo of the note into evidence after the prosecution had effectively destroyed it. Hence, under the circumstances the most appropriate remedy would have been to have excluded the note. (Cf., *United States v. Morrison* (1980) 449 U.S. 361, 364-65 [sanctions should be tailored to remedy constitutional violation].)

7. Alternatively The Jury Should Have Been Instructed Regarding The Inferences To Be Drawn From The Lost Note

Assuming arguendo that the note itself should not have been excluded, at a minimum the judge should have give the instruction requested by the

defense.[299] Such instructions were appropriate under the circumstances. (See *Arizona v. Youngblood* (1988) 488 U.S. 51, 54 [court instructed jury if they found the state had lost or destroyed evidence they might "infer that the true fact is against the State's interest"]; *People v. Zamora* (1980) 28 Cal.3d 88, 102-03; see also Evidence Code § 413.)

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[299] The defense requesting the following instructions:

> If you find that items of evidence were either lost or destroyed, while in the custody of the police investigative agencies, you must take the failure to preserve this evidence as indicating that among the inferences which may reasonably have been drawn from this evidence, those inferences most favorable to the defendant are the more probable. (CT 14565.)
>
> A fingerprint on the Love Insurance note, if any, which was not defendant's fingerprint would support an inference that another person either wrote the note or had possession of the note.
>
> If you conclude that potential exculpatory value of the Love Insurance note has been lost, you may find, based on the lost or destroyed fingerprint alone, that the Love Insurance note has not been properly authenticated by the prosecution.
>
> In deciding the question of authentication, you must apply the presumption of innocence to the Love Insurance note and any lost or destroyed fingerprint. (CT 14640.)
>
> If you determine that there is evidence which had been seized by law enforcement and that it has been either lost, destroyed or altered while in their custody, you may not conclude that the portion of that evidence that was lost, destroyed or altered would have incriminated the defendant.
>
> You may, however, conclude that the lost, destroyed or altered evidence could have tended to exonerate the defendant.
>
> Furthermore, if you find that certain evidence has been lost, destroyed or altered, you may view that portion of such evidence that has been presented to you with distrust. (CT 14731.)

D. The Error Was Prejudicial

The Love Insurance note was the most important piece of evidence in a very closely balanced case. (See § 2.3.1(I)(2), pp. 209-11 above, incorporated herein.) Hence, the loss of the fingerprint can only be considered a substantial loss since it could have excluded Lucas. (RTT 11912-13.)

Accordingly, the judgement should be reversed under the state standard of prejudice. (*People v. Watson* (1956) 46 Cal.2d 818.) "'In a close case Any error of a substantial nature may require a reversal and any doubt as to its prejudicial character should be resolved in favor of the appellant.' [Citation]." (*People v. Von Villas* (1992) 11 Cal.App.4th 175, 249.)

Moreover, since the prosecution cannot demonstrate beyond a reasonable doubt that the error was harmless, the sentence should also be reversed under the federal standard of prejudice. (*Chapman v. California* (1967) 386 U.S. 18.)

Even if the error was not prejudicial as to the guilt judgment, it was prejudicial, individually and cumulatively, as to penalty. The penalty trial was closely balanced[300] and the error was substantial. Certainly, erroneously authorizing the jury to consider the Santiago and Swanke cases to find Lucas guilty of the Jacobs murders was a "substantial error" since it undermined the lingering doubt theory at penalty. Therefore, the prosecution cannot meet its *Chapman* burden of proving beyond a reasonable doubt that the error was harmless as to the defense mitigating theory of lingering doubt. (See Volume 6, § 6.5.1(D), pp. 1551-52, incorporated herein [substantial error at penalty is

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[300] See Volume 7, § 7.5.1(J)(3)(a), pp. 1619-22, incorporated herein [close balance at penalty demonstrated by near-deadlock, length of deliberations, request for readback of testimony, request for re-instruction, etc.].

prejudicial under *Chapman*].) Further, even if that error were viewed solely as an error of state law, reversal would be required, for there is at least "a reasonable (i.e., realistic) possibility" that but for that substantial error, the jury, giving due weight to the lingering doubt they likely would have otherwise harbored, would not have rendered a death verdict. (*People v. Brown* (1988) 46 Cal.3d 432, 448.)

2 JACOBS CASE

2.4 LOVE INSURANCE NOTE: ADMISSIBILITY ISSUES

ARGUMENT 2.4.3

THE JUDGE FAILED TO MAKE THE REQUIRED PRELIMINARY FINDING OF ACCURACY AND/OR TO INSTRUCT THE JURORS ON THE NEED TO MAKE SUCH A FINDING BEFORE ADMITTING/CONSIDERING THE PHOTOGRAPH OF THE LOVE INSURANCE NOTE IN LIEU OF THE ORIGINAL UNDER EVIDENCE CODE SECTIONS 1400 AND 1401

A. Introduction

Even assuming it was permissible to allow handprinting comparison from a photograph (but see § 2.5.7, pp. 438-44 below, incorporated herein) the trial judge was required under Evidence Code § 403 "to make a preliminary assessment of authenticity before admitting written documents into evidence. . . ." (*People v. Epps* (2001) 25 Cal.4th 19, 27.) Furthermore, Evidence Code § 403 requires the judge to instruct the jury to make the required finding of authenticity before considering the evidence. (*Epps,* 25 Cal.4th at 27 [preliminary finding of authenticity by trial judge does not preclude jury from reaching a contrary conclusion]; see also *DuBois v. Sparrow* (1979) 92 Cal.App.3d 290, 296-97 [§ 403 (c)(1) specifically preserves the parties' right, on request, to have the jury determine authenticity and to disregard this evidence if it finds against authenticity].)

However, in the present case the trial judge violated both of these established rules by ruling that the authenticity requirements of Evidence Code § 1400 and § 1401 did not apply to the photograph of the Love Insurance note:

> I don't believe that authentication and those authentication codes in the Evidence Code apply to the Love note. (RTT 11437:18-20; see also RTT 11338-39.)

This ruling was reversible error because the Love Insurance note was the key piece of evidence offered against Lucas as to the Jacobs charges.

B. The Judge Was Obligated To Make A Preliminary Finding

Apart from the considerations of the Best Evidence Rule, which applied to "duplicates" (see § 2.4.5, pp. 360-67 below, incorporated herein), a writing, whether an original or a copy, may not be admitted into evidence without a preliminary finding of the writing's authenticity. (See Evidence Code § 1400 and § 1401.)

"The foundation for admission of a writing or copy is satisfied by the introduction of evidence sufficient to sustain a finding that the writing and copy are what the proponent of the evidence claims them to be. [Citations.]" (*People v. Garcia* (1988) 201 Cal.App.3d 324, 328-29.) The accuracy of the photograph is relevant to the issue of authentication[301] but conflicting inferences concerning the accuracy of the photograph are for the judge and jury to resolve. (*People v. Garcia*, *supra*, 201 Cal.App.3d at 329.) Thus, authentication is a preliminary fact within the meaning of Evidence Code § 403 and, therefore, the trial judge is required to make the necessary factual finding and to appropriately instruct the jury on request of counsel. (See *People v. Epps*, *supra*; see also *People v. Marshall* (1996) 13 Cal.4th 799, 832 ["trial court must determine whether the evidence is sufficient to permit the jury to find the preliminary fact true by a preponderance of the evidence"].) The duty to instruct upon request is expressly included in Evidence Code §

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[301] That is, to what extent is the photograph offered for comparison "an exact and accurate" representation of the original. (*Geer v. Missouri Lumber & Mining Co.* (Mo. 1896) 134 Mo. 85 [34 S.W. 1099, 1101]; see also 31 A.L.R. 1413.) The authenticity condition establishes the need for an "exact reproduction of the original." (*Buzard v. McAnulty* (Tex. 1890) 77 Tex. 438 [14 S.W. 138, 141].)

403(c)(1) which provides as follows:

> (c) If the court admits the proffered evidence under this section, the court:
>
> (1) May, and on request shall, instruct the jury to determine whether the preliminary fact exists and to disregard the proffered evidence unless the jury finds that the preliminary fact does exist.

In the present case there were more than mere conflicting inferences regarding the accuracy of the copy. As the defense argued, there were actual differences between the original and the photograph. (See CT 11224-25; see also Trial Exhibit 22.) Accordingly, the judge committed reversible error by failing to make a preliminary factual finding as to whether the photograph had been adequately authenticated and the judge further erred by refusing Lucas' instruction that the jury be instructed on this preliminary fact.

Additionally, because the defense requested instruction (CT 14554; 14639) the judge erroneously refused to require the jurors to make the requisite preliminary finding.

C. The Error Violated The Federal Constitution

Removing authentication from the jurors' consideration violated Lucas' Sixth and Fourteenth Amendment rights to due process and trial by jury. "Implicit in the right to trial by jury afforded criminal defendants under the Sixth Amendment to the Constitution of the United States is the right to have that jury decide all relevant issues of fact and to weigh the credibility of witnesses." (*United States v. Hayward* (D.C. Cir. 1969) 420 F.2d 142, 144; see also *United States v. Gaudin* (1995) 515 U.S. 506, 511; *Davis v. Alaska* (1974) 415 U.S. 308, 318 [". . . counsel [must be] permitted to expose to the jury the facts from which jurors, as the sole triers of fact and credibility, [could] appropriately draw inferences relating to the reliability of the

witness"]; *Bollenbach v. United States* (1946) 326 U.S. 607, 614 [". . . the question is not whether guilt may be spelt out of a record, but whether guilt has been found by a jury according to the procedure and standards appropriate for criminal trials..."].) "A fundamental premise of our criminal trial system is that 'the jury is the lie detector.' [Citation.] Determining the weight and credibility of witness testimony, therefore, has long been held to be the 'part of every case [that] belongs to the jury, who are presumed to be fitted for it by their natural intelligence and their practical knowledge of men and the ways of men.' [Citation.]" (*United States v. Scheffer* (1998) 523 U.S. 303, 313.)

Moreover, by arbitrarily denying Lucas his state created rights under California law including Evidence Code sections 403, 1400 and 1401, the error violated Lucas' due process rights under the federal constitution. (14th Amendments; see also *Hicks v. Oklahoma* (1980) 447 U.S. 343.)

Moreover, the error also violated the Due Process and Cruel and Unusual Punishment Clauses of the federal constitution (8th and 14th Amendments) which require heightened reliability in the determination of guilt and death eligibility before a sentence of death may be imposed. (See *Beck v. Alabama* (1980) 447 U.S. 625, 627-46; see also *Kyles v. Whitley* (1995) 514 U.S. 419, 422; *Gilmore v. Taylor* (1993) 508 U.S. 333, 342; *Burger v. Kemp* (1987) 483 U.S. 776, 785.)

Furthermore, verdict reliability is also required by the Due Process Clause (14th Amendment) of the federal constitution. (*White v. Illinois* (1992) 502 U.S. 346, 363-64; *Donnelly v. DeChristoforo* (1974) 416 U.S. 637, 646.)

D. The Errors Were Prejudicial

Because it deprived Lucas of a judge and jury finding as to the accuracy and reliability of the key prosecution evidence in a closely balanced

case, the judgment should be reversed. (See § 2.3.1(I)(2), pp. 209-11 above, incorporated herein.) While the matter could be remanded for the judge to make the required determination (see § 2.3.5.1(I), pp. 299-300 above, incorporated herein), the failure of the jury to make the required preliminary finding is reversible. "'In a close case . . . any error of a substantial nature may require a reversal and any doubt as to its prejudicial character should be resolved in favor of the appellant.' [Citation]." (*People v. Von Villas* (1992) 11 Cal.App.4th 175, 249.)

The guilt judgment should be reversed under the state harmless-error standard. (*People v. Watson* (1956) 46 Cal.2d 818, 836.) "'In a close case . . . any error of a substantial nature may require a reversal and any doubt as to its prejudicial character should be resolved in favor of the appellant.' [Citation]." (*People v. Von Villas* (1992) 11 Cal.App.4th 175, 249.) In the present case the error was substantial and the Jacobs charges were closely balanced. (See § 2.3.1(I)(2), pp. 209-11 above, incorporated herein.) Therefore, the judgment should be reversed under the *Watson* standard.

Moreover, because the error violated Lucas' federal constitutional rights, the judgment should be reversed unless the prosecution demonstrates beyond a reasonable doubt that there is no reasonable possibility the error could have affected the proceedings. (*Chapman v. California* (1967) 386 U.S. 18, 23-24; see also *In re Rodriguez* (1987) 119 Cal.App.3d 457, 469-70 [*Chapman* standard applied to combined impact of state and federal constitutional errors]; *People v. Williams* (1971) 22 Cal.App.3d 34, 58-59 [same].) Given the closeness of the evidence and the substantial impact of the error, the prosecution cannot meet this burden. Therefore, the judgment should be reversed under the federal harmless-error standard.

Finally, even if the error was not prejudicial as to guilt, it was

prejudicial, individually and cumulatively, as to penalty, under both the state and federal standards of prejudice because it undermined the mitigating theory of lingering doubt. The penalty trial was closely balanced[302] and the error was substantial. Certainly, erroneously allowing the jury to utilize the Love Insurance note to find Lucas guilty of the Jacobs murders, thereby undermining lingering doubt as to Lucas' guilt, was a "substantial error." Therefore, the prosecution cannot meet its *Chapman* burden of proving beyond a reasonable doubt that the error was harmless as to the defense mitigating theory of lingering doubt. (See Volume 6, § 6.5.1(D), pp. 1551-52, incorporated herein [substantial error at penalty is prejudicial under *Chapman*].) Further, even if that error were viewed solely as an error of state law, reversal would be required, for there is at least "a reasonable (i.e., realistic) possibility" that but for that substantial error, the jury, giving due weight to the lingering doubt they likely would have otherwise harbored, would not have rendered a death verdict. (*People v. Brown* (1988) 46 Cal.3d 432, 448.)

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[311] See Volume 7, § 7.5.1(J)(3)(a), pp. 1619-22, incorporated herein [close balance at penalty demonstrated by near-deadlock, length of deliberations, request for readback of testimony, request for re-instruction, etc.].

2 JACOBS CASE

2.4 LOVE INSURANCE NOTE: ADMISSIBILITY ISSUES

ARGUMENT 2.4.4

BECAUSE THE COPY OF THE LOVE INSURANCE NOTE WAS NOT CERTIFIED IT SHOULD NOT HAVE BEEN ADMITTED INTO EVIDENCE

A. Introduction

The handprinting on the original Love Insurance note was destroyed by the prosecution. (See § 2.4.2(B), pp. 333-38 above, incorporated herein.) Therefore, the prosecution sought to present a photo of the note. The defense objected to the copy of the note because it had not been properly certified as required by the Evidence Code § 1531 and § 1551. (RTT 11438; CT 11437.) The judge ruled that the note did not need to be certified because it was not offered to prove the "content of the writing." (RTT 11437-38.)

This ruling was erroneous because the note was a writing as defined by Evidence Code § 250 and was admitted for purposes of utilizing its content. Hence, the failure to certify the photo of the note as required by Evidence Code § 1551 and § 1531 rendered the note inadmissible. Because the note was the key evidence in the Jacobs charges, its erroneous admission was reversible error.

B. Legal Principles

A photograph of a lost or destroyed writing may be admitted into evidence pursuant to Evidence Code § 1551. That statute requires that a photograph of a writing be certified per Evidence Code § 1531 at the time the

photograph was taken.[303]

Hence, under the express terms of Evidence Code § 1551 a photograph of a destroyed or lost writing is inadmissible if the certification requirements of § 1531 have not been met.[304] (See *People v. Kirk* (1999) 74 Cal.App.4th

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[303] Evidence Code § 1551 provides as follows:

> A print, whether enlarged or not, from a photographic film (including a photographic plate, microphotographic film, photostatic negative, or similar reproduction) of an original writing destroyed or lost after such film was taken or a reproduction from an electronic recording of video images on magnetic surfaces is admissible as the original writing itself if, at the time of the taking of such film or electronic recording, the person under whose direction and control it was taken attached thereto, or to the sealed container in which it was placed and has been kept, or incorporated in the film or electronic recording, a certification complying with the provisions of § 1531 and stating the date on which, and the fact that, it was so taken under his direction and control. (Stats. 1965, c. 299, § 2, operative Jan. 1, 1967. Amended by Stats. 1969, c. 646, p. 1298, § 1.)

Evidence Code § 1531 provides as follows:

> For the purposes of evidence, whenever a copy of a writing is attested or certified, the attestation or certificate must state in substance that the copy is a correct copy of the original, or of a specified part thereof, as the case may be. (Stats. 1965, c. 299, § 2, operative Jan. 1, 1967.)

[304] Subsequent to Lucas' trial, the "Best Evidence Rule" (former Evidence Code § 1501, et. seq.) was replaced in 1998 by the "Secondary Evidence Rule" (Evidence Code § 1520 et. seq.) However, the Secondary Evidence Rule did not eliminate the authentication and certification requirements for lost or destroyed writings. (See Evidence Code § 1521(2)(c) ["Nothing in this section excuses compliance with Section 1401 (continued...)

1066 [uncertified public records are inadmissible per Evidence Code § 1530 and § 1531]; cf. Evidence Code § 405, Comment – Assembly Committee On Judiciary ["Sections 1550 and 1551 are special exceptions to the Best Evidence Rule; hence, § 405 governs the determination of any disputed preliminary fact under these sections . . . "].)

As to the issue of what constitutes a "writing," Evidence Code § 250 is quite broad:

> "Writing" means handwriting, typewriting, printing, photostating, photographing, photocopying, transmitting by electronic mail or facsimile, and every other means of recording upon any tangible thing any form of communication or representation, including letters, words, pictures, sounds, or symbols, or combinations thereof, and any record thereby created, regardless of the manner in which the record has been stored. (Stats. 1965, c. 299, § 2, operative Jan. 1, 1967. Amended by Stats. 2002, c. 945 (A.B. 1962), § 1.)

The "Law Revision Commission Comment" verifies that Evidence Code § 250 should be broadly interpreted: "'Writing' is defined very broadly to include all forms of tangible expression, including pictures and sound recordings."[305]

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[304](...continued)
(authentication)"].)

Moreover, in *In re Kirk*, *supra*, 74 Cal.App.4th at 1074 the court held that the certification rules of Evidence Code § 1530 and § 1531 were not changed by the Secondary Evidence Rule. The same rationale applies to Evidence Code § 1551. Because the Secondary Evidence Rule left § 1551 intact, the courts continue to be bound by its express certification requirements.

[305] Nor is there any question that the note was a writing. It consisted of "handwriting" upon a "tangible thing" which was a form of "communication or representation" utilizing a "combination" of "words" and
(continued...)

C. The Photograph In The Present Case Was Not Certified

In light of the legal principles set fourth above, because the Love Insurance note had been photographed and then lost, it should not have been admitted into evidence without the certification required by Evidence Code § 1551.

D. The Error Violated Lucas' State And Federal Constitutional Rights

The erroneous admission of the note into evidence in violation of express statutory prerequisites violated the Due Process Clause of the Fourteenth Amendment to the United States Constitution by arbitrarily denying Lucas' state created rights under California law including Evidence Code sections 250, 405, 1530, 1531, 1550 and 1551. (*Hicks v. U.S.* (1980) 447 U.S. 343, 346; see also *People v. Sutton* (1993) 19 Cal.App.4th 795, 804; *Hernandez v. Ylst* (9th Cir. 1991) 930 F.2d 714, 716.)

Moreover, the error also violated the Cruel and Unusual Punishment Clause of the federal constitution (8th and 14th Amendments) which require heightened reliability in the determination of guilt and death eligibility before a sentence of death may be imposed. (See *Beck v. Alabama* (1980) 447 U.S. 625, 627-46; see also *Kyles v. Whitley* (1995) 514 U.S. 419, 422; *Burger v. Kemp* (1987) 483 U.S. 776, 785; *Gilmore v. Taylor* (1993) 508 U.S. 333, 342.)

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[305](...continued)
"symbols" (numbers). Furthermore, the relevance of the markings on the note entirely depended on the preliminary fact that the photograph was authentic. (See generally Evidence Code § 1400, Law Revision Commission Comment [Before any tangible object may be admitted into evidence, the party seeking to introduce the object must make a preliminary showing that the object is in some way relevant to the issues to be decided in the action].)

Furthermore, verdict reliability is also required by the Due Process Clause (14th Amendment) of the federal constitution. (*White v. Illinois* (1992) 502 U.S. 346, 363-64; *Donnelly v. DeChristoforo* (1974) 416 U.S. 637, 646.)

E. The Error Was Prejudicial

The error was prejudicial under the *Watson* standard (*People v. Watson* (1956) 46 Cal.2d 818, 836) because the Love Insurance note was the key prosecution evidence in a closely balanced case. (See § 2.3.1(I)(2), pp. 209-11 above, incorporated herein.) "'In a close case . . . any error of a substantial nature may require a reversal and any doubt as to its prejudicial character should be resolved in favor of the appellant.' [Citation]." (*People v. Von Villas* (1992) 11 Cal.App.4th 175, 249.)

Moreover, because the error violated Lucas' federal constitutional rights, the judgment should be reversed unless the prosecution demonstrates beyond a reasonable doubt that there is no reasonable possibility the error could have affected the proceedings. (*Chapman v. California* (1967) 386 U.S. 18; 23-24; see also *In re Rodriguez* (1987) 119 Cal.App.3d 457, 469-70 [*Chapman* standard applied to combined impact of state and federal constitutional errors]; *People v. Williams* (1971) 22 Cal.App.3d 34, 58-59 [same].) Given the closeness of the evidence and the substantial impact of the error, the prosecution cannot meet this burden. Therefore, the judgment should be reversed under the federal harmless-error standard.

Finally, even if the error was not prejudicial as to guilt, it was prejudicial, individually and cumulatively, as to penalty, under both the state and federal standards of prejudice because it undermined the mitigating theory

of lingering doubt. The penalty trial was closely balanced[306] and the error was substantial. Certainly, erroneously allowing the jury to utilize the Love Insurance note to find Lucas guilty of the Jacobs murders, thereby undermining lingering doubt as to Lucas' guilt, was a "substantial error." Therefore, the prosecution cannot meet its *Chapman* burden of proving beyond a reasonable doubt that the error was harmless as to the defense mitigating theory of lingering doubt. (See Volume 6, § 6.5.1(D), pp. 1551-52, incorporated herein [substantial error at penalty is prejudicial under *Chapman*].) Further, even if that error were viewed solely as an error of state law, reversal would be required, for there is at least "a reasonable (i.e., realistic) possibility" that but for that substantial error, the jury, giving due weight to the lingering doubt they likely would have otherwise harbored, would not have rendered a death verdict. (*People v. Brown* (1988) 46 Cal.3d 432, 448.)

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[306] See Volume 7, § 7.5.1(J)(3)(a), pp. 1619-22, incorporated herein [close balance at penalty demonstrated by near-deadlock, length of deliberations, request for readback of testimony, request for re-instruction, etc.].

2 JACOBS CASE

2.4 LOVE INSURANCE NOTE: ADMISSIBILITY ISSUES

ARGUMENT 2.4.5

THE JUDGE FAILED TO EXERCISE HER DISCRETION TO DECIDE WHETHER OR NOT THE PHOTOGRAPH OF THE LOVE INSURANCE NOTE WAS ADMISSIBLE UNDER THE BEST EVIDENCE RULE

A. Introduction

Assuming that a photograph of a writing was admissible for purposes of handwriting comparison (but see § 2.4.2 - § 2.4.4, above, incorporated herein), the Best Evidence Rule required the trial court to weigh and consider any deficiencies in the photograph before allowing it into evidence. However, in the present case the trial judge refused to exercise the required discretion. She erroneously concluded that the Best Evidence Rule didn't apply because the prosecution was not attempting to prove the content of the writing:

> Best Evidence is denied as inappropriate statement of the law. We're not talking about the content of the writing. Content of writing is not attempted to be proved. It's just the writing itself. (RTT 11437.)

Due to the failure of the judge to exercise her discretion as to the admissibility of this crucial piece of prosecution evidence the judgment should be reversed.

B. The Best Evidence Rule Applied To The Note

The judge erroneously ruled that the Best Evidence Rule did not apply to the Love Insurance note.

First, the note <u>was</u> offered to prove its content. Both the name of the insurance company and the telephone number were substantially utilized by the prosecution as circumstantial evidence that Lucas left the note at the scene since he purchased Love Insurance himself. (See e.g., RTT 11770-74.)

Second, the handwriting comparison also depended on the "content" of the letters and numerals. The shape, formation and style of each letter and numeral was relevant, indeed critical, to expert testimony concerning the note. (See e.g., *People v. Garcia* (1988) 201 Cal.App.3d 324, 329-30 [Best Evidence Rule applicable to photograph of composite sketch in eyewitness identification case].) Hence, the accuracy of the photograph was critical to the purpose for which it was admitted.[307] Under Evidence Code § 250 "writing" is defined very broadly.

In sum, the photograph of the Love Insurance note was a writing to which the Best Evidence and authentication statutes applied. (Cf. Witkin On Evidence, Documentary Evidence § 35, (2000) [comparing a chattel and a writing].)

Moreover, as a photograph, the Love Insurance note was a "duplicate" of the original under Evidence Code § 260 which defines a "duplicate," inter

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[307] In this regard it should be noted that a "writing," as defined by Evidence Code § 250, is extremely broad:

> "Writing" means handwriting, typewriting, printing, photostating, photographing, photocopying, transmitting by electronic mail or facsimile, and every other means of recording upon any tangible thing any form of communication or representation, including letters, words, pictures, sounds, or symbols, or combinations thereof, and any record thereby created, regardless of the manner in which the record has been stored. (Stats. 1965, c. 299, § 2, operative Jan. 1, 1967. Amended by Stats. 2002, c. 945 (A.B. 1962), § 1.)

The "Law Revision Commission Comment" verifies that Evidence Code § 250 should be broadly interpreted: "'Writing' is defined very broadly to include all forms of tangible expression, including pictures and sound recordings."

alia, as a "counterpart produced by . . . photography." Hence, the photograph of the note as a duplicate was expressly within the ambit of Evidence Code § 1511 which regulated the admissibility of "duplicates." (See § C, below.)

C. The Best Evidence Rule Required The Judge To Weigh Any Deficiencies In The Photograph Before Admitting It As A Substitute For The Original

The Best Evidence Rule, which was extant at Lucas' trial,[308] depended heavily upon a reasoned exercise of discretion by the trial judge. Hence, the judge had broad discretion to exclude photographic "duplicates" based on unfairness. § 1511 provided:

> A duplicate is admissible to the same extent as an original unless (a) a genuine question is raised as to the authenticity of the original or (b) in the circumstances it would be unfair to admit the duplicate in lieu of the original.

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[308] In 1999 the Best Evidence Rule (Evidence Code sections 1500-1511) was replaced by the Secondary Evidence Rule (Evidence Code sections 1521-1523). However, "this reform [was] not a major departure form former law, but primarily a matter of clarification and simplification." (1998 Law Revision Commission Comments to Evidence Code § 1521.)

In particular, the Secondary Evidence Rule retained the Code's reliance on the sound discretion of the trial judge to assure fairness and reliability. For example, under § 1521 the judge must exclude secondary evidence if he or she "determines either of the following:

> (1) A genuine dispute exists concerning material terms of the writing and justice requires the exclusion.
>
> (2) Admission of the secondary evidence would be unfair."

These exceptions "provide further protection against unreliable secondary evidence." (1998 Law Revision Commission Comment to Evidence Code § 1521.) "Those exceptions are modeled on the exceptions to former section 1511 and Rule 1003 of the Federal Rules of Evidence." (*Ibid.*)

In sum, "section 1511 relies on the wise discretion of trial courts to determine those particular circumstances in which it is unfair to use a duplicate in lieu of the original." (*People v. Garcia* (1988) 201 Cal.App.3d 324, 328, 330.) Among the broad range of factors which the judge should consider in exercising this discretion is whether there is a claim, "based on substance, not mere speculation that the original might contain some relevant difference." (*People v. Garcia, supra*, 201 Cal.App.3d at 330.)

D. The Judge Erroneously Failed To Exercise Her Discretion In The Present Case

In the present case a "claim of substance" was raised concerning the accuracy of the photograph and the fairness of admitting it in lieu of the original. Indeed, a number of authorities suggest that photographs should never be allowed as a substitute for the original for purposes of handwriting comparison. (See § 2.5.7, pp. 438-44 below, incorporated herein.)[309]

Moreover, there were relevant differences between the original and the photograph including missing content within the folds of the note (RTH 8219; 8221; 8223; 13891; 24625) and the absence of impression marks.[310]

Accordingly, the evidence and defense counsel's objection required the

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[309] However, the prosecution experts at trial testified that very often it is possible to arrive at authorship by "study of a good photograph." (RTH 8616; see also 8156-57 [Harris].)

[310] It is important to have the original document because "originals represent three dimension[s] . . . whereas [with] a photograph something is lost in the reproduction of the original." (RTH 8616.) Obviously, with a two dimensional copy or photograph any three dimensional aspects of the writing such as indentations in the paper will not be exactly duplicated. (RTK 598 [testimony by David Oleksow].) [Although this fact was not in the record through witness testimony, it is a matter of common sense or knowledge which the judge reasonably could have considered.]

judge to exercise her discretion under Evidence Code § 1511. Here failure to do so was error.

E. The Error Violated Lucas' Federal Constitutional Rights

Because the error arbitrarily denied Lucas' state created right to the exercise of judicial discretion under the California Evidence Code, including former sections 1500-1511 and current sections 1521-1523, the error violated the Due Process Clause of the Fourteenth Amendment to the United States Constitution. (*Hicks v. Oklahoma* (1980) 447 U.S. 343, 346; see also *People v. Sutton* (1993) 19 Cal.App.4th 795, 804; *Hernandez v. Ylst* (9th Cir. 1991) 930 F.2d 714, 716.)

Moreover, the error also violated the Due Process and Cruel and Unusual Punishment Clauses of the federal constitution (8th and 14th Amendments) which require heightened reliability in the determination of guilt and death eligibility before a sentence of death may be imposed. (See *Beck v. Alabama* (1980) 447 U.S. 625, 627-46; see also *Kyles v. Whitley* (1995) 514 U.S. 419, 422; *Gilmore v. Taylor* (1993) 508 U.S. 333, 342; *Burger v. Kemp* (1987) 483 U.S. 776, 785.)

Furthermore, verdict reliability is also required by the Due Process Clause (14th Amendment) of the federal constitution. (*White v. Illinois* (1992) 502 U.S. 346, 363-64; *Donnelly v. DeChristoforo* (1974) 416 U.S. 637, 646.)

F. The Judgment Should Be Reversed

The guilt judgment should be reversed under the state harmless-error standard. (*People v. Watson* (1956) 46 Cal.2d 818, 836.) "'In a close case . . . any error of a substantial nature may require a reversal and any doubt as to its prejudicial character should be resolved in favor of the appellant.' [Citation]." (*People v. Von Villas* (1992) 11 Cal.App.4th 175, 249.) In the

present case the error was substantial because the Love Insurance note was key evidence and the Jacobs charges were closely balanced. (See § 2.3.1(I)(2), pp. 209-11 above, incorporated herein.) Therefore, the judgment should be reversed under the *Watson* standard.

Moreover, because the error violated Lucas' federal constitutional rights, the judgment should be reversed unless the prosecution demonstrates beyond a reasonable doubt that there is no reasonable possibility the error could have affected the proceedings. (*Chapman v. California* (1967) 386 U.S. 18; 23-24; see also *In re Rodriguez* (1987) 119 Cal.App.3d 457, 469-70 [*Chapman* standard applied to combined impact of state and federal constitutional errors]; *People v. Williams* (1971) 22 Cal.App.3d 34, 58-59 [same].) Given the closeness of the evidence and the substantial impact of the error, the prosecution cannot meet this burden. Therefore, the judgment should be reversed under the federal harmless-error standard.

Finally, even if the error was not prejudicial as to guilt, it was prejudicial, individually and cumulatively, as to penalty, under both the state and federal standards of prejudice because it undermined the mitigating theory of lingering doubt. The penalty trial was closely balanced[311] and the error was substantial. Certainly, erroneously allowing the jury to utilize the Love Insurance note to find Lucas guilty of the Jacobs murders, thereby undermining lingering doubt as to Lucas' guilt, was a "substantial error." Therefore, the prosecution cannot meet its *Chapman* burden of proving beyond a reasonable doubt that the error was harmless as to the defense

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[311] See Volume 7, § 7.5.1(J)(3)(a), pp. 1619-22, incorporated herein [close balance at penalty demonstrated by near-deadlock, length of deliberations, request for readback of testimony, request for re-instruction, etc.].

mitigating theory of lingering doubt. (See Volume 6, § 6.5.1(D), pp. 1551-52, incorporated herein [substantial error at penalty is prejudicial under *Chapman*].) Further, even if that error were viewed solely as an error of state law, reversal would be required, for there is at least "a reasonable (i.e., realistic) possibility" that but for that substantial error, the jury, giving due weight to the lingering doubt they likely would have otherwise harbored, would not have rendered a death verdict. (*People v. Brown* (1988) 46 Cal.3d 432, 448.)

G. Alternatively, The Matter Should Be Remanded Because The Judge Failed To Exercise Her Discretion

Because the judge failed to exercise her discretion the matter should be remanded. (Penal Code § 1260; *People v. Leahy* (1994) 8 Cal.4th 587, 612; *People v. Coyer* (1983) 142 Cal.App.3d 839, 845; *People v. Minor* (1980) 104 Cal.App.3d 194, 199; *People v. Vanbuskirk* (1976) 61 Cal.App.3d 395, 405-07.) (See § 2.3.5.1(I), pp. 299-300 above, incorporated herein.)

Moreover, the remand should be to a different judge. Having already determined and ruled that Lucas should be executed, it would be virtually impossible for her to remain totally impartial no matter how "objective and disciplined [she] may be. . . ." (*People v. Kaanehe* (1977) 19 Cal.3d 1, 15.) Therefore, if the matter is remanded, it should be heard by a different judge. (See *Rose v. Superior Court* (2000) 81 Cal.App.4th 564, 576; *People v. Stanley* (1984) 161 Cal.App.3d 144, 156; *United States v. Mikaelian* (9th Cir. 1999) 168 F.3d 380, 387-88; *United States v. Clark* (2nd Cir. 1973) 475 F.2d 240, 251.)